

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. 29422-23-24

Child's Name:

J.P.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

James Gerl, CHO

Date of Decision:

August 21, 2024

BACKGROUND

The parents filed a due process complaint alleging a denial of FAPE and seeking both compensatory education and reimbursement for a unilateral placement of the student in a private school, and contending that the school district violated IDEA by conducting inappropriate reevaluations, and alleging that the school district violated Section 504 by permitting the student to be subjected to disability and racial-based bullying or harassment. The school district contends that it provided a free and appropriate public education to the student, that its evaluations were appropriate and that it did not violate Section 504.

PROCEDURAL HISTORY

Despite the fact that the parties did a good job of agreeing to numerous stipulations of fact, the hearing nonetheless required two in-person sessions to complete the voluminous testimony of witnesses.

Parent exhibits P-1 through P-42 were admitted into evidence. School district exhibit S-2 through S-4, S-7, S-10 through S-12, S-16, S-17, S-23 through S-26, S-29 and S-33 were admitted into evidence. All other exhibits listed on the school district's exhibit list were withdrawn.

After the hearing, counsel for each party presented written closing arguments/posthearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not

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

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

ISSUES PRESENTED

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

1. Whether the parents have proven that the school district's reevaluations of the student were inappropriate and violated IDEA?
2. Whether the parents have proven that the school district failed to provide the student a free and appropriate public education while the student was attending school at the district?
3. Whether the parents have proven that they should be reimbursed for the unilateral private placement of the student?
4. Whether the parents have proven that the school district violated Section 504?

FINDINGS OF FACT

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

1. The district is a recipient of federal funds.
2. Student's date of birth is [redacted].
3. Student is a resident of the district and is currently in [redacted] grade at a private school in Wilmington, Delaware.
4. The student is a currently eligible student under the IDEA, having initially been identified for Early Intervention with a Developmental Delay.
5. Student received a reevaluation at the end of the student's kindergarten year and was found eligible for continued special education services due to a Speech/Language Impairment.
6. Student last attended the district for [redacted] grade in the 2021-2022 school year.
7. Student had an annual IEP during [redacted] grade dated December 13, 2021, with subsequent revisions dated February 28, 2022, and May 4, 2022.
8. On April 4, 2022, the district issued a Permission to Reevaluate which the parents signed and returned on April 8, 2022.
9. On April 24, 2022, parents submitted a disability discrimination complaint on behalf of the student.
10. An IEP meeting was held on May 4, 2022, with counsel for both parties attending.
11. The district issued a Reevaluation Report (RR) for the student on June 3, 2022.
12. The June 3, 2022 RR found that the student has a primary disability category of Other Health Impairment and secondary disability category of Speech/Language Impairment.

13. An IEP meeting was held on June 24, 2022, with counsel for both parties attending, to review the recent RR and create a new annual IEP.

14. On July 14, 2022, parents returned signed NOREP approving the June 24, 2022, IEP.

15. On August 5, 2022, parents provided notice of their intent to place student at a private school for [redacted] grade, the 2022-2023 school year.

16. An IEP meeting was held on September 7, 2022, with counsel for both parties attending, to review the results of an occupational therapy assessment.

17. On September 12, 2022, parents received an investigative summary from the district in response to their discrimination complaint.

18. On September 17, 2022, parents received the revised IEP.

19. On September 24, 2022, parents returned the NOREP disagreeing with revised IEP along with notice of their intent to keep student at the private school for [redacted] grade, the 2022 - 2023 school year.

20. On September 27, 2022, parents appealed the findings of the investigative summary (of the discrimination complaint).

21. On December 13, 2022, parents received the response to their appeal of the findings of the investigative summary (of the discrimination complaint).

22. On March 29, 2023, parents contacted the district in order to inquire about what programming the district had available for the student during the 2023 - 2024 school year.

23. On April 18, 2023, the district issued a Permission to Reevaluate, which the parents signed and returned on the same date.

24. On June 29, 2023, parents provided notice of their intent to place student at the private school for [redacted] grade, the 2023 - 2024 school year.

25. The district issued an RR for the student on June 30, 2023.

26. The June 30, 2023 RR continued to find that the student has a primary disability category of Other Health Impairment and secondary disability category of Speech/Language Impairment.

27. An IEP meeting was held on July 25, 2023, with counsel for both parties attending, to review the recent RR and create a new annual IEP.

28. The parents received the final version of the new annual IEP on August 3, 2023.

29. On August 7, 2023, the parents returned NOREP disagreeing with new annual IEP, along with notice of their intent to place the student at the private school for [redacted] grade, the 2023 - 2024 school year.

