and professional integrity and qualifications of Clarity's staff in emails, implying that they would initiate complaints with oversight organizations. Clarity staff regarded Parents' conduct and emails as hostile and threatening.[28]

The situation between Parents and Clarity staff continued to worsen. In early August 2012, Clarity informed Defendant that it could not continue to provide services to G.K., but was willing to remain during a transition period to a new provider. Defendant, upon notifying Parents of Clarity's decision, began a search for a replacement.[29] After becoming aware of Clarity's intention to withdraw services, Mother initiated a meeting at the preschool with Clarity staff and recorded the meeting without the knowledge or consent of the staff. Clarity management learned of the incident and of Mother's insistence that staff members sign statements that she presented to them concerning how G.K.'s program was to be implemented. As a result, Clarity informed Defendant that it would cease services to G.K. altogether as of that date, August 15, 2012.[30]

Parents characterized Clarity's decision to cancel services as a voluntary withdrawal of services due to its recognition that it was incapable of providing G.K. with an appropriate ABA program. While Defendant agreed with some of Parents' concerns with respect to data collection, Defendant attributed many of the issues Parents identified to mistrust of any deviation from Lovaas methods and to a lack of communication. Defendant agreed to replace hours that were not provided to G.K. upon Clarity's cancellation of services.[31]

Keppley Behavioral Consulting, Inc.
(August 2012 – October 2012)

During the transition period in which Clarity was still willing to assist, Defendant contacted *Keppley Behavioral Consulting, Inc.* ("Keppley"), to be the service provider starting September 2012. However, upon Clarity's immediate withdrawal, Keppley commenced providing services in August 2012.[32] The transition to Keppley was not as smooth as Defendant had hoped due to unanticipated delays, including obtaining staff clearances. In the course of Keppley's short-lived (five to six weeks) tenure of providing services, it was apparent from the outset that Parents and Keppley had serious "philosophical differences" over the type of ABA program Parents wanted and the *Verbal Behavior*-based ("VB") program Keppley provided which, Parents believed, differed from Lovaas' methods.[33]

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[28] *Id.* at ¶28.
[29] *Id.* at ¶¶29-30.
[30] *Id.* at ¶31.
[31] *Id.* at ¶¶33-34.
[32] *Id.* at ¶35.
[33] *Id.* at ¶¶36, 43 (quotations in original).

Other problems quickly arose; *to wit*: Parents began questioning Keppley staff's credentials; Parents requested that only one therapist be assigned to work with G.K., although Keppley's standard procedure involved two therapists to work with a student for better generalization (a request Keppley acceded to);[34] Keppley had difficulty finding staff willing to work with G.K. without supervision due to a discomfort with Mother, who raised questions about staff training and G.K.'s safety due to several incidents. One incident involved G.K. having an allergic reaction, and another involved G.K. bumping his head. Parents also objected to a Keppley therapist's use of an iPad as a reinforcement for G.K. and accused the therapist of an incorrect and/or overuse of the iPad as a reinforcement. A Keppley behavior specialist consultant, who had begun providing G.K. with services as a PCA and witnessed the incident over the iPad and had been involved in the incident over G.K.'s head bump, immediately resigned from the case.[35] In October 2012, Keppley withdrew its services when the remaining therapist assigned to work with G.K. became ill and could not continue.[36]

G.K.'s Overall Progress
(March 2012 – September 2012)

G.K.'s developmental skills and progress toward goals were reported in (1) the March 2012 IEP/IFSP, (2) the September 2012 IEP/IFSP, (3) the October and November 2012 progress reports on goals from Lovaas, and (4) the report of the *Independent Educational Evaluation* ("IEE") funded by the IU (pursuant to the April 4, 2012 settlement agreement).[37]

