This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: J.G.
ODR 18403 / 16-17 KE

Date of Birth:
[redacted]

Dates of Hearing:
January 23, 2017
February 13, 2017

OPEN HEARING

Parties to the Hearing: Parent[s]	Representative: Pro Se
Delaware County Intermediate Unit 200 Yale Avenue Morton, PA 19070	Gabrielle Sereni, Esquire Raffaele & Puppio 19 W. Third Street Media, PA 19063
Date of Decision:	March 2, 2017
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

The Child[1] is a preschool-aged child residing within the boundaries of the Delaware County Intermediate Unit (IU) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the classification of Autism. As such, the Child is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The Parents[2] requested this hearing because although they agree with the IU's Transition Evaluation and with the Goals on the July 2016 Individualized Education Plan (IEP) they believe that the program and placement the IU offered (IU Classroom) for the Child is inappropriate, and that in order to receive a free appropriate public education (FAPE) the Child requires continued placement in their unilaterally selected private program (Private Program) for children with speech/language deficits. The Parents[3], are seeking an order that the IU reimburse the tuition they have paid for the Child's Private Program including summer classes from the date the Child turned three years old, and that the IU fund the Private Program including summer classes going forward. They also ask that the IU supplement the Private Program by providing individual ABA therapy and the services of a BCBA consultant.

The Parents additionally seek compensatory education services for the hours the Child did not receive pendent services while the IU was on August hiatus. The IU maintains that its offer of an autistic support classroom is appropriate. The IU further argued that pendent services over the August break were not necessary to ensure FAPE because regression/recoupment data taken in earlier breaks did not support a need for uninterrupted services.

Based upon the preponderance of the evidence before me I find in favor of the Intermediate Unit on the issue of the Child's program/placement and in favor of the Parents on the issue of denial of services during the August 2016 IU hiatus.

Issues

1. Is the program/placement the IU offered the Child appropriate?

2. If the IU's program/placement is not appropriate, is the program unilaterally chosen by the Parents appropriate?

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[1] This decision is written without further reference to the Child's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

[2] Both Parents were present at the due process hearing sessions. The Child's mother conducted communication with the IU and represented the Parents at the hearing. When the term "Parent" is used in the body of this decision it designates the mother, with the understanding that she was acting on her behalf and that of the Child's father.

[3] The Parents proceeded pro se in the hearing but were represented by counsel and an advocate from the time of the first IEP meeting in March, and through the second IEP meeting, until September 19, 2016. The attorney and the advocate did not attend either IEP meeting. [NT 377-378]

3. If the IU's program/placement is not appropriate, and the program unilaterally chosen by the Parents is appropriate, must the District supplement the Parents' chosen program by providing ABA services?

4. If the IU's program/placement is not appropriate and the Parents' unilaterally chosen placement is appropriate, are there equitable considerations that would reduce or remove the IU's obligation to fund the Parents' unilateral placement?

5. Is the Child owed compensatory education services for pendent services not delivered while the IU was on hiatus during August 2016?

Stipulations

The parties stipulate that the IU's Transition Evaluation is appropriate. [NT 23, 305]

The parties stipulate that the Goals in the July 2016 IEP are appropriate. [NT 24, 305]

Findings of Fact[4]

The Child

1. The Child is nearly four years old and resides within the region served by the IU. The Child is eligible for special education services under the classification of autism. [S-6]

2. The Child received Birth to Three Early Intervention services from a private agency under contract with the IU. As the parties have not yet agreed on a program/placement for the Child the IU is continuing pendent services, although at a reduced level at the Parents' request. [NT 296]

3. In September 2015, about six months prior to the Child's third birthday, the Parents enrolled the Child in the Private Program which they now seek to continue. The teacher from that program provided input for the Transition Evaluation and subsequent IEP development. [NT 39, 427; S-6]

4. At age two-and-a-half the Child transitioned well to the Private Program, only having a difficult first day but afterwards adjusting quite comfortably. The Child continues to participate in the Private Program without difficulty. [NT 142-143, 171-172, 302, 382]

5. The Child has a seizure disorder, has been recently diagnosed with cerebral palsy, has a brain malformation, and may have an intellectual disability. After a period

[4] The IU's exhibits are marked as "S" followed by the exhibit number; the Parents' exhibits are marked as "P" followed by the exhibit number.

of not having seizures, episodes started up again recently. No seizures have happened in the Private Program location. [NT 194-195, 299-300, 451]

6. The Child's strengths are a wonderful personality, a zest for life, and the capacity to learn with structure, drill and repetition. The Child loves to play, is curious about the environment, likes to explore and is increasingly willing to engage in novel activities and to engage in reciprocal play. The Child is loving and affectionate, enjoys other people and has excellent imitation skills. [NT 428, 478, 487]

7. Currently the Child has deficits in the areas of speech/language, occupational therapy, physical therapy, specially designed instruction, socialization, sensory issues and behavior including self-regulation. [NT 211-212, 421, 479, 487; S-6]

8. The Child has communication deficits - a very limited vocabulary, significant expressive and receptive language delays, and a motor speech disorder. [NT 428-429]

9. In the area of receptive language, the Child has needs related to responding to questions including yes/no questions and 'wh' questions. In the area of expressive language there are needs in the areas of requesting and commenting and expanding vocabulary. In the area of speech development there are needs for production of early developing sounds at the word level in consonant-vowel-consonant and in consonant-vowel-consonant-vowel words. [NT 467; S-12]

