

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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 28414-23-24

Child's Name:

A.M.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

James Gerl, CHO

Date of Decision:

February 9, 2024

BACKGROUND

The parents filed a due process complaint seeking reimbursement for a unilateral placement of the student in a private school. The school district contends that it offered a free and appropriate public education to the student and contests reimbursement.

I find in favor of the school district with regard to the issue raised by the complaint.

PROCEDURAL HISTORY

Counsel in this case did an excellent job of stipulating to ninety-seven separate facts. Some of the stipulations have been omitted from the findings of facts in this decision because they are not decisionally relevant, relating instead to periods of time that are not relevant to the disposition of this case. Parent exhibits P-1 through P-95 were admitted into evidence, and school district exhibits S-1 through S-42 were admitted into evidence.

Despite agreement as to a large number of facts and agreement as to the admissibility of almost all exhibits, two in-person sessions were nonetheless needed for the testimony in this case. Nine witnesses testified at the due process hearing sessions.

After the hearing, counsel for each party presented 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).

ISSUE PRESENTED

The due process complaint, as explained and clarified at the prehearing conference convened in this case, presents the following issue:

1. Whether the parents have proven that the school district should reimburse them for tuition for a unilateral placement of the student in a private school for the 2023 – 2024 school year?

FINDINGS OF FACT

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

1. The student was born on [redacted]
2. The parents enrolled student in the School District for [redacted] (2010 – 2011 school year).
3. Since [redacted], the district has been and continues to be the student's local education agency.
4. The student attended school in the school district from [redacted] through [redacted].

5. Initially, the student was eligible for special education services under the exceptionality category of intellectual disability. In its April 25, 2016 Reevaluation Report, the school district found the student eligible under the primary exceptionality of intellectual disability and the secondary exceptionality of autism.

6. The student has attended the private school in question since May 20, 2021. From May 20, 2021 through the 2022 – 2023 school year, including ESY, the school district paid for tuition and related services and provided transportation on a waiver of FAPE agreement.

7. The school district issued a NOREP on May 23, 2023, proposing a supplemental life skills support program. The parents disapproved the NOREP. The parents noted, “We don’t feel the programming is appropriate to meet [the student’s] needs.”

8. The school district issued a Permission to Reevaluate (“PTRE”) on February 3, 2023. The parents signed the PTRE on February 4, 2023, and the school district noted that it was received on February 6, 2023.

9. The school district issued its Reevaluation Report on April 5, 2023 and found the student eligible for special education services under the primary exceptionality category of intellectual disability and the secondary exceptionality category of autism. The April 5, 2023 reevaluation included a review of records, observations, IQ and achievement assessments, adaptive behavior rating scales, a functional behavioral assessment, an occupational therapy evaluation, a speech evaluation, and a functional vision assessment.

10. The school district’s psychologist observed the student at the private school twice for the evaluation. During the first observation, on March 7, 2023, from 10:00 a.m. to 10:25 a.m., the psychologist noted that “[Student] walked away from the table nine times through the 25-minute

observation. The student appeared to comply with 2 – 3 demands, then required a break. The student benefits from positive reinforcement, such as preferred food and objects. The longest [Student] remain[ed] seated was for two minutes. [Student] appeared happy and [Student] was compliant with examiner throughout the observation.”

11. During the second observation, on March 13, 2023 from 10:25 to 10:45 a.m., the psychologist noted that “Student complied with tasks when provided appropriate reinforcement. The student was motivated to engage in appropriate behavior as the student was given reinforcers after completing each demand.” The examiner noted that “[t]his observation appeared to occur within a highly structured environment without adult or peer distractions.”

12. The school district administered the Comprehensive Test of Nonverbal Intelligence (“CTONI-2”), and the student received a Full Scale IQ standard score of 42, less than first percentile with a classification of “very low.” On the Wechsler Individual Achievement Test – Fourth Edition (“WIAT-IV”), the student obtained standard scores of 40, less than 0.1 percentile with a description of “extremely low,” in both Reading and Math Composites. On the word reading subtest, the student was not able to identify letters or letter sounds. On the reading comprehension subtest, the student was not able to respond to comprehension questions even with several sensory breaks, redirection and prompts by the examiner, the student’s paraprofessional and special education teacher, and ample time to answer questions. The evaluator noted that “[h]e did not type responses on the student’s iPad on this assessment.”

