

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: 22501/19-20AS

Child's Name: I.P.

Date of Birth: [redacted]

Parents:
[redacted]

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Hearing Officer: James Gerl, CHO **Date of Decision:** October 27, 2019

DECISION

DUE PROCESS HEARING

22501/19-20AS

BACKGROUND

The parents filed a due process complaint seeking compensatory education for alleged denial of FAPE for the 2017 – 2018 school year and the 2018 – 2019 school year, as well as an alleged denial of FAPE for failure to provide adequate extended school year services for the summers of 2018 and 2019. In addition, the parents seek reimbursement for tuition for their unilateral placement of the student in a private school for the 2019 – 2020 school year. Finally, the parents seek reimbursement of their expert witness fees under Section 504. I find that the school district did not deny a free and appropriate public education to the student for the 2017 – 2018, 2018 – 2019 or 2018 – 2020 school years and that the school district did not offer inadequate extended school year services for the summers of 2018 and 2019. I find that the parents are not entitled to reimbursement for their unilateral placement of the student in a private school or for their expert witness fees.

PROCEDURAL HISTORY

At the due process hearing in this matter, the parties compiled a large administrative record. Over the course of one and a half hearing days, six witnesses provided testimony. Parents' Exhibits 3, 7, 9, 13 through 16, 20, 22, 28, 30 through 34, 37 through 40, 45 and 46 were admitted into evidence. School district Exhibits 1 through 64 were admitted into evidence.

At the close of the hearing, counsel for each party presented oral closing arguments. All arguments submitted by the parties have been considered. To the extent that the argument 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 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 and at the outset of the hearing, the hearing officer reconciled the two lists. The following issues were presented in this case:

1. Whether the parents have proven that the school district denied a free and appropriate public education to the student for the 2017 – 2018 school year?

2. Whether the parents have proven that the school district denied a free and appropriate public education to the student for the 2018 – 2019 school year?

3. Whether the parents have proven that they are entitled to reimbursement for unilateral placement of the student in a private school for the student for the 2019 – 2020 school year?

4. Whether the parents have proven that the school district's extended school year programs for the student denied a free appropriate public education to the student?

5. Whether the parents have proven that they are entitled to reimbursement for their expert witness fees pursuant to Section 504?

FINDINGS OF FACT

Based upon the parties' stipulations of fact at the due process hearing, the hearing officer makes the following findings of fact:

1. The student's birthdate is [redacted], and the student is [early teenaged].
2. The student resides within the geographical area served by the school district.
3. The student has attended school within the district since the 2011 – 2012 school year.
4. The student was originally identified as eligible for special education services pursuant to an initial evaluation report dated May 30, 2014 under the categories of specific learning disability and speech language impairment.
5. The district conducted a reevaluation of the student and issued a reevaluation report on May 30, 2017.
6. The May 30, 2017 reevaluation report identified the student as being in continued need of special education supports and services and under the eligibility categories of specific learning disorder and speech language impairment.
7. The student began the 2017 – 2018 school year (fifth grade) at an elementary in the school district with an IEP dated May 24, 2017.

8. The May 24, 2017 IEP was revised on October 17, 2017 and on February 20, 2018.
9. A new annual IEP was developed for the student on April 3, 2018.
10. The student began the 2018 – 2019 school year (sixth grade) at a middle school within the district on an IEP dated April 3, 2018, as revised on June 4, 2018.
11. The April 3, 2018 IEP was revised on June 4, 2018, October 24, 2018, December 12, 2018, February 1, 2019 and February 27, 2019.
12. The school district conducted a functional behavioral assessment of the student and issued a report on November 28, 2018.
13. A positive behavior support plan was developed for the student on approximately December 3, 2018.
14. The revision to the IEP on December 12, 2018, incorporated the positive behavior support plan into programming for the student.
15. The district conducted a reevaluation of the student and issued a reevaluation report on March 8, 2019.
16. Pursuant to the March 8, 2019 reevaluation report, the student was determined to be eligible for special education services under the disability categories of specific learning disability and emotional disturbance.
17. The March 8, 2019 reevaluation report found that the student was no longer in need of speech language services.

18. The appropriateness of the March 8, 2019 reevaluation report was the subject of an Office of Dispute Resolution hearing, No. 22018/1819, before another special education hearing officer, who ruled in a decision that the March 8, 2019 reevaluation report was appropriate.

