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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: S.F.
ODR # 2889/11-12AS

Date of Birth: [redacted]

Dates of Hearing:

March 30, 2012
April 16, 2012
April 23, 2012
June 5, 2012

CLOSED HEARING

Parties to the Hearing:

Parents

Representative:

Liliana Yazno-Bartle, Esquire
Grove Summit Office Park
607A North Easton Road
Willow Grove, PA 19090

Montgomery County Intermediate Unit
1605 West Main Street
Norristown, PA 19403

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Date Record Closed:

June 26, 2012

Date of Decision:

July 3, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Child¹ is a preschool-aged child who resides in the area served by the Montgomery County Intermediate Unit [IU]. Child currently attends a private pre-school program and is provided special education and related services by the IU in that environment.

The Parents filed for this hearing, contending that the IU failed to provide all the special education and related services which Child should have received since the transition from the Birth to Three program, and also that Child requires a typical preschool placement in order to benefit meaningfully from the special education program. The Parents are asking for compensatory education, reimbursement for the private preschool tuition, and an order for prospective placement in that same private preschool for the 2012-2013 school year. The IU claims that, aside from missed services that it intends to make up, no compensatory education is due and owing, and the Parents are not, by law, entitled to reimbursement for private preschool tuition or an order for a prospective placement in that setting.

For the reasons presented below I find for the Parents in part and for the IU in part.

Issues

1. Did the IU deny Child a free, appropriate public education by failing to provide specific physical therapy, speech/language therapy, occupational therapy, direct instruction, feeding therapy, and a medically trained personal care assistant; and, if so, is Child entitled to compensatory education and, if so, in what form and amount?
2. Did the IU deny Child a free, appropriate public education by failing to provide an adaptive activities chair, a toileting chair, a stander/gait trainer, a wheelchair, an appropriate augmentative communication device, and appropriate training and consultation for each device, and, if so, is Child entitled to compensatory education and, if so, in what form and amount?
3. Does Child require a placement in a typical preschool setting in order to be provided with a free, appropriate public education and, if so, should the Parents be reimbursed for preschool tuition already paid and should the IU be directed to place Child prospectively in a typical preschool that includes summer programming?

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.

Findings of Fact

1. Child lives with the Parents and is a resident of the county served by the IU. [J-3]
2. Child sustained a significant brain injury at birth which was followed by seizures for the first few days of Child's life. Child's prognosis immediately following birth was very poor. Child's health and prognosis gradually improved and, at the age of two, Child was diagnosed with cerebral palsy. Although Child has not had any seizures since shortly after birth, they may recur at any time. [NT 72-74, 123-124; J-8]

Birth to Three Program

3. Child was first evaluated for early intervention services at the age of three months by the Birth to Three provider. An Individualized Family Service Plan [IFSP] was developed immediately after the evaluation and provided for services in the home [occupational therapy] one hour each week in addition to weekly consultation with the service coordinator. [NT 615-616; J-3, J-4]
4. By the time Child was ten months of age, early intervention services increased to include special instruction [one hour per week] and consultation with a social worker [one hour every other week] in addition to the occupational therapy and consultation with the service coordinator. [J-5]
5. The Parents² arranged for private physical therapy for Child beginning in March 2009 three times per week; they also arranged for private occupational therapy and feeding therapy beginning at one year of age. [NT 95-98, 109-110, 676-677; J-6, J-7, J-8, J-10, J-13]
6. Through the Birth to Three program during Child's second year, Child was provided with physical therapy [ninety minutes per week], speech therapy [sixty minutes per week], feeding therapy [thirty minutes per week], augmentative communication consultation [three hours per month], and consultation by a nutritionist [two hours per month], in addition to the special instruction [one hour per week], social worker consultation [two hours per month], occupational therapy [one hour per week], and consultation with the service coordinator [one hour per week]. [NT 75-78, 95; J-11]
7. The Parents arranged for private speech therapy for Child beginning shortly before Child's second birthday. [NT 112-113, 677; J-16]
8. Child was provided with a communication device by the Birth to Three provider following an evaluation conducted by the augmentative communication consultant. Child successfully used the device but it had to be

² Child's mother has been more actively involved in Child's early intervention services, but the plural is used when it appears that she was acting on behalf of both Parents.

returned to that provider before Child transitioned to the IU program. [NT 85-88, 365-366, 622-623, 630]

9. In late spring 2010 before Child's second birthday, Child's physical therapist recommended a gait trainer for Child to address upright mobility needs, including taking steps to walk short distances. Other benefits of the gait trainer were that Child could interact with peers at the same physical position/level as they were in, and to meet some of Child's physical and developmental needs for upright posture such as promoting bone growth and bone density. [NT 114-116, 185-188, 816-817; J-17]
10. The Birth to Three provider conducted its last evaluation of Child in September 2010. At that time, Child demonstrated emerging cognitive skills, emerging communicative intent and improving oral motor skills [receptive language a relative strength and expressive language a relative weakness], initiation of social contact and ability to communicate a range of emotions, progress in gross- and fine-motor skills, and varying skills in adaptive functioning with continued needs in development of feeding. [J-18]

Transition to the IU Program

11. A meeting to discuss Child's transition from the Birth to Three program to the IU program was held in early February 2011 by conference call. Topics discussed at the meeting included Child's significant needs in the areas of feeding, and Child's use of the communication device. The Parents also asked during that transition meeting about possible preschools that Child could attend. [NT 357-365, 367-368]
12. Following the transition meeting, the Parents returned an input form to the IU which provided information about Child's Birth to Three services which included speech device support. Strengths were noted that Child was very social, learned quickly, and remembered and retained new concepts; concerns related to gross and fine motor and oral motor skills, speech, and feeding. [NT 373-384; J-30]
13. The Parents provided permission to evaluate Child, and the IU issued an Evaluation Report [ER] in May 2011. The Parents' input was included, and the psychologist reported her evaluation of the developmental domains. Student's overall cognitive development was reported to be in the average range, but Child qualified for services in that area to maintain pre-academic skill development. [J-31, J-33]
14. In the Communication Domain, Child exhibited mildly delayed receptive language skills and significantly delayed expressive language skills and articulation. Child demonstrated excellent communicative intent and joint attention, and the ER reported that Child used a variety of methods of

communication, including vocalizing, gestures, and some signs, and that the early intervention team was exploring use of assistive technology. [J-33]

15. In the Social and Emotional Development Domain, Child did not demonstrate delays or a need in that area. [J-33]
16. With respect to the Physical Development Domain, the ER noted Child's ability to tolerate upright/standing activities, and specified needs to improve balance, strength, postural control, and motor control [gross motor skills]. Child also exhibited delayed fine motor skills. [J-33]
17. In the Adaptive Development Domain, Child displayed significant developmental delays, and needs were noted to improve activities of daily living functions. [J-33]
18. The ER recommended "the use of appropriate equipment or adaptations for seated classroom activities" as well as suggestions to support the family with respect to speech, occupational, and physical therapy and community activities. [J-33]

