

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

Closed Hearing

ODR File Number:

21855-18-19

Child's Name:

A.L.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

James Gerl, CHO

Date of Decision:

December 15, 2019

BACKGROUND

The parents filed a due process complaint alleging that the school district denied a free and appropriate public education to the student. The parents seek compensatory education for the period from February 27, 2017 through the end of the 2017 – 2018 school year. The parents seek reimbursement for a private program for the student that they developed for the 2018 – 2019 school year. The parents also seek reimbursement for an evaluation of the student by their expert neuropsychologist. In addition, the parents allege that the school district discriminated against the student in violation of Section 504 and the Americans with Disabilities Act. I find that the school district provided a free and appropriate public education to the student at all relevant times herein. I find further that the parents are not entitled to reimbursement for an evaluation of the student, and I find that the school district did not discriminate against the student in violation of Section 504.

PROCEDURAL HISTORY

The parties and their lawyers compiled an extremely voluminous record; it is difficult to believe that the education of a young person could generate documents and witness testimony rivaling the *IBM v. Xerox* litigation. The parties presented the testimony of 16 witnesses over three full days of the hearing. In addition, tens of thousands of pages of documents were offered into evidence. The admitted school district's exhibits include a 5-inch three-ring binder and a 4-inch three-ring binder. The admitted parents' exhibits include a 5-inch three-ring binder, two 3-inch three-ring binders and a 2-1/2-inch three-ring binder. Counsel for the parties failed to enter into any stipulations of fact, partly explaining the burdensome record in this case.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. Counsel for the parents omitted a footnote from the brief submitted and offered the additional footnote two days after the deadline for post-hearing filings. The content of the omitted footnote was considered, but to combat the unfairness of the parents' counsel having the district brief for two additional days before submitting an additional filing, the district was permitted two additional days to submit a response to the additional filing. The district declined to file a response. The additional filing by the parents was considered herein.

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 have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

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

Counsel were asked prior to the hearing to provide a bulleted list of issues. Counsel for each party complied. In addition, during the course of the hearing an issue arose as to whether, given an omission in the complaint, the student is a party to this proceeding. The district contends that the student is not a party; the parents contend that the student is a party. The district's argument favors form over substance. Rather than

rehash the contentious arguments of the parties, it is concluded that it would be absurd to have yet another lengthy administrative hearing only to repeat the process with the same facts and issues. Even though the complaint was unclear, the district's argument is rejected and it is concluded instead that the student and the student's parents are all parties to this case.

The following issues were presented by the complaint in this case:

1. Whether the parents have proven that the school district denied a free and appropriate public education to the student from February 27, 2017 to the end of the 2017 – 2018 school year?
2. Whether the parents have proven that they are entitled to reimbursement for their private educational program for the student as a remedy for denial of FAPE for the 2018 – 2019 school year?
3. Whether the parents have proven that they are entitled to reimbursement for an evaluation of the student?
4. Whether the parents have proven that the school district discriminated against the student in violation of Section 504 and/or the Americans with Disabilities Act?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:¹

1. The student's date of birth is [redacted]. (P-71)
2. The student's IEP was revised on multiple occasions during the student's tenure in the district. On January 12, 2017, the

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "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 IEP was revised to update present levels of performance and to note additional progress. In addition, new goals were added. (S-22)

3. The student's IEP was amended again on February 15, 2017. (S-24)
4. On October 13, 2017, the parents had a telephone conversation with district personnel during which the district personnel declined to observe the student using the Spelling to Communicate letter board method because the district viewed this method to not be evidence based. (P-10, p. 1)
5. On October 17, 2017, the student's parents invited the district's special education coordinator and two special education teachers to receive training on the Spelling to Communicate method developed by Growing Kids Center. (P-10, p. 1)
6. Spelling to Communicate, or S2C, is a form of the rapid prompt method and/or facilitated communication. (S-97, p. 13 – 16)
7. There is no research to support the validity or reliability of Spelling to Communicate methodology. (S-97, p. 12 – 13; NT 53, 225, 321, 379, 650; P-10, p. 1)
8. As used by the student, Spelling to Communicate involves the student pointing to letters on a laminated letter board held in mid-air by an adult communication partner. (NT 84 – 85)
9. The adult communication partner will prompt the student speller when the student slows down or is not making sense. The communication partner sometimes must prompt the speller and redirect the speller in specific ways. The adult communication partner must occasionally prompt the student,