10. The Child has significant difficulty with transitions. In the context of the pendent OT services delivered in a clinic setting the Child becomes upset when it's time to leave the session, when something is taken away, or when a request is made to stop one activity and start another. [NT 297-299, 352, 480-481; P-27]

11. However, transitioning is improving. The occupational therapist providing pendent OT services since May 2016 notes more successful transitioning back and forth between preferred and adult directed play, much better self-regulation in terms of shorter and less frequent tantrums, and more mature play. [NT 481]

12. The ABA therapist providing pendent ABA services in the home setting since May 2016 notes that transitions have gotten much better in that the Child will transition from table to a play activity on the floor, from one play area to another, and although there are times when transitions can be difficult, overall, the Child has done 'really well' with transitions since their work began. [NT 487-488]

<u>Transition Evaluation and IEP Development</u>

13. The IU conducted a Transition Evaluation prior to the Child's third birthday. A Transition Evaluation is used to plan Preschool Early Intervention programming. The IU had access to information that conveyed the Child's significant degree of

need in all areas of development and the Parents' concerns that these be addressed. [NT 343-345; S-12]

14. On a Family Questionnaire the Parents provided input for the Transition Evaluation and subsequent IEP development. They had concerns about the Child's global developmental delay, including motor planning issues and frequent tantrums, but their primary concern was the Child's speech and communication needs. [NT 39-41; S-7]

15. On an Ages and Stages Questionnaire the Parents expressed concerns regarding a processing delay, that at not quite three the Child was acting more like a one-year-old, that the Child had very few words and repeated a lot, and that the words 'didn't stick'. Additionally the Parents reported that the Child had just started running although not in a natural-looking manner, and that the Child did not jump or climb stairs and needed a lot of help with climbing. [NT 55-56; S-10]

16. On the Ages and Stages Questionnaire and in her testimony the Parent noted that the Child didn't communicate wants and needs effectively, became frustrated, and had difficulties with changes in routine and getting used to new people. Speech again was a primary concern. The Parents wanted the Child to participate in a preschool setting, but mother was worried about the Child falling and getting injured during a seizure when she was not around. [NT 56, 307; S-10]

17. On the Family Questionnaire the Parents also provided information about various physical conditions including epilepsy for which the Child received medication, but at the time of the preparation of the Transition Evaluation the Child had not had a seizure in about 18 months. On the Ages and Stages form the Parents noted the Child had ear infections and eczema in the last several months but they did not mention seizures. [NT 42, 55; S-10]

18. For purposes of the Transition Evaluation a Board Certified Behavior Analyst (BCBA) who is the clinical supervisor of the private agency providing Birth to Three services assessed the Child on two separate occasions using the VB-MAPP, an Applied Behavior Analysis (ABA) based "gold standard" evaluation that looks at various skill repertoires in order to determine ABA services and placement recommendations. [NT 124-125]

19. The VB-MAPP showed that at nearly age three the Child scored mostly in level one, discrete skills that are typically mastered by children birth to 18 months. However, the Child did receive a score in every repertoire, for example the Child was spontaneously vocalizing, using about six words or word approximations to make requests, spontaneously labeled, and looked in the direction of speakers. The Child's two strongest skills were matching to sample and independent play skills, and the Child reached the 18 to 30 months level in functional play. The Child was interested in adults in the evaluation setting and affectionate with

mother, asked to be played with, imitated on demand and also evidenced spontaneous imitation. [NT 127-129; S-12]

20. The BCBA participated in the March 2016 IEP meeting and based on the VB-MAPP results recommended eight hours of pull-out one-to-one ABA intense instruction weekly, and seven hours of supervision by a BSC monthly. She did not recommend a one-to-one aide at that time noting that a one-to-one aide can be a double edged sword that, while useful, can also foster over-dependence, but does not disagree with the IEP team's later adding a one-on-one aide in the July IEP meeting. [NT 131-132]

21. The 8 hours of pull-out intense instruction in a controlled private environment with the ABA therapist would target discrete skill deficits. [NT 137-138, 147]

22. An ABA therapist has the skills to assist a child with transition issues. [NT 134-136]

23. A one-to-one ABA therapist can completely individualize a child's program within a classroom setting such that the child can participate in the larger group but receive specific interventions as needed to address behavioral needs. [NT 136-137]

24. Following the Transition Evaluation the parties held an IEP meeting on March 7, 2016. The IU issued an IEP; after two months the Parents indicated their disapproval of the IEP on the accompanying Notice of Recommended Educational Placement (NOREP) and requested mediation. [NT 57-58, 61-65; S-12, S-15, S-16, S-19]

25. On May 23, 2016 the Parent observed the autistic support classroom which was the IU's first offered placement. The Parent's observation lasted about eight minutes. The Parent believed that the classroom was completely different from what was described in the NOREP. [NT 66-69, 348; S-20]

26. The parties engaged in mediation in June, 2016. Although the matter was not resolved the parties agreed that the Parents would visit another autistic support classroom. On July 20, 2016 both Parents observed this autistic support classroom which was different from the one the Parent first observed in May. The Parents were in the building for 17 minutes; they stopped the visit because they believed that their presence was disruptive to the classroom. [NT 77-80, 361-362, 375, 397-398; S-26, S-31]

