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

Child's Name: A. V.

Date of Birth: [redacted]

ODR No. 18090-16-17-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Capital Area IU/EI Program 55 Miller St. Summerdale, PA 17093	Christopher J. Conrad, Esquire Marshall, Dennehey, Warner, C. & G., P.C. 126 E. King St. Lancaster, PA 17602
Date of Decision:	September 22, 2016
Hearing Officer:	William Culleton Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Child) is an eligible child with a disability, receiving services from the Intermediate Unit Early Intervention Program named in the title page of this decision (IU). (NT[1] 9-11, 159-160.) Child is [redacted] identified as a child with Multiple Disabilities pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA). (NT 9-11.). Child is age-eligible to transition to kindergarten. (NT 9.) Child resides with Child's Mother in a local school district (District) within the boundaries of the IU region, and Father shares physical custody for some nights of the week. (NT 108-109.)

Child's Parents are separated and share joint educational decision-making responsibility. Child's Mother and Father disagree as to whether or not Child should transition to kindergarten. Child's Father requested due process by filing a complaint against the IU, asserting that the IU should place Child in a Multiple Disabilities classroom for kindergarten. Child's Mother, participating as a party in this matter (NT 11), disagrees, preferring to keep Child in the IU's early intervention program for another year, as provided in state law and policy. 11 P.S. §875-103 (defining "Age of Beginners" as the minimum age defined by school districts for admission to first grade); 24 P.S. §13-1304(c)(age of beginner is above kindergarten age); 22 Pa. Code § 11.15 (school districts must establish minimum age for beginners to attend first grade); §14.101 (eligible young child defined as under "age of beginner"); Transition of Preschool Children to School Age Programs, Announcement EI-09#19 (Office of Child Development and Early Learning, Bureau of

[1] In this decision, the various parts of the record are identified as follows: "NT" means the transcript; "P" refers to Father's exhibit; "IU" refers to an exhibit offered by the IU. I rely only upon those exhibits that were admitted into evidence.

Early Intervention Services, October 20, 2009)(children eligible for transition to kindergarten may remain in early intervention services until they attain the age of beginners).

The IU takes the position that either its services or those of the kindergarten multiple disabilities classroom sought by Father are appropriate for Child. The IU further argues that the hearing officer has no authority to order the IU to place Child in a kindergarten classroom, because the IU has no authority to provide kindergarten services[2]. Father responds that the hearing officer has the authority to order placement in the multiple disabilities kindergarten class.[3]

ISSUES

1. Should the hearing officer order the IU to place Child in the multiple disabilities classroom selected by Father or take any action with regard to such placement?

2. Has the IU proposed and is it presently providing an appropriate placement for the Child?

3. Has the IU complied with the procedural requirements of the IDEA with regard to its obligations to Father?

FINDINGS OF FACT

1. Child is [preschool age but of an age eligible to enter kindergarten]. (NT 9.)

2. Child is classified under the IDEA with Multiple Disabilities. (NT 9-10.)

3. Child's use of language is delayed and Child is receiving speech and language therapy; Child communicates through a combination of manual signs and English language words. (P 34, 40.)

[2] The IU made this argument in a motion to dismiss prior to hearing; however, the hearing officer reserved decision on this legal issue, and proceeded to a hearing. The issue is now ripe for decision.

[3] After the record closed, Father challenged the transcription of the hearing. I have considered Father's challenge in detail, and find that none of Father's complaints have merit. Many of Father's objections were not to the accuracy of the transcript, but I have considered these in the context of the following findings and conclusions. Those few objections that addressed the accuracy of the transcript were either directly contrary to my recollection and notes or so vague that I could not discern what alternative language Father asserted to be accurate. One objection - to the use of "Q" and "A" instead of designating the name of the witness - was frivolous; this transcript form is not misleading or inaccurate. In sum, I deny Father's challenges to the transcript.

4. Child has developmental delays and educational needs in the areas of hearing, vision, gross and fine motor skills, functional mobility, postural control, sensory processing, feeding, dressing, toileting, visual motor and prewriting skills, and compliance with teacher directed tasks. Child does not eat solid food reliably and is fed through a gastric tube, requiring attendance by a nurse. Child needs nursing services in school. (NT 221; P 40; IU 5; P 17, 19, 31, 34.)

