

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

Pennsylvania Special Education Hearing Officer

Final Decision and Order

ODR No. 27062-22-23

CLOSED HEARING

Child's Name:

A.H.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

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Hearing Officer:

James Gerl, CHO

Date of Decision:

May 15, 2023

BACKGROUND

The parents filed a due process complaint seeking compensatory education as well as a prospective private placement because of an alleged denial of a free and appropriate public education by the school district. The parents also allege that the student was discriminated against on the basis of a disability by the school district in violation of Section 504 of the Rehabilitation Act. The school district contends that it provided a free and appropriate public education to the student and that it has not discriminated against the student on the basis of a disability. I find in favor of the school district on all issues raised by the due process complaint.

PROCEDURAL HISTORY

This due process hearing was conducted in one efficient virtual session. Counsel are to be commended for agreeing to an unusually large number of stipulations of fact, as well as for agreeing to the admissibility of a large number of exhibits. The length of time necessary to hear and decide this case was shortened by the lawyers effectively using the hearing time to put on evidence only of matters that were contested.

Eight witnesses testified at the due process hearing. Parent Exhibits 1 through 26 and 28 through 44 were admitted into evidence. Parent Exhibits P-27, P-45 and P-46 were all withdrawn. School District Exhibits S-1 through S-7 were admitted into evidence.

Prior to the hearing, both parties submitted a written statement of the issues presented. These issues were confirmed by counsel at the prehearing conference, as well as at the beginning of the due process hearing.

After the hearing, counsel for each party submitted written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

To the extent possible, personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

The due process complaint, as explained and clarified at the prehearing conference convened for this matter, and as further confirmed at the due process hearing, presents the following issues:

1. Whether the parents have proven that adverse consequences should be imposed upon the school district for failing to provide educational records concerning the student?
2. Whether the parents have proven that the school district denied a free and appropriate public education to the student?
3. Whether the parents have proven that the school district discriminated against the student on the basis of a disability in violation of Section 504?

FINDINGS OF FACT

Based upon the parties' stipulations of fact, I have made the following findings of fact:

1. The student is a resident of the school district and has been eligible for special education since enrollment in the district for the 2018 – 2019 school year.

2. The student attended the student's neighborhood school from [the 2018-2019 school year] until the end of [redacted] (2021 – 2022 school year).

3. The district completed a reevaluation report on December 10, 2018, the student's [redacted] year, and found that the student had a primary disability category of specific learning disability in all academic areas and a secondary disability category of speech language impairment.

4. An IEP team meeting was held on December 13, 2019, and an IEP was developed that provided 450 minutes of learning support per week, which is 90 minutes per day. The IEP also provided 30 minutes per month of occupational therapy and 120 minutes per month of speech language therapy.

5. Pursuant to the governor's order concerning COVID, the school district physically closed on March 13, 2020.

6. The district did not qualify the student for extended school year services in 2018, 2019, 2020, and 2021. The district did not have an extended school year program during the summer of 2020 because of the COVID-19 pandemic.

7. All students in the school district began the 2020-2021 school year with virtual instruction.

8. An IEP team meeting was convened on December 10, 2020 and an IEP for the student was developed. The IEP provided 450 minutes per week of learning support, which is 90 minutes per day. The IEP also provided 300 minutes of occupational therapy per IEP term and 120 minutes per month of speech/language therapy.

9. The district completed a review of records reevaluation report on January 14, 2022. The parents requested additional testing and the district conducted additional testing.

10. A new reevaluation report for the student was completed on March 30, 2022. This reevaluation report changed the student's primary disability category from specific learning disability to intellectual disability. Speech language impairment remained the student's secondary disability category.

11. The parents disagreed with the reevaluation report and requested an independent speech/language evaluation and an independent educational evaluation.

12. The school district granted the request for an independent speech/language evaluation and denied the request for an independent educational evaluation.

13. An IEP team meeting was convened on March 28, 2022. An IEP was developed that provided 1,545 minutes of learning support per week, 30 minutes per month of individual occupational therapy, and 90 minutes per month of group speech language therapy.