27. The parties engaged in another IEP meeting on July 25, 2016. The participants crafted the IEP that is now the IU's final offer of FAPE. The Parents participated in the discussion as did the IU. [NT 72, 86-87; S-25]

28. The BCBA who evaluated the Child wrote all the Goals for both the March and the July IEPs. [NT 146]

29. Based upon new information the Parents provided at the mediation session on June 16, 2016, the July 25, 2016 IEP was revised and added: provision of 8.25 hours of a one-to-one ABA therapist for the first week of school to pair with the Child and address possible difficulty transitioning into the IU autistic support classroom; an increase from seven to ten hours of a behavior support consultant for the first month of school to aid transition; addition of the seizure action plan the Parents had presented at mediation; an initial nursing consult with the Child's team to review the seizure action plan and to go over the protocol and training on the EpiPen Junior followed up by quarterly nursing consults; a full-time one-on-one ABA trained aide (with whom the Child is already working and who can facilitate the Child's transition to the classroom) for behavior management strategies and who would also be specifically trained on the seizure action plan and the EpiPen and would have a walkie-talkie in order to contact the nurse. The IU also proposed placement in the second classroom the Parents visited on July 20, 2016. [NT 73-77, 317-319; S-25]

30. The NOREP accompanying the July 25, 2016 IEP indicates that the IU considered the Parents' request to fund the Private Program. [NT 81-82; S-26]

31. The Parents returned the NOREP as unapproved on October 31, 2016, the third time the IU issued it. [NT 83-85; S-26, S-28, S-30]

The IU Classroom Proposed Program/Placement

32. The teacher of the IU Classroom has been a special education teacher of children with autism for twelve years. In addition to undergraduate and master's degrees in education she was trained for seven years in ABA applications in classrooms by the Verbal Behavior Project through the Pennsylvania Training and Technical Assistance Network (PaTTAN). She has also taught in a preschool classroom for neurotypical children. [NT 227-228]

33. The teacher is well experienced in working with young children who have difficulties with transitioning into the classroom program and with children who have sensory overload issues. [NT 255-259, 266-267]

34. The morning classroom being offered to the Child operates four days per week from 8:30 to 11:15. There are currently ten children; staffing is composed of the teacher, her teaching assistant, an ABA support person, as well as a one-to-one aide who is a Board Certified Behavior Analyst (BCBA) for one of the students. If the Child joins the class with the Child's dedicated one-to-one ABA aide there will be eleven children and five adults in the classroom at all times. [NT 140, 231, 234-235, 260]

35. Some of the children in the class are higher functioning than the Child and the higher functioning children can provide the Child with modeling opportunities in the areas of behavior and expressive language. [NT 516]

36. Although the IU understood that the Child napped in the afternoon and so assigned a morning classroom, the IU is also holding a place in the afternoon classroom for the Child if the Parents so choose. The afternoon classroom currently has seven children. [NT 270]

37. To help ease the Child's transition the IU plans to assign the same ABA therapist who has been delivering pendent services to the Child as the Child's dedicated full time ABA aide in the IU classroom. [NT 272-273, 275]

38. In addition to the full time staff, related services professionals come into the classroom to conduct small group and individual sessions which may be given in or out of the classroom: a speech therapist comes into the classroom two full mornings a week; an occupational therapist comes into the classroom two mornings a week; a physical therapist comes in one morning a week. A behavior consultant comes into the classroom for consultation as specified in the children's IEPs or as needed. [NT 234-237. 245-246, 250-251]

39. The classroom is highly structured. The class schedule involves a movement (sensory) break during which each child's activities are based on the child's developmental levels; work on preschool expectations such as hanging up coats and opening backpacks; snack time facilitating communication and practicing requesting preferred items; group music with work on imitation, turn-taking and self-esteem; small or larger group play; bathroom use or getting familiar with the bathroom; movement break; small group sensory-based art activity; literacy using the alphabet and stories including intermittent music and song; and transitioning into dismissal. [NT 231-233, 261-265]

40. The classroom uses the Pennsylvania curriculum standards set out for typical children but modified for the children in the classroom. The teacher and staff utilize music, a Promethean board, modeling, flexible seating and Applied Behavior Analysis to provide the children's educational and therapeutic programs. [NT 237]

41. ABA is a strategy where you look at the behavior you want to see, think about the antecedent strategies used to elicit the behavior, and then consider the consequences to determine if the right level of reinforcement is being provided. [NT 237-238]

42. Communication needs are addressed through the speech therapist working with the teacher; the use of a research-based core-board that involves the sensory areas of speaking, hearing, watching and touching; direct instruction; modified signs (sign language); an electronic system (Dynavox) and a lending library of other

electronic devices. If a child is successful with trials of a device the IU works with the parents to obtain a device that would belong to the child and be used at home and in the classroom. [NT 238-245]

43. In addition to the overall classroom activities where the teacher pairs children with better socialization skills with children who have more of a deficit, and herself models turn taking and social interactions, socialization is targeted once a week with a formal program, the Second Step Curriculum. The children are also at times on the playground with children who attend the YMCA typical preschool program housed in the same building; at times the YMCA children come into the classroom. [NT 247-249]