5. Child is placed in a program for deaf and hearing impaired children provided by an approved private school (APS), pursuant to a contract between the IU and a school for the deaf in Pennsylvania. Presently, Child's program is for approximately one half of a school day. Originally Child attended three days per week, but presently, Child attends five days per week. Child has attended this program since July 2014. (NT 144-147, 228.)

6. The APS provides educational and related services that address all of Child's educational needs. (IU 1, 8; P 31, 34, 40, 49.)

7. The APS provides Child with some instruction in an included setting with age-typical peers. Child's Individualized Education Program (IEP) specifies that Child will be provided pre-academic instruction in inclusive settings at least one hour per program day. (NT 179; IU 1, 8.)

8. The IU is not authorized by the Commonwealth of Pennsylvania to operate kindergarten services. (NT 191-192.)

9. Child's parents are separated, and a prevailing custody order provides that they share educational decision-making authority equally. However, the order provides that Child resides with Mother for nine nights out of fourteen, and with Father for five nights out of fourteen. By agreement of Parents, Child currently resides with Mother on five of seven nights per week. (NT 108-109, 216-217.)

10. Child is eligible by age and residence for entrance into a public school kindergarten program offered by the District. (NT 108, 217.)

11. The District is part of a consortium of school districts that offers placement in a multiple disabilities classroom (Consortium Classroom) hosted in and provided by a different school district. (NT 45, 65-68.)

12. The Consortium Classroom has six students and three staff. It provides a full array of related services, including a nurse on site. It offers reverse inclusion with beginners and second graders who read to the children in the Consortium Classroom, as well as other inclusion opportunities. Consortium Classroom students' ages range from five to ten years of age at present, although in June 2016 Mother was unable to identify any children in that class who were of kindergarten age. (NT 45-48, 51-52, 220-221.)

13. The Consortium Classroom is staffed to provide nursing services as needed. Parents are not allowed to provide such services in lieu of qualified nurses, or to participate at will in programming. (NT 46-48; P 28.)

14. The District offered an IEP for Child that specified inclusion with first grade peers for specials", as well as inclusion for lunch, recess, school activities and "CBI". It did not specify a number of hours per day for inclusion opportunities. (IU 5.)

15. Father's district of residence also offers a full-time multiple disabilities classroom with similar staff to Child ratio. (NT 72-80.)

16. As part of the transition-to-school-age process, both parents considered the two multiple disabilities programs offered by the District and Father's district of residence. (NT 76-77, 84.)

17. In December 2015, Parents attended an orientation session at the District. (NT 121.)

18. Pursuant to Child's IEP, the IU convened a transition-to-kindergarten meeting in late January 2016, and both the District and Father's school district of residence sent representatives to provide information on their programs. (NT 87, 122; P 10.)

19. At the transition meeting, Mother signed the intent to register form for the District. (NT 124-125.)

20. A registration meeting was held in April 2016, and Father was invited. Child was registered with the District. (NT 134; P 28, 43, 44.)

21. In May 2016, the IU convened Child's annual IEP meeting. The IEP team continued Child's placement by the IU at the preschool program in the APS. (NT 148-150, 157-159; IU 1, 2, 3, 8, 9.)

22. On the day of the IEP meeting, the IU issued two forms to each Parent, entitled "Notice of Recommended Educational Placement/ Prior Written Notice" (NOREP). One NOREP was written to continue Child's placement in the APS and make changes updating Child's IEP. The other NOREP was written to reflect Parents' decision to transition Child to a kindergarten program through the District. Thus, the IU offered to provide the placement of Parents' choice. (NT 150-154; IU 1, 2, 3, 4 p. 1.)

23. Mother approved both of the NOREP forms. (NT 151-152; IU 2, 3.)

24. Father did not return the NOREP reflecting the IU's offer to continue Child's placement at the APS and to revise the IEP. Father expressed disagreement with this NOREP in an email message. (IU 4 p. 1.)

25. Father did not return the NOREP reflecting Parents' decision to transition Child to the District kindergarten program, but indicated in an email message that he approved that NOREP. (IU 4.)