Almost all of the goals established in the March 2012 and September 2012 IEP/IFSPs were originally developed in September 2011. According to the October and November 2012 Lovaas progress reports, ten of the goals included in one or both of the IEP/IFSPs were implemented by Lovaas staff at a time when Lovaas was the sole provider of ABA and behavior support services (prior to April 2012). Lovaas reported little progress on the goals by March 2012, but considerable progress by October 2012, when Keppley ended its provision of services. The progress reported in March 2012 in the Lovaas report was consistent with the goals established in the March 2012 IEP/IFSP, and the progress reported in September 2012 was commensurate with the September 2012 IEP/IFSP goals.[38]

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[34] Generalization refers to the transferring of skills learned in one environment to another. *M.C. on Behalf of J.C. v. Cent. Reg. Sch. Dist.*, 81 F.3d 389, 394 (3d Cir. 1996).
[35] Decision ¶¶36-37, 40-42.
[36] *Id.* at ¶40.
[37] *Id.* at ¶46.
[38] *Id.* at ¶47.

In September 2012, an IEE further revealed that G.K. demonstrated age-appropriate cognitive/intellectual skills and the ability to engage in academic tasks, although G.K. avoided tasks with high verbal content.[39]

Although not binding, the following are some of the Hearing Officer's conclusions of law statements with a brief summary of the justification for said conclusions:

> The record discloses that Parents essentially interfered in the implementation of services and sought to exercise greater control over the nature of the program G.K. received, the service provider, and the details of how services are delivered than is permitted by the IDEIA.[40] Parents have no right to control delivery of services. Where there is a conflict between an LEA based upon "philosophical" differences, LEA philosophy takes precedence unless and until it leads to inappropriate placement and/or services based on evidence, not the beliefs or preferences of Parents, even if adopting Parents' philosophy would lead to better services for G.K.[41]
>
> Parents' conversations about the delivery of services should occur with the case manager and the staff supervisor, not directly with the staff member. If the supervisor and case manager deem it necessary or advisable, or if the Parent actually observes a situation in which the child is in imminent physical danger, the Parent may speak directly with a staff member. However, nothing in the record suggested that any such situation, including G.K. allegedly bumping his head while with a Keppley staff member, occurred in this case.[42]
>
> Parents cannot force Defendant to enter into a contract with a particular provider; thus, the objective reasonableness of Parents' words and actions in certain situations or whether some individuals were exceptionally sensitive to conduct that others might not mind is irrelevant.[43]
>
> The record establishes that Defendant went beyond what is required to provide appropriate services to assure stability in service providers, especially with regard to the transition from Lovaas to Clarity. Defendant responded to Parents' concerns and was willing to assure that G.K. received hours that were missed when Clarity canceled services on August 15, 2012; although missed hours sometimes occurred because of last minute changes initiated by Parents.[44] Service providers also attempted to meet Parents' requests, such as Keppley

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[39] *Id.* at ¶4.
[40] Decision 13-14.
[41] *Id.* at 18-19.
[42] *Id.* at 15-16.
[43] *Id.* at 15.
[44] *Id.* at 16.

acquiescing to providing only one therapist to G.K., as opposed to its normal practice of providing two.[45]

Parents contend that they were willing to accept Defendant's service providers and did not insist that only Lovaas could appropriately deliver G.K.'s ABA therapy and supportive behavior services. While the fact that Clarity and Keppley voluntarily withdrew from providing services is accurate, that they did so because they thought they were incapable of providing appropriate services is seriously misleading and not supported by the evidence.[46] After the April 4, 2012 settlement agreement that ended a prior due process proceeding, Parents dropped their demand that Defendant maintain Lovaas as the ABA therapy and behavior service provider for G.K. Nonetheless, Parents continued to insist that subsequent providers, such as Clarity and Keppley, replicate Lovaas services.[47] Questioning the credentials of the staff employed by both agencies was unreasonable; nothing in the record suggests anyone assigned to work with G.K. was not well-qualified. Further, although providers other than Lovaas were unable to meet Parents' standards and unwilling to take direction from them, the record does not support any lack of ability to deliver appropriate services to G.K.[48]