19. A meeting was held on April 1, 2019 to review the reevaluation report and develop an IEP for the student.

20. As a result of the April 1, 2019 meeting, the school district offered the programming as set forth in the April 1, 2019 IEP.

21. The April 1, 2019 IEP was rejected by the parents in a Notice of Recommended Educational Placement dated April 11, 2019.

22. The parents pursued an independent neuropsychological evaluation of the student by their expert witness.

23. The report of the parents' expert witness was shared with the district through counsel on June 21, 2019.

24. By letter dated July 8, 2019, the parents, through counsel, advised the district of their intent to withdraw the student from the school district and enroll the student in a private school at district expense for the 2019 – 2020 school year.

25. By letter dated July 15, 2019, the district advised the parents that it was not willing to pay for placement at the private school; that the district believed that it could appropriately program for the student; and that the IEP team would review the

independent educational evaluation and schedule an IEP team meeting at the earliest mutually convenient time prior to the start of the 2019 – 2020 school year.

26. The parents withdrew the student from the school district on July 24, 2019.

27. An IEP team meeting was held on August 13, 2019 resulting in the school district revising the April 1, 2019 IEP.

28. The district issued a Notice of Recommended Educational Placement on August 18, 2019, which was rejected by the parents on August 22, 2019.

29. At all relevant times, the parents were aware of their procedural safeguards.

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

30. The student is a wonderful kid with a heart of gold. The student is quiet and shy and is a true peacemaker. (NT 126 – 127)

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___”).

31. For the 2017 – 2018 school year, the student’s IEP contained goals and specially designed instruction based upon the student’s needs, as identified in the district’s reevaluation report. The student’s educational program included direct reading instruction for 60 minutes per day, math instruction for 60 minutes per day, direct writing instruction for 45 minutes three times a week, speech language therapy for 30 minutes per day, counseling two times per month for 30 minutes and an occupational therapy consultation one time per month. The student was in the general education classroom approximately 61% of the time (S-4; S-5)

32. The student and the student’s father reported to the student’s treating outside therapist that the student was doing relatively well in school as of September 7, 2017. On September 20, 2017 the therapist concluded that the student had acclimated well to school. (P-14, pp. 162, 165)

33. An IEP team meeting in October of 2017 was held to discuss the student’s transition into fifth grade. The parents made the district aware of the student’s stress at home at this meeting. (S-12)

34. The school district reduced the student’s homework load during the first half of the 2017-2018 school year after being informed by the parents that the student was experiencing stress as a result of homework assignments. (NT 42-43)

35. The student’s private therapist noted on November 9, 2017 that the student was making some progress socializing at school. (P-14, p156)

36. The student's IEP was updated on February 20, 2018. The IEP states that the student made progress on the student's reading goal, the student's math goal and the student's speech language goals. The IEP provides for extended school year services for the student, including a summer program featuring 75 minutes per day of reading, 37 minutes per day of math, and 30 minutes per week of speech language therapy. (S-12)

37. The student's private therapist noted on March 1, 2018 that the student felt that the student was making better connections at school. (P-14, p175)

38. The IEP team met in March of 2018. The IEP team reported the student's progress in reading, written expression and math and focus assessment. (S-18)

39. The student's IEP team created a new annual IEP for the student on April 3, 2018. The IEP goals were updated to reflect the student's progress in the prior year. The IEP included specially designed instruction to address the student's needs in the areas of self-esteem, confidence, work pace and work completion. The IEP added the related service of counseling. The IEP sets forth extended school year services goals for reading and math. (S-18)

40. The student's IEP team met on April 3, 2018 to discuss the parents' concerns about the student's emotional state and symptoms of depression. Based upon the parents' request and the medical needs of the student, all reading and writing demands on the student were removed through the end of the school year. The

student's extended school year program was changed during this IEP to provide one-on-one intensive instruction in reading and math. (S-20)

41. The student has experienced mild to moderate anxiety intermittently since the student was a toddler. Symptoms increased as a result of chronic stress in the student's home due to fighting between the student's siblings and the student witnessing the parents managing the conflict between the siblings. (NT 128-129; P-14, p. 162)

42. There is a genetic component to the student's depression; the student's family history includes a history of depression on the [redacted] side. The student's depression was a factor in the student's problems at school. (S-44, p. 2; P-14, p. 10; NT 147 - 150; NT 176 - 177)