The IU Program – Services in the Home

19. An Individualized Education Program [IEP] meeting convened on June 1, 2011, at which a draft IEP was discussed. This IEP contained goals primarily related to gross and fine motor skills and activities, communication skills, and self-feeding; speech, physical, and occupational therapies were included as was weekly specialized instruction. The team also discussed the need for a medically trained personal care assistant [PCA]. The IEP stated that Child did not need services during scheduled breaks. [NT 430; J-36]
20. Several of Child's IEP goals recognized the need for adaptive seating in order for Child to sit independently and work on those goals, the need for adaptive equipment for standing and ambulating to work on those goals, and the need for assistive technology for communication. [J-37]
21. Also at that June 1, 2011 IEP meeting, as the Parents expressed interest in having Child attend preschool, the team discussed preschool options for Child. The IU suggested that the Parents consider a classroom setting operated by the IU which had both reverse mainstream and typical classroom environments at the preschool level. However, before the Parents were able to arrange a tour of that classroom setting, the program was closed. [NT 418-420, 425-426, 840, 894, 958-961]
22. The Parents approved the Notice of Recommended Educational Placement [NOREP] on June 1, 2011 for services to be provided in the home. The Parents understood that the program to be implemented was what was contained in the draft IEP but with revisions to physical therapy and the feeding goal, including the provision of physical therapy services over breaks

as agreed to by the team, and that Child's services would be delayed if they did not approve the NOREP on that date.³ [NT 710-714, 716-717, 740, 959-960, 971; J-37]

23. The IU mailed the Parents a new IEP dated June 3, 2011 which included the changes discussed at that June 1, 2011 meeting. It stated that Child needed assistive technology devices and/or services which should be explored through the SETT process.⁴ This IEP included all the goals in the draft IEP, but also added a goal for cognitive activities.⁵ A change was made to provide for physical therapy during scheduled breaks of one week or more. [NT 714; J-37]
24. The Parents obtained a private occupational therapy feeding evaluation in June 2011. The purposes of that evaluation were to help Child's feeding experiences be more successful so that Child could gain weight, and to work on developing independent feeding skills and a positive mealtime experience. The evaluator recommended ongoing occupational therapy intervention and consultation and specific goals. This occupational therapist has continued to provide feeding therapy to Child. The Parents did not share this evaluation report with the IU. [NT 444-446, 487-490, 690-691; J-40]
25. Also in June 2011, the Parents arranged for a private Wheelchair Seating and Mobility Evaluation, which resulted in specific recommendations for an activity chair, a toileting chair, and a wheelchair for mobility. The Parents provided the results of that evaluation to the IU in early September 2011. [J-22, J-39, P-39]
26. The Parents also obtained a private Feeding/Swallowing evaluation by a speech pathologist in July 2011. This evaluator recommended feeding and oral-motor therapy as well as appropriate postural support, tools, and strategies. [NT 446-447; J-41]

The IU Program – Services in the Preschool

27. The Parents explored preschools in the area during the summer of 2011 and enrolled Child in a private preschool program that accepted Child beginning in September 2011. Child attended nine hours per week at the private preschool. [NT 569-573, 576-577, 579-580, 720-721, 732-735, 764-766, 782; J-55]

³ The IU had a scheduled three-week long break which delayed the initial provision of its services to Child until the beginning of July. [NT 673]

⁴ Student Environment Tasks and Tools, a method of assessing students' assistive technology needs. [NT 1037]

⁵ The Parents did not challenge the substance of this goal, but rather the procedure in adding the goal without an IEP team meeting and decision. [NT 559-565; Parents' Closing Brief at 23]

28. The Parents signed a NOREP on September 2, 2011 for services to be provided in an early childhood education environment. There was no meeting of the IEP team, but the IU mailed a new IEP dated September 6, 2011 to the Parents with the September 2, 2011 NOREP several days later. The September 6, 2011 IEP added a PCA twice each week when attending the preschool, and also noted that occupational and speech therapies over scheduled breaks would be discussed. [NT 723-727; J-43]
29. On September 7, 2011, as Child was ready to begin attending the preschool, the Parents wrote to the IU because they were concerned that it had not yet made arrangements for a medically-trained PCA, activity chair, gait trainer, wheelchair, toileting chair, or augmentative communication device. [NT 120-123, 128-130, 458-459, 472-473, 917-920; J-22]
30. A new NOREP dated September 8, 2011 was provided to the Parents who signed approval on September 14, 2011. The NOREP noted the needs for the adaptive activities chair, the stander/gait trainer, and the toileting chair. Once again no IEP accompanied the NOREP, but an IEP dated September 12, 2011 was subsequently mailed to the Parents. This September 12, 2011 IEP increased the amount of speech therapy [to two hours per week] and physical therapy [to two hours per week]. [J-45]
31. Also in early September 2011, Child's occupational therapist recommended a specific activity chair for Child's use in the classroom setting. The activity chair provided necessary support for Child to engage in tasks in a seated position without having to use one hand for stabilization. [NT 52, 59-60, 508; J-44]
32. The Parents arranged for additional private speech therapy beginning in November 2011 after the therapist provided by the IU accepted other employment. The Parents also believed it was important to focus on Child's speech therapy needs at that time. [NT 530-532; J-47]⁶
33. The family received Child's wheelchair in November 2011 from the company which contracts with the facility that conducted the mobility evaluation. The wheelchair was not as lightweight and portable as the Parents had expected, but they planned to use it to transport Child between home and the preschool and were able to do so. [NT 128-140; J-22]
34. A conference call meeting convened at the end of November 2011 at which the participants discussed the lack of equipment, missed therapy sessions, the PCA, meetings that should have been scheduled, the Parents' request to have a new itinerant teacher assigned to Child, and reimbursement for preschool tuition. [NT 535-540, 842; J-48]

⁶ Child is presently provided with three hours of private, individual speech therapy, and twice-weekly private physical therapy sessions. [NT 303-304, 310, 387]