13. For written expression, the student was not able to functionally use a pencil, did not write letters and was unable to write the student’s name.

14. On the math problem-solving subtest, the student worked at a pre-kindergarten level. When prompted by the examiner, the student identified one shape and one number correctly. The student was not able to consistently identify one-digit numbers, size and comparisons, and apply one-to-one correlations. On the numerical operations subtest, the student did not demonstrate the ability to count to five, identify numbers, or use addition or subtraction to solve math computation problems.

15. On adaptive scales, the student's teacher at the private school and the parents endorsed responses that showed adaptive functioning at less than the first percentile. The teacher endorsed critical items in the maladaptive domain: uses strange or repetitive speech (sometimes), repetitive physical movements over and over (sometimes), eats non-food items such as dirt, paste, or soap (sometimes), and wanders or darts away without regard to safety (sometimes). The parents endorsed critical items in the maladaptive domain: gets fixated on objects or parts of objects (sometimes), loses awareness of what is happening around the student (sometimes), eats non-food items such as dirt, paste, or soap (sometimes), and wanders or darts away without regard to safety (sometimes).

16. The school district obtained information from the private school for the completion of its functional behavioral assessment. The private school reported the following behaviors of concern: (1) Flopping: laying on the floor, spin on floor; (2) Disrobing: remove or attempt to remove clothes; (3) Swiping: attempting to reach and immediately discard items; (4) Mouthing/spitting: placing non-food items in mouth; (4) Pushing: pushing people; (6) Unhappy vocalizations: low pitch sounds; (7) Stomping: raise foot and forcefully bring it down; (8) Forced cough; (9) Noncompliance: failure to comply with directive within five seconds; turn body and head

away from staff; and (10) Out of area: moving at least six feet away from instructor.

17. The school district psychologist noted that during her observation, which took place in a “highly structured setting,” the student did not demonstrate flopping, disrobing, swiping, mouthing, stomping or unhappy vocalizations. The school district psychologist did observe two behaviors of concern: off task behavior (sensory stimulation/playing with objects) and noncompliance (failure to comply with directive within five seconds; turn body and head away from staff).

18. In her functional behavioral assessment recommendations, the school district psychologist reported: “The (private school) uses ABA principles and reinforcements in the form of verbal praise and edibles on variable ration schedule for compliance with demands. This is an appropriate strategy to target the behaviors of concern.”

19. The school district psychologist concluded that “[a] positive behavior support plan should be continued to help target [Student’s] behaviors of concern. (The student) also requires continued services in a supplemental life skills classroom along with consistent one-on-one support and positive reinforcement.” The psychologist also noted, “there was no interaction with peers during the observations; however, peer interaction and social skills should also be addressed in the behavior plan.”

20. The school district speech pathologist attempted to administer the Peabody Picture Vocabulary Test (“PPVT”). The examiner was unable to establish a basal, as the student did not answer any questions correctly, and the testing was discontinued. The student’s receptive language skills were informally assessed. Of three crayons, [the student] was able to correctly identify the color of one. [The student] was able to correctly identify named

shapes. [The student] was able to identify named icons on the student's iPad containing [the student's] preferred reinforcers with 20% accuracy.

21. The school district had previously provided physical therapy as a related service for the student. The school district exited the student from physical therapy following the school district's April 9, 2018 reevaluation report, in which the evaluating physical therapist noted, the student "shows physically safe and functional mobility skills to navigate the student's school environment and keep pace with the student's peers for school-based routines with supervision and occasional cues. As a result, the [student] does not qualify for school-based physical therapy services." The April 9, 2018 reevaluation report did not report the results of any formal or informal physical therapy assessments.

22. The school district did not complete a physical therapy evaluation as part of its April 5, 2023 reevaluation report.

23. The school district's occupational therapist completed an occupational therapy evaluation as part of the April 5, 2023 reevaluation. The student achieved scores in the less than first percentile on fine and gross motor assessments on the Goal Oriented Assessment of Lifeskills ("GOAL") – an assessment of fundamental motor abilities needed for daily living.

24. At the time the school district completed its April 2023 reevaluation report, the student was not receiving vision supports at the private school. The IEPs the school district issued following its June 19, 2019 reevaluation report included consultative vision support services. The IEPs did not identify blind or visually impaired as a special consideration.