43. The student's therapist collaborated with the school district's counselor on the student's school program. (P-14, pp. 114, 120; NT Vol. II, 11 – 14, 19 - 22)

44. The student's therapist reported that the student appeared to be making some progress socializing in school as of November 9, 2017. (P-14, p. 156)

45. From March to May of 2018, the student presented with a more upbeat and cheerful attitude and a lightened demeanor at school. The student's parents sent an e-mail to the student's teacher and school counselor thanking them for their good work and continued support of the student on May 8, 2018. (S-18, p. 13; P-32, pp. 8 – 9)

46. The student's educational program for the 2018 – 2019 school year, which was the sixth grade school year, included a math transition class with 15 students and three adults - one regular education teacher, one special education teacher and an additional aide. The student's program also included 47 minutes per day of reading support, with the student and one other student; 47 minutes of writing instruction in a small group, with the student and two other students. For science and social studies, the student was in a general education setting, but the curriculum material was modified and adapted for the student. The student was to receive small group testing and work broken down into chunks. The student also received 47 minutes per day of learning center, where the student and four other students would work with the case manager and receive extended time, repeated practice, help with study skills and other individualized help. The student was in the general education classroom approximately 61% of the time. (NT 184 – 190; S-31)

47. In September and October of 2018, the student's outside therapist noted that the student was doing relatively well in school "with no major issues reported" and that the student was continuing in October with the student's improved mood from September. (P-14, pp. 68, 71)

48. By the end of October, the student was exhibiting school avoidance and the student was crying. The student's IEP team was convened on October 24, 2018 to address these issues. At this meeting, the student's reading instruction was changed to

one-on-one direct instruction with a reading specialist every day for 47 minutes using a research based sequential reading program. Also changed at this IEP team meeting was the addition of weekly counseling sessions with the school psychologist. In addition, a Permission to Evaluate form was issued to conduct a functional behavioral analysis. (NT 193 – 194; NT 288 – 290; S-31; S-26; S-28; NT Vol. II, 15 – 17)

49. Upon completion of the functional behavioral analysis, the district prepared a positive behavior support plan for the student. The team met on December 12, 2018 to discuss the functional behavioral analysis and the positive behavior support plan. At this meeting, the district offered of a self-contained special education math class. The team added additional emotional support and the implementation of morning check-ins with the student's case manager. (S-29; S-30; S-31; S-33; NT 198 – 199; NT 253; NT Vol. II, 15 – 17)

50. The parents declined the district's proposal to move the student to a self-contained classroom for math. (S-32; NT Vol II p 17)

51. As of February 7, 2019, the district's school counselor who worked with the student continued to collaborate with the student's outside private therapist in developing the student's program. (P-14, p. 13; NT Vol. II, 11 – 14, 19 - 22)

52. A meeting of the IEP team was held on February 1, 2019. At the meeting, the student's clear improvement in class attendance and the fact that the student had stopped crying in the class was noted. The counselor noted that the student was coming

to her less frequently after the adoption of the morning check-in system. (S-37; NT 45 – 50; NT 199 – 200; NT 202; NT Vol. II, 24)

53. In working with the student's outside therapist, the student's IEP team developed a protocol for the student to use when the student was feeling sad. The protocol involved allowing the student to go to a designated safe space, where the student would meet with a teacher, the case manager or the counselor. There, the student would choose a preferred activity and the student could talk about the feelings the student was experiencing with the adult. After 10 minutes, the student was allowed to return to class. If the student felt sad again, the student could return to the safe place. A provision for contacting both parents was included if the student returned a second time. The February 2019 IEP also added specially designed instructions, including a lunch group for the student and homework accommodations to reduce the student's stress. (S-37, p. 51; NT Vol. II, 18 – 22)

54. The February 2019 IEP provided for an extended school year services program which included intensive reading and math instruction on a one-on-one basis. (S-37, p. 54; NT 201)

55. The school district reevaluated the student on March 8, 2019. The reevaluation report was found to be appropriate by another Pennsylvania special education hearing officer. An IEP for the student was developed on April 1, 2019

based upon the findings and recommendations of the reevaluation report. (S-40; S-41; S-43)