35. Representatives of the IU sent a NOREP to the Parents following the November 2011 meeting, at the Parents' request, summarizing the conversation. [NT 535, 728-731, 879-880, 932, 947-948; J-48]
36. On December 14, 2011, Child's occupational therapist recommended a specific toileting chair for Child for use at the preschool and conveyed information about it to the Parents and to the IU. The toileting chair provides necessary physical support for Child to use the restroom facilities. [NT 42-45, 56-57; J-26, J-49]
37. Also in December 2011, due to ongoing concerns between the itinerant teacher and the family, a different itinerant special education teacher was assigned to Child. That teacher started working with Child in early January 2012 after the winter break. [NT 193-194, 429, 743-744, 911-912, 934, 987-988]
38. At a meeting at the family's home in January 2012, the Parents again asked the IU about reimbursement for the preschool tuition they had been paying. The Parents thereafter learned that the other members of the IEP team had determined that the IU would not pay for the preschool tuition. [NT 426-430, 541, 556-557; J-48]
39. A SETT meeting was held in January 2012 which the speech therapist did not attend. An action plan was subsequently developed to obtain an augmentative communication device, orient the team members to it, and incorporate its use throughout the day including at the preschool. It was also suggested that the family obtain an application for their iPad that Child could use in the meantime.⁷ [NT 88, 329-330, 540, 543-544, 549-552, 624-625, 991, 1038-1042; J-50]
40. Following the SETT meeting, the IU provided Child with an augmentative communication device which was not the device recommended as the recommended device was not available. The IU arranged for a one-hour training session on the new communication device later in January 2012. The one-hour training session provided was not sufficient for anyone to feel comfortable using the device, including Child's father who is a software engineer. Child's father did program a few phrases on the device that Child was able to use. [NT 92-93, 327, 542-551, 553-554, 623, 632-636, 638-642, 801-803, 991-993, 1039-1044, 1065-1066, 1068, 1073-1074]
41. On January 30, 2012, Child's private occupational therapist recommended that Child be provided with occupational therapy services during extended breaks [one week or longer] due to observed regression in skills during the winter break. [NT 57-59, 63; J-53]

⁷ Child could use the iPad successfully, mostly independently, but could be easily distracted by other applications on that device. [NT 625-626, 630, 636, 653-654]

42. The IU issued a NOREP dated January 20, 2012 following the January 3, 2012 informal meeting, which related to an IEP also dated January 20, 2012. The Parents did not approve the NOREP and instead requested a due process hearing. [NT 555-558, 586; J-54]
43. In February 2012, the Parents arranged for a private augmentative communication evaluation, after which the private evaluator recommended a different speech device be used. The Parents shared this report with the IU. [NT 589-590, 642-644, 646; J-63]
44. On March 4, 2012, Child's private speech therapist recommended that Child be provided with speech therapy services during extended breaks to avoid regression in skills. Child demonstrated oral apraxia, developmental apraxia of speech, and possible dysarthria. [NT 317-318, 320-322, 345-346; J-56]
45. The IU provided a different communication device for Child in April 2012, which was similar to the device that Child had used successfully in the Birth to Three program and was the device recommended through the SETT process. The IU arranged for training on the new device which was provided to the family, IU representatives including the assistive technology consultant, the PCA, Child's occupational and speech therapists, and the teacher; ongoing training would be available. Child was and is able to successfully use this device. [NT 622-623, 646-653, 799-801, 804, 847-848, 853, 1041-1045, 1069-1071]
46. Child needs a medically-trained PCA because of continuing concerns about a recurrence of seizures, Child's complex feeding needs, Child's significant physical needs including proper physical positioning, and appropriate use of all the specific equipment necessary for Child to participate in preschool activities. [NT 121-128, 359, 917-918; J-22]
47. Child requires significant support with eating and drinking, and extreme care is necessary during feeding routines to ensure Child's physical safety. The occupational therapist who conducted the private feeding evaluation in June 2011 continues to provide consultation with the family. She recommended that Child be provided with feeding therapy services weekly in the educational setting with additional weekly training for staff. The Parents did not believe the feeding goal in the IEP was appropriate, failing to address concerns about Child's safety and actual feeding needs. As a result, the IU did not implement the feeding goal in the IEP. [NT 106-107, 124, 405-408, 437-438, 487-489, 497, 499-501, 505-506, 508-511, 513, 520, 656-658, 805-807; J-43]

Lapses in Provision of Services and Equipment

48. Child has had a variety of PCAs since starting preschool in September 2011, many of whom were not medically trained and/or who were not available on

all days that Child was to or did attend.⁸ When a PCA was not available, Child was not able to participate in most activities and often spent the majority of the time at the preschool strapped into a stroller not able to interact with peers. As of the date of the first session of the due process hearing [March 30, 3012], there were approximately 24 days when a PCA was not available at all.⁹ As of April 18, 2012, Child had a PCA who was a licensed practical nurse. [NT 140-149, 457-465, 651, 665-666, 789, 799, 808-810, 1021-1022]

49. Child was not provided physical therapy at the preschool between September 14, 2011 and the time of the due process hearing. Rather than providing two hours of physical therapy each week, Child's physical therapist was present at the preschool on only four or five occasions by the time of the due process hearing. [NT 792, 815-816]
50. Child was not provided speech therapy at the preschool between the beginning of November 2011 and mid-January 2012, losing approximately twenty hours of these services. [NT 152-156]
51. While the activity chair was provided to Child at the preschool in approximately October 2011 within a month of the recommendation by the private occupational therapist, no training was provided by the IU to the occupational therapist or the preschool teacher on how to use the chair so that Child would be adequately supported in a seated position. [NT 52-56, 59-60, 508, 812-813, 817-818, 823-824]
52. Child's gait trainer was not made available until the end of January 2012, and no training or adjustments to the device were provided until February 8, 2012. As of the time of the due process hearing, this device was still not used regularly in the preschool because insufficient training was provided by the IU to staff. [NT 185-186, 193, 793-795, 818-820]
53. A toileting chair recommended in mid-December 2011 was provided at the preschool at the end of January, and training was conducted in early February. However, the toileting chair has been used very infrequently because of the challenges presented in using the equipment, the changes in PCA staffing, and the minimal training given to staff by the IU. [NT 159, 161-166, 820-823]
54. Child is able to use the toileting chair successfully in the home environment. [NT 164-166]
55. Since Child's transition to the IU and through the end of the due process hearing, Child has not been provided with physical, occupational, or speech

⁸ Child's mother attended preschool with Child for the first six weeks because the assigned PCA was not comfortable working with Child. [NT 402, 774]

⁹ Although the Parents' Closing Argument suggests a different number of days, I find the mother's testimony on this point to be credible. [NT 140-149]

therapy during breaks of one week or more in the IU schedule [totaling nine weeks] except for two weeks in August when physical therapy was provided. As set forth in the IU calendar for 2010-11 and 2011-12, the IU had scheduled breaks in June [3 weeks], August [3 weeks], October [1 week], November [1 week], December [2 weeks], February [1 week], and April [1 week]. [NT 171-184; J-43; Parents' Closing Argument at P-1]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in " equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer*, and also accepted the burden of production although *Schaffer* is not specific on assignment of this element. Upon very careful consideration and examination of the testimony and documents this hearing officer has determined that the evidence was not evenly balanced on the issues presented such that a conclusion under *Schaffer* was ultimately not necessary.

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).