14. The March 28, 2022 IEP was revised on April 22, 2022 to change the speech/language minutes from 90 minutes per month to 120 minutes per month. The parents did not sign a Notice of Recommended Educational Placement (hereafter sometimes referred to as "NOREP") approving the revised IEP.

15. The mother and the parents' advocate attended the IEP team meeting held on May 9, 2022 to discuss the March 28 and April 27, 2022 IEPs.

16. Another IEP team meeting was scheduled for June 3, 2022 with the mother and the parents' attorney to discuss the IEP.

17. Following the June 3, 2022 meeting, counsel for the parents and counsel for the district exchanged e-mails regarding the requested revisions to the student's IEP. Counsel for the district provided the parents' counsel with a NOREP on July 7, 2022 reflecting the proposed program and the parents did not sign the NOREP.

18. On July 7, 2022, the district filed a due process complaint to defend its March 30, 2022 reevaluation report.

19. A final IEP was issued by the school district on July 8, 2022. The IEP proposed 1545 minutes per week of learning support, 90 minutes per month of occupational therapy and 120 minutes per month of speech language therapy. The district proposed to change the student's placement to its "intensive learning support classroom" at a different school.

20. The school district sent a letter to the parents on August 3, 2022 notifying the parents of the student's change of elementary school.

21. The new elementary school to which the student was assigned on August 3, 2022 letter is less than a mile from the student's home.

22. A due process hearing was held on August 2, 2022 regarding the school district's complaint following its denial of the parents' request for independent educational evaluation. The hearing officer in that case issued a decision in favor of the school district on August 11, 2022. The parents have appealed that decision to federal court. The matter is currently pending in the Eastern District of Pennsylvania.[redacted]

23. An independent speech language evaluation was completed on July 27, 2022 and provided to the lawyer for the school district on August 4, 2022.

24. The school district's 2022 – 2023 school year began on August 29, 2022.

25. On August 29, 2022, the parents' counsel advised the school district's counsel of the parents' "intent to enroll (the student) into a private school and seek tuition reimbursement from the district."

26. On September 6, 2022, the district's counsel sent a letter to the parents' counsel denying the parents' request for tuition reimbursement.

27. The student's first physical day of attendance at the new elementary school in the intensive learning support placement was September 6, 2022.

28. The school district completed a review of records reevaluation report October 28, 2022 to incorporate the independent speech language testing.

29. An IEP team meeting was held on November 30, 2022. The IEP proposed 1,500 minutes of learning support, 90 minutes per month of occupational therapy, 120 minutes per month of speech language group therapy and 120 minutes per month of speech language individual therapy.

30. The parents signed the NOREP on December 22, 2022 and stated, we are "approving the NOREP for the changes to go into effect but the IEP continues to not be appropriate."

Based upon the evidence in the record compiled at the due process hearing, I have made the following findings of fact: ¹

31. The student is a sweet, outgoing child who enjoys [a sport]. (NT 241 – 242)

32. The student enrolled in the school district [redacted] at the beginning of the 2018 – 2019 school year. Before enrolling [redacted], the student had demonstrated developmental delay in various areas and had received early intervention services since the student was four months old. When the student entered the school district, the student had limited academic skills. The student could only identify three letters and was unable to write any numbers. (P-1, P-44)

33. The December 10, 2020 IEP for the student had goals for literacy, math and speech, as well as accommodations and specially designed instruction. The student was in the regular education classroom for approximately 76 percent of the school day. At the time that the IEP was created, the student was able to identify approximately five words on the primary sight word list. By the end of the 2020 – 2021 school year, the student was able to identify 34 words on that list. (P-9, P-11)

34. During the student's [2019-2020 and 2020-2021] school years, the student received small group instruction in both reading and math. The student's reading and math groups contained six or fewer students. The

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; and "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT____").