25. For the April 5, 2023 reevaluation report, the school district vision teacher conducted a functional vision assessment which included an

observation of the student at the private school on March 14, 2023. The vision teacher noted that the student was seen by an ophthalmologist, as well as Salus University Eye Institute, in 2020 and no vision concerns were found. Following completion of the functional vision assessment, the vision teacher recommended consultative vision support services "to assist staff with adapting [Student's] educational materials based on [the student's] visual needs." The vision teacher recommended the following accommodations: (1) reduce room lighting and use backlit devices; (2) add movement elements (shiny or reflective materials) to the handles of tools, where [the student's] hands need to be placed, where the student needs to touch to activate a device, to increase visually guided reach in purposeful activities; (3) position the student away from traffic in the classroom; (4) decrease the movement of materials around the student when working on tasks in order to decrease distractions; (5) reduce the visual complexity of materials (use materials that have highly saturated colors presented in simple black or non-complex backgrounds); (6) Give [Student] frequent breaks to decrease visual demands, but these breaks can be short (one – two minutes) and do not require (the student) to get up and move away, and; (7) during periods of individual instruction give [Student] a quiet area to work."

26. The school district's April 5, 2023 reevaluation report recommended consideration of the following modifications and specially designed instruction based upon a review of supports implemented by the private school: prompt/strategies: staff will put an emphasis on verbal behavior; use of variable schedule of reinforcement; intensive specific instructional strategies and behavior support in a small group setting; content area subjects to be functionally related to the general curriculum with intensive language instruction and other basic skills with supplementary curriculum; self-care and daily living skills to be broken down into small

steps with hand over hand assistance/prompting faded as [Student] develops understanding and mastery of skills; conduct frequent preference assessments to assist with effective reinforcers; implement data-based effective teaching procedures and antecedent curricular modifications throughout the school day; utilize natural environment training and intensive teaching contexts; any incorrect or non-responding during probe conditions will result in immediate error correct; introduce [Student] to a variety of new activities and items to identify additional preferred leisure activities.

27. The school district convened an IEP team meeting on May 10, 2023.

28. Before the May 10, 2023 IEP team meeting, the school district provided the parents with two draft IEPs. The first was with its April 21, 2023 Invitation to Participate in IEP Meeting. The second was by e-mail on May 9, 2023.

29. The parents toured the school district's life skills program on May 12, 2023.

30. The parents provided written feedback on the IEP on May 18, 2023.

31. The school district provided the final IEP to the parents by e-mail on May 23, 2023 at 6:42 p.m. along with a NOREP for supplemental life skills.

32. The IEP notes that the student would be in the regular education classroom for 41% of the school day. The IEP states that "student will participate with nondisabled peers during lunch, electives, school-wide events and extracurricular activities. The IEP teacher and guidance counselor will meet with the students to encourage participation in after school clubs and athletic opportunities."

33. The IEP identifies communication, assistive technology, and behaviors as special considerations. Blind or visually impaired is not identified as a special consideration.

34. The May 10, 2023 IEP includes a safety plan to address protocols in the event the student eloped from the classroom or school building.

35. The May 10, 2023 IEP includes functional reading and functional math goals; an independent living goal; a vocational goal; two occupational therapy goals; a speech goal and a modified behavior goal.

36. The May 10, 2023 IEP includes a positive behavior support plan that identified behaviors of concern as dropping, elopement, noncompliance and concerning behavior. The PBSP included five behavior goals: elopement, concerning behavior, completing up to 10 minutes of academic/functional demands in the absence of challenging behaviors, waiting, and responding to one-step safety directions.

37. The May 10, 2023 IEP includes the following related services: biennial reevaluation; personal care assistant 6.9 hours/day; transportation with aide; occupational therapy – individual thirty 30-minute sessions per IEP year; speech and language therapy – individual sixty 20-minute sessions per IEP year; and speech and language therapy – large group thirty 30-minute sessions per IEP year.

38. Supports for school personnel include monthly consultative support from the school district occupational therapist; consultative support from the school district teacher of students with visual impairments, approximately once per month for 30 minutes; and 12 hours per month of consultative support from the school district behavior specialist.

39. The May 10, 2023 IEP included input from the school district physical therapist, who provided a summary of the student’s PT history and

services in the school district and noted that “Based on the student’s most recent re-evaluation through the School District (May 2019), skilled physical therapy was not recommended.” The June 17, 2019 reevaluation did not include formal or informal PT assessments and the April 9, 2018 reevaluation did not include a formal PT assessment.