44. The teacher is prepared to implement the Child's goals as articulated in the IEP. [NT 253-255]

45. The IU's speech/language pathologist earned a Bachelor's degree in Communication Disorders in 2004 and in 2008 received her Master's in Speech, Language and Hearing Pathology from LaSalle University. She has also earned some graduate credits in Clinical Psychology and Counseling. She is Pennsylvania licensed as a speech/language pathologist, has her Clinical Certificate of Competence through the American Speech-Language and Hearing Association, and holds an Instructional 2 certification through the Pennsylvania Department of Education. She has worked with early intervention children and school-age students, and has worked with autistic children. [NT 464-465, 469]

46. The July 25, 2016 IEP has goals written by the IU's speech/language pathologist who participated in the Transition Evaluation and who provided four hours of speech/language pendent therapy services weekly until the Parents declined these services. The goals address the needs identified in the areas of receptive and expressive language and speech production. [NT 466, 468-469]

47. The IEP goals for speech/language can be targeted throughout the day in the autistic support classroom. Requesting and commenting are implemented during various activities, including snack time and circle time. Answering yes/no questions can be targeted throughout the school day. The speech/language pathologist can target production of words that are appropriate to the classroom curriculum or that the Child would frequently use. [NT 469]

48. Based on the Child's strengths and needs from the evaluation, the speech/language therapist recommended thirty minutes a week of small group therapy in the classroom as appropriate in order to make meaningful and adequate progress toward the goals. The classroom setting is appropriate because the Child would be directing comments and requests to peers as well as adults; research shows that children often learn more from peers than they do from adults. [NT 470]

49. The speech/language pathologist also recommended an additional thirty minutes a week of individual speech/language therapy delivered in the classroom setting to target specific goals and teach the skills necessary to carry over into the group setting. [NT 470-471]

50. The speech/language therapist has encountered a large number of children with the Child's level of severity of language needs. Although in the speech/language therapist's judgment the recommended amount of services is appropriate to address the Child's significant level of impairment, if it became apparent that the Child needed more time or a more restrictive setting for the delivery of the speech/language therapy she would consult with the team and the family and have a team meeting to discuss whether progress toward the goals was adequate; if the data showed the progress was not adequate then an adjustment would be made in the strategies, or the goals, or the services. [NT 471-472]

51. The July 25, 2016 IEP has goals written by the physical therapist who participated in the Transition Evaluation. The goals address the Child's ability to safely navigate a school environment. [NT 110-112, 114-115; S-25]

52. The IEP calls for 45 minutes of pull-out individual physical therapy per week. [NT 115-117; S-25]

53. Having the physical therapy take place individually but in the environment where the Child goes to school is beneficial to observe and work with skill deficits seen specifically in the school, including how those deficits could be impacted by peers around the Child. [NT 219-220, 222-223, 225]

54. The physical therapist interacts with a child's teacher as part of a team and can offer suggestions and ideas about to help the child in the classroom. [NT 221-222]

55. The July 25, 2016 IEP has OT goals written by the occupational therapist who participated in the Transition Evaluation. The goals address the Child's functional and sensory needs in order to be able to access an educational environment as identified in the evaluation. [NT 407-409; S-12, S-25]

56. The IEP provides for 45 minutes a week of small group (one or two peers) OT in the classroom setting. A group setting will allow the Child to use the good imitation skills identified in the evaluation to follow the peer models' motor movements. Group delivery will also address socialization skills such as turn-taking and requesting. [NT 408-409]

57. The IEP also calls for 15 minutes a week of individual OT work with the Child in the classroom to assist with anything that may be needed such as some extra hand-over-hand assistance with focused attention. [NT 412-413, 418]

58. OT delivered in the classroom setting places the therapy in the environment where the Child will be expected to utilize the learned skills. Sometimes it is difficult for a child to generalize (transfer) functional skills learned in an isolated therapy room back into the setting in which they are to be used. [NT 410-411]

59. The IEP also calls for 30 minutes per month of OT consultation services to provide strategies and modify the environment to accommodate the Child's sensory issues if needed. [NT 411, 413-414]

60. The practice of the IU classroom is to involve the nurse if a child has a medical emergency. The Child's one-to-one ABA aide would have a walkie-talkie in order to contact the nurse, located in the same building as the classroom. [NT 144]

The Private Program

61. Since September 2015 the Child has attended the Private Program. Currently the Child attends three days a week from 9:00 am to 11:00 am. On two of those days the Child remains at the location to receive 30 minutes of individual speech/language therapy from the program director. [NT 279-280]

62. The Private Program enrolls up to six children at a time. Currently four children including the Child are enrolled but one attends infrequently. All of the four children currently enrolled are not on the autistic spectrum. [NT 282-283, 428, 442]

63. The Private Program is located in a very small self-contained classroom with minimal distractions and one-to-one support. [NT 190-191]

64. Most of the children in the Private Program, over time, or right from the beginning, are enrolled in another program at the same time they are attending the Private Program. Some may go to a typical preschool environment with support, others may go to a specialized program, such as the ones that the IU provides, with the goal being to bridge gaps to effect transition and skill generalization. [NT 446]

65. The Private Program is a language-focused preschool group that is highly structured, predictable and has routines. It uses a total communication approach, which is a combination of words, gestures, sign, and visual schedules in order to teach the children how to communicate and expand their play skills. The goal of the program is to get children ready for a less restrictive environment. [NT 426]