student's teacher for [the 2019-2020 and 2020-2021 school years] utilized research-based methodologies for both reading (Reading Mastery) and math (Connecting Math Concepts) during these school years. The reading program also included writing interventions. (NT 38 – 41, 54 – 55)

35. The student made progress in [the 2019-2020 and 2020-2021 school years]. (NT 65 -67, 216 – 219; P-9, P-11)

36. During the student's [2021-2022] school year, the student continued to receive small group instruction in both reading and math with nine or fewer students in the reading group and five students in the math group. The student's teacher utilized research-based methodology for both reading and math in the classroom. (NT 70 – 71, 87)

37. The student made progress during [2021-2022 school year]. (NT 76 – 77, 94 – 95, 100 -103; P-4, P-20)

38. The student's [redacted] teacher believed that the student might make more progress in a more intensive learning support setting. When the [redacted] teacher raised that possibility with the student's mother, the student's mother was concerned that the student might sustain a regression with regard to bathroom issues. (NT 79, 93 – 94)

39. According to testing completed for the March 2022 reevaluation, the student achieved a full-scale IQ of 65, which placed the student in the first percentile among the student's peers. The student's IQ score is in the significantly below average range. (P-20, P-44)

40. The May 9, 2022 IEP team meeting was collaborative in nature. The school district addressed many of the concerns raised by the parents during the meeting. (P-44)

41. Following the June 3, 2022 IEP team meeting, the student's IEP was revised in response to feedback from the parents. A finalized version of

that IEP was sent to the parents and the parents' attorney on June 14, 2022. The proposed IEP reflected input from the parents and proposed an educational program and placement for the student in a self-contained intensive learning support classroom, where the student would receive 1,545 minutes per week of specialized instruction, along with occupational therapy and speech therapy services. The proposed IEP included goals based upon the parents' input. The placement and program in the proposed June 2022 IEP would have the student in a regular education classroom for approximately 21 per cent of the school day. (S-4; P-26, P-44; NT 225 – 227, 237 – 238)

42. The student's parents applied to send the student to the private school to which they seek a prospective private placement on August 25, 2022. (NT 222 – 223)

43. The private school at which the parents request that the student be placed in a prospective placement only has students with disabilities. The private school is not an approved school by the Commonwealth of Pennsylvania to provide a free and appropriate public education to students with disabilities. The only interaction that the student would have with non-disabled students at said private school would be approximately one hour per week where the students have lunch with the students from another private school. Said private school uses Orton – Gillingham, the parents' preferred methodology. (NT 107 – 108, 121 – 125)

44. The student's November 30, 2022 IEP is now in effect for the student. It contains multiple goals, including a reading goal, a spelling goal, a reading fluency goal, a writing goal, other reading goals, a math addition and subtraction goal, a math word problem goal, an occupational therapy goal, and multiple speech and other goals. The IEP also provides for modifications and specially designed instruction. Pursuant to the IEP, the student is in the

regular education classroom approximately 21 per cent of the school day. (P-38; NT 182 – 185, 279)

45. The occupational therapist who worked with the student during the 2022 – 2023 school year utilized a research-based handwriting program for the student, “Handwriting Without Tears.” The occupational therapist also worked on generalizing occupational therapy into the learning support classroom. The student made progress in occupational therapy during the 2022 – 2023 school year. (P-37, P-38, P-39; NT 131 – 140, 146)

46. The student’s [2022-2023 school year] teacher utilized research-based interventions for reading and math, including Corrective Reading, Reading Mastery, Connecting Math Concepts and iReady. The student was “smack in the middle” for reading and although the student was in a lower level group for math, the student was in the middle of that learning group. (NT 40, 54, 88, 161 – 162, 167, 169 – 173)

47. The student made progress on each of the student’s reading and math goals in the [2022-2023 school year].. (P-35; NT 194 – 195)

48. The student’s IEP has goals for each of the areas where the parents had expressed concern to the school district. (NT 225 – 227; 237 – 238)