40. The private school’s December 15, 2022 IEP (revised on March 21, 2023), included physical therapy as a related service at a frequency of two hours per month.

41. The May 10, 2023 IEP states that the student will participate in community-based instruction one time per week. It also states that the student will participate in meal planning, preparation, and clean up one time per week.

42. The parents disapproved the May 23, 2023 NOREP on May 31, 2023.

43. On July 27, 2023, the school district sent a letter declining the parents’ request for tuition reimbursement for the 2023 – 2024 school year at the private school.

44. The school district’s letter of July 27, 2023 advised the parents, “[i]f you wish to avail yourself of a public school program, you will need to re-register [Student] in the District.” The parents re-enrolled the student, as requested.

45. The student began attending the private school on or about May 20, 2021 pursuant to a settlement agreement with the school district. The school district continued to fund the student’s tuition, related services and transportation for the private school through ESY for the 2022 – 2023 school year.

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

46. The student is a happy, gentle, playful kid, who loves music and going to restaurants. (NT 330 – 331; P-79)

47. The April 5, 2023 evaluation report issued by the school district for the student concluded that the student requires an educational program with a strong focus on vocational skills because the student was then [redacted] years old. The report states that the student requires supports and services to address the student’s independence, adaptive skills and vocational skills. The evaluation report notes that the student had no peer interactions at the private school, and it recommends that the student be placed in a supplemental life skills classroom with one-on-one support to meet the student’s functional academic, functional behavior, vocational, social needs and supervision for safety. (P-79; NT 232 – 234)

48. The May 10, 2023 IEP includes a post-secondary transition plan. The plan includes three transition goals. Many of the other goals in the IEP would be implemented in conjunction with the transition program. The transition program is based upon research-based methods and features a community component and a work-based focus. The transition plan would be implemented as a part of the STRIVE program that incorporates life skills, functional communication skills and work skills to help set the students up for when they leave high school to increase the likelihood of living

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____”).

independently and having functional life skills. (S-63; NT 430 – 431, 500-501, 598 – 603, 624, 655 – 657, 373-374)

49. The May 10, 2023 IEP provides the related services of speech language therapy and occupational therapy integrated throughout the school day. (P-63; NT 373, 655 – 656)

50. The teacher who would implement the student's IEP in the school district is a certified special education teacher. (NT 230 – 231, 372 – 374, 562 – 563)

51. The May 10, 2023 IEP includes a speech goal that involves the student appropriately using the student's augmentative alternative communication (hereafter sometimes referred to as "AAC") device. The teacher who would implement the student's IEP at the school district is familiar with devices like the AAC device used by the student. (P-63; NT 373 – 374)

52. Many of the goals and specially designed instruction included in the May 10, 2023 IEP were adapted from or included in the IEP in place at the private school. (NT 246-248)

53. The May 10, 2023 IEP includes a safety plan, a positive behavior support plan and a 1:1 aide (or personal care assistant). (P-63; NT 79, 236 – 238)

54. The May 10, 2023 IEP includes specially designed instruction related to the student's vision needs. The vision SDI was based upon a functional vision assessment of the student conducted by the school district's vision teacher. (P-63; NT 248 – 249)

55. The parents requested revisions to the May 10, 2023 IEP. The school district agreed to make some of the revisions requested by the

parents and some revisions suggested by the parents' expert witness. (NT 431 – 433, 603 – 605, 616 - 619)

56. The school district director of special education had a telephone conversation with the student's father on May 23, 2023. The father asked if it was possible for the student to continue attending the private school. The special education director said that it was not possible because the IEP team had determined that the school district's offer of a public school program was appropriate. The father then asked about possible supports to help ease the student's return to the school district. The special education director agreed to have school district personnel who would be working with the student visit the private school in order to help ease the student's transition back to the public school. (P-94; NT 322 – 324, 606 – 609)

57. The special education teacher who would implement the student's May 10, 2023 IEP in the school district, along with another teacher, visited the student's program at the private school on June 12, 2023 to help facilitate the student's transition back to the public school. (P-94; NT 128 – 129; 249 – 253)

58. The private school is a licensed private school; it is not an approved private school. All of the students at the private school have a diagnosis of autism. The student has no interaction with nondisabled peers at the private school. (NT 95 – 97, 141 – 142, 605, 653, 500 – 501)

59. The program offered by the May 10, 2023 IEP is a lot less restrictive than the program offered by the private school. (P-63; NT 500-501, 169, 128, 142, 370 – 371)