calm the student down, and know when to terminate a session because the student speller is not giving correct answers. The adult communication partner resets the speller when the speller states nonsense. Family members serving as adult communication partners sometimes smile, cry and show emotion during the process. (NT 157 – 160, 333 – 340)

10. The American Speech Language Hearing Association has issued a position statement which is currently in effect on Rapid Prompting Method, which includes the Spelling to Communicate method. The American Speech Language Hearing Association does not recommend the use of such methods. The American Speech Language Hearing Association requires speech language pathologists to inform and warn clients, family members, caregivers, teachers, administrators and other professionals that there is no evidence that messages produced using these methods reflect communication by the person with a disability before using or considering using rapid prompt methods, such as Spelling to Communicate. (P-53; NT 226 – 227, 380 – 386; S-97)
11. The student's IEP was amended on October 26, 2017 to reflect parent concerns regarding the letter board. The student's progress was documented in the IEP and the student's positive behavior support plan was tweaked. (S-29; NT 815 – 816)
12. The student's IEP was updated on December 2, 2016 as a result of a reevaluation report on November 17, 2016. The student's IEP was updated with regard to behavioral input and updated occupational therapy and speech language information, as well as new strengths and needs, new work experience progress, new specially designed instruction and

new goals. The December 2, 2016 IEP documents the student's progress with regard to the use of a calculator, using e-mails, typewriting the student's daily activities, and following steps, demonstrating comprehension regarding activity, and progress in the area of communication, including the use of verbal requests, greetings and social pleasantries. (S-19; S-20)

13. On December 12, 2017, the school district's special education supervisor agreed to observe the student on December 18, 2017 using the Spelling to Communicate method. (P-10, p. 53)
14. In December 2017 and January 2018, three school district personnel - a special education supervisor, a speech language therapist and an autistic support teacher – traveled to witness the student receiving Spelling to Communicate sessions. The district staff observed the adult communication partner was using excessive prompts and cuing to obtain correct responses from the student. The autistic support teacher gave the adult communication partner some U.S. history and government materials from the student's course in the school district. The adult communication partner was able to elicit correct responses to the U.S. history and government questions from the student only after the teacher gave the adult communication partner the answer key for the questions. (NT 640 – 641, 700 – 720; S-96)
15. On December 19, 2017, the parents forwarded to the district a report from the parents' private speech language therapist concerning the student using the Spelling to Communicate method. (P-10, p. 79; P-7)

16. The parents' private speech language pathologist is a member of the American Speech Language Hearing Association, but she did not warn the parents that the Spelling to Communicate method was not recommended by the Association or that there is no evidence that messages produced using this method reflect communication by the person with a disability. The parents' speech language pathologist described her review not as an assessment but rather as an experiment. (NT 222 – 227)
17. The student's IEP team agreed on January 8, 2018 to experiment with the use of Spelling to Communicate method with the student at school. (S-43; NT 466-468)
18. The parents retained a neuropsychologist, who conducted a modified evaluation of the student using Spelling to Communicate on a letter board from December 1, 2016 to February 12, 2018. The evaluator obtained a standard score of 122 on reading comprehension and 94 on math concepts and applications. The evaluator issued a report on April 4, 2018 and the parents provided it to the school district. The report included copied and pasted e-mails and opinions from the student's parents into the evaluator's report. (S-47)
19. The modified neuropsychological evaluation by the parents' neuropsychologist deviated from standardization practices and the results of the evaluation are not valid or reliable. The evaluator did not attempt to assess the student's intellectual capabilities or the impact of the student's disabilities upon the student's attention or other educational factors. (NT 193 – 200, 202; 176-178, 192-196; 752-756)