The gaps that occurred in G.K.'s services from summer 2012 through early February 2013 resulted directly from Parents' insistence on close involvement in the delivery of services, their attempts to mold the provision of services to their preference, and to direct Defendant's providers in the details, means, and methods for implementing G.K.'s IEP.[49]

Although Parents argue that Defendant failed to ensure appropriate progress through its service providers because G.K. made no progress during the periods that providers other than Lovaas delivered services, this contention is not supported by the evidence. After two years of intensive ABA therapy, especially between March and September 2012, when Clarity and Keppley provided services consecutively, G.K. began to demonstrate more consistent and stable gains than when Lovaas was the sole provider, despite the transition from home-based EI services to regular preschool during that period. Though there were several changes in the ABA/behavior staff who worked directly with G.K., the specific service provider is not nearly as important as the techniques common to all ABA-based methods, which are very effective for G.K., who also made overall progress during spring and summer 2012, even with staff changes, increases in difficult behavior, and temporary regression.[50]

Parents' interference and attempts to exercise control over the details of the delivery of services beyond parental participation rights under the IDEIA

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[45] *Id.* at 16-17.
[46] *Id.* at 17.
[47] *Id.* at 17-18.
[48] *Id.* at 18.
[49] *Id.* at 14.
[50] *Id.* at 19.

caused gaps in services between late summer 2012 and February 2013 (the time between Keppley and Potential Discoveries). Therefore, Parents will not be reimbursed for any costs incurred in providing replacement services during that time period.

Because Defendant was required to provide services at all times and Parents arranged for services to maintain G.K.'s ability to make progress, Defendant will be required to reimburse Parents for any costs paid or owed up to the amount the IU would have paid its current service provider for the same number of hours that Parents replaced; *i.e.*, the time period between when Keppley ended provision of services (October 2012) and when Potential Discoveries began (February 2013). Defendant is not obligated to reimburse Parents for (1) days when G.K. was absent from school or (2) days G.K. did not receive services for some other reason, regardless of Parents' obligation to pay for any such days, and (3) any hours that Parents' provider collected data or delivered services for any period when Defendant had a provider under contract with staff available to provide services.

DISCUSSION

In their motion for summary judgment, Plaintiffs argue that the Hearing Officer erred:

(1) in ruling that G.K. was not denied a FAPE, where the undisputed evidence establishes that G.K.'s IEP was not implemented consistently or properly and resulted in a denial of meaningful progress;

(2) in improperly creating and applying a standard for parental participation in the development of G.K.'s IEP that violated Parents' right of participation under the IDEIA;

(3) in ruling that Parents engaged in inappropriate conduct that interfered with the implementation of G.K.'s IEP;

(4) in refusing an award of compensatory education or full reimbursement for the private services Parents engaged to address the denial of a FAPE; and

(5) in ruling that Plaintiffs waived their §504 claim.

Defendant essentially contests the Hearing Officer's finding that Parents were entitled to reimbursement for some of the expenses incurred, argues that Parents' conduct was unreasonable and an impediment to providing services, and contends that it should not be responsible for any time that G.K. was not provided services because of Parents' conduct, which Defendant argues,

went beyond a parent's participatory rights in the IEP process. Defendant further argues that because it acted promptly to rectify any purported denials of a FAPE, any reimbursement would be inappropriate.

Thus, the issues before this Court are whether: (1) G.K. was provided a FAPE; (2) Parents' participation in the development and implementation of G.K.'s IEP exceeded statutory limits; (3) remedies and/or full reimbursement is warranted; and (4) Plaintiffs preserved and supported their §504 discrimination claim. These issues will be discussed *ad seriatim*.