26. The IU, after ten days, proceeded with implementation of the NOREP that offered continued placement in the APS. (NT 154.)

27. In June 2016, the District convened an IEP meeting at which it offered Child placement in the Consortium Classroom. Under this proposal, the District would remain the local educational agency for implementation of the IEP. (NT 109-113; IU 5.)

28. The Consortium Classroom program was offered full time, and the IEP offered a placement of full time multiple disabilities support. (IU 5, 6.)

29. During the June IEP meeting, Father's mother was present, but was asked to leave. (NT 129-130, 229-230; P 14.)

30. Within ten days, Father returned the NOREP indicating Father's approval of the District's proposed placement in the Consortium Classroom. (NT 140; IU 5, 6.)

31. Mother did not approve the District's proposed June 2016 IEP, stating a preference to continue Child in the preschool program provided through the IU at the APS. (NT 116, 220-221; IU 7.)

32. Mother's returned NOREP was received twelve days after the June IEP meeting and five days after the NOREP was signed by the District superintendent and sent. (NT 137-140; IU 5, 7.)

33. After the June IEP meeting at the District, Mother communicated to the IU that Mother disagreed with the District's offered placement and intended to continue Child for another year at the APS. (NT 155-157.)

34. Mother disagreed with the Consortium placement because, in her view, it did not appear that there were any same-age peers in the classroom; Consortium Classroom staff did not have sufficient fluency in sign language to enable Child to use Child's entire range of expressive vocabulary, much of which consists of signs; and inclusion offered in the IEP was less than offered by the APS, because limited to lunch and recess, and there was not an explicit offer of academic inclusion. Mother also believed that, due to Child's disabilities, Child was not ready for kindergarten; Child's birthday is relatively late, so Child would be relatively young in the kindergarten cohort for this year. (NT 220-224, 237-239.)

35. In August 2016, the IU convened an IEP meeting by conference call to consider revising the IEP. The IU proposed to increase Child's attendance at the half-day APS preschool program from three days to five days per week. The IEP contained a transition plan for Child's transition to kindergarten at the end of the current school year. (NT 157-158; P 8, 9.)

36. The IU sent NOREP forms to each parent reflecting the increase in APS days being offered to Child. Mother approved the increased days, returning the NOREP within ten days of the IEP revision telephone conference call. (NT 158; IU 8, 9.)

37. Father returned the NOREP, disapproving the offered increase in hours at the APS. Father indicated several reasons for disagreeing: 1) that the APS emphasizes only one disability, that of hearing impairment, in contrast to the Consortium Classroom, which would address all of Child's multiple disabilities; 2) that the APS does not allow parents to substitute for the assigned nurse when the latter is unavailable for feeding and other needs; 3) that the APS provides limited

physical accessibility; and 4) that the Consortium Classroom would be closer to Parents' respective residences, and would entail a shorter bus ride for Child. Father also raised procedural challenges to the IU's offer: 1) that the NOREP was sent several days after the IEP conference call, giving Father fewer than ten days to review the IEP and respond to the NOREP; and 2) that the revised IEP did not include language that Father had requested in the parental input section. (NT 158-159; IU 10; P 19.)

38. The August 2016 NOREP was sent several days after the IEP conference call, giving Father fewer than ten days to review the IEP and respond to the NOREP; the IU failed to send it also by email message, as Father had requested. (NT 172-173; P 18, 19.)

39. Father requested that language be inserted into the August 2016 revision of the IEP as parental input, and the IU failed to do that when requested. This was due to a limitation of the software program into which IEP text and data are entered. After repeated requests by Father and further efforts by the Supervisor of Early Intervention, the Father's input was entered into the Child's IEP. (NT 171-172; IU 10; P 19, 20.)

40. The IU sent IEPs and IEP revisions to Father by regular mail, despite Father's request to receive such documents by email also. (NT 172-173; IU 8, 10.)

41. The IU in offering to continue Child in the APS program did not consider whether or not the Consortium program would be less restrictive than the APS program. (NT 176-183; P 4; IU 8.)

42. The IU does not recommend that its offered program is better for Child than the kindergarten level program offered by the District. (NT 159.)