20. At the April 10, 2018 IEP team meeting, the school district agreed to receive training from Growing Kids Center, the company that invented and developed the S2C method. The team added a goal for time-on-task and specially designed instruction for regular education coursework. The parents approved the student's program through a Notice of Educational placement dated April 26, 2018 and May 16, 2018. (S-51; S-54; S-55; NT 434-436)
21. The school district made an effort to get the owner/developer of Spelling to Communicate methodology, Growing Kids Center, to come to the district and provide the training for district staff. Although the arrangements were made months earlier, the training did not occur until September of 2018, and the training was provided not by the owner/developer of the company but by another representative of the company. The training was provided at the school district offices. The training was disorganized, and there was no manual for the participants. The Growing Kids Center trainer could not answer questions about the use of S2C in a classroom setting or whether it had ever been used in a classroom. The trainer taught the school district staff to prompt the student and supply answers rather than to obtain answers from the student. The special education teacher and autistic support teacher, who had frequently worked with the student in the classroom, were not able to get the student to give clear answers using S2C methodology. The Spelling to Communicate methodology is similar to the Rapid Prompt Method and to facilitative communication which have been shown to not reflect the authentic voice of the speaker. (NT 671 – 674, 675 – 678; NT 469 – 477; P-53; S-97; S-95)

22. The student's IEP was revised on October 9, 2018. The IEP notes that members of the student's team participated in a training concerning the use of S2C, but that the trial did not yield evidence to support the usage of the method, but the team agreed to permit the student to use laminated letter boards in lieu of keyboards in the classroom. Updates on the student's progress as to the student's goals were stated in the IEP. (S-60; NT 476-478)
23. Prior to evaluating the student for a reevaluation in November of 2018, the school district psychologist met with the student's mother and discussed the Spelling to Communicate method. The psychologist informed the student's mother that Spelling to Communicate would not be used during the school evaluation process to determine the student's present levels. The district psychologist reviewed videos of the student using the Spelling to Communicate method at the request of student's mother. In reviewing the videos, the psychologist noted that some type of facilitation was going on between the adult communication partner and the student. Given the standardization of the assessments to be conducted, the psychologist notified the parent that the psychologist would not be using the speech to communicate methodology when assessing the student's intelligence or achievement for the reevaluation. (NT 749 – 756; S-57)
24. The school district psychologist conducted a reevaluation of the student in November of 2018. The psychologist considered the parents' independent modified neuropsychological evaluation of the student, as well as the evaluator's own assessments. The school district psychologist determined that the Spelling to

Communicate methodology should not be part of the student's IEP. (S-62; NT 755; 479-481)

25. On November 28, 2018, the student's IEP was updated in view of the reevaluation report. The parents disagreed with the reevaluation report, but the district team members stated that the use of an adult communication partner holding a letter board did not result in authorship by the student. The IEP contains goals for functional reading/comprehension, functional communication writing, functional money skills, behavior goals, expressive and receptive language, initiating and responding socially, functional community/safety goals, functional data entry goal, remaining on task, providing functional information and the IEP included specially designed instruction based upon the student's needs, as identified in the district's reevaluation report. The student's IEP included a positive behavior support plan, occupational therapy one time per week for 30 minutes, speech language therapy three times per week for 30 minutes, adaptive physical education one time per four day cycle for a 55 minute session, eligibility for extended school year services, direct instruction from basic math, practical language (reading and writing), social language lab and adaptive electives. The student was in general education 42% of the time. The student was provided with a laptop and letter boards to respond. The student's daily routine included functional reading throughout the day in the autistic support classroom through social behavior stories, menus, store circulars, community-based instruction readings, and community-based instruction activities. (S-63; NT 479-481, 755-756)