66. In the Private Program there are activities for brief periods of time based on the children's attention spans, with the goal being to try to lengthen them as time in the school year goes on. The class follows a picture schedule, with the same kinds of activities daily so that the children will have multiple opportunities throughout the course of the week to acquire skills that they need. [NT 430]

67. The Private Program uses a picture exchange system to augment communication. [NT 177-178]

68. The Private Program does not utilize a set preschool curriculum, instead bases its work on norms for developmental expectations for preschoolers. The staff uses child development books and OT test standards to gauge the norms. [NT 449-450]

69. Although it does not develop or use an IEP the Private Program can work on skills targeted in the IEP that the IU has proposed. [NT 431-433, 453]

70. The Private Program offers group OT once a week for one hour. [NT 281-282, 431, 450]

71. A nurse is available to the Private Program in a location about a quarter mile, or a two-minute car ride, away. [NT 176-177]

72. The Private Program addresses the Child's behavioral needs by providing a 'lab-like' environment to learn appropriate in-class behavior in order to be able to function competently in a preschool class. The Child is taught rules and given lots of practice, with lots of praise when the Child is on task and redirection when off task. [NT 438-439]

73. If there is a child with particularly challenging behaviors the program director can seek consultation with a psychologist at the college in which the Private Program is located. [NT 443-444]

74. On the playground the children in the Private Program encounter neurotypical children from another preschool program on campus. If a child shows interest in playing with a neurotypical child the staff will facilitate it. [NT 448]

75. The director of the Private Program who provides the classroom experience for the Child holds Bachelor's and Master's degrees in speech pathology, is licensed as a speech pathologist in Pennsylvania and is certified by the American Speech and Hearing Association. In addition to directing the Private Program she has a private practice. She has 28 years' experience in her field. [NT 496; P-28]

76. The director of the Private Program is not a certified teacher. [NT 435]

77. There are three adults in the classroom: the program director who is a speech/language pathologist and two speech/language pathology students, one an undergraduate in her junior year of college and the other who has graduated and is taking a gap year before beginning a Master's program. Neither is a certified teacher. The undergraduate may stay for two years and the graduate may or may not stay depending on if/when she starts the post-graduate program. [NT 283-284, 440-441]

78. Although she has no formal education or additional credentials geared toward working with children with autism the director of the Private Program has acquired experience through various employment settings and has attended seminars over the years. [NT 435-436; P-28]

79. Although the director of the Private Program has no formal education or additional credentials in behavior management or ABA, about 20 years ago she took a 5-day workshop in the Lovaas ABA approach to working with autistic children and has attended conferences/workshops over the years, the last being about 5 years ago. [NT 290, 436-438; P-28]

80. Although the written description of the Private Program notes that it uses 'cognitive behavioral' techniques, the program director has no formal training or credentials in cognitive behavior therapy but relies on past on the job training and continuing education. The teaching assistants have limited training in these techniques and are learning from the program director as they participate in the classroom. [NT 443; P-10, P-28]

81. The program description notes the program provides 'therapeutic socialization', which the program director describes as teaching children how to socialize, how to interact with a peer, what to say, how to get someone's attention, how to negotiate something, how to refuse if someone doesn't want to do something. The program director testified that it is "therapeutic" because the program is a lab environment, a very small structured "very contrived environment" to teach children skills in a small environment, with the hopes they will get the skill set and then generalize it to other more typical environments where they can be more successful. [NT 445-446]

82. The Private Program director noted that given significant deficits the Child is much better than when starting the program about 18 months ago, having made small increments of progress in producing vowels and in being more consistent in speech production although not yet talking in sentences. [NT 458]

83. The Private Program director acknowledged that the Child's needs that are other than speech/language are not being addressed in the Private Program but instead through the other outside services the Child receives. [NT 458]

84. The Private Program does not utilize augmentative and alternative communication devices. However, the Child receives one hour a week of individual speech/language therapy working on augmentative and alternative communication at a local hospital. The work is done on an iPad using the LAMPS program. The Child started learning this device in October 2016; the Private Program director did not recommend the device and is just becoming familiar with the device. [NT 284-286, 460]

85. The Private Program does not offer PT, but the Parents provide the Child an hour of individual PT weekly at a local hospital. [NT 280, 450]

86. The Private Program does not offer ABA therapy but the IU provides the Child with 8 hours of ABA pendent services weekly in the home. [NT 281, 287-288; S-9]

87. Although one of the Child's pediatricians recommended that the Child stay with the current provider (the Private Program) because of difficulty with transitions, in a March 14, 2016 letter she at the same time recommended a full-day, full-year educational program with 20 to 25 hours of service per week including the structured behavior intervention of ABA and intensive speech services. The pediatrician wrote the letter following the first IEP meeting after the IU had offered its program. [NT 109-111; P-13]

88. The Child's neurologist wrote that the Child requires OT, PT, speech and social therapy and a better classroom ratio than 1:11. [NT 111-112; P-13]

89. Another of the Child's pediatricians stated that the current school environment (Private Program) should remain unchanged, and that the therapy schedule with PT, OT, and speech not be disrupted. [NT 112; P-13]

90. Student's hospital-affiliated physical therapist offered a letter noting that the Child has difficulty with transitions. [NT 113; P-13]