49. The parents’ lawyer retained the parents’ special education administration expert at an unspecified time in the last few months. On approximately March 10, 2023, the parents’ special education administration expert wrote a report concerning the IEPs that were in effect for the student at the school district. The expert’s analysis and conclusions were based solely upon a review of certain records provided by counsel for the parents. The expert did not observe the student or meet with the student’s parents. The expert did not contact or receive input from school district teachers or staff

who worked with the student. The expert stated that her file review was difficult because multiple IEP revisions had been requested by the parents or the parents' lawyer and made by the school district. The expert recommended that the student receive Orton – Gillingham reading methodology and recommended that the student receive compensatory education and extended school year services. (P-42; NT 256 – 284)

50. On February 6, 2023, the parents' reading expert issued a report concerning the student. The report concludes that the student would benefit from Orton – Gillingham or Wilson reading methodology. The reading expert administered a reading assessment to the student but did not observe the student in the student's classroom at the school district and did not talk to any of the teachers or staff at the school district who work with the student. (P-40; NT 244 – 256)

51. The student's IEPs for [the 2019-2020, 2020-2021, 2021-2022, and 2022-23 school years] at the school district were reasonably calculated to provide meaningful educational benefit given the unique individual circumstances of the student. (Record evidence as a whole.)

52. The school district did not treat the student less favorably than non-disabled peers. (Record evidence as a whole.)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*, (hereafter

sometimes referred to as “IDEA”): an identification violation, an evaluation violation, a placement violation or a failure to provide a free and appropriate public education (hereafter sometimes referred to as “FAPE”). IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. An important procedural safeguard under IDEA allows parents the opportunity to inspect all educational records with regard to the student. 34 C.F.R. § 300.501(a). In view of the fact that civil discovery methods are not available in the administrative hearings conducted under IDEA, the federal regulations also require that parents be permitted to inspect and review any educational records regarding the student before a due process hearing. 34 C.F.R. § 300.613(a)

3. A party to a due process hearing waives an argument if it is not properly presented and argued before the hearing officer. JL v. Lower Marion School District, 81 IDELR 251 (E.D. Penna 2022); LB by RB and MB v. Radnor Township School District, 78 IDELR 186 (E.D. Penna 2021); See, 34 C.F.R. § 300.511(d).

4. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as “FAPE”) to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program (hereafter sometimes referred to as “IEP”) is reasonably calculated to enable the child to make progress in light of the child’s unique circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. 386, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School

District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018); Abigail P by Sarah F v Old Forge Sch Dist, 82 IDELR 227 (MD Penna. 2023).

5. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, *supra*; LB by RB and MB v Radnor Twp Sch Dist, 78 IDELR 186 (ED Penna 2021).

6. The appropriateness of an IEP in terms of whether it has provided a free appropriate public education must be determined at the time that the IEP was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; instead, it requires an educational plan that provides the basic floor of educational opportunity. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); DS v. Bayonne Board of Education, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009).

7. IDEA does not require a school district to guarantee a particular result or to close the gap between children with disabilities and their non-disabled peers. Abigail P by Sarah F v Old Forge Sch Dist, 82 IDELR 227 (MD Penna. 2023); JN and JN ex rel. JN v. Southwest School District, 56 IDELR 102 (N.D. Penna. 2015); see, Kline Independent School District v. Hovem, 690 F. 3d 390, 59 IDELR 121 (5th Cir. 2012); HC and JC ex rel. MC v. Katonah – Lewisboro Union Free School District, 59 IDELR 108 (S.D. NY 2012); District of Columbia Public Schools, 111 L.R.P 77405 (SEA D.C. 2011). Progress toward a FAPE is measured according to the unique individual circumstances of the individual student and not in comparison to other students. See, GD by Jeffrey and Melissa D v. Swampscott Public Schs, 122 LRP 6305 (1st Cir. 2022). The Third Circuit has specifically ruled that IDEA does not require that all, or even most, disabled children advance at a grade-level pace. KD by

Dunn v. Downingtown Area School District, 904 F. 3d 248, 72 IDELR 261 (3d Cir. 2018).