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

30. The student is kind, thoughtful and empathetic. (NT 150- 151)

31. The student's teacher e-mailed the student's parents on March 23, 2022 stating that the student was having problems following directions over the course of approximately the last month. The parents responded to the e-

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___").

mail stating that the student had been bullied in the cafeteria by a classmate but that the student's special education teacher had a plan to stop the bullying and that the student's parents were in agreement with the plan. (S-2)

32. On March 26, 2022, the parents e-mailed the school district stating that the parents had "found a private school that (they are) hoping (the student) can attend next school year ([redacted])." The e-mail noted that the private school services were "built-in to the curriculum (eliminating the need for pullout services), and the class size is seven, making it ideal for (the student)." The parents requested that specific testing for purposes of admission of the student to the private school be included as part of the school district's reevaluation of the student. The parents listed the requested testing as stated on an admissions e-mail that they had received from the private school. The parents stated that they wanted the student to do as well on the tests as the student can "so that (the student) can gain admission to the private school." (S-2; NT 113 – 115, 362 – 363)

33. On April 4, 2022, the school district issued a Permission to Reevaluate that included in the proposed reevaluation the specific testing that the parents wanted in order to facilitate admission of the student to their desired private school. (S-3, S-2; NT 113 – 115)

34. On April 24, 2022, the parents filed with the school district a complaint of discrimination, harassment and/or retaliation. The complaint alleged the following incidents reported by the student to [Student's] parents during the 2021 – 2022 school year: two other students repeatedly asked the student math questions that the student could not answer and then laughed at the student or called the student stupid; and on February 17, 2022, another student told the student something to the effect of "I am glad your birth mother does not live with you;" and on or about March 31, 2022, and on one

other occasion during the 2021 – 2022 school year, another student called the student [derogatory word]. (P-6, P-7; NT 53 – 57, 121 - 123)

35. At the May 4, 2022 IEP team meeting, the IEP team revised the student's IEP to incorporate specially designed instruction requested by the parents to address the social conflicts that the parents believed the student had been experiencing. Specifically, the IEP was amended to include seating the student near peers who were positive role models; all staff who supervise the student or monitor the student were advised of the identity of the two peers who had caused problems for the student or had a history of conflict with the student and staff was directed to discretely attempt to keep the student and the two identified peers separated when practical; and if the student appeared to be distressed, staff were to prompt the student to see a trusted adult (case manager, counselor or administrator). (P-8; S-2; NT 96, 103 – 106, 178 – 179)

36. The SDI that provided that the student be kept apart from the disfavored peers was implicated during one instance in which the student joined a soccer game during recess that already included the two identified peers. On that occasion, the special education teacher asked the student if [Student] was uncomfortable in that situation, and the student stated that the student was uncomfortable. The teacher then informed the disfavored peers that they were unable to participate in that soccer game. (P-8; NT 225 – 227, 291 – 292)

37. The student was absent six days and had no tardies during the student's [redacted] grade school year at the school district. (P-34; NT 91 – 92)

38. The student was making progress across all areas in [redacted] grade in the school district. (P-4, P-8, P-12; NT 165 – 166, 173 – 174, 177 – 179, 195, 208, 211 – 213, 217, 230 – 231, 257 – 260, 320 – 322)

39. It is not statistically valid to compare a student's percentile ranks from one evaluation to the student's percentile ranks in a later evaluation. Such an analysis is not comparing "apples to apples." (NT 351 – 353, 372 – 373)

40. The June 3, 2022 reevaluation of the student by the school district was conducted by a certified school psychologist. (NT 308, 316; P-10)

41. The June 3, 2022 reevaluation included parent input, teacher input, a review of educational records, a speech language evaluation, interview of the student, and testing observations of the student. The reevaluation included a number of assessments, including the Wechsler Intelligence Scale for Children (WISC-V) (to assess cognitive functioning and intelligence), the Wide Range Assessment of Memory and Learning (WRAML-3) (to assess memory, learning and cognitive functions), the Kaufman Test of Educational Achievement (KTEA-3) (to assess academic achievement), the BASC-3 (to assess behaviors and social emotional functioning), the Conners-3 (to assess ADHD symptoms and related behaviors) and the BRIEF-2 (to assess behaviors and executive functioning). The reevaluation included a qualitative reading inventory (QRI) concerning word recognition, oral reading fluency, reading comprehension and math skills. The student was reading at a third-grade level. The reevaluation report recommended that the student continue to be eligible for special education under the primary category of Other Health Impairment and with a secondary disability category of Speech/Language impairment. (P-10; NT 311 – 312, 316 – 324, NT 328 – 336)

42. The June 3, 2022 reevaluation report identified the student's educational needs as: improve executive functioning, improve age-appropriate peer interactions, support attention regulation and working memory and verbal memory, and improve articulation skills. The reevaluation

found the student's strengths to include: reading skills in the average range, math and writing skills in the average range, and age-appropriate receptive – expressive language, voice and fluency skills. (P-10)

43. As a part of the June 3, 2022 reevaluation, the school psychologist made three phone calls to attempt to obtain input from the student's private social worker/therapist. The therapist did not return the telephone calls. (P-10; NT 378)

44. At the June 24, 2022 IEP team meeting, the IEP team added a speech goal to improve the student's production of the /r/ sound in the initial and blend position. The IEP team also added goals to include an oral reading fluency goal, a goal to address executive functioning deficits, and a social skills goal. (P-12; NT 229 – 232)