56. The student made good progress in reading under the April 1, 2019 IEP. From March of 2018, where the student was at a 3rd grade reading level, the student advanced to a 4.5 reading level and tested as high as fifth and sixth grade level in reading. (NT 202 - 203; NT 291 - 298; NT 298 – 299; S-41, p. 17; S-46, p. 14; S-54, p. 17; S-55, pp. 46 – 51)

57. The student made substantial progress on many of the student’s other goals during the 2018 – 2019 school year. The student made progress on the student’s written expression goal, the student’s math goal, the student’s behavior goal, and the student’s spelling goal. (NT 196 – 199; NT 201 – 202; NT 531 – 537; S-41, p. 20 - 183; S-55, pp. 52 – 63)

58. The student’s absences started to decrease substantially after the school district implemented the morning check-in program, the lunch bunch, and the weekly counseling sessions with the school psychologist. (NT 202; NT Vol. II, 18 – 24)

59. The student showed substantial growth with regard to behaviors during the course of the 2018 – 2019 school year. (NT Vol. II, 24 – 25)

60. The session notes for the student’s outside private therapist for May 23, 2019 state in part, “Client appears to be in ‘limbo’ regarding summer school ESY because of legal issues related to accepting district recommendations. The family

doesn't have the money to send the client to a private program. Note: Therapist professionally frustrated bc parents have refused efforts on therapist's part to refer client/family to family based services, which appears to be clinically indicated now more than ever." (P-45, p. 24; NT 121 - 124)

61. The parents declined extended school year services for the student for the summer of 2019. (NT 201; 119 – 120; S-38: P-45, p. 24)

62. The IEP developed for the student's program for the 2019 – 2020 school year was revised on August 13, 2019 to include revisions based upon the report of an independent educational evaluation prepared by the parents' expert witness. The school district added additional IEP goals concerning organization and planning and a number sense goal. The IEP also added additional specially designed instruction to reflect the recommendations of the parents' expert witness. The IEP included remedial pullout instruction three times per week and an additional consultation with a board-certified behavior analyst. (S- 45; S-55)

63. The IEPs developed for the student for the 2017 – 2018, 2018 – 2019 and 2019 – 2020 school years were reasonably calculated to permit the student to make progress appropriate in light of the student's individual circumstances. (record evidence as a whole)

64. The extended school year services offered by the student's IEPs for the summers of 2017, 2018 and 2019 were appropriate. (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 appropriate public education (hereinafter sometimes referred to as “FAPE”) to a student with a disability. There must be: (1) a determination as to whether the school district has complied with the procedural safeguards as set forth in IDEA, and (2) 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 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. A school district is required “...to the maximum extent appropriate (ensure that) children with disabilities... are educated with children who are non-disabled 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 the education in the regular education classroom with the use of supplementary aids and services cannot be achieved satisfactorily.” Individuals with Disabilities Education Act (hereinafter sometimes referred to as “IDEA”) § 612(a)(5)(A); 34 C.F.R. § 300.114(a)(2); 22 Pa. Code § 14.195.

5. The Third Circuit has ruled that the least restrictive environment provision of IDEA sets forth a “strong congressional preference” for integrating children with disabilities in the regular education classroom, and that the least restrictive environment requirement is a core substantive requirement of IDEA. Oberti v. Board of Education, 995 F.2d 1204, 19 IDELR 908, n.18 (3d Cir. 1993).

6. IDEA does not require a school district to guarantee a particular result or to close the gap between children with disabilities and their nondisabled peers. JN and JN ex rel. JN v. Southwest School District, 56 IDELR 102 (M.D. Penna. 2015); see, Klein Independent School District v. Hovem, 690 F.3d 390, 59 IDELR 121 (5th Cir. 2012); HC and JC ex rel. MC v. Katonah – Lewisboro Union Free School District, 59 IDELR 108 (SDNY 2012); Kelsey v. District of Columbia, 111 LRP 14802 (D. DC 2015); District of Columbia Public Schools, 111 LRP 77405 (SEA DC 2011). The Third Circuit has specifically ruled that IDEA does not require that all (or even most) disabled children advance at a grade-level pace. KD by Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

7. A functional behavioral assessment or positive behavior support plan is not required by IDEA where a student's IEP otherwise appropriately addresses behaviors that affect learning. JL by KL & KL v Lower Merion Sch Dist, 68 IDELR 12 (ED Penna 2016); IDEA Section 614(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).