The Parents and Grandparent of Child all testified candidly and credibly about the facts in this case. Child's mother exhibited an excellent recall for details and her very credible testimony was given a great deal of weight in all respects save one, explained below, which is more attributable to a misinterpretation than a lack of reliability. As both a parent and a certified teacher in Pennsylvania, she presented as a knowledgeable and very impassioned advocate for Child.

Child's father similarly provided highly credible testimony, particularly with respect to the problems encountered by the family and service providers in the trial of the first

augmentative communication device obtained in January 2012. The testimony of this witness, who as a software engineer was unable to make this device functional for Child in all but the most basic of uses, was accorded significant weight in concluding that that device was not appropriate for Child.

Child's grandfather, with substantial experience in the field of special education as both a teacher and administrator, was also very involved with the family and with Child's educational program. He presented as a very credible witness on the facts with the single exception of the misinterpretation similar to that of the mother.

The Parents' occupational and speech therapists and the private preschool director were all very credible with respect to the factual testimony they provided about Child and this case. The occupational therapist, with a master's degree and five years' experience, was well qualified, had worked with Child for well over two years, and clearly had a good relationship with the family. She was very familiar with and able to describe the adaptive devices recommended for Child and why they were needed.

The testimony by the speech-language therapist, who has a master's degree and twelve years' experience, was extremely persuasive about Child's need for services over the summer break, particularly when contrasted with her hesitation to make a similar endorsement regarding a one-week break due to a lack of research to support it. However, her testimony about Child's needs and experiences in the preschool environment was given little weight since she had not observed or provided services to Child there; similarly, she was able to provide little information about Child's augmentative communication devices since she did not attend the January training or review the manual, or attend the SETT meeting, and therefore had limited knowledge about Child's devices.

The private preschool director, who as a certified special education teacher is unmistakably very qualified and experienced in the field, gave highly credible testimony about the preschool program, the events leading to Child's attendance there, and Child's progress in that setting. She also convincingly testified to specific services, including the PCA, and equipment that were not provided for Child at the preschool. However, her testimony regarding Child's need for a typical preschool placement at public expense, like that of the occupational and speech therapists, was accorded little weight on the issues of tuition reimbursement and prospective placement as is more fully explained below.

Child's lead teacher at the private preschool has a master's degree and certification in elementary education, and has been in her position for thirteen years. She testified credibly to Child's experiences and participation in the preschool classroom. She also provided a summary of the services and equipment which were not provided, which was not only reliable but also supported by other witnesses. Her description of the extent to which Child was not able to access the preschool curriculum as a result of these lapses, as well as the challenges she consequently faced on a daily basis, was convincing and forthright.

The occupational therapist who conducted the feeding evaluation and provides consultation to the family has 33 years' experience in occupational therapy in a variety of settings including early intervention as well as in feeding therapy. She was very persuasive in her detailed testimony about Child's needs for specific feeding techniques and the reasons for them. Her description of Child's progress in feeding over time was extremely helpful in enhancing this hearing officer's understanding of Child's feeding challenges and supported her recommendations for feeding therapy and her testimony was accorded significant weight.

The first supervisor at the IU who testified gave little information and displayed very limited recall of the events in this case. Of all of the witnesses presented, his testimony was deemed to be the least reliable.

The other IU supervisor, who holds a doctoral degree in special education and several teacher and administrator certifications, was much more credible and, while she was not the witness most familiar with Child and the facts, she exhibited good recall of her role in the case and the events that involved her. She also conceded that meetings of Child's IEP team were not held, and provided a reasonable explanation for why she did not become more involved. This witness was further very persuasive in describing the factors that the IU considers in determining whether to fund a preschool placement.

Child's current itinerant teacher/case manager from the IU has certification as an elementary and special education teacher and many years' experience in early intervention. She had good recall and gave plausible testimony on her role in implementing Child's IEP in the short time period she was assigned to Child. Although she appeared to be extremely careful in her answers on cross-examination, her limited testimony was credible with respect to her role in the case.

The IU early intervention case manager, who has 26 years' experience as an early intervention teacher and administrator, testified quite convincingly on the question of what the discussion was among the Parents and IU personnel with respect to placing Child at a preschool. This evidence was accorded significant weight.

The last witness, the IU speech-language pathologist and assistive technology consultant, has education and certification in both fields. She demonstrated good recollection of the events surrounding the January 2012 SETT meeting and the reasons for the acquisition of the first augmentative communication device. She was also forthright in describing the training she gave on that device and how it compared to the training for the other. Her testimony was credible on the facts with which she was familiar.

Legal Basis

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act. 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Once disabled children are identified as being eligible for special education

services the IDEA requires the State to provide them with a “free appropriate public education” [FAPE]. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9).

It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received FAPE. 20 U.S.C. §1415(f)(3)(E).

An "appropriate" education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1).

Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

Local education agencies such as an Intermediate Unit provide FAPE by designing and implementing a program of individualized instruction 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 benefit”, a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011).

An eligible student is denied FAPE if the IEP 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); *Polk*,

The Third Circuit explains that while an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a “basic floor of opportunity”. There is no requirement to provide the “optimal level of services.” *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). 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). Citing *Carlisle*, Pennsylvania’s federal court in the Eastern District noted, “Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit at the time it was created.

The Office of Child Development and Early Learning [OCDEL] has explained that while the concept of a school year and extended school year [ESY] do not apply to children in early intervention, decisions on providing services during breaks must be made with consideration of “all available data and observations of the child” and may be guided by the ESY criteria set forth in section 14.132. Those criteria are:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
- (iii) Whether the student’s difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
- (iv) *The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.*
- (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
- (vi) The extent to which successive interruptions in educational programming result in a student’s withdrawal from the learning process.
- (vii) *Whether the student’s disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.*

22 Pa. Code § 14.132(a)(2) (emphasis added).

Issue 1: Did the IU deny Child a free, appropriate public education by failing to provide specific physical therapy, speech/language therapy, occupational therapy, direct instruction, feeding therapy, and a medically trained personal care assistant; and, if so, is Child entitled to compensatory education and, if so, in what form and amount?

Physical Therapy: Pursuant to the IEPs which were to be implemented for Child at the preschool, Child was to receive two hours of physical therapy per week which was not consistently provided. [FF 19, 22, 23, 38, 55] There can be no clearer denial of FAPE than a simple failure to provide the services which the IEP team has agreed are necessary. The failure to provide these services constitutes a denial of FAPE for which compensatory education shall be awarded.

The IEP also specified that Child was to be provided with two hours of physical therapy each week during scheduled breaks of one week or more. [FF 23] The record establishes that numerous sessions of physical therapy were not provided, and further that Child was not provided with physical therapy during seven weeks of scheduled breaks of one week or more. [FF 49, 55] Child shall accordingly be awarded compensatory education as discussed below.