60. The instructor who works with the student at the private school is not a certified special education teacher or a board-certified behavior analyst. (NT 136; 101-102)

61. The student does not receive vision support at the private school. (NT 248)

62. The student does not use the student's AAC device independently at the private school. The AAC device that the student uses at the private school is not properly configured; the display screen has too many icons. (NT 155, 190, 258; 351 – 355; P-84, P-86)

63. The student's instructor at the private school uses reinforcers excessively and in contravention of accepted principles of applied behavior analysis. (NT 461, 470)

64. Progress monitoring data collection practices used by the private school are of questionable validity. (NT 476 – 478)

65. The post-secondary transition plan in place at the private school lacks specific supports and does not have a plan relative to what the student wants to do after high school. The director of the private school told the school district's special education teacher during her visit to the private school on June 12, 2023 that there had been no discussion concerning post-secondary transition with the parents because the parents did not know what they wanted to do yet. (P-59; NT 139, 249 – 253)

66. The student has made minimal progress on many of the student's IEP goals at the private school. (P-59, P-71; NT 145 – 155, 253, 349 – 350, 476 – 478, 534)

67. The parents did not provide the school district with a 10-day notice that they were unilaterally withdrawing the student from the school district and seeking to place the student in a private school at public expense. Until the due process complaint in this case was received on August 14, 2023, the school district believed that the student would be

returning to attend school in the school district pursuant to the May 10, 2023 IEP. (S-29, S-32, S-33; NT 328 – 329, 610 – 616)

68. On July 27, 2023, the special education director sent the parents a letter stating that the district was ready, willing and able to provide FAPE to the student. The letter mentioned reimbursement because the father had asked in a telephone conversation if the student might continue to attend the private school. The parents had not asked for reimbursement. (S-32; NT 613-615)

69. The parents wanted the student to continue attending the private school because the parents were very happy with it. The parents had had problems communicating with school district staff and were not happy with the school district when the student had previously attended the school district during the [redacted] and [redacted] grade up to the 2021-2022 school year. (NT 289, 308, 311)

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(b)(6)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. In order to receive reimbursement of tuition for a unilateral private school placement, a parent must prove three elements: 1) that the school district has denied FAPE to the student or committed another substantive violation of IDEA; 2) that the parents' private school placement is appropriate; and 3) 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, 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).

3. Reimbursement of tuition for a unilateral placement may be reduced or denied if the parents fail to give the local education agency at least 10 business days' notice prior to the removal of the student that they are rejecting the public school placement, stating their concerns with the public school placement and that they are seeking to enroll the student in a private school at public expense. IDEA § 612(a)(10)(c)(iii)(bb); 34 C.F.R. § 300.148(d)(1)(ii).

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 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. ____, 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).

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 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; 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. 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 the student a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, *supra*; IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).

8. 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); TM v. Quakertown Comm. Sch. Dist., 21 F. Supp. 3d 792, 69 IDELR 276 (E.D. Pa. 2017); JL v Lower Merion Sch Dist, 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 WVa. 2008).

9. A school district must "...to the maximum extent appropriate (ensure that) children with disabilities... are educated with children who are nondisabled and that special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2); IDEA § 612(a)(5)(A); 22 Pa. Code § 14-195. The Third Circuit has stated that the least restrictive environment requirement sets forth a "strong congressional preference" for integrating children with disabilities in regular education classrooms. Oberti v. Board of Education, 995 F. 2d 1204, 19 IDELR 908 (3d Cir. 1993). The least restrictive environment requirement is a substantive requirement of IDEA. Oberti, *supra* at n.18.

10. IDEA does not concern itself with labels, rather, the IEP of a child with a disability must be tailored to the unique needs of the particular child. 34 C.F.R. § 300.106(a)(3)(i); see, Heather S v. State of Wisconsin, 125 F. 3d 1045, 26 IDELR 870 (7th Cir. 1997); Osage R-1 Sch Dist. v. Simms ex rel BS, 841 F. 3d 996, 56 IDELR 282 (8th Cir. 2011) A child's identified needs, and not the description of the disability or the category of program, determines the services that must be provided to the student. The Sch Dist. of Philadelphia v. Post, et al., 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Penna. 2017); see, Maine Sch Administrative Dist No. 56 v. Mrs. W. ex rel. KS, 47 IDELR 219 (D. Maine 2007); see also, Analysis of Comments to Proposed Federal Regulations, 71 Fed. Reg. 156 at 46586, 46588 (OSEP August 14, 2006; In re Student With a Disability, 52 IDELR 239 (SEA WV 2009). Individualization and a child's unique needs are the key concepts

underlying IDEA. Andrew F, supra; TR v. Sch. Dist. of Philadelphia, 4 F. 4th 279, 79 IDELR 33 (3d. Cir. 2021)