8. For a procedural violation to be actionable under IDEA, the parent must show that the violation also caused a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, *supra*; Abigail P by Sarah F v Old Forge Sch Dist, 82 IDELR 227 (MD Penna. 2023); IDEA § 615(f)(3)(B); 34 C.F.R. § 300.513(a).

9. A parent cannot compel a school district to use a specific educational methodology. A school district is afforded the discretion to select from among various methodologies in implementing a student's IEP. Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012); JL v. Lower Marion School District, 81 IDELR 251 (E.D. Penna 2022); see EL by Lorsson v. Chapel Hill – Carrboro Board of Education, 773 F. 3d 509, 64 IDELR 192 (4th Cir. 2014); Lessard v. Wilton – Lyndborough Coop School District, 592 F. 3d 267, 53 IDELR 279 (1st Cir. 2010); In re Student With A Disability, 51 IDELR 87 (SEA WV. 2008).

10. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable. Forest Grove School District v. TA, 557 U.S. 230, 52 IDELR 151 (at n. 11) (2009); Ferren C v. School District of Philadelphia, 612 F. 3d 712, 54 IDELR 274 (3d Cir. 2010); CH by Hayes v. Cape Henlopen Sch. Dist., 606 F. 3d 59, 54 IDELR 212 (3d Cir 2010); Sch. Dist. of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Area Sch. Dist., 71 IDELR 87 (E.D. Penna. 2017). See Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Ed., Albuquerque Public Schools, 530 F. 3d 1116, 49 IDELR 241

(10th Cir. 2008); In re Student with a Disability, 52 IDELR 239 (SEA W.V. 2009).

11. Prospective private placements as relief for violations of IDEA are rarely made by hearing officers or courts; the clear preference is to educate students in public schools; placement in a private school is the exception. See, RH by Emily H & Matthew H v. Plano Independent Sch Dist, 607 F.3d 1003, 54 IDELR 211 (5th Cir 2010). Although hearing officers and courts clearly have broad equitable powers to award appropriate relief where there has been a violation of IDEA, awards of prospective private placement have been made only in egregious cases where the school district cannot provide FAPE. See, Draper v. Atlanta Independent School System, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008); Upper Darby Sch Dist, 120 LRP 27028 (SEA Penna. 2020).

12. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of his or her disability be excluded from participation and/or denied the benefits of or be subject to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1. To establish a violation of Section 504, a parent must prove: 1) that the student is disabled; 2) that the student was otherwise qualified to participate in school activities; 3) that the school district receives federal funds; and 4) that the student was excluded from participation in and denied the benefits of or subject to discrimination at the school. To offer an appropriate education under Section 504, the school district must reasonably accommodate the needs of a handicapped child to ensure meaningful participation in educational activities and meaningful access to educational benefits. To comply with Section 504, a school district must provide education and related aids or services that are designed to meet the individual needs of handicapped students as adequately as the needs of non-handicapped students are met. Ridley School District v. MR and JR ex

rel. ER, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); Strepp ex rel MS v Midd West Sch Dist, 65 IDELR 46 (M.D. Penna. 2015).

13. The parents have not proven that the school district denied a free and appropriate public education to the student.

14. The parents have not proven that the school district discriminated against the student on the basis of a disability in violation of Section 504.

DISCUSSION

1. Whether the parents have proven that adverse consequences should be imposed upon the school district for failure to provide educational records concerning the student?

During the due process hearing, the parents' attorney requested that an adverse finding or other adverse consequence be imposed against the school district because it had failed to provide the parents with certain educational records pertaining to the student. The school district denied the allegation.

The ability of a parent to examine records concerning a child with a disability is the first of the enumerated procedural safeguards provided by IDEA. Specifically, IDEA states that parents of a child with a disability must be afforded an opportunity to inspect and review all educational records with respect to the identification, evaluation and educational placement of a child, as well as the provision of a free and appropriate public education to the child. 34 C.F.R. § 300.501(a).