26. Under the student's IEPs in the district, the student also participated in PAES lab in order to assist with the student's transition to the community. The student was successful in the community-based program. The skills involved included alphabetizing, numerical sorting, making change, data entry, shop measurement, food measurement. The student was able to succeed in the community skills lab without using Spelling to Communicate methodology. (S-48; NT 732 – 736)
27. On October 24, 2018, the Virginia Board of Audiology and Speech Language Pathology issued an order concerning the owner/developer of Spelling to Communicate and Growing Kids Center and found her to be in violation of the law by acting as a speech language pathologist after her license had expired on December 31, 2004. The Board issued an order placing the inventor/developer of Spelling to Communicate and Growing Kids Center on probation for a period of 36 months, fining the owner/developer \$8,000.00, and requiring the owner/developer to remove a number of testimonials from the company website concerning services given from January 1, 2004 to December 13, 2017, the period that the speech-language license was not in effect. (S-89; NT 141-142)
28. On November 6, 2018, the parents' lawyer sent an e-mail to the school district's lawyer stating that the parents would seek reimbursement for the private program that they had developed for the student. (P-10, p. 270)
29. The student's IEP team met on November 28, 2018. The meeting was difficult for the participants because the parents disagreed with the district's position concerning S2C. The IEP states that the team shared with the parents that "the use of

letter boarding, specifically, holding the letter board/keyboard could not prove authorship” and therefore was not a reliable way to determine the student’s communication. The IEP states goals and notes the student’s progress on the student’s prior goals. The IEP was sent home with a Notice of Recommended Educational Placement dated December 14, 2018. (S-63; S-65; NT 480 – 484, 755 – 756)

30. The messages produced by the Spelling to Communicate letter board system when used with the student likely do not represent communications by or the authentic voice of the student. (Record evidence as a whole.)
31. The student is capable of independent communication using some speaking, typing, pointing and identifying pictures. (NT 484 – 487, 830 – 831)
32. The student made dramatic progress from the student’s freshman year to the student’s senior year in the district’s community-based instruction program. (NT 448 – 449; 732-736)
33. The student made considerable progress under the student’s IEPs at the school district. (NT 430 – 436, 448 – 449, 458 – 469, 474 – 481, 817 - 827; S-23; S-24; S-25; S-27; S-29; S-35; S-40; S-43; S-51; S-60; S-63; P-19; P-52)
34. On December 10, 2017 at 11:52 p.m., the student’s mother sent an e-mail to the student’s special education teacher and other special education officials at the district. The e-mail refers to an unidentified prior request for an independent evaluation by the school district. The e-mail continues that the parents have retained a neuropsychologist to conduct a

“comprehensive psychoeducational evaluation.” The evaluator would be observing the Spelling to Communicate sessions with the student and giving her opinion on the efficacy of the method. The e-mail does not request that the parents be compensated for the evaluation of Spelling to Communicate by the neuropsychologist. (P-10, p. 38; NT 176 - 177)

35. The school district did not respond to the parents’ e-mail regarding the parents retaining a neuropsychologist to evaluate the Spelling to Communicate program. (Record evidence as a whole)
36. The IEPs developed for the student from February 27, 2017 through the end of the 2018 – 2019 school year were reasonably calculated at the time that they were written to confer educational benefit upon the student appropriate in view of the student’s individual circumstances. (Record evidence as a whole)
37. The private program developed by the parents for the student involving the Spelling to Communicate methodology is not appropriate to reasonably meet the student’s needs. (Record evidence as a whole)
38. The school district has not discriminated against the student on the basis of the student’s disabilities. (Record evidence as a whole)