11. 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 Merion Sch Dist, 81 IDELR 251 (E.D. Penna 2022); LB by RB and MB v Radnor Township Sch Dist, 78 IDELR 186 (E.D. Penna 2021)

12. The parents have not proven that the school district's May 23, 2023 IEP failed to offer a free and appropriate public education to the student for the 2023 – 2024 school year, and, therefore, the parents are not entitled to an award of reimbursement for private school tuition for their unilateral placement.

DISCUSSION

1. Whether the parents have proven that the school district should reimburse them for tuition for a unilateral placement for the 2023 – 2024 school year?

The parents seek reimbursement for a unilateral placement of the student in a private school. The school district contends that the parents have not proven that reimbursement is appropriate. An analysis of the three prongs of the Burlington-Carter-TA standard follows:

a. Whether the parents have proven that the school district denied a free and appropriate public education to the student for the 2023– 2024 school year?

The parents contend that the school district denied a free and appropriate public education to the student. The parents allege specifically

that the goals of the IEP proposed by the school district were inappropriate; that the transition program offered by the school district was inappropriate; that supports for the student to return to the school district were not appropriate; and that the supplemental life skills program was not sufficiently restrictive.

The parents have not proven that the school district's offered IEP constitutes a denial of FAPE. It is significant that the parents' post-hearing brief does not even attempt to argue that the program offered by the school district was not reasonably calculated to confer meaningful educational benefits given the student's unique individual circumstances. Indeed, the evidence offered by the parents does not meet the legal standard, and, therefore, the parents have not proven a denial of FAPE.

At the heart of this dispute is the parents' desire that the school district provide an ideal education for the student that maximizes the student's potential. The student's father testified that the parents were happy with the program at the private school and were unhappy with the school district because of events that happened in the past, during [redacted] and [redacted] grade up to the 2021-2022 school year. The director of the private school that the student now attends testified that the student should be in the environment where the student can "best learn." The director of the private school also testified that the goals in the student's IEP should be the "most meaningful" for the student. Similarly, the parents' expert testified that the student can "best learn" in an intense ABA program like the one at the private school. The report of the expert witness stated that the private school program would provide the student with a "greater level of comprehensive programming" than is typically available in a life skills program. Clearly, the thrust of the evidence presented by the parents

is that they believe that the private school program is better for the student than the public school program.

It is understandable that parents would want the best possible education for their child. IDEA, however, does not require a school district to provide the best possible education for a child with a disability. Instead, IDEA requires that a child with a disability be provided with an IEP that is reasonably calculated to provide meaningful benefit given the individual circumstances of the student. In the instant case, a fair reading of the credible and persuasive evidence in the record reveals that the program proposed by the school district was responsive to the student's unique individual needs, as identified by a comprehensive evaluation conducted by the school district. The IEP proposed by the school district was reasonably calculated to confer meaningful educational benefit to the student in view of the student's unique individual circumstances, especially in this case, the student's need for a strong post-secondary transition plan.

The parents argue that the goals contained in the school district's proposed IEP are not appropriate. The persuasive and credible record evidence reveals, however, that the goals contained in the proposed IEP would appropriately address the student's unique individual needs, as identified by the comprehensive evaluation conducted by the school district. The parents have not proven that the goals contained in the proposed IEP constitute a denial of FAPE. Moreover, even assuming *arguendo* that one or more goals contained in the school district's IEP were not appropriate, inappropriate goals would constitute a procedural violation. The parents have not made any attempt to show that any goal would cause educational harm to the student or seriously impair the parents' participation rights. The parents' argument concerning the IEP goals is rejected.