8. A school district is responsible for meeting the educational needs of a student with a disability but is not required to treat the medical, psychological, medication or family needs of a student. EK by AG v. Warwick School District, 62 IDELR 289 (ED Penna. 2014); see, District of Columbia Public Schools, 111 LRP 60125 (SEA DC 2011).

9. In order to receive reimbursement or tuition and related expenses resulting from a unilateral private school placement, parents must prove three elements: 1) that the school district denied FAPE to the student or otherwise violated 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, 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).

10. A school district must provide extended school year services to a child with a disability only when necessary to provide a free appropriate public education because the benefits the disabled child gains during the regular school year will be significantly jeopardized if he or she is not provided with an extended school year program. 34 C.F.R. § 300.106; LG and EG ex rel. EG v. Wissahickon School District, 55 IDELR 280 @ n.3 (ED Penna. 2011); see, MM v. School District of Greenville County, 37 IDELR 183 (4th Cir. 2002); In re Student with a Disability, 108 LRP 25080 (SEA WV 2007).

11. The IEPs developed by the school district during the 2017 – 2018 school year were reasonably calculated to provide educational benefit appropriate given the

student's individual circumstances. The school district provided free appropriate public education to the student during the 2017 – 2018 school year.

12. The IEPs developed by the school district for the 2018 – 2019 school year were reasonably calculated to provide the student with educational benefit appropriate given the student's individual circumstances. The school district provided free appropriate public education to the student during the 2017 – 2018 school year.

13. The IEPs developed by the school district for the 2019 – 2020 school year were reasonably calculated to provide educational benefit to the student that were appropriate given the student's individual circumstances. The school district offered a free appropriate public education to the student for the 2019 – 2020 school year. The parents have not established that they are entitled to reimbursement for their unilateral placement of the student in a private school.

14. The extended school year programs offered by the school district to the student for the 2017, 2018 and 2019 summers were appropriate and provided a free appropriate public education because they were reasonably calculated to address issues pertaining to significant regression and recoupment.

15. The parents have not prevailed under IDEA or Section 504 and are not entitled to reimbursement for their expert fees under Section 504.

DISCUSSION

1. Whether the parents have proven that the school district denied the student a free and appropriate public education for the student for the 2017 – 2018 school year?

The gravamen of the parents' complaint concerning alleged free appropriate public education denial across all three school years in question involves the parents' contention that the student needed to be in separate segregated special education classrooms only with students with similar disabilities. Based upon the facts of this case, however, the parents' argument runs afoul of the least restrictive environment mandate of IDEA.

The testimony of the father and the report and testimony of the parents' expert witness focuses upon the fact that the student is in general education classes at the school district. The parents have failed to prove, however, that the student needed to be in segregated special education classes in order to receive educational benefit. Indeed, the school district was obligated to educate the student with students who do not have disabilities to the maximum extent appropriate. A special education student should be in general education classes, with appropriate supplementary aids and

services, unless such a placement cannot result in the successful education of the student. In the instant case, it is clear that the student was making progress and receiving an appropriate education in the classes the student attended at the school district which were provided in the least restrictive environment as required by law. To require full-time separate special education classes for this student would violate the least restrictive environment requirements of IDEA. The parents' argument that the student required a more restrictive placement is rejected.

Another recurring element of the parents' complaint about the school district involves the effect that the student's depression was having upon the student's education. The student's depression had a genetic component with a [redacted] family history of depression, and the student's depression was linked by the student's therapist to a chronic conflict at home among the student's siblings. In addition, the student's depression was complicated by the fact that the parents refused the recommendation of their private therapist that they undergo family therapy. The school district was not responsible for treating medical or psychological issues of the student. Nonetheless, the record reflects that the school district took appropriate actions and made changes when the student suffered stress or anxiety that affected the student's school performance. The student's mental health issue was a part of this student's unique individual circumstances. Given this student's individual circumstances and the district's efforts, the student's IEPs were appropriate.

A third overarching argument that extends through the parents' FAPE arguments for all three school years involves citations in the closing argument of parents' counsel to areas where the student had fallen short of the performance by the student's nondisabled peers. Multiple references in the record to whether or not the student was performing on grade level, or for example whether or not a fifth grader should be able to spell certain words, misses the point. IDEA does not require that students with a disability be able to perform on grade level, and IDEA does not guarantee any particular result. The parents' argument is rejected.