91. The Parents engaged a psychologist affiliated with the facility under which the Private Program operates to opine on the appropriateness of the Private Program; the psychologist thought she could be asked to evaluate another program/programs at a later time, but only addressed the Private Program in her summary report. [NT 150, 153-154, 165-166; P-22]

92. The psychologist completed a Consultation Summary dated January 7, 2017. The psychologist shared the Summary with the Parents prior to issuing the final report and changed a few things in the background information. [NT 152; P-22]

93. The psychologist did not read the original Infant Toddler Evaluation or the Transition Evaluation; the psychologist did not read the proposed IEP of July 2016; the psychologist did not conduct any direct testing of the Child. Her opinion was based solely on information the Parents provided to her and on an observation of the Private Program. [NT 156-160, 164]

94. The psychologist's opinion is that the Private Program is appropriate because of the class size, it meets the Child's language needs, the Child has adjusted well to the program, and that changes can be disruptive to the Child's cognitive, emotional and physical well-being. [NT 160-161, 169-170, 188-189; P-22]

95. The psychologist's opinion regarding changes being disruptive to the Child's physical well-being were based primarily on her safety concern that transition could trigger seizures. [NT 161-164]

96. The Child had five seizures between September 21 and December 16, 2016. Although the seizures did not happen while the Child was at the Private Program, they did occur during the time period the Child is attending the Private Program. [NT 185-186, 296]

97. Although the Parents would like the Child to remain in the Private Program, they strongly disagree with the psychologist's reasoning that the Child should stay in the Private Program because of seizures, and they do not believe that transitions cause seizures. [NT 293-295]

98. The private psychologist opined that the Child should remain in the Private Program through age five years. [NT 184-185]

99. The private psychologist acknowledged that the Child has needs other than speech, and that the Private Program does not address these needs. She testified that these needs are met through other programs. [NT 183-184]

100. Despite her concerns about a change from the current program to another program triggering seizures, the psychologist opined that with an appropriate transition plan the Child could successfully change schools and enter a new educational program with some overlap in staff, a trial period and one-to-one support with assistance from the Child's current teacher. [NT 174-175]

Pendent Service Delivery in August 2016

101. Pendent service delivery began on May 13, 2016 shortly after the Parents returned as disapproved the NOREP issued after the March 7, 2016 IEP meeting. [NT 351]

102. The family did not access the full number of hours of ABA therapy because of the Child's school and private therapy schedule, and after a brief period dropped the speech/language and the PT services because of scheduling issues and because the Parents were providing them privately. The family is accessing the pendent OT services and about half of the pendent ABA hours. [NT 313-314, 353-359]

103. Since the Private Program closed for part of the summer, the Parents requested that the IU continue to provide the pendent services of ABA and OT to the Child during the IU's 2016 summer break, from August 8 through August 28th. [359-360, 368, 393-394]

104. The IU denied the Parents' request for pendent services during that period in August because the IU's practice is to provide pendent services only during the times when the IU programs are in session. [NT 114-115]

105. Although the IU obtained data about regression/recoupment over IU breaks in the skills areas targeted by the pendent services, the data was taken when the Child was in the Private Program and was therefore receiving most of the services to which the Child was accustomed. This data is not reflective of how the Child would fare without any services other than the privately provided PT. The data was not taken on behavior. [NT 370, 484-496, 514-515]

106. Following the break in services in August the Child engaged in regressed behaviors such as biting, self-injurious actions and increased tantrums, some of which had been seen before the break as well. [NT 500-509, 514; S-23, P-15]

107. During the time that the Child originally received services under the birth to three early intervention program there were no breaks in service delivery. [NT 360]

108. The last agreed upon IFSP upon which the Child's entitlement to pendency is based does not provide for any breaks in service delivery. [S-4]

Discussion and Conclusions of Law

General Legal Principles

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case therefore the Parents asked for the hearing and thus bore the burden of proof; at Parents' request the hearing officer assigned the burden of production to the IU, but the burden of persuasion remains with the Parents. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the

witnesses*". Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also* generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014).

All the witnesses appeared to be testifying to the best of their knowledge and recollection, and there were no contradictions in the recitation of facts. I offer the following regarding some of the witnesses: I found the Parent to be a tenacious and loving advocate for her child and she is to be commended for her thorough preparation for the hearing. I found her testimony to be sincere as it reflected what she and her husband believe is best for their child. I could not find the testimony of the private psychologist reliable. She based her opinion that the Private Placement is appropriate for the Child only on information supplied by the Parents and on an observation of the Child in the Private Program. Admittedly her role was limited in scope, and she agreed on the record that she was in support of the Private Program itself rather than in comparison to another program. Her primary reasons for finding the Private Program appropriate for the Child to continue attending were the group size and that remaining there avoids a major transition that could lead to seizures; she was uninformed about whether or by whom the private Program provides ABA, about the credentials of the director of the program, and about the credentials of the other classroom staff. Notably, the Parent strongly rejected the private evaluator's concerns about transition triggering seizures. The service coordinator/supervisor of preschool early intervention was deemed, based on his training as a speech/language therapist and his experience setting up an autistic support program, to be a reliable and informative witness in this matter. [NT 31-33, 87-88] His candor in simply acknowledging that the IU's practice is not to provide services during breaks was appreciated. The BCBA who conducted the VB-MAPP assessment is multi-credentialed. Her relevant credentials are an undergraduate degree in secondary education, and a Master's degree in school psychology. She is a licensed behavioral specialist, a board-certified behavioral analyst (BCBA), and a nationally-certified school psychologist. [NT 123-124] In addition to her educational background, the BCBA's professional opinion was based upon her direct knowledge of the Child through evaluation and supervision of the ABA therapist, and also on her experience with hundreds of autistic children for whom she has provided evaluations, treatment and/or case supervision. The ABA therapist providing 8 hours of pendent services weekly since May 2016, and who knows the IU's offered classroom is in an excellent position to offer an opinion about whether the IU offer is appropriate. I found her opinion that the Child could "definitely be successful" in that setting because the teacher is excellent and everything is individualized to be reliable. [NT 517-518] The director of the Private Program has impressive credentials and experience in her field. Overall I found her to be candid in describing the program and her qualifications, and appreciated that she explained what her program offered but did not try to deny that the Child needed additional specialized programming.