CONCLUSIONS OF LAW

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

1. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free and appropriate public education (hereinafter sometimes referred to as “FAPE”) to a student with a disability. There must be:
 - i. A determination as to whether the school district has complied with the procedural safeguards as set forth in IDEA, and
 - ii. An analysis of whether the individualized educational plan is reasonably calculated to enable the child to make progress in light of the child’s circumstances. *Endrew F by Joseph F v. Douglass County School District RE-1*, 580 U.S. ____, 137 S. Ct. 988, 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).
2. In order to provide FAPE, an IEP must be reasonable, not ideal. *KD by Dunn v. Downingtown Area School District, supra*.
3. The appropriateness of an IEP in terms of whether it has provided a free and appropriate public education must be determined as of the time that it 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; 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 271 (3d Cir. 2012); *DS v. Bayonne Board of Education*, 602 F.3d 553, 564, 54 IDELR 141 (3d Cir. 2010)
4. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their

participation rights, or causes a deprivation of educational benefit.

Ridley Sch Dist v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).

5. A parent cannot compel a school district to use a specific methodology. A school district is allowed the discretion to select from among various methodologies in designing a student's IEP. *Ridley Sch Dist v. MR and JR ex rel. ER*, *supra*. 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. Sch Dist*, 592 F.3d 267, 53 IDELR 279 (1st Cir. 2010); *In re Student With A Disability*, 51 IDELR 87 (SEA W. VA 2008).
6. In order to receive reimbursement for tuition and related expenses resulting from a unilateral private school placement, parents must prove three elements:
 - i. That the school district denied FAPE to the student or otherwise violated IDEA;
 - ii. That the parent's private school placement is appropriate; and
 - iii. That the equitable factors in the particular case do not preclude the relief. *School Committee Town of Burlington v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996, 103 LRP 37667 (1985); *Florence County School District 4 v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993); *Forest Grove School District v. TA*, 557 U.S. 230, 52 IDELR 151 (2009).
7. A parent has a right to an independent educational evaluation if the parent disagrees with an evaluation conducted by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either

- i. File a due process complaint to request a hearing without unnecessary delay to show that its evaluation is appropriate or
 - ii. Ensure that an independent educational evaluation is provided at public expense. 34 C.F.R. § 300.502(b)(1) and (2); PP *Westchester Area School District*, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009); *DZ v. Bethlehem Area School District*, 54 IDELR 323 (Penna Commonwealth Ct. 2010).
8. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of the disability be excluded from participation and/or be denied the benefits of or subjected 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:
 - i. That the student is disabled;
 - ii. That the student is otherwise qualified to participate in school activities;
 - iii. That the school district received federal funds and
 - iv. That the student was excluded from participation in, or denied the benefits of or was subjected to discrimination at the school. *Ridley Sch Dist v. MR and JR ex rel. ER, supra.*
9. The parents have not proven that the school district denied FAPE to the student from February 27, 2017 through the end of the 2018 – 2019 school year. The parents have not proven that they are entitled to compensatory education or reimbursement for their private program for the student.

10. The parents have not proven that they are entitled to reimbursement for the modified neuropsychological evaluation of the Spelling to Communicate program conducted by their expert neuropsychologist.
11. The parents have not proven that the school district discriminated against the student on the basis of the student's disability.

DISCUSSION

Whether The Parents Have Proven That The School District Failed To Provide A Free And Appropriate Public Education To The Student From February 27, 2017 Through The End Of The 2017 – 2018 School Year?

The parents have requested an award of compensatory education for the period of time from February 27, 2017 through the end of the 2017 – 2018 school year. They allege a denial of FAPE. The gravamen of the complaint by the parents in this case is that the school district must utilize Spelling to Communicate methodology, including a letter board held mid-air by an adult communication partner, in order to provide FAPE to the student.

Both parties, in their post-hearing briefs, describe Spelling to Communicate as a methodology. The law is clear, however, that a parent cannot dictate which methodology a school district must use; the choice of methodology remains within the sound discretion of school officials. Because the parents cannot override the school district's choice of a specific methodology, the parents' argument must be rejected. The refusal of the school district to use the parents' preferred methodology does not constitute a denial of FAPE.