The parents also argue that the life skills program offered by the school district was in itself a denial of FAPE because it was not an “autistic support” program. The parents’ argument misses the mark. The legal standard articulated by the Supreme Court requires an analysis of whether the IEP is reasonably calculated to confer meaningful educational benefit in view of the student’s unique circumstances. IDEA does not concern itself with labels or stereotypes assigned to various categories of educational programs. In this case, the IEP offered by the school district clearly meets the student’s identified needs and is appropriate for the student. The parents’ desire for an extremely segregated placement also contradicts the basic tenant of IDEA that a student with a disability should be educated in the least restrictive environment. The parents’ argument concerning the name or category assigned to the program or placement is rejected.

The parents’ brief abandons two of the issues that the parents had identified prior to the hearing and agreed at the outset of the hearing were the issues concerning the alleged denial of FAPE in this case: whether the IEP proposed by the school district included an appropriate post-secondary transition plan and whether the school district had provided adequate supports for the student’s return to the public school district. Because the parents had not addressed these arguments, they are deemed to be waived. The parents’ arguments are rejected.

Even assuming *arguendo* that the parents had not waived these arguments, the evidence does not support the parents’ contentions. The post-secondary transition program proposed by the school district is robust and well crafted to meet the student’s needs. Indeed the unique individual circumstances of this student, as identified by the comprehensive evaluation conducted by the school district, include the need for an educational

program with a strong vocational focus. The IEP offered by the school district includes a strong post-secondary transition plan; in contrast, the private school program did not. The parents cite no legal authority under IDEA concerning a requirement to provide supports for bringing a student back to the school district. However, in any event, the record evidence reveals that the school district did offer such supports. The special education director and the father had a telephone conversation after the May 10, 2023 IEP team meeting specifically concerning such supports. As a result of the father's request for such supports, the school district sent two teachers, including the special education teacher who would be implementing the school district's IEP, to the private school to observe the student in order better support and smooth bringing the student back to the public school. The parents' arguments are without merit and are rejected.

Also in the parents' brief, for the first time, the parents argue that the student was denied a free and appropriate public education because the school district predetermined the student's program. Predetermination was not one of the contentions that the parents raised prior to the hearing at the prehearing conference and was not one of the issues that was identified at the beginning of the hearing. Accordingly, the parents have waived the predetermination issue, and it is not appropriately before the hearing officer. See, 34 C.F.R. § 300.511(d). Even assuming *arguendo*, however, that predetermination is properly before the hearing officer, the record evidence clearly reflects that the evaluator who prepared the evaluation report for the school district's comprehensive evaluation of the student clearly was making a recommendation to the IEP team concerning placement and not determining placement as a single individual. The parents' argument has no merit.

As the testimony of the student's father clearly reveals, the basis of the parents' resistance to the school district program involves events that occurred when the student attended the school district for [redacted] and [redacted] grade up to the 2021-2022 school year. The parents are less focused on the program currently offered by the school district and more focused on grievances from the past. Indeed, much of the evidence in the voluminous record relates to a time period well before the relevant timeframe. The correct analysis is whether the current IEP proposed by the school district is reasonably calculated to confer meaningful educational benefit in view of the student's unique individual circumstances. The parents have not proven that the school district's proposed educational program constitutes a denial of FAPE.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's father, and the witnesses called on behalf of the parents. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: much of the testimony of the student's father was elicited through leading questions by the parents' lawyer. Although the technical court rules of evidence do not apply at administrative due process hearings, the rules of evidence can be helpful in weighing evidence, as was explained on the record to counsel. In addition, the student's father gave contradictory and misleading testimony concerning the reading and math goals in the school district's IEP. The witness who conducted a functional behavioral analysis of the student gave contradictory testimony with regard to whether or not the student had issues with elopement. The testimony of the director of the private school was very evasive and combative on cross-examination, including not knowing what had happened in a video she had just been shown, as well as not knowing whether the student had a post-secondary transition plan in the IEP

at the private school. The testimony and report of the parents' expert witness was not credible or persuasive and it is entitled to little weight. The original report by the expert recommends the private school over the school district program without the expert having knowledge of the school district program. The expert's conclusions were instead based upon stereotypes and assumptions about programs typically available in programs labeled as "life skills" in public school systems. Stereotypes and labels are not useful in special education and frequently lead to unfounded assumptions about individuals with disabilities. The credibility of the expert witness was also impaired by his demeanor, and a contradiction between his testimony and his report concerning whether teachers in special education classrooms are often working with students that have different goals in their IEPs and whether that fact affects the ability of a special education teacher to instruct the students in the class.