Speech/language Therapy: Pursuant to the IEPs which were to be implemented for Child at the preschool, Child was to receive two hours of speech therapy per week which was not provided. [FF 19, 30] The failure to provide these services constitutes a denial of FAPE for which compensatory education shall be awarded.

The IEP team also specified that the team would discuss whether Child needed speech therapy over scheduled breaks in the IU calendar. [FF 28] There is no evidence in the record to suggest that such a conversation occurred. On March 4, 2012, Child's private speech therapist recommended that Child be provided with speech therapy over extended breaks to avoid regression. [FF 44] This recommendation, coupled with the IU's unquestionable understanding of Child's needs in this area, should at least have resulted in a meeting or discussion about whether Child should be provided with speech therapy during scheduled breaks of one week or more. Although the private speech therapist stopped short of recommending this service during shorter breaks, I find that the record as a whole, including her testimony about Child's speech therapy needs, supports the conclusion that the IU should have been providing speech therapy to Child over breaks of one week or more after this recommendation was made, consistent with the OCDEL guidance noted above, and, given the IU's experience with Child as of that point in time, compensatory education shall be awarded since it did not.

Occupational Therapy: Pursuant to the IEPs which were to be implemented for Child at the preschool, Child was to receive two hours of occupational therapy per week, and the team was to discuss whether child needed occupational therapy over scheduled breaks in the IU calendar. [FF 19, 28] As with speech therapy, there is nothing in the record to show such a discussion took place. On January 30, 2012, Child's private occupational therapist recommended that Child be provided with occupational therapy services during extended breaks of one week or longer because of observed regression in skills during the winter break. [FF 41] I find her testimony to be very reliable and supportive of the conclusion that the IU should have been providing occupational therapy to Child over breaks of one week or more after this recommendation was made, consistent with the

OCDEL guidance noted above and given the IU's experience with Child as of that point in time, and that because the IU did not do so, compensatory education shall be awarded.

Direct Instruction: Pursuant to the IEPs which were implemented for Child at the preschool, Child was to be provided with one hour of "specialized instruction" per week. [FF 19] Testimony was presented at the hearing that Child was not provided with direct instruction by the itinerant teacher for the majority of the time period in question. [NT 778, 802-03] However, Child's IEPs do not specify "direct instruction" by the special education teacher. I find the testimony of Child's itinerant teacher on the services that were provided in implementing the special instruction to be credible, as well as that of the IU supervisor who described both special and direct instruction and what special instruction might include. [NT 908-911, 988-990, 1010-1013] I therefore conclude that the Parents have not met their burden of establishing that Child was denied FAPE because direct instruction was not provided.

Feeding Therapy: The record is replete with evidence that Child has significant and complex needs with respect to feeding. The IU recognized these needs in part when it developed a feeding goal for Child's IEP. [FF 19, 22, 24, 26, 47] Nevertheless, when it became apparent that the feeding goal as written could not appropriately and safely be implemented in the preschool setting, the IU knew or should have known that actual feeding therapy, as described by the Parents' witness who provides it at home, was necessary to be part of Child's educational program. This witness was extremely convincing in detailing the complexities of Child's feeding needs as well as the necessity for ongoing appropriate training for staff who would implement the feeding therapy. She and the Child's mother also persuasively outlined the progress that had and had not been made with respect to Child's feeding needs during the time period in question. [NT 490-496, 517-519, 590-594] Accordingly, compensatory education from the time Child started at the preschool shall be awarded.

Trained PCA: Child's IEP team well understood the need for a PCA who would be able to support Child in the preschool environment. [FF 19, 28, 29, 34, 46, 48] The record establishes that as of the time of the due process hearing, there were 24 days that Child did not have a PCA available, and was therefore not able to access the preschool curriculum. [FF 48] Additionally, there were substantial periods of time during which Child had an assigned PCA who was not sufficiently trained to provide Child with the needed physical support to engage in the activities of the children in the classroom; it was not until April 18, 2012 that Child was provided with a PCA who was medically trained. [FF 48] Compensatory education shall be awarded for this denial of FAPE.

Issue 2: Did the IU deny Child a free, appropriate public education by failing to provide an adaptive activities chair, a toileting chair, a stander/gait trainer, a wheelchair, an appropriate augmentative communication device, and appropriate training and consultation for each device, and, if so, is Child entitled to compensatory education and, if so, in what form and amount?

Adaptive Activities Chair: Child's IEP team was aware as of the June 2011 IEP meeting that Child required adapted seating to provide proper support to enable Child to sit independently and work on many of the goals in the IEP, and its provision was part of the September 8, 2011 NOREP. [FF 20] No action was taken with respect to this need until after the private occupational therapist made a recommendation in September 2011 for the specific chair, and another month elapsed before the chair was available. [FF 51] After the chair arrived, there was no training provided so that staff could position Child appropriately in the seat, resulting in a significant denial of FAPE due to Child's inability to access and participate in the preschool activities and curriculum. [FF 51] Compensatory education shall be awarded.

Toileting Chair: Child's needs in activities of daily living have been well known since the time of Child's transition to the IU. The need for a toileting chair was noted in the September 8, 2011 NOREP. [FF 18, 30] Child's private occupational therapist recommended a specific toileting chair for Child's use at the preschool in December 2011, which was obtained near the end of January 2012. [FF 53] Once available, however, only minimal training was provided to staff at the preschool who were not able to use the equipment with Child with any regularity due to the lack of sufficient training. [FF 53] Child's ability to use a toileting chair successfully at home [FF 54] demonstrates that Child could also use the chair successfully at the preschool if the staff had been given the requisite knowledge and training to enable Child to accomplish this important function of daily life. I conclude that the IU denied FAPE to Child by neglecting to provide proper training to staff on the toileting chair and shall award compensatory education.

Stander/Gait Trainer: Child's IEP team was aware before the June 2011 IEP meeting that Child required adaptive equipment to provide proper support to enable Child to stand and ambulate in order to work on many of the goals in the IEP. [FF 18, 30] The need for the stander/gait trainer was noted in the September 8, 2011 NOREP. [FF 30] However, no action was taken with respect to this need until January 2012 when the equipment was provided. [FF 52] After the equipment arrived, there was insufficient training provided so that staff could position Child appropriately in the equipment, resulting in a significant denial of FAPE due to Child's inability to access and participate in the preschool activities and curriculum. [FF 48, 52] Compensatory education shall be awarded.

Wheelchair: Unlike the above devices and equipment for use at the preschool, the parties contemplated that the Parents would use the wheelchair they obtained pursuant to the recommendations in the Wheelchair Seating and Mobility Evaluation for transporting Child between home and the preschool. [FF 25, 33] The Parents claim the IU should have obtained and provided its own wheelchair or made other arrangements to accommodate Child's transportation. However, merely because Parents have discovered that the wheelchair is difficult and cumbersome to use for this purpose is not a sufficient basis on which to find the IU denied FAPE to Child in this regard.