43. The Child's IEP documents do not agree to register Child for kindergarten; rather, they provide that the "family" will do so. (P 2, 3, 11.)

44. The IU is currently implementing the Child's IEP at the APS placement. (NT 159-160, 193.)

45. There is no scientific basis in published literature to indicate that it is inappropriate to retain a child in Early Intervention when otherwise eligible to advance to kindergarten as provided by law. (NT 160-166; HO 2.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the

finder of fact.[4] In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[5] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Father, who initiated the due process proceeding. If the Father fails to produce a preponderance of the evidence in support of Father's claim, or if the evidence is in "equipoise", the Father cannot prevail under the IDEA.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 Pa. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I have weighed the evidence with attention to this duty.

[4] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[5] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

Father did not testify under oath, although he made numerous statements of fact during the hearing, while questioning witnesses and while entering objections; many of Father's objections were overruled because they were essentially counter-statements of fact, rather than being valid objections to the questions. At several points during the hearing, I made it clear that Father would have the opportunity to testify as to any and all of the assertions that he had made not under oath during questioning. At the end of testimony, I also made it available to Father to take the oath and swear to the truth of all such assertions, in lieu of repeating those assertions. Father did not take advantage of those opportunities. Although his verbal response to my offers was indirect, his demeanor and body language made it clear to me that he did not want to take the oath at that time. Therefore, in weighing the evidence for purposes of the findings of fact above, I have relied upon only the complete exhibit books[6] and the testimony of the remaining witnesses. I accord the statements of Father no weight for purposes of making findings, since those statements were not sworn.

Nevertheless, in view of what may have been confusion on the part of Father during the hearing - and especially at the end of the hearing when it was time for him to testify - my conclusions discussed below include an assessment of the pertinent evidence in view of Father's unsworn statements, taking those statements as if they were under oath. Thus, as an accommodation to Father, I have assessed each finding and conclusion to see if Father's statements would have been so convincing that they would outweigh the evidence provided by the other witnesses or the exhibits admitted into evidence. In some cases, I find that Father's unsworn statements are consistent with the record and that his assertions of fact are true. In other cases, I

[6] At the end of the hearing, the IU stipulated to the admission of all of Parent's exhibits except those that I had expressly excluded during the hearing. The excluded documents are: P 1 (NT 203) and P 22 (NT 212).

reach the opposite conclusion. In no case do I find that Father's unsworn assertions of fact give rise to a conclusion that the IU failed to follow the IDEA regarding the issues that are before me.

I found all of the witnesses to be credible and reliable, based upon their demeanor while testifying and their way of responding to questions without any hint of adversarial intent or obfuscation. Their testimony was in relevant part corroborated by the documentary record.

IU AUTHORITY TO PLACE CHILD IN A KINDERGARTEN PROGRAM

This is the crux of Father's due process complaint, and the relief that he desires. Moreover, the IU has challenged my legal authority to order it to enroll Child in a school district for purposes of effectuating Father's desired placement. I conclude that the IU is correct about the law: I do not have legal authority to issue the order that Father requests.

The IU has no legal authority to place or register a child as a [student] in any school district. Father has pointed to no legal basis for the assertion that the IU should be ordered to do so. In my independent research, I have found no legal basis for the IU registering a child in a school district. On the contrary, Pennsylvania education statutes make it clear that the IU has no such authority. The Public School Code of 1949 provides limited authority to intermediate units. 24 P.S. §9-914A (providing and limiting the powers and duties of intermediate unit boards of directors). The section lists certain actions and services that an intermediate unit may perform. That list does not include any authority to enroll or assign a child to a school operated by a school district. Nowhere in the Public School Code is there any language suggesting that intermediate units can register or admit children to schools operated by school districts.

Yet the same Public School Code, in a series of other sections, repeatedly authorizes school districts to enroll children within their jurisdictions and to assign such children to their schools. 24

P.S. §§13-1301 through 1316.1. Specifically, section 13-1304 authorizes school districts to set the criteria, within specified limits, for admission of children to first grade and above. Section 13-1310 authorizes school districts to assign children to the schools that they operate. Clearly, the law requires school districts - not intermediate units - to decide who is to be registered and assigned to their schools.