Even assuming *arguendo*, however, that this is somehow not a methodology issue, it is clear from the evidence in the record that the staff of the school district made numerous efforts to investigate the parents' preferred method. The district's thorough investigation of Spelling to

Communicate revealed numerous substantive and ethical issues concerning the methodology. The parents concede that there is no scientific research to support Spelling to Communicate method. Also, Spelling to Communicate is a form of the Rapid Prompting Method and the American Speech Language Hearing Association has issued a position statement that does not recommend the use of Rapid Prompting Method because of a lack of scientific validity and because information obtained through the method should not be assumed to be the communication of a person with a disability.

When the district hired Growing Kids Center, the company that invented and owns Spelling to Communicate, to train district staff members on the methodology, the staff members were concerned that the training was not well organized and that there was no manual to accompany the method. Most compelling and convincing was the testimony of the student's special education teacher, who was clearly pained to be testifying against the family whom he testified that he loved. It was the credible and persuasive testimony of the special education teacher that when he took the Spelling to Communicate training, he was being trained to prompt the student to give the student the answers. Other staff who were trained in the Spelling to Communicate method agreed that the results were not the authentic voice of the student.

In addition, it was the credible and persuasive testimony of the very well qualified expert who testified on behalf of the school district that the results of Spelling to Communicate methodology, when done with this student, are likely not the authentic voice of the student. Due to ethical concerns, the expert recommended that the district not consider any communication generated by the student using Spelling to Communicate to be the student's own words or thoughts.

The only case cited by either party that involves a similar method of communication is *Fairfield (CT) Bd of Educ*, 72 IDELR 165 (OCR 2018). Although that case involves issues arising under Section 504 and the Americans with Disabilities Act, rather than IDEA, it is significant that the agency concluded that the concerns of school district staff regarding a process with a letter board held mid-air by an adult communication partner were credible. Specifically, the lack of research and training and ethical issues pertaining to whether the result was the authentic voice of the student were determinative. The agency's conclusion in that case is consistent with the conclusion in the instant case by school district staff after investigating the student's use of Spelling to Communicate.

In view of the substantive concerns regarding the lack of research and training issues involving Spelling to Communicate methodology, as well as the ethical issues involving the significant doubt that the results are the authentic voice of the student, the school district made a reasonable and thoughtful decision, and it did not deny a free and appropriate public education to the student by refusing to use Spelling to Communicate methodology.

In addition to the substantive FAPE allegation that the district denied the student a free and appropriate public education by failing to incorporate Spelling to Communicate methodology in the IEP, the parents also assert certain procedural violations concerning improper goals or insufficient goals in the student's IEP. These arguments are rejected. Although the appropriateness of an IEP should be judged at the time it is written and not after the fact, the record evidence in this case nonetheless shows that the student clearly made substantial progress under the IEPs in effect from February 27, 2017 through the end of the 2017 – 2018 school year. The student's IEPs were reasonably calculated, in view of the student's individual circumstances, to permit the student to make meaningful educational

progress. To the extent that the parents allege that various goals in the student's IEPs were recycled or that certain goals were not present in IEPs, the evidence in the record does not support the allegations. Even assuming arguendo that the parents had proven such procedural violations, however, the alleged violations are clearly harmless. The student's IEP was reasonably calculated to permit the student to make progress in view of the student's individual circumstances and in fact the student did make substantial progress under the IEPs.