Augmentative Communication Device: Child's significant communication needs were also well known to the IU upon Child's transition to its program, as was Child's then-

current use of such a device. [FF 8, 11, 14, 20] A SETT meeting was discussed in June 2011, yet that meeting was inexplicably not held until January 2012. [FF 23, 39] The recommended device was not provided, and instead a substitute device was made available. [FF 39, 40] Training on the substituted device was minimal at best, with only the most basic use of the equipment possible after Child's father managed to program a few phrases that Child could use. [FF 39, 40] The failure to provide an appropriate augmentative communication device to Child with the necessary training resulted in Child's inability to communicate meaningfully with staff and peers at the preschool, and amounts to a clear denial of FAPE for which compensatory education shall be awarded.

Compensatory Education

The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy when a school district has failed to provide a student with FAPE *Lester H. v. Gilhool*, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district's failure. [*Id.*] It is well settled that compensatory education is an appropriate remedy where a local education agency knows, or should know, that a student's or child's educational program is not appropriate or that the student or child is receiving only trivial educational benefit, and the agency fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the student or child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a method that awards the "amount of compensatory education reasonably calculated to bring a student to the position that the student would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Compensatory education is an equitable remedy. *See Lester H.*

I was provided no evidence to support a determination of what position Child would have been in had Child been provided with appropriate educational programming throughout the time period in question, and such evidence would only be speculative. Thus, I conclude that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Child in this case.

Therapy Services

Compensatory education for the physical, occupational, speech, and feeding therapy which should have been but was not provided shall be awarded, hour for hour, in an amount equal to the services which were missed. Because the IU knew or should have

known of the need for these services prior to the time the services were missed, there shall be no adjustment for any period of rectification.

Physical Therapy: Child is entitled to compensatory education in the form of two hours of physical therapy per week for services which should have been but were not provided during the preschool day and during scheduled breaks in the IU calendar of one week or more, from the first day Child was entitled to those services [September 14, 2011]. The IU shall be given credit for any such hours that it has previously provided to make up for the deprivation.

Speech/Language Therapy: Child is entitled to compensatory education in the form of two hours of speech/language therapy per week for services which should have been but were not provided during the preschool day from the first day Child was entitled to those services [September 14, 2011]. Child is also entitled to two hours of speech/language therapy per week for services which should have been provided during scheduled breaks in the IU calendar of one week or more that occurred after March 4, 2012 when the recommendation for those services was made. The IU shall be given credit for any such hours that it has previously provided to make up for the deprivation.

Occupational Therapy: Child is entitled to compensatory education in the form of two hours of occupational therapy per week for services which should have been but were not provided during scheduled breaks in the IU calendar of one week or more that occurred after January 30, 2012, when the recommendation for those services was made. The IU shall be given credit for any such hours that it has previously provided to make up for the deprivation.

Feeding Therapy: Child is entitled to compensatory education for the IU's failure to provide for feeding therapy for Child during the preschool day from the first day Child was entitled to those services [September 14, 2011]. I conclude that one hour per week of compensatory education, not including scheduled breaks in the IU calendar of one week or more, is an appropriate amount of feeding therapy, and that amount shall be awarded to compensate Child for weekly sessions of therapy as well as weekly sessions of training for staff,¹⁰ as recommended by the Parents' feeding therapist. The IU shall be given credit for any such hours that it has previously provided to make up for the deprivation.

Other Services/Devices

Trained PCA, Adaptive Activities Chair, Toileting Chair, Stander/Gait Trainer: The basis for the award of compensatory education for each of these services/devices has been explained above. However, the denial of FAPE on these bases is not conducive to an award of a specific number of hours compensatory education. I conclude that the absence of these appropriate services and devices, singly or together, denied Child access to the preschool curriculum and prevented Child from participating meaningfully in that

¹⁰ This is also the amount suggested in Parents' due process complaint.

environment for each hour that Child attended preschool beginning on September 14, 2011, Child's first day. I also conclude there shall be no adjustment for a reasonable rectification period because, as explained above, the IU had full knowledge of Child's needs well before Child transitioned into its program. Thus, Child shall be awarded compensatory education in the amount of nine hours per week beginning on September 14, 2011 and continuing through April 18, 2012 when the medically trained PCA was provided,¹¹ for each day that Child did or was scheduled to attend preschool, not including scheduled breaks in the IU calendar.

The hours of compensatory education for the Trained PCA, Adaptive Activities Chair, Toileting Chair, and Stander/Gait Trainer are subject to the following conditions and limitations. I find that the value of each hour of the compensatory education shall be set at \$10.00 based on the testimony of the director of the private preschool on the hourly rate the family paid to enroll Child in that setting. [NT 767] This assigned value is deemed equitable as the Parents were providing a preschool environment for Child which Child was unable to access because of the IU's failure to provide the necessary services, equipment, and training for staff on the use of the equipment.

Child's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that addresses Child's areas of need. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that would appropriately be provided by the IU through any future IEP. This principle sets the maximum cost of all of the hours of the compensatory education awarded. The Parents may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The Parents also may use fewer hours of expensive services so long as the maximum dollar amount of the award is not exceeded. Finally, the Parents must not be required to make co-payments or use personal insurance to pay for any part of these services.

These specific hours of compensatory education may be used at any time from the present until the date of Child's 8th birthday which should be a reasonable time within which to remedy the deprivation to this young child. Finally, given the unique nature of the deprivation in this particular case, the hours of compensatory education for the Trained PCA, Adaptive Activities Chair, Toileting Chair, and Stander/Gait Trainer may, if the Parents' wish, be used for preschool tuition until Child begins to attend a school-aged program.

Augmentative Communication Device: Having concluded that the failure to provide an appropriate augmentative communication device to Child with the necessary training amounts to a clear denial of FAPE, the remedy for the deprivation presents a similar challenge. I conclude that the hours at preschool during which Child was not able to engage in meaningful communication at the preschool has been remedied by the award described above related to the other services/devices. However, had an appropriate

¹¹ Parents suggest the award end on April 17 or 20, 2012, the date on which the medically trained PCA was provided. [Parents' Closing Brief at P-1]

device been provided to Child for use no later than September 14, 2011, Child would also have had use of the equipment at home and in other environments, and would undoubtedly have made much greater strides in communication development and been much more proficient in its use than Child is at present. I find the Parents' suggestion for additional hours of compensatory education for each weekday that Child attended preschool, and additional hours for each weekday that Child was not in preschool, is reasonable to remedy the deprivation and shall award two hours of compensatory education for each day Child was scheduled to or did attend preschool, and four hours of compensatory education for each weekday Child was not scheduled to or did not attend preschool, including scheduled breaks in the IU calendar, to equitably remedy the absence of an appropriate communication device for Child. The period of time for this remedy shall begin on the first day of preschool [September 14, 2011] and continue through the date on which the appropriate device and training on that device were provided [April 18, 2012]. The IU shall be given a reasonable rectification period of thirty calendar days following the provision of the first device provided in January 2012 during which time sufficient training should have been provided and the parties would have objectively determined that the device was not appropriate for Child.