FAPE: The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C.

§1401(9). Local Educational Agencies [LEAs] including Intermediate Units provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan [IEP]. 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009.

A free appropriate public education (FAPE) "consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction." *Ridley School District v. M.R.*, 680 F.3d at 268-269 (citing *Board of Education v. Rowley*, 458 U.S. 176, 188-189, 102 S. Ct. 3034, 73 L. Ed.2d 690 (1982)). In addition to having to be specially designed to meet the unique needs of the child, the FAPE must be provided under public supervision and direction and at no cost to the parents. *P.P. ex rel. Michael P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009).

Meaningful Benefit: "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning" and meaningful educational benefit must relate to the child's potential. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley*; *Oberti v. Board of Education*, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996), *cert. den.* 117 S. Ct. 176 (1996). The appropriateness of an IEP must be determined as of the time at which it was made, and the reasonableness of the program should be judged only based on the evidence, known to the school district at the time at which the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3rd Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ*., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

The issue of whether an IEP is appropriate is a question of fact. *S.H. v. State-Operated Sch. Dis. Of Newark*, 336 F.3d 260, 271 (3d Cir. 2003). A court should determine the appropriateness of an IEP as of the time it was made, and should use evidence acquired subsequently to the creation of an IEP only to evaluate the reasonableness of the school district's decisions at the time that they were made." *Susan N. v. Wilson School Dist.*, 70 F.3d 751, 762 (3d Cir. 1995).

An LEA is not required to maximize a child's potential; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ., 852* F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988); *Ridley*. An IEP is not required to incorporate every program, aid, or service that parents desire for their child. Rather, an IEP must provide a "basic floor of opportunity" for the child. *Mary Courtney T.* In a homespun and

frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "....the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than "trivial" or "*de minimis*" benefit is required. *See Polk; Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts "need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity"). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Parental Participation: A placement decision is a determination of where a student's IEP will be implemented. Placement decisions for children with disabilities must be made consistent with 34 CFR 300.116. The IEP team, including parents, makes placement decisions. Like the formulation of an IEP, a placement decision is not a unilateral matter for LEA determination. The IDEA's implementing regulations at 34 CFR 300.116(a)(1) however, are also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA mandates parental participation in the placement decision 34 CFR 300.116(a)(1), but does not suggest the degree of weight parental preference should be given.

Numerous court decisions have noted that although Parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it. *See, e.g. Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) [noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives"]; *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) ["[P]arents who seek public funding for their child's special education possess no automatic veto over a school board's decision"]; *Rouse v. Wilson*, 675 F.Supp. 1012 (W.D.Va.1987); 34 C.F.R. Pt. 300 App. A, at 105 9 "The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive [a free appropriate public education"].

Tuition Reimbursement: Parents who believe that an LEA's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA's implementing regulations at 34 C.F.R.

§300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

> "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency enroll the child in a private…school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment…"

Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education,* 471 U.S. 359, 374 (1985). A court may grant "such relief as it determines is appropriate". "Whether to order reimbursement and at what amount is a question determined by balancing the equities." *Burlington*, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

Then, in 1997, a dozen years after Burlington, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

> (i)In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

Pendency:
Regarding a child's status during proceedings (pendency), the implementing regulations for the IDEA can be found at 34 CFR §300.518(a) which reads:

> (a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

The language of stay put provision clearly demonstrates Congress's intent that all handicapped children, regardless of whether their cases are meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved.

A student's current educational placement is not defined in the IDEA or its regulations. Generally, courts have interpreted the term to mean the current education and related

services and placement provided in accordance with the most recently approved IEP. *George A. v. Wallingford Swarthmore School District, 2009 WL 2837717 (E.D. Pa.); Drinker v. Colonial School Dist., 78 F.3d 859, 864 (3d Cir. 1996),* The Court in *Drinker, supra* stated in pertinent part that the current educational placement is the IEP actually functioning when the dispute arose and "stay put" was invoked. If an IEP has been implemented, then that program's placement will be the one subject to the stay put provision. *Drinker, 78 F.3d at 867 (quoting Thomas v. Cincinnati Bd. Of Ed., 918 F. 2d 618, 625-26 (6th Cir. 1999).*

Discussion

The nearly four-year-old Child who is the subject of this hearing is classified as having autism and related global developmental delays and as such requires a variety of services to ensure FAPE. It is important to point out at the outset that in deciding this case I was not charged with weighing two proposed programs and discerning which is better. The IU must afford the Child with an appropriate program, not the better of two programs or the best program. Once the responsible educational agency has offered an appropriate program, other potential programs are not under consideration. In this matter, based on all the evidence before me I find that the IU's proposed placement is appropriate. It provides all the services that the Child requires to address multiple handicaps, integrated in a public setting with a credentialed special education teacher who is supported by ABA consultation and who has direct access to the Child's related services providers. The IU's placement ensures that the Child will receive individualized programming in the classroom through the addition of a one-to-one ABA trained aide throughout the school day with additional individual ABA hours after the classroom is dismissed. Although the IU is required to provide only an "appropriate" program, I find that the IU's offer of FAPE to the Child is more than appropriate and is, in fact, exemplary.