The testimony of the witnesses employed by or testifying on behalf of the school district was more credible and persuasive than the testimony of the student's parents and the parents' other witnesses with regard to this issue because of the demeanor of the witnesses, as well as the following factors: the testimony of the parents' expert neuropsychologist was not credible or persuasive because the witness was extremely evasive on cross-examination. The credibility and persuasiveness of the parents' expert neuropsychologist was also impaired by the fact that the evaluator allowed the parents to be present and actively involved during the testing of the student and because the evaluator admittedly permitted a lack of standardization in the testing protocol. The credibility and persuasiveness of the testimony of the parents' expert speech language pathologist is impaired of the fact that her testimony was elicited especially on redirect examination through the use of very leading questions. Although the rules of evidence do not apply with regard to admissibility in these administrative hearings, they are sometimes helpful with regard to weighing testimony. The credibility of the student's mother was impaired by her admission that she encourages the student during letter board sessions. The credibility of the student's pediatrician that she believed that the student's authentic voice was reflected by the S2C letter board sessions is impaired by her testimony that she consults with the parents concerning medicine changes for the student

despite the fact that the student is an adult and can allegedly communicate with the S2C letter board.

It is concluded that the parents have not proven that the student was denied a free and appropriate public education from February 27, 2017 through the end of the 2017 – 2018 school year.

Whether The Parents Have Proven That They Are Entitled To Reimbursement For Their Private Educational Program For The Student For The 2018 – 2019 School Year?

Under the first prong of the *Burlington/Carter/Forest Grove* analysis concerning reimbursement for a unilateral placement, the question is whether or not the school district denied a free and appropriate public education or otherwise committed a substantive violation of IDEA. The parent argues that the IEP offered by the school district to the student for the 2018 – 2019 school year did not constitute an offer of FAPE.

The primary argument by the parents concerning denial of FAPE involves their claim that the school district should have incorporated Spelling to Communicate methodology with an adult communication partner holding the letter board in mid-air as a part of the student's IEP. The portions of the preceding section of this decision pertaining to the Spelling to Communicate methodology is incorporated by reference herein. The parents' argument concerning the Spelling to Communicate methodology is rejected.

The IEP offered by the school district for the 2018 – 2019 school year was reasonably calculated to confer educational benefit appropriate in view of the student's individual circumstances. Accordingly, the parents have not proven the first prong of the *Burlington/Carter/Forest Grove* test, and the request for reimbursement must be denied.

Even assuming *arguendo* that the parents had proven the first prong of the *Burlington/Carter* analysis, they have not met the second prong

concerning the appropriateness of their private educational program for the student. The parents' private program involves the use of Spelling to Communicate methodology with an adult communication partner holding a letter board mid-air. The discussion in the previous section concerning Spelling to Communicate methodology is incorporated herein by reference. It is clear that the parents' program is not appropriate and that the parents have not proven that they have met the second prong of the analysis. Reimbursement for the parents' private S2C program must be denied.

Neither party addresses the third prong of the *Burlington/Carter/Forest Grove* analysis. Accordingly, no analysis of the third prong is conducted herein.

The credibility and persuasiveness of the parents and the parents' witnesses is less credible and persuasive than the testimony of witnesses employed by or testifying on behalf of the school district in this case because of the demeanor of the witnesses, as well as the discussion contained in the analysis of the first issue herein.

It is concluded that the parents have not established that they are entitled to reimbursement for their private educational program for the student.

Whether The Parents Have Proven That They Are Entitled To Reimbursement For An Independent Educational Evaluation?

The parents filed a request with the school district for an independent educational evaluation. The request by the parents, however, was not really a request for an independent educational evaluation as that term is used in special education law. Instead, the parents' request was that the school district evaluate or study the Spelling to Communicate methodology, which the parents were advocating for inclusion in the student's IEP. Because the

request by the parents was not made after a disagreement with the comprehensive evaluation by the school district, as contemplated under IDEA, the independent educational evaluation provisions of IDEA and the related regulations do not apply to this request. Because the parents' request does not qualify as an independent educational evaluation, as that term is used in IDEA, the parents' request for reimbursement for the modified psychoeducational evaluation by their expert witness is rejected.