A fourth overarching argument in closing argument by the parents is that the school district is trying to "outsource" its responsibilities under IDEA to the student's private outside therapist. It is true that the district counselor and other school staff collaborated with the student's outside therapist, but that is clearly not improper. Given this student's unique circumstances, including the student's depression, the district worked appropriately with the therapist to make numerous changes and tweaks to the student's IEPs to provide the student with an opportunity to make progress that was appropriate for this student. Many of these collaborative efforts were successful for the student. As a result, the student who was in a general education setting along with numerous supports and accommodations for a majority of the school day, made significant progress and advanced from grade to grade. The parents' argument is rejected.

No procedural issues are asserted concerning the 2017 – 2018 school year; rather the parents attack the substantive validity of the student’s IEPs. The student’s IEP provided for direct reading instruction for 60 minutes per day; direct math instruction for 60 minutes per day; and direct writing instruction for 45 minutes three times per week. The IEP also included the related services of speech language therapy for 30 minutes per day, counseling two times per month for 30 minutes and occupational therapy one time per month. At the time it was written, the student’s fifth grade IEP was clearly consistent with the results of the reevaluation report which was conducted before it and the IEP was reasonably calculated to allow the student to make progress appropriate in light of the student’s individual circumstances.

As issues arose during the school year, the student’s IEP team met a number of times and made appropriate adjustments. The team met and made changes to the IEP on October 17, 2017, on February 20, 2018, and in March and April, 2018. As the student’s IEP was amended at the various meetings, the student’s progress on the student’s goals was noted therein.

Although the appropriateness of an IEP should be judged at the time it is written and not after the fact, the record nonetheless shows that the student clearly made progress on the student’s IEP goals during the 2017 – 2018 school year that was appropriate in view of the student’s circumstances.

The testimony of the witnesses employed by the school district was more credible and persuasive than the testimony of the father and the parents' 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 is entitled to little weight because the expert did not speak with any of the student's teachers or other school staff concerning the student's educational program at the school district. Instead, the parents' expert assumed that the student was in large general education classes in the student's program at the school district. Instead, the record reflects that the student's curriculum material in the general education classes was modified to meet the student's needs and the student also received specialized instruction, including from a special education teacher and in one on one or small group settings in various subjects. The credibility and persuasiveness of the student's father's testimony is impaired by a contradictory statement that he made in two e-mails that he sent to the student's special education teacher and counselor on May 8, 2018 thanking them for their support of the student and the good job that they were doing with the student. This documentary evidence contradicts the father's testimony that the district staff was constantly ignoring his pleas that the student's situation was extreme.

In addition, the weight to be accorded to the father's testimony is impaired by the fact that he was very evasive on cross-examination. Moreover, the testimony of the father and the parents' expert witness includes responses to a number of leading

questions of the parent, especially on direct examination, and of the expert, especially on redirect examination. Although the rules of evidence do not apply with regard to admissibility in these administrative proceedings, they may be helpful in weighing testimony.

The parents' argument that the district should have conducted a functional behavioral assessment of the student and developed a behavior plan for the student during the 2017-2018 school year is rejected. The parents' closing argument cites no authority to support this argument. IDEA does not require an FBA for every student with behavior issues. The district's multiple tweaks to the student's IEPs appropriately addressed the student's problem behaviors.

In closing argument, counsel for the parents cites a number of cases which stand for the proposition that no student is ineducable. These cases are clearly distinguishable because the district does not make any argument in this case that it cannot educate the student. Instead, the district claims, and the evidence in the record supports, that the student did make progress that was appropriate in view of the student's individual circumstances.

It is concluded that the parents have not proven that the student was denied a free and appropriate public education during the 2017 – 2018 school year.

2. Whether the parents have proven that the school district denied a free and appropriate public education to the student during the 2018 – 2019 school year?

The portions of the discussion of the previous issue concerning overarching issues that affect all three school years; including least restrictive environment considerations; grade level comparisons; the involvement of the student's home problems with siblings and resulting mental health issues; and alleged outsourcing to the student's private therapist; are incorporated by reference herein.