I. Free Appropriate Public Education (FAPE)

Although Plaintiffs contend that the Hearing Officer erred in finding that Defendant provided G.K. with a FAPE, Parents' argument does not involve G.K.'s specific IEP,[51] but rather its implementation. The evidence of record does not support Parents' argument. In the decision, the Hearing Officer impartially summarized each of the staff member's qualifications for each service provider and found that the individuals assigned to work with G.K. were highly qualified and educated, and each person enabled G.K. to develop and attain a level of educational benefit required under the IDEIA. G.K.'s progress was properly documented, even by Lovaas, the preferred provider. The Hearing Officer carefully weighed the voluminous administrative record and correctly found that a FAPE was offered to G.K, and that Parents' unsuccessful relationships with all service providers, other than Lovaas, were due to Parents' incorrect perception that the

[51] G.K.'s IEP during the relevant time period included goals related to walking up/down stairs, ball play, task completion, matching, functional play, cooperative peer play, sensory organization to decrease frustration, following directions, communication, visual motor integration, self-care, transition and attention to small group activities, and increasing age appropriate vocabulary. The IEP also provided for a number of educational accommodations and supports via Specially Designed Instruction, of which key elements included repetition, gaining attention, modeling, positive reinforcement, prompting, prompt hierarchy, movement, sensory diet, use of motivators, optimal seating, extended wait time, facilitation of play and turn taking, social stories, scripts, task analysis, clear concise language, nonverbal cues, visual schedule, proactive measures, countdowns, emotion strip, choice, first/then language, and opportunities to practice skills. IU-50.

service providers' staff lacked sufficient training and supervision, and Parents' desire to have Lovaas as the service provider. The administrative record supports the following summary of service providers, appropriate services offered to G.K., and progress made during the time period at issue – March 2012 to February 2013.

Clarity Services Group (March 2012 – August 2012)

Once G.K. reached the age of three and Lovaas could no longer provide services to G.K., Parents recommended to Defendant that Clarity become the replacement service provider. This recommendation was accepted by Defendant. Clarity requires that its PCAs have at least a college degree and additional training in accordance with Pennsylvania standards for highly qualified paraprofessional (20 hours). The PCAs do not develop lesson plans, nor teach; they generally work directly with the child and collect data.[52] Clarity's ABA therapists are required to have a degree in special education, psychology or behavior analysis, as well as one year of experience as a therapist working with children, 40 hours of supplemental intensive ABA training, and an additional ten hours demonstrating competency in teaching and data collection. Clarity's supervisors must have a master's degree in an education/behavior-related field, and be certified as a *Board Certified Behavior Analyst* ("BCBA"), have five years of experience working in an ABA program, and have supervision training.[53] In addition, staff members are evaluated using a Procedural Integrity Checklist to ensure consistency and fidelity of implementation. Typically, the Checklist is not provided to parents due to its subjective nature.[54]

In May 2012, Clarity conducted a *Functional Behavior Assessment* ("FBA") of G.K.[55] Using information obtained from Parents, Lovaas, other available data, and 12 hours of

[52] Decision ¶20.
[53] *Id.* at ¶21.
[54] P-17; P-32; N.T. 1647-48.
[55] IU-24; IU-50.

observation, the FBA identified specific areas affecting G.K.'s needs, tantrums, non-compliance, and elopement,[56] and recommended means to reduce behavior concerns, identify possible replacement behavior, and to incorporate these changes. Parents approved the FBA, and a Positive Behavior Support Plan was developed incorporating similar recommendations from the FBA, as well as procedures for collecting data.[57] The plan was revised in August 2012.[58] Clarity also conducted a *Verbal Behavior Milestones Assessment & Placement Program* ("VB-MAPP"), to assess G.K.'s language abilities.[59] Two therapists and the IEE provider chosen by Parents confirmed during the due process hearings that a VB-MAPP is an appropriate tool in behavior programming.[60] Notwithstanding Parents' concerns about inaccurate reporting of data and G.K.'s low attendance due to either Clarity's provision of services or Parents' intervention, G.K. made progress, as reflected in the March 2012 and October 2012 IEP/IFSPs.[61]

Exceptional Learning, LLC (Offered in August 2012)
Education Alternatives for ABA, LLC (Offered in September 2012)