Therefore, I conclude that the IU in this case is not authorized to place Child in the particular program in which Father wants Child to be placed. This can be done only by the appropriate school district. Consequently, I lack authority to order the IU to register Child in the District.

The law also provides that Father's desired placement cannot be mandated by any school entity in view of Mother's opposition to such placement at this time. Under the law, a school district is required to accept a child's registration only if the child lives within the geographical boundaries of the school district. 24 P.S. §13-1302. Where parents are separated, the child's residence is defined as the place where the child resides for the majority of the time, unless a court order or custody agreement provides to the contrary. This definition is contained in the regulation that implements this law 22 Pa. Code §11.11(a)(1); the regulation has the force of law.

The record in this matter is uncontroverted that Child presently resides for the full week with Mother, in the District. While the court order of custody provides for joint physical custody, Mother has a greater amount of court-ordered time of physical custody; in addition, the parties have arranged that Child reside with Mother for even more evenings per week. Therefore, the District is the appropriate school district in which to register Child.

Nevertheless, there is no legal basis for this hearing officer to order Child's placement in the District. The District has no legal obligation to register Child, and it is not a party to this matter.

Although Mother is a party, the hearing officer has no authority to order her to place Child in the District.

As Mother declines to send Child to the District, preferring to keep Child in the APS for this year, the District has no legal obligation to register Child. As this due process matter was filed only against the IU, the District is not before the hearing officer in this due process matter. It has not had any opportunity to respond to Father's requests in this matter. Therefore, both as a matter of law and as a matter of fairness to the District, the hearing officer cannot order the District to register or place Child.

Although Mother is a party, an administrative hearing officer has no legal authority to order Mother to do anything. The hearing officer's authority is limited to issuing orders regarding the provision of services by educational agencies. Rather, the custody court is the proper tribunal from which Father could seek an order requiring Mother to register Child in her school district of residence, and Father is always free to seek such an order from the custody court.

In sum, the IU cannot legally register Child in the District, or place Child in the Consortium program. Therefore, a hearing officer cannot order the IU to do so. Nor can the hearing officer enter any order against the District or Mother. I cannot order Child's placement in the program that Father desires, and Father's request for such relief is denied.

APPROPRIATENESS OF OFFERED PLACEMENT AT IU SPONSORED PROGRAM

Father raised a number of issues about the appropriateness of the APS placement. I have considered these arguments, discussed below, and applied the law to the facts as proven on this record. I discuss the legal standard first, and then show why I conclude that the APS is an appropriate placement. Finally, I discuss Father's criticisms to the extent that I could discern them.

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). This means that a child's IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the Child'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)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). An eligible Child 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); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

A school district is not necessarily required to provide the best possible program to a Child, or to maximize the Child's potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a "basic floor of opportunity" for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

Thus, an IEP or placement is appropriate if it offers meaningful educational benefit to the Child. Father asserts that the APS program does not do so. Yet the evidence is one sided in this

matter to the contrary; the evidence is far more than preponderant that the IU program offered to Child is appropriate, and that it does offer meaningful benefit to Child.

The IU has offered a placement at the APS that has provided services to Child addressing all of Child's educational needs, including hearing, speech and language, vision, fine motor, gross motor, functional mobility, sensory needs, toileting, feeding, dressing, nursing services, classroom readiness and social skills, and pre-academic skills. Both the testimony of the IU Supervisor of Early Intervention and the extensive documentation of the services being offered by the APS demonstrate this, and this evidence also discloses Child's non-trivial progress in the APS program. The APS also provides Child with inclusion opportunities from which Child is reasonably likely to benefit, including some inclusive activities in pre-academic skills. Therefore, I conclude that the IU has offered and is providing an appropriate program to the Child.

Father, wanting and fighting for the best for Child, offered a number of criticisms of the APS program. Father raised both substantive and procedural criticisms. I have considered each of Father's substantive criticisms in this section.

In doing so, I have weighed the evidence twice: first, I have weighed the evidence without giving weight to Father's unsworn statements; second, in order to accommodate Father's needs, I have weighed the evidence as if Father had sworn to every statement that he made during the hearing and as if he had sworn to the authenticity of every exhibit that he introduced into evidence.