The student's 2018 – 2019 school year involved a transition to middle school and sixth grade. Again, no procedural issues are asserted; rather the parents attack the substantive validity of the student's IEPs. The student's IEP provided that the student would receive a modified curriculum in general education classes, as well as a math transition class with 15 students and three adults, a regular education teacher, a special education teacher and an aide. The student also received 47 minutes of learning center work for organization or completion and study skills. The student and [the] father told their private outside therapist that the student started the year doing relatively well in school with no major issues.

An IEP team meeting was conducted on October 24, 2018 to discuss the student's avoidance and crying. The IEP team made changes to the student's program,

including changing reading instruction to one-to-one direct instruction with a reading specialist every day for 47 minutes. The reading specialist used a research based sequential reading program. Also, weekly counseling sessions with the school psychologist were added. Also at that meeting, it was determined that a functional behavioral analysis for the student would be school conducted.

Following the functional behavioral analysis, a positive behavior support plan was created and the IEP team met on December 12, 2018 to discuss the FBA and PBSP. At that meeting, the school district offered to provide the student with a self-contained special education math class. This offer was declined by the parents. The IEP team also included additional emotional support with the implementation of morning check-ins with the student's case manager.

The student's case manager and the school counsellor continued to collaborate with the student's outside therapist concerning dealing with the student's depression and the student's behaviors. Many of the changes resulting from this collaboration benefitted the student's school experience and reduced [the student's] level of stress and anxiety at school.

Another IEP team meeting was held on February 1, 2019. At that time, the IEP team noted the student's improvement in class attendance and that the student had stopped crying in class. Also, as a result of the check-in system, the counselor noted

that the student was coming to see the counsellor less frequently. A protocol was established in collaboration with the outside therapist which provided the student with a safe place when feeling sad. Also, specially designed instruction was added to include a lunch group and homework accommodation to reduce the student's stress.

A reevaluation report was conducted on March 8, 2019. The reevaluation report was determined to be appropriate in a decision by another Pennsylvania special education hearing officer following a previous due process hearing. An IEP was developed on April 1, 2019 based upon the recommendations from the reevaluation report. The student made excellent progress in reading under the sixth grade IEPs. The student also made progress on the student's goals for written expression and behavior.

With regard to this issue, the testimony of the school district witnesses was more persuasive and credible than the testimony of the parent and the parents' witnesses for the reasons previously stated herein.

It is concluded that the IEPs developed by the school district for the student's sixth grade year for the 2018 – 2019 school year were appropriate because they were reasonably calculated to enable the student to make progress appropriate in view of the student's individual circumstances. The parents have not proven that the school district denied the student FAPE with respect to the 2018 – 2019 school year.

3. Whether the parents have proven that they are entitled to tuition reimbursement and related expenses for the parents' unilateral placement of the student in a private school for the 2019 – 2020 school year?

The portions of the discussion of the previous issues concerning recurrent arguments that affect all three school years; including least restrictive environment considerations, grade level comparisons, the involvement of the student's home problems with siblings and resulting mental health issues, and alleged outsourcing to the student's private therapist, are incorporated by reference herein.

Applying the three-pronged analysis for cases involving reimbursement for a unilateral placement established by the Supreme Court in the Burlington/Carter/TA decisions, the first prong of the analysis is whether the school district denied a free and appropriate public education to the student or otherwise violated IDEA. Again, no procedural issues are asserted; rather the parents attack the substantive validity of the student's IEPs. The program offered by the school district for the 2019 – 2020 school year is reflected in an IEP which was developed on April 1, 2019. The IEP was revised when the district received an independent educational evaluation conducted by the parents' expert witness. The parents provided the report of the independent educational evaluation to the school district on the last day of school, June 21, 2019. The IEP was revised to include two additional goals for organization and planning and

a number sense goal. Changes were also made to specially designed instruction, and pull-out remedial instruction and consultation with a behavior analyst, in order to reflect the recommendations made by the parents' expert.

The parents' expert witness did not disagree with any of the specific contents of the IEP offered to the student by the school district for the 2019 – 2020 school year, with the exception that the expert felt that the IEP should be implemented in a private school with separate special education classrooms. A separate special education setting for this student would not be appropriate and would clearly violate the least restrictive requirement mandate of IDEA. The argument is rejected.

It is concluded that the IEP developed by the school district for the student's seventh grade year for the 2019 – 2020 school year were appropriate and reasonably calculated to enable the student to make progress appropriate in view of the student's unique individual circumstances. The parents have not proven a denial of FAPE.