Moreover, likely because of the fact that IDEA does not permit the use of civil court trial discovery techniques, such as interrogatories, subpoenas

duces tecum, requests for production of documents or depositions in the administrative hearings conducted under IDEA, the law specifically provides that when parents file a due process hearing request, they have the right to promptly inspect and review any educational records relating to their child. 34 C.F.R. § 300.613(a). Thus, it is of paramount importance that a local education agency promptly provide education records pertaining to a student to the parents well in advance of a due process hearing.

Given the serious nature of the allegation by parents' counsel at the hearing, the hearing officer took the matter under advisement and directed the parties to specifically address in their post-hearing briefs the issue of whether an adverse finding or other adverse consequences should be imposed upon the school district for the alleged failure to provide documents. Despite this specific instruction, however, the brief of the parents does not include any argument concerning this issue. Accordingly, it is determined that the parents have waived and abandoned this issue, and no finding is made concerning whether there has been a failure to provide educational records to the parents. The relief requested by the parents at the hearing concerning an adverse finding is, therefore, denied.

2. Whether the parents have proven that the school district failed to provide a free and appropriate public education to the student?

Prior to the hearing, counsel for the parents submitted a list of issues that contained a number of specific sub-issues under the category of whether the school district denied a FAPE to the student. This list of issues was confirmed and discussed in detail at the prehearing conference. The parents' post-hearing brief, however, provides no argument concerning many of the

asserted sub-issues, including: inappropriate speech services, inappropriate occupational therapy services, failure to implement four specific components of the student's IEPs; behavioral issues by the student that impede learning; and extended school year services. Because the parents have provided no argument concerning these sub-issues, it is concluded that the parents have waived and abandoned these sub-issues and they are not properly before the hearing officer.

In addition, it is noted that in their post-hearing brief, the parents include a number of issues that were not raised among the many specified sub-issues concerning denial of FAPE prior to the hearing. Designated as procedural violations in the parents' brief, these issues were not raised as issues prior to the hearing and are, therefore, not properly before the hearing officer.

A fair reading of the parents' post-hearing brief makes it clear that the gravamen of the parents' FAPE argument boils down to a methodology dispute. The testimony of the parents' expert witnesses makes it clear that they prefer that the Orton Gillingham methodology be used with the student instead of the methodologies used by the school district. The parents and their experts felt that the student would do better with their preferred methodology. What the parents' expert and the parents' post-hearing brief refer to as "inappropriate programing" for the student is really a dispute concerning the teaching methodology that the parents contend should have been used for the student.

As the Third Circuit Court of Appeals has made clear, the issue of methodology is reserved to the educators employed by a local education agency and a parent cannot compel a school district to utilize the parents' preferred methodology. A local education agency is not required to use the

best methodology or to provide an ideal program. In this case, the student's teachers and related service providers utilized a number of research-based methodologies. Moreover, the record evidence reveals that the student was successful and made progress under the methodologies used by the district's staff. The parents' contention that the student was denied a free and appropriate public education because the school district did not utilize the parents' preferred methodology is without merit and is rejected.

An additional argument raised by the parents is that the student did not make sufficient progress while in the school district. This argument is rejected for a number of reasons. First, IDEA does not require that a school district guarantee any particular outcome for a child with a disability.

Second, although no particular grade level or amount of progress is required, IDEA does require that an IEP be reasonably calculated to confer meaningful educational benefit upon the student based upon the student's unique individual circumstances. In this case, it is clear that the student's IEPs were reasonably calculated to confer meaningful educational benefit, and in fact did confer meaningful educational benefit. This is particularly true when weighed against the unique individual circumstances of this student, who was significantly developmentally delayed and was performing at an extremely low level when the student entered the school district. An assessment later revealed that the student had a full-scale IQ of 65, which placed the student in the first percentile among the student's peers and is in the significantly below average range. The school district developed numerous IEPs for the student that added modifications and changes over time that were directly responsive to the issues raised by the student's parents and the student's needs. The mother testified, significantly, that there were no concerns or

issues raised by the parents that the school district failed to address at the numerous IEP team meetings.