Considering the evidence each way, I find that the evidence does not reach the required level of a "preponderance" of evidence to show that the IU failed to offer and provide an appropriate program and placement to Child. On the contrary, considering the evidence each way, I find that the evidence is preponderant that the IU's offered program and placement is appropriate.

Father's initial criticism is that the APS program emphasizes deafness and hearing impairment, and fails to address all of Child's multiple disabilities. Father relied primarily upon the fact that the APS is operated by a school for the deaf. Father introduced some exhibits that show the APS program's thorough effort to teach students who are deaf or have hearing impairments. Yet none of this evidence proves that the program fails to address other impairments of its students. On the contrary, exhibits in evidence show preponderantly that the program addresses the full range of Child's multiple disabilities. Father's assertion that it fails to do, even if sworn testimony, would not alter this balance of the evidence of record.

Father's second criticism is that the APS program fails to provide Child, who utilizes a wheelchair, appropriate physical access to its programs. Although Father introduced a picture of the steps to the entrance of the program, Father did not provide any evidence that there is not a "handicapped" entrance ramp or elevator that can provide Child with physical access to the programs required by Child's IEP. Indeed, extensive documentation in the record demonstrates that Child is accessing all such programming. Thus, the evidence is not preponderant that Child is denied physical access to needed APS programming. Again, taking as sworn all of Father's statements at the hearing about this subject, the evidence would not be preponderant that APS programs that Child needs are not physically accessible to Child.

Father's third criticism is that the APS program is more restrictive than that of the Consortium program that Father favors. On the contrary, the evidence is preponderant that the APS program is no more restrictive than the Consortium program; if anything, the evidence shows that for Child, the APS program is less restrictive than the Consortium program. Witnesses from both programs testified about the inclusiveness of their programs, and each program offers some inclusion in both pre-academic and non-academic settings as a general matter. However, Child's

IEP for the APS placement specifies that Child will receive pre-academic instruction in an inclusive setting for one hour per program day, at least three days per week. In contrast, the District's offered IEP provided for inclusion only in general terms, but did not specify one hour per program day of pre-academic inclusion at least three times per week. Therefore, the evidence is preponderant that the Child's IEP for the APS program is less restrictive.

Thus, even disregarding that the APS IEP is more specific about inclusion, Father has failed to provide convincing, preponderant evidence that the Consortium program would be less restrictive than the APS program[7]. Father's statements to the contrary, even if sworn, would not be any more convincing on this point, because they would not be consistent with the documentary record.

Father's fourth criticism is that the Consortium program is a full day program, while the APS offers only a half day program. The evidence bears this out preponderantly. Yet this does not prove that the APS program is inappropriate for Child. There is no evidence in this record to that effect. On the contrary, there is some evidence that Child was making progress in the APS program during the past school year. Weighing this evidence, I conclude that the Father has not shown that the APS program is inappropriate for Child because of its half day schedule. Father's statements during the hearing, even if sworn, would not have affected the weight of the evidence on this issue.

Father's fifth criticism is that the Consortium program is much closer to Father's home and closer to Mother's home as well; thus, Child's bus ride is much shorter to and from the Consortium program. The evidence is preponderant that this is the case, but, as with the shorter days in the

[7] Although the APS is a separate school, its documentation shows that it has typical students, or brings typical students to its site for inclusion purposes. Although the Consortium site is a public school, there was no evidence that this made any difference in terms of Child's access to typical peers or older typical students. Thus, the mere fact that the Consortium Classroom is a public school program does not add significant weight to the overall evidence in this record proving that the two programs are equally inclusive in general terms, and that Child's IEP for the APS provides significantly better guarantees of inclusion because it is more specific.

APS program, discussed above, the shorter bus ride does not prove by a preponderance of the evidence that the APS program is inappropriate. Indeed, there is no evidence to that effect, and Father made no assertion that, if sworn, would tend to show that Child's daily bus ride is depriving Child of meaningful educational benefit.