The hours of compensatory education for the Augmentative Communication Device are subject to the following conditions and limitations. Child's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that addresses Child's areas of need. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that would appropriately be provided by the IU through any future IEP. There are financial limits on the Parents' discretion in selecting the appropriate developmental, remedial, or therapeutic services or device. The costs to the IU of providing the awarded hours of compensatory education may not exceed the full cost of the hourly rate that would have been paid to the actual assistive technology consultant on Child's IEP team.¹² This principle sets the maximum cost of all of the hours of the compensatory education awarded. The Parents may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The Parents also may use fewer hours of expensive services so long as the maximum dollar amount of the award is not exceeded. Finally, the Parents must not be required to make co-payments or use personal insurance to pay for any part of these services.

These specific hours of compensatory education may be used at any time from the present until the date of Child's 8th birthday, which should be a reasonable time within which to remedy the deprivation to this young child.

Lastly with respect to the request for compensatory education, the Parents also raise numerous procedural violations by the IU. "A procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes

¹² This is the value suggested by the Parents for this deprivation, and this hearing officer finds it reasonable to use that figure for this portion of the compensatory education award. [Parents' Closing Brief at P-1]

substantive harm to the child or his parents.” *C.H. v. Cape Henlopen School Dist.* 606 F.3d 59, 66 (3d Cir. 2010). As I have already found substantive denial of FAPE to Child by the IU on a number of bases and have ordered remedies, there is no need to further discuss the asserted procedural violations.

Issue 3: Does Child require a placement in a typical preschool setting in order to be provided with a free, appropriate public education and, if so, should the Parents be reimbursed for preschool tuition already paid and should the IU be directed to place Child prospectively in a typical preschool that includes summer programming?

The Parents argue that Child’s special education program must be provided in the least restrictive environment, which here is the private preschool that Child attends. They also contend that the provisions of Child’s IEP require that the special education services be delivered in a typical preschool environment.

All eligible children must be educated (receive FAPE) in the “least restrictive environment” (“LRE”), that is, to the maximum extent appropriate, with their typical peers. *See* 20 U.S.C. § 1412(5). The Third Circuit early on recognized and applied the principle of LRE in *Oberti v. Bd. Of Educ. Of the Borough of Clementon Sch. Dist.*, 995 F. 2d 1204; 19 IDELR 908 (3d Cir. 1993). Federal and State law also provide that both concepts, FAPE and LRE, extend to preschool-aged eligible children. In addition to 20 U.S.C. § 1402(9) referenced above, the federal IDEA regulations pertaining to “placements” states in relevant part that “In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that . . . [t]he placement decision . . . [i]s made in conformity with the LRE provisions of this subpart . . . See 34 C.F.R. 300.116.

Likewise, in Pennsylvania , “[e]arly intervention services” are defined at 11 P.S. Section 875-103 as, among other things, “...provided to eligible young children in compliance with the provisions of this act and Part B [of the IDEA] . . . [c]ompliance includes procedural safeguards and free appropriate public education, related services and IEPs...provided in the least restrictive environment appropriate to the child's needs”. Pennsylvania’s general and early intervention regulations provide that LEAs are required to provide access to “a full continuum of placement options”. 22 Pa. Code Section 14.102 (a)(1)(iv). The purpose of early intervention services is to promote students’ success in the general education environment. 22 Pa. Code Section 14.102(a)(vi). Early intervention IEP teams must also recommend that early intervention services be provided in the least restrictive environment with appropriate and necessary supplemental aids and services, and may elect to provide them in a typical preschool program with noneligible young children. 22 PA. Code Section 14.155 (b)(1) (*emphasis added*).

At 20 U.S.C. § 1401(9) Congress defined a FAPE independent of the place in which it is located:

The term *free appropriate public education* means *special education and related services* that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

This hearing officer concludes that the plain words of this definition mean that the “at public expense” and “without charge” requirements of the Act apply to “special education and related services,” and not to the place in which such education and services are provided. The definition of the component term “special education,” further emphasizes the independence of the “special education and related services” that are to be provided “without charge” from the setting in which those services are provided, to which no “free” condition is applied. Congress defines “special education” as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with disabilities, including . . . instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings,” *id.* at 1401(29). Thus, the instruction and services that the IDEA requires be provided “free,” or “at no cost to parents,” or “without charge,” are those that are “specially designed” to meet the “unique needs” of the disabled learner and are to be provided in the setting where the disabled learner is located.

This hearing officer finds that the LRE, in contrast to FAPE, is not programs and services but rather a *setting that is common to all learners* of the same age or grade level. It is the “regular classes” in which “children who are not disabled” are educated from kindergarten on up and from which the child with disabilities cannot suffer “removal” to “special classes” or “separate schooling,” unless his or her needs cannot be addressed “satisfactorily” therein. *Id.* at § 1412(a)(5)(A). *Oberti* established a “presumption in favor of mainstreaming”. The child with a disability does not have to establish a “need” for the LRE, and the appropriateness of the LRE does not hinge upon whether it is “specially designed” to address the child’s “unique needs,” although the child might be entitled, without cost to his or her parents, to “special education and related services”—in the form of “supplementary aids and services”—that would enable him or her to *access* the LRE. *Id.* The needs-based special education and related services, which expressly must be provided at no cost to the child or his or her parents, are thus distinct from the presumptive setting in which those services must be provided.

On point with the above analysis is the fact that neither the IDEA, nor Pennsylvania special education regulations, *prohibit* a disabled preschool-age child’s parents from selecting the most restrictive environment, their own home, as the setting in which FAPE (special education and related services) is delivered. The range of settings (early childhood environments) in which typical preschoolers spend their time and in which disabled preschoolers receive FAPE is wide. As regards disabled preschoolers, a family may choose to have their preschool child’s “special education and related services”

delivered, among other possibilities alone or in combination, in places such as their own home, in a relative's or a neighbor's home, in a small private home-based daycare, in a private daycare center, or in a private preschool. Parents may decide to access these options for their typical or disabled preschoolers for a few hours a day a few days a week, up to daily full day placement including pre-care and after-care hours to accommodate their work schedules. The LRE is distinctly separate from FAPE; a preschool child is entitled to receive FAPE in a highly restrictive environment if the parents so choose, or in environment(s) of lesser restriction, but the LEA does not have to fund that environment itself. This hearing officer holds that where, as in this case, the parents of a preschooler freely choose a typical preschool environment, there is no statutory obligation on the part of the LEA to purchase that environment with public funds. The LEA's sole obligation is to provide FAPE in that environment. By providing special education and related services to the child in the regular preschool setting that the Parents chose and paid for — as did the parents of the nondisabled peers with whom the child is educated— the IU fulfilled its responsibilities under the IDEA to the child.¹³

As a final note, it is recognized that in Pennsylvania at the current time there is no universal entitlement to preschool for nondisabled or disabled children; although the current expectation is full day Kindergarten availability for every child even that level of programming for young children is not the case in all school districts.