Once Clarity withdrew its services on August 15, 2012, Defendant offered Plaintiffs the services of *Exceptional Learning, LLC* ("Exceptional Learning"), (who had several Lovaas staff on their team) in August 2012, those of *Education Alternatives for ABA, LLC* ("Education Alternatives"), in September 2012,[62] and, later, those of Keppley. Parents, however, rejected Exceptional Learning because Parents viewed its owner's conduct when interviewing Lovaas'

[56] IU-50 at 3-5, 7, 11-12.
[57] IU-24 at 3-8.
[58] IU-29.
[59] N.T. 720.
[60] IU-28; IU-46; IU-1 at 2894-908; N.T. 721, 1675, 1678; P-1 at 14.
[61] IU-22; IU-34.
[62] IU-48.

clinical supervisor as "unprofessional," and rejected Education Alternatives because it used a VB program methodology with which Parents disagreed.[63]

Under the IDEIA, Parents do not have a right to compel a school district to provide a specific program or employ a specific *methodology* in educating a student. *J.E.*, 834 F. Supp. 2d at 246 (citing *Rowley*, 458 U.S. at 199) (emphasis provided). Rather, Plaintiffs are entitled to a "basic floor of opportunity," not an "optimal level of services." *D.S.*, 602 F.3d at 557 (citations omitted). The record does not reveal any reasonable justification for Parents to have rejected either of the offered service providers. Notwithstanding, Defendant attempted to address Parents' concerns and hired Keppley.

Keppley Behavioral Consulting, Inc. (August 2012 – October 2012)

The record reveals that Keppley, Exceptional Learning, and Education Alternatives were being considered as replacement service providers when disagreements intensified between Parents and Clarity. As to its staffing requirements, Keppley insists that its contracted therapists have, at a minimum, an associate's degree, although most have bachelor's degrees in education, psychology, or a field related to behavioral science. Keppley's supervisors are required to have a master's degree in special education and be either BCBAs or *Board Certified Associate Behavior Analysts* ("BCABA"). To work without supervision, Keppley requires its therapists to develop critical skills, not merely achieve a specific overall competency score.[64] In addition, Keppley's owner, Sharon Keppley, M.Ed., BCBA, is a statewide consultant to the Pennsylvania Autism Initiative.[65] Under Keppley's staffing procedures, a therapist working with a child is evaluated after training to assess the therapist's ability to properly teach skills consistent with ABA principles. The therapists specifically assigned to work with G.K. each had a master's degree in

[63] N.T. 199, 879-81, 1215-18.
[64] Decision ¶39; N.T. 689-90, 806.
[65] Decision ¶44; N.T. 688.

special education. The Hearing Officer noted that the different providers had different standards for determining when a PCA can work independently without a supervising BCBA present at all times.[66]

During the nearly six weeks that Keppley provided services to G.K., Keppley assessed problem behaviors and developed a behavior plan which included strategies to address G.K.'s behavior issues and performed a VB-MAPP evaluation.[67] Mother agreed with the proposed behavior plan, noting it was very similar to that of Lovaas. The Hearing Officer noted that a progress report of data collected from September 5, 2012, to October 1, 2012, revealed that G.K. was making progress and mastering goals.[68]

Based on the evidence presented, the Hearing Officer determined that members of Keppley's staff were qualified and that complaints directed at them were created by Parents' conduct and their differences regarding program philosophies. The Hearing Officer also found that Defendant, as the LEA, can refuse a parent's preferred service provider and select its own program and services, as long as the selection appropriately meets the eligible child's needs. *See, e.g., J.E.*, 834 F. Supp. 2d at 253 ("Plaintiffs do not have a right to compel the District to provide a specific program . . . even if it is the best possible education for J.E."). This Court agrees. Though Defendant attempted to accommodate Parents' preferences, it is under no legal obligation to do so as long as the program selected provides access to meaningful educational benefit. Clearly, Keppley and the other service providers had programs that provided G.K. such access.

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[66] Decision ¶38; N.T. 644-45.
[67] IU-33; IU-1 at 6023-304; N.T. 671, 720-22, 726-27, 737-46.
[68] Decision 19; P-29; N.T. 756.