It should be noted, however, that the school district erred when it did not file for a due process hearing after receipt of the parents' request for an independent educational evaluation. Even though the parents' request was not truly for an independent educational evaluation, and even though the request was not particularly clear, the school still district should have followed IDEA procedures and requested a hearing officer determination of the same. Instead, the school district simply failed to respond to the inquiry without filing for a due process hearing, as contemplated by law. In so doing, the school district committed a procedural violation of IDEA. In this case, however, the procedural violation was clearly harmless because the student received a free and appropriate public education, and the parents have not shown any adverse effect upon the student's education because of the school district's failure to file a due process complaint. Also the parents clearly were accorded meaningful and active participation in the IEP process. Because the procedural violation was not actionable, no relief will be ordered as a result of the procedural violation.

The credibility of the testimony of the witnesses employed by the school district were more credible and persuasive than the testimony of the parents and the parents' witnesses because of their demeanor, as well as the factors outlined in the discussion of the first issue herein.

The parents have not proven that they are entitled to reimbursement for an independent educational evaluation at public expense.

Whether The Parents Have Shown That The School District Discriminated Against The Student In Violation Of Section 504 Or The Americans With Disabilities Act?

The parents do not allege and have not proven that the student was discriminated against on the basis of the student's disability, and therefore, there can be no finding of a violation of Section 504.

The school district argues that a special education hearing officer in Pennsylvania has jurisdiction over claims under the Americans with Disabilities Act. The basis for the district's position is the Supreme Court decision concerning exhaustion of administrative remedies. In contrast, the parents, who are the parties seeking relief in this complaint, contend that Pennsylvania special education hearing officers do not have authority to decide claims brought under IDEA and Section 504 of the Rehabilitation Act but not under the Americans with Disabilities Act. (See Footnote 5 on pages 29 to 30 of the post-hearing brief filed by the parents in this case.) In view of the parents' position that the hearing officer does not have jurisdiction over the Americans with Disabilities Act, the hearing officer declines to make a decision with regard to that issue in this case. Instead, it is assumed, since the parties seeking relief do not believe the hearing officer has jurisdiction over the claim, that the claim should not be determined in this decision.

Assuming *arguendo*, however, that the hearing officer does have jurisdiction over Americans with Disabilities Act claims, the heart of the parents' claim with regard to this issue in this case is that the school district allegedly violated the effective communication ADA provisions by failing to allow Spelling to Communicate with an adult communication partner holding a letter board. The discussion of Spelling to Communicate methodology contained in the discussion of the first issue in this case is incorporated by reference herein.

The district has cited an administrative decision that is on point with regard to the ADA and Section 504 allegations in this case. In *Fairfield (CT) Bd of Educ*, 72 IDELR 165 (OCR 2018), the Office of Civil Rights rejects the contention of the parents in that case that the school district violated Section 504 or the Americans with Disabilities Act by failing to accede to the parents' request that the school district provide a communication system with a letter board being held mid-air by an adult communication partner. In rejecting the parents' contentions, OCR found school district concerns to be credible, especially with regard to a lack of research, the training involved, and ethical issues with regard to the authenticity of the student's voice under this methodology. Accordingly, OCR concluded that the requested methodology was a fundamental alteration of the student's program and not a violation of the Americans with Disabilities Act or discrimination under Section 504.

Thus, assuming that the hearing officer has jurisdiction over the ADA issue, the parents have not established that the failure of the school district to provide Spelling to Communicate methodology with an adult communication partner constitutes a violation of ADA. Concerning the Section 504 allegations, the parents have not proven that the district's refusal to use S2C methodology was discrimination on the basis of a disability.

The testimony of the witnesses employed or testifying on behalf of by the school district who were testifying on behalf of the school district was more credible and persuasive than the testimony of the parents and their witnesses with regard to this issue.

The parents have not proven any discrimination by the district against the student on the basis of disability in violation of Section 504 or the Americans with Disabilities Act.

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: December 15, 2019

James Gerl

James Gerl, CHO
Hearing Officer