Therefore I conclude that the distance of the APS from Child's homes does not render the APS program inappropriate. The IU is not necessarily required to provide the best possible program to Child, and Child's IEP is not required to incorporate all that Father desires for Child. Ridley Sch. Dist. v. M.R., 680 F.3d above at 269.

Father's last criticism of the APS program is that he would not be able to provide nursing services to Child if the school nurse is absent, and generally that he would not have free access to Child's classroom for any other purposes. I understand that Father is reasonably concerned that he be able to attend to Child's medication needs and to the care required by Child's G-tube for feeding purposes; the record suggests that Father does provide at least some of these services himself at home.

Yet, the witness for the Consortium program testified that the Consortium program's policies for all parents would not allow Father to provide substitute nursing services, and explained that Father would not be allowed a carte-blanche for parental access to the classroom, as such access would disrupt the educational process. Thus, the record shows that any APS restrictions on parental access to its classrooms would not necessarily be unreasonable; in any event, there is no evidence, even taking Father's statements as sworn, that the APS program is inappropriate because of any such restrictions.

The hearing officer brought up a final consideration, asking the IU's supervisor if there is any scientific evidence that it is harmful to a child to hold that child back in early intervention

when eligible for kindergarten. The witness could cite none, and the one policy statement that the witness cited, admitted as HO 2, does not provide any such evidence. At best that exhibit is a statement of opinion without citing any evidence that such a decision would be harmful. Mother articulated several plausible reasons for her decision to continue early intervention for another year. Without giving expert weight to these opinions, I note that her reasons were individualized to Child's specific needs. Thus, there is no evidence that provision of another year of early intervention to Child would be inappropriate.

PROCEDURAL CRITICISMS

Father asserted a number of procedural challenges, and I turn to them now. First, I will set forth the legal standard; then I will address all of Father's procedural challenges. On this record, I find no substantive or procedural violations of the IDEA or its implementing federal and state regulations.

A hearing officer can find a local educational agency in violation of the IDEA only in limited circumstances. The IDEA states that the hearing officer must find a "substantive" violation, "based on a determination of whether the child received a free appropriate public education." 20 U.S.C. §1415(f)(3)(E)(i). However, a hearing officer can find that a procedural violation deprived the Child of a FAPE if one of three things is proved: 1) the procedural violation "impeded the child's right to" a FAPE; 2) the procedural violation "significantly impeded" the parent's participation in decision making; or 3) the procedural violation "caused a deprivation of educational benefits." 20 U.S.C. §1415(f)(3)(E)(ii). Therefore, I must first determine whether or not Father has proven procedural violations by a preponderance of the evidence, and if so, I must

determine if the violation has resulted in one of the three "substantive" deprivations enumerated above.

Father's first procedural challenge is that the IU agreed to register Child for the Consortium program, so that they should be ordered to do so. I have discussed above the fact that the IU has no authority to register a Child in a school district; if they had done so, they would have exceeded their authority. However, there is no evidence that they agreed to do this. Indeed, the documentary record proves by a preponderance that the IU expected Parents to register Child in a district if they chose to do so, and it did not promise to do that itself. Taking Father's assertion as sworn, I would not alter this weighing of the evidence, because Father's assertion is contradicted by the documentary evidence.

Father second challenge is that Mother failed to return the NOREP disagreeing with the District's June offer of placement in the Consortium program until twelve days after the IEP meeting in which the offer had been discussed. The evidence supports this assertion by a preponderance. Yet Mother's delay in returning the District NOREP did not alter the legal obligations of the IU.

In addition to the federal regulations set forth at 34 C.F.R. §300.1 et seq., Pennsylvania has implemented the IDEA also, through Chapter 14 of the Pennsylvania Code, 22 Pa. Code §14.101 et seq. This regulation requires local education agencies (including the IU) to implement an IEP no later than ten days after it is offered. 22 Pa. Code §14.131(a)(6). However, this regulation did not obligate the District to start providing services to Child, because the IEP was written to begin in August. By that time, Mother had registered her disagreement. Moreover, this ten day implementation requirement has no legal effect upon the IEP offered by the IU in May 2016, which

Mother did accept in timely fashion. Thus, the "ten day" rule that Father invokes is not material to this matter. It placed no obligation on the IU, which is the sole respondent in this matter.