It is concluded that the parents have not proven that the May 10, 2023 IEP offered by the school district denied a free and appropriate public education to the student for the 2023 - 2024 school year. Accordingly, reimbursement for the parents' unilateral placement must be denied.

b. Whether the parents have proven that the private school at which they have unilaterally placed the student is appropriate?

The second prong of the Burlington - Carter analysis involves whether the parents have proven that their chosen private school is appropriate. It is not necessary to reach the second prong in this case because the parents have not proven the first prong. Assuming *arguendo* that the parents had proven the first prong, however, they have not proven that their private

school is appropriate. Although the bar is lower for parents to prove a private school appropriate than it would be for a public school district placing a student in a private school, parents must nonetheless show that the private school that they have selected for the unilateral placement will provide a program that is reasonably calculated to confer meaningful educational benefit in view of the student's unique circumstances.

In this case, the private school selected by the parents is not appropriate. The instructor who works with the student at the private school is not a certified special education teacher and is not a board-certified behavior analyst. The student's AAC device at the private school is not properly configured because it has too many icons on the screen. The student does not independently use the AAC device at the private school.

The unique individual circumstances of this student, as identified by the comprehensive evaluation conducted by the school district, include the need for an educational program with a transition plan including a strong vocational focus. The private school director told the special education teacher during her observation that the private school had not developed a post-secondary transition plan for the student because the parents were not sure what they wanted to do after the student finishes school. The private school program is not appropriate because it did not include a robust transition component with a vocational focus.

In addition, the student does not have interaction with any same age peers, let alone typically developing peers, at the private school. Although the least restrictive environment factor in itself may not necessarily render a private school inappropriate, in conjunction with the other factors in this case, the extremely restrictive nature of the private school placement is inappropriate.

More importantly, the student made only minimal progress on many of the student's IEP goals at the private school. The private school progress monitoring data collection practices are of dubious validity, but the evidence in the record shows that the student made only minimal progress on many of the student's IEP goals while at the private school.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's father and the witnesses called on behalf of the parents. See discussion in the previous section.

It is concluded that if it were necessary to reach the second prong of the Burlington – Carter analysis, the parents have not proven that the private school that they selected for unilateral placement was appropriate.

c. Whether the parents have proven that the equities favor reimbursement?

The third prong of the Burlington – Carter analysis involves a determination as to whether the conduct of the parties and any other equitable factors might weigh in favor or against reimbursement. It is not necessary to reach the third prong in this case because the parents have not proven the first prong. Even assuming *arguendo* that the parents had proven the first and second prongs, however, they have not established that the equities favor reimbursement.

The record evidence demonstrates that the parents did not have an open mind concerning a possible public school placement in the school district for the student. As the testimony of the student's father made clear, the parents' reaction to the student's previous time in the school district for [redacted] and [redacted] grades up to the 2021-2022 school year strongly

colored their perception of the May 10, 2023 IEP offered by the school district. The parents assumed that what they had objected to at the school district years ago rendered any return to the district inappropriate. The parents were happy with the private school placement, and the parents clearly did not give the school district program a fair review because of past grievances.

In addition, the parents failed to provide the mandatory 10-day notice to the school district that they were rejecting the placement offered by the school district and instead unilaterally placing the student in a private school and seeking reimbursement therefor. Indeed, until the due process complaint was filed, the parents had not provided any notice of any kind to the school district that they were seeking reimbursement for a unilateral placement for the student. Up until the due process complaint was received, school officials believed that the student would be attending school in the district. The father indicated that the student would be attending school in the district when he got the special education director in a telephone call to agree to send the student's teacher and other personnel to the private school to observe the student's program and help ease the transition to the public school program. The student's teacher and another teacher did travel to the private school to observe the student after this telephone request by the father. Even after the parents convinced the special education director to send personnel to observe the private school to help arrange a smooth change from the private school to the public school, the parents didn't tell the school district that the student would not be attending school in the district after all. Parents provide no justification for failing to give notice even after indicating that the student would be attending school in the district and asking for, and receiving, help with the transition. Their failure to provide notice under these circumstances is extremely unreasonable.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's father and other witnesses called on behalf of the parents. See discussion regarding credibility in previous sections of this decision.

It is concluded that if it were necessary to reach the third prong of the Burlington – Carter analysis, the parents have not demonstrated that the equities favor reimbursement.

The requested relief of reimbursement for the unilateral private placement must be denied.

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: February 9, 2024

James Gerl

James Gerl, CHO
Hearing Officer