Assuming *arguendo* that the parents had proven the first prong of the unilateral placement analysis, under the second prong of the unilateral placement analysis, the parents have proven that the private school selected is appropriate for the student. Although it is true as the district points out that the literature from the school does not state that the school is designed to educate students with mental health issues or depression and the testimony of the director of the school provided very few details

about the student's actual program, the record reveals that the student's private outside therapist investigated the website of the school and determined that the school was appropriate for the student. The conclusion of the student's outside therapist in this regard is credible and persuasive.

Assuming *arguendo* that the parents had proven the first prong of the unilateral placement analysis, however, the parents have not met their burden under the third prong of proving that the equities favor reimbursement in this case. In particular, it is very concerning that the parents disregarded the recommendation of their private outside therapist to receive family-based therapy. The therapist's notes indicate that the therapist openly expressed professional frustration over the fact that the parents would not participate in such therapy with the student and the student's siblings given that the outside therapist had found that such therapy was clearly indicated. Because the parents failed to do their part in treating the student's depression, it would be extremely unfair to require that the school district pay for a private school education because of the effects upon the student's education resulting from the student's depression.

In addition, the notes of the private therapist indicate that the parents declined to have the student attend extended school year services because of litigation strategy concerns. This is not acceptable. Parents who deprive a student with a disability of

needed services to benefit their litigation posture are in no position to claim that the equities favor them. The equities in this matter favor not reimbursing the parents.

With regard to the unilateral placement issue, the testimony of the school district witnesses was more persuasive and credible than the testimony of the father and the parents' witnesses for the reasons previously stated herein.

The parents have not shown that they are entitled to tuition reimbursement.

4. Whether the parents have proven that the school district's extended school year programs for the student denied a free appropriate public education to the student?

The parents raise an issue concerning extended school year services, but counsel for the parties stipulated prior to the hearing that the parents' challenges to extended school year services in this case did not involve any dispute with regard to current services and, therefore, that an expedited hearing was not needed with regard to the extended school year services in this case.

The parents contend that the school district's extended school year programs for 2018 and 2019 were inadequate. In their closing argument, the parents point to the fact that the student was not reading on grade level and allege that previous extended school year services were not sufficient. The parents do not argue that the extended school

year services were not reasonably calculated to prevent any significant problems with regression and recoupment, which is the function of extended school year services under IDEA. It is apparent from the record that the extended school year services portions of the student's IEPs were appropriate. The parents' contentions regarding extended school year services are rejected.

The discussion in the previous sections concerning the fact that there is no requirement that a student with a disability be academically on grade level, as well as the other general analysis in the preceding sections is incorporated by reference herein.

Moreover, the notes of the student's private therapist indicate that the parents declined to have the student attend extended school year services during the summer of 2019 because of litigation strategy concerns. This statement of the private therapist directly contradicts the testimony of the student's father that extended school year services were declined because they were inadequate. It is clear that the parents rejected extended school year services for the student because they feared that accepting the summer program would somehow hurt their legal case. The father's testimony in this regard is not credible or persuasive and is entitled to no weight. With regard to this issue, the testimony of the school district witnesses was more persuasive and credible than the testimony of the father and the parents' witnesses for the reasons previously stated herein.

The parents have not proven that the district failed to provide adequate and appropriate extended school year services programs for the student.

5. Whether the parents have proven that they are entitled to reimbursement for the parents' expert witness fees pursuant to Section 504?

The parents raised this issue in their bulleted list of issues filed prior to the hearing, but counsel for the parents did not present any argument concerning this issue or cite any legal authority for the relief requested in the oral closing argument during the hearing. Accordingly, the parents have waived this issue.

Assuming *arguendo* that the issue is properly before the hearing officer, however, the parents have not proven sufficient basis for being awarded expert witness fees. Indeed, the parents have not prevailed on any issue in this case, and there has been no showing of discrimination in violation of Section 504. Because of the foregoing, it is not necessary to reach the issue raised by the closing argument of the school district concerning whether an IDEA hearing officer has jurisdiction under Section 504 to award attorneys' fees.

The parents have not proven that the parents are entitled to expert fees pursuant to Section 504.

ORDER

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

IT IS SO ORDERED.

ENTERED: October 27, 2019

James Gerl

James Gerl, CHO
Hearing Officer