45. The June 24, 2022 IEP included the following: small group instruction in the area of fluency and decoding for 15 minutes per day; direct instruction in social skills for 30 minutes per week; direct instruction in executive functioning weaknesses for 50 minutes per week; speech language therapy for 30 minutes per week. The IEP also included numerous accommodations, modifications and specially designed instruction to support the student's needs as determined by the reevaluation report. As a result of the reevaluation report, the IEP included specially designed instruction to complete an occupational therapy assessment of the student. (P-12)

46. The parents did not express any concerns with the June 2022 IEP at the IEP team meeting. The parents returned the signed NOREP approving the IEP on July 14, 2022. (P-13; NT 128, 233 – 234)

47. On August 5, 2022, the parents provided the school district with a 10-day notice that they intended to place the student at public expense at

the private school the student now attends for [redacted] grade for the 2022 – 2023 school year. (P-14)

48. The mission of the private school in which the parents unilaterally placed the student is to allow all students to reach their fullest potential. All students who attend the private school have language-based learning differences, including specific learning disabilities, speech language impairments or ADHD. The class size is seven students. The private school does not develop IEPs or other individualized plans for its students. The student's reading teacher at the private school is licensed as a regular education teacher in New Jersey through an alternate route; the teacher is not licensed as a special education teacher or a school psychologist. Teachers at the school are not required to be licensed teachers. All students who attend the private school who need reading instruction receive instruction in the Wilson reading methodology in 45-minute sessions five days per week. (P-42; NT 398 – 399, 412, 443 – 445, 448 – 449, 452 – 453, 480 – 481, 83-84)

49. Almost any student would benefit from a very small class size. (NT 332, 260)

50. At the September 7, 2022 IEP team meeting, the IEP team reviewed the occupational therapy evaluation results and included IEP occupational therapy goals for improved motor coordination and sensory processing skills. The IEP included related specially designed instruction. The IEP included occupational therapy as a related service two times per week for 30-minute sessions. The parents rejected the revised IEP. (S-17; P-15, P-16; NT 48 – 49, 55, 197 – 198)

51. The school district conducted a formal investigation into the parents' discrimination and harassment allegations and issued an investigative summary on September 12, 2022. The school district investigation found that three unrelated incidents were substantiated. The substantiated incidents

involved other students asking the student math problems the student could not answer, calling the student stupid and making comments about the student's birth mother. The school district concluded that the two alleged incidents of racial discrimination, involving other students calling the student [derogatory name], could not be substantiated. The school district addressed the various incidents with the other students involved. The school district arranged that the student would not be scheduled for the same classes as the other students involved in the incidents. The school district agreed to notify the parents of any future incidents involving the student. The conclusion of the investigation was that the substantiated conducted was clearly inappropriate but was not sufficiently severe, pervasive or persistent to constitute discrimination or harassment. (P-17; NT 63-64)

52. On September 27, 2022, the parents filed an appeal under the school board's policy of the findings of the investigative summary. (P-19; NT 65)

53. In a December 13, 2022 letter by the school district assistant director of human resources, the school district rejected the parents' appeal of the findings of the investigative summary. The appeal conclusion affirmed the results of the investigative findings that three incidents reported by the parents were substantiated but that the incidents did not constitute discrimination or harassment because the actions were not sufficiently severe, persistent or pervasive. The appeal findings recommended that the student and parents also be offered an alternative elementary school to the one that the student had been attending in the school district, if they so desired. (S-23; NT 204)

54. The student saw a private therapist who is a licensed social worker in Delaware from April of 2022 through January of 2024. The social worker did not contact school district staff or review any of the student's educational

records. The focus of the therapy provided by the social worker was the student's underlying issues, [redacted]. The sessions also dealt with resolving conflict. The social worker reported that the student had also been antagonized by other students at the private school. (P-28; NT 487 – 489, 495 – 496, 505, 510 – 511)

55. The student was not enrolled in the school district for [redacted] grade. The school district issued a Permission to Reevaluate on April 18, 2023 because the parents had requested an offer of FAPE for [redacted] grade. The parents consented to the reevaluation on April 18, 2023. (S-24)

56. On October 29, 2023, the parents provided a 10-day notice notifying the school district of their intention to unilaterally place the student at the same private school for [redacted] grade for the 2023 – 2024 school year. (P-27)

57. The June 2023 reevaluation included parent input, a review of the student's educational records, speech language evaluation, an occupational therapy evaluation, physical therapy evaluation, interview of the student, Kaufman Test of Educational Achievement 3rd Edition (KTEA-3) (to assess academic achievement), the BASC-3 (to assess behaviors and social and emotional functioning), and a BRIEF-2 (to assess behaviors and executive functioning). The school district's school psychologist who conducted the evaluation observed the student during the student's Wilson reading class at the private school as a part of the evaluation. The June 30, 2023