Having made the determination that the IU's program is appropriate, I am not required to examine the Private Program. However, for the benefit of the Parents who put a great deal of effort into preparing and presenting their case I will briefly provide reasons why I find the Private Program inappropriate. Moreover, had the IU not provided an appropriate program, the Parents' request for tuition reimbursement would still have to be denied because their unilaterally chosen program is not appropriate to meet all the Child's educational and related services needs.

The Private Program is not provided by a certified special education teacher, it does not incorporate ABA therapy provided by ABA credentialed personnel, and it does not provide PT services. To address the needs of the whole child it requires additional services to be provided by the IU, and other services which the Parents are willing to fund themselves. The Private Program is not an integrated program that can provide meaningful educational benefit to the whole Child. It is notable that the director of the Private Program testified that *in addition to participating in her program,* the children in her program generally receive services for the other half-day in a preschool setting. The Parents presented evidence that the Child's medical professionals recommended directly or indirectly that the Child remain in the Private Program. Although this

evidence was considered I find it unpersuasive for several reasons. First the recommendations were made after the IU had offered its program and while it is not unusual for parents involved in due process to collect support for their positions from medical personnel who treat their children, the support provided here is clearly in opposition to what was already offered. Second and more importantly, the medical professionals in this case are unlikely to have backgrounds working in public education and have not visited the LEA's proposed program or the Parents' chosen program and are therefore not in a credible position to make recommendations about education. The testimony of the private psychologist who does have experience and credentials to be able to opine on the issue of placement did not examine the IU's offered program, did not consider the needs of the child other than the communication needs, and based her reason for the child remaining in the Private Program on a premise that the Parents clearly rejected. Her testimony was not persuasive either as a counter to the IU program (which she candidly admitted was not her intent) or as sufficient evidence that the Private Program was appropriate.

It is apparent that the Parents are very satisfied with the Private Program and believe that it can implement the IEP goals, and that they trust the program director and are confident about her skills in addressing the communication portion of the Child's multiple needs. [NT 308] They are concerned about the student-to-teacher ratio in the IU classroom and about the level of stimulation in the classroom. They are concerned that the IEP is not offering the amount of individual speech/language therapy their child needs. Finally they are very worried about how the Child will respond if a change in placement is made. While I can appreciate their concerns, I find that the IU has provided a more than appropriate program, although it is not the program that these loving parents such as those referenced in *Tucker v. Bayshore* seek for their child. The IU has demonstrated through testimony and documentary evidence that its proposed classroom placement will be able to implement the Child's IEP and provide services that more than appropriately meet all the Child's special education and related services needs in an integrated fashion. Further, it is clear that the IU has put safeguards in place to aid the Child's transition into the full preschool program. The Parents' stated ultimate goal is that when the Child reaches kindergarten age the Child will be able to attend the neighborhood school a sibling attends. [NT 309] The Child is about to turn four, and in addition to providing an excellent preschool program the IU placement offers a sound platform for transitioning into a school-based program as it closely resembles a specialized kindergarten routine and approach to delivering a public school curriculum with integrated related therapeutic services.

With regard to delivery of pendent services during the August 2016 IU hiatus, the IU spent time defending its denial of services on the basis of skill regression/recoupment data collected prior to the break in question, as is generally appropriate when Extended School Year services are being considered. The Parents put forth post-August 2016 data that suggested that the Child's behavior regressed after the August hiatus. Looking at the record before me, I find that neither data set is relevant.

Having scoured the last agreed upon IFSP I find no documented mention of agreed-upon

service breaks, and I find the Parent credible in her testimony that there were no breaks in service delivery during birth to three programming. The service coordinator / supervisor of preschool early intervention candidly testified that the practice of the IU is not to provide services during breaks. Without such a provision in the IFSP however, failure to provide services constitutes a denial of FAPE.

Conclusion

The IU has offered an appropriate program. The Private Program is not appropriate. The Parent are not entitled to tuition reimbursement.

The Child is entitled to compensatory service hours for the pendent services that were not delivered during the IU's summer hiatus.

Order

It is hereby ordered that:

1. The program and placement the IU offered to the Child is appropriate.

2. The parentally-chosen private placement is not appropriate.

3. The Parents are not entitled to tuition reimbursement for their unilateral placement of the Child.

4. Should the Parents decide to keep the Child in their unilaterally-chosen placement the IU is not required to supplement that placement by providing related services.

5. The IU must provide the Child with compensatory education hours equal to the number of hours of ABA and OT that were denied during the August 2016 hiatus.

Any claims not specifically addressed by this decision and order are denied and dismissed.

March 2, 2017
Date

Linda M. Valentini, Psy.D., CHO
Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official