Similarly, Father's third procedural challenge is inconsequential. Apparently invoking the same ten day rule, Father asserts that the IU did not afford him ten days to respond to the August NOREP increasing the Child's attendance at the APS from three days to five days. Factually, Father was not deprived of any right. The NOREP form asks the parent to return the form within ten days of its receipt, not, as Father alleges, within ten days of the IEP meeting. In effect, the IU was agreeing to consider Father's return of the NOREP even if delivered more than ten days after the IEP meeting date. Moreover, Child was not deprived of anything, and the IU was within its rights to treat Mother's consent as consent for the change in services. 34 C.F.R. §300.30 (parent defined as "a biological" parent of the child, in the absence of a contrary court order).

Fourth, Father argues that the IU committed a procedural violation by not immediately placing Father's parental input into the August revised IEP. However, the evidence shows by a preponderance that the IU did place this input into the IEP, after a delay caused by a computer software problem. While the limitations of computer software do not always absolve educational agencies of their duties under the IDEA, in this case there is no violation; while parental input must be placed in an IEP, the IDEA, its regulations and the state regulations do not prescribe a specific time limit for doing so. At any rate, I discern no substantive harm arising from the delay alleged here. Taking Father's assertions as sworn does not alter my weighing of the evidence here, since Father's statements do not show that the IEP was not amended eventually.

Fifth, Father seems to complain about Mother changing her mind about placement. There is no law prohibiting a parent from changing her or his mind about placement as a child comes to the age of eligibility for kindergarten.

Sixth, Father asserts that his mother was asked to leave an IEP meeting, and the record is preponderant that this is true. As Father's mother was not a necessary party to such a meeting under the IDEA, I discern no procedural violation based upon this record. 34 C.F.R. §300.322.

Last but not least, Father argued that the IU failed to consider whether or not the Consortium program constituted a less restrictive environment for Child. The evidence is preponderant that this is true. However, I conclude that this argument also fails because the APS program offered by the IU was in fact either equally restrictive or less restrictive than the Consortium program, as discussed above[8]. Therefore, even if there were a procedural violation in the IU's failure to compare the restrictiveness of the APS and Consortium programs, it did not result in any deprivation of FAPE or other substantive harm to Child or Father.

There is no evidence that any failure to compare the restrictiveness of the IU and Consortium programs could have impeded Child's right to a FAPE, under the exception provided at 20 U.S.C. §1415(f)(3)(E)(ii)(I). Father offered no evidence to that effect.

Similarly, there is no evidence that any such failure to compare the restrictiveness of the APS and Consortium programs "significantly impeded" Father's opportunity to participate in decision-making, as provided in 20 U.S.C. §1415(f)(3)(E)(ii)(II). The record shows preponderantly that Father received appropriate notices of meetings, and was given the opportunity to provide parental input at IEP meetings; also, the Early Intervention supervisor testified credibly that he had had numerous communications from Father. Father offered no substantial disagreement with the specific assertions of the documents of record or the Supervisor's testimony on this score. Thus, any statements of Father that his participation was impeded were in contradiction to the preponderant evidence of his appropriate opportunity to participate; even if sworn, such statements

[8] As discussed above, I reach this conclusion even taking Father's statements on the record as sworn.

would not have overcome the weight of that evidence. In short, the record is preponderant that Father's participation was not "significantly" impeded due to any IU failure to compare the restrictiveness of the APS and Consortium programs.

Finally, there is no evidence that any such failure to compare the restrictiveness of the APS and Consortium programs deprived Child of any educational benefits, as provided in 20 U.S.C. §1415(f)(3)(E)(ii)(III). This is discussed above in the previous section of this decision regarding alleged substantive violations. Taking Father's statements as sworn does not alter this analysis.

CONCLUSION

In sum, I conclude that the IU cannot be ordered to place Child in the Consortium program. I conclude that the IU offered an appropriate program and placement for Child in May and August 2016. I conclude that the IU did not commit any procedural violations that would justify a hearing officer order in this matter. Therefore, I conclude that the Father is not entitled to any relief against the IU, and the matter will be dismissed.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the requests for relief are hereby DENIED and DISMISSED. It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

September 22, 2016