The parents' post-hearing brief also raises a number of alleged procedural violations. Many of the alleged procedural violations listed in the parents' brief were not listed as issues by the parents prior to the hearing and are not properly before the hearing officer. See discussion above. Moreover, even assuming *arguendo* that the alleged procedural violations are properly before the hearing officer, the argument made by the parents concerning these issues is conclusory in nature. There is no persuasive argument that any of the procedural violations occurred. Moreover, even assuming *arguendo* that the parents have proven any of the alleged procedural violations, a procedural violation can only amount to an actionable denial of a free and appropriate public education if the violation adversely impacts the student's education or significantly impairs the parents' right to participate. In this case, any such alleged procedural violation has not been shown to have a negative impact upon the student's educational performance. Also, it is clear that the parents meaningfully participated, inasmuch as the mother conceded that the school district addressed every concern raised by the parents regarding the student's IEPs during the numerous IEP team meetings, all of which the parents attended and actively participated in.

The testimony of the school district witnesses concerning this issue was more credible and persuasive than the testimony of the student's mother and witnesses testifying on behalf of the parents. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: The student's mother gave extremely evasive and contradictory testimony on cross-examination concerning when she applied to the private school that parents seek to have the student placed at. Specifically, she testified that she

applied to the private school after she had visited the new school proposed by the school district. She changed her testimony when presented with the due process complaint that states that the parents had applied to the private school on August 25, 2022. In addition, the parents' due process complaint and the statement of issues by parents' counsel both contradict the documentary evidence in the record with regard to whether the student ever had any behavior problems that impede learning. The testimony of the two experts called by the parents is impaired by the fact that neither expert observed the student in class at the school district and the fact that neither expert had any contact with or received any input from the teachers or staff at the school district. The testimony of the parents' expert in special education administration is also impaired by inaccuracies and contradictions with regard to whether the school district conducted any progress monitoring and with regard to whether any of the factors that justify extended school year services for students with disabilities under IDEA was present for this particular student.

It is concluded that the parents have not proven that the school district denied a free and appropriate public education to the student.

3. Whether the parents have proven that the school district discriminated against the student on the basis of a disability in violation of Section 504?

The parents contend that the school district discriminated against the student on the basis of disability in violation of section 504. The school district denies that it has discriminated against the student.

The thrust of the argument in the parents' post-hearing brief is that the school district discriminated against the student by placing the student in

regular education classes. It should be noted that this is a different argument than the 504 issue that parents raised before the hearing, which focused upon whether the student was attending the student's neighborhood school. The new argument concerning discrimination because a restrictive regular education placement was not sufficiently restrictive is, therefore, not properly before the hearing officer.

Even assuming *arguendo* that this new 504 issue is properly before the hearing officer, however, it must be rejected. The parents' argument, even if the asserted facts are accepted as true, does not amount to a violation of Section 504. There are no allegations of any discrimination on the basis of disability. There is also no evidence in the record to support any allegation of discrimination or any comparison of the way the student was treated, as opposed to the way the school district meets the needs of nondisabled students. The parents have not alleged or even attempted to argue the necessary elements of a violation of Section 504. The parents' argument concerning Section 504 is rejected.

To the extent that the testimony of the various witnesses at the hearing concerning this issue was discrepant as to this issue, it is concluded that the testimony of the school district witnesses was more credible and persuasive than the testimony of the student's mother and the witnesses called on behalf of the parents. The discussion of credibility contained in Issue No. Two is incorporated by reference herein.

It is concluded that the parents have not proven that the school district discriminated against the student on the basis of a disability in violation of Section 504.

ORDER

Based upon the foregoing, it is **HEREBY ORDERED** that all relief requested in the due process complaint is hereby denied. The complaint is dismissed.

IT IS SO ORDERED.

ENTERED: May 15, 2023

James Gerl

James Gerl, CHO
Hearing Officer