For these reasons, and because ESY and the concept of programming over summer breaks do not apply to children at this age, there is no need to discuss further the Parents' request for the IU to fund summer programming or prospective placement at the private preschool.

Mention should also be made of the evidence presented by the Parents that they understood the IU to be offering a preschool placement to Child. I find that this belief on their part is a matter of misinterpretation of the discussions about placement for the fall of 2011. As explained, the testimony of the IU early intervention case manager was convincing and reliable that the discussion did not constitute an offer to place the child at public expense in a preschool, but was rather centered on where Child would be and, accordingly, where the IU would deliver the services it was required by law to provide. [NT 960-966]

Section 504

The Parents articulated a claim under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §793 *et seq.* Parents, however, adduced no explicit evidence of discrimination on the basis of disability, and did not argue that the evidence established a separate and distinct claim under §504 in addition to the District's alleged violations of IDEA. Their 504 claim was based entirely upon the same facts that they asserted in support of their IDEA claims.

¹³ It should also be noted that the case on which the Parents rely to support this claim, *In re the Educational Assignment of Jonathan S.*, Spec. Ed. Op. 1181 (2001), was reversed. *Delaware County Intermediate Unit v. Jonathan S.*, 809 A.2d 1051 (Pa. Commw. 2002), *appeal denied*, 575 Pa. 693, 835 A.2d 710 (2003).

In many cases, “a party may use the same conduct as the basis for claims under both the IDEA and [Section 504].” *Andrew M. v. Delaware County Office of Mental Health and Retardation*, 490 F.3d 337, 349 (3d Cir. 2007). However, where a child is not a school-age child who would be entitled to a public education if he or she did not have a disability, a violation of the IDEA is not also a violation of Section 504 because there was no discrimination on the basis of disability. *Id.* at 350; 24 P.S. § 13-1301; *see also Allyson B. ex rel. Susan B. v. Montgomery County Intermediate Unit*, 2010 WL 1255925 * 15, 2010 U.S. Dist. LEXIS 32159 *41 (E.D. Pa. 2010). Accordingly, I find no basis for a violation of Section 504 in this case.

Order

It is hereby **ORDERED** that:

1. The IU denied Child FAPE in some areas but not in others as follows:
 - a. Physical Therapy: The IU did deny FAPE to Child for its failure to provide physical therapy sessions in accordance with Child’s IEPs, including scheduled breaks in the IU calendar, during the time period in question.
 - b. Speech/Language Therapy: The IU did deny FAPE to Child for its failure to provide speech/language therapy sessions in accordance with Child’s IEP during the time period in question, and for its failure to provide speech/therapy sessions over scheduled breaks in the IU calendar after those services were recommended on March 4, 2012.
 - c. Occupational Therapy: The IU did deny FAPE to Child for its failure to provide occupational therapy sessions over scheduled breaks in the IU calendar after those services were recommended on January 30, 2012.
 - d. Direct Instruction: The IU did not deny FAPE to Child for its failure to provide direct instruction to Child during the time period in question.
 - e. Feeding Therapy: The IU did deny FAPE to Child for its failure to provide feeding therapy for Child during the time period in question.
 - f. Medically Trained PCA: The IU did deny FAPE to Child for its failure to provide a medically trained PCA for the time period in question.
 - g. Adaptive Activities Chair: The IU did deny FAPE to Child for its failure to provide an adaptive activities chair and appropriate staff training on that equipment during the time period in question.
 - h. Toileting Chair: The IU did deny FAPE to Child for its failure to provide a toileting chair and appropriate staff training on that equipment after a specific recommendation was made on December 14, 2011.
 - i. Stander/Gait Trainer: The IU did deny FAPE to Child for its failure to provide a stander/gait trainer and appropriate staff training on that equipment during the time period in question.

- j. Wheelchair: The IU did not deny FAPE to Child for its failure to provide a wheelchair for Child's transportation.
 - k. Appropriate Augmentative Communication Device: The IU did deny FAPE to Child for its failure to provide an appropriate augmentative communication device and appropriate training for staff and the family during the time period in question.
2. As the IU violated the IDEA in the above areas the IU must provide Child with compensatory education services in the amount of hours and, where applicable, hourly values specified below, in accordance with the above conditions and as follows:
- a. Physical Therapy: Child is entitled to two hours of physical therapy per week for services that were not provided between September 14, 2011 and the date of this decision. The IU shall be given credit for any such hours that it has previously provided to make up for the deprivation.
 - b. Speech/Language Therapy: Child is entitled to two hours of speech/language therapy per week for services that were not provided between September 14, 2011 and the date of this decision, including scheduled breaks of one week or more between September 14, 2011 and the date of this decision. The IU shall be given credit for any such hours that it has previously provided to make up for the deprivation.
 - c. Occupational Therapy: Child is entitled to two hours of occupational therapy per week for services that were not provided during scheduled breaks of one week or more between January 30, 2012 and the date of this decision. The IU shall be given credit for any such hours that it has previously provided to make up for the deprivation.
 - d. Feeding Therapy: Child is entitled to one hour per week of feeding therapy to include training for staff for services that were not provided between September 14, 2011 and the date of this decision but not including scheduled breaks in the IU calendar of one week or more.
 - e. Medically Trained PCA, Adaptive Activities Chair, Toileting Chair, Stander/Gait Trainer: Child is entitled to an aggregate nine hours per week of compensatory education between September 14, 2011 and April 18, 2012, not including scheduled breaks in the IU calendar, valued at the hourly rate of the cost of the preschool to the Parents [\$10/hour].
 - f. Appropriate Augmentative Communication Device: Child is entitled to two hours per day for each day that Child was scheduled to or did attend preschool, and four hours per day for each weekday that Child did not attend preschool whether or not those weekdays were scheduled school days, between September 14, 2011 and April 18, 2012, valued at the full cost of the hourly rate that would have been paid to the assistive technology consultant on Child's IEP team.
3. The IU is not directed to reimburse the Parents for private preschool tuition paid for the 2011-2012 preschool year.

4. The IU is not directed to provide and fund placement for Child in the private preschool program for the 2012 summer program or the 2012-2013 preschool year.

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

July 3, 2012

Date

Linda M. Valentini, Psy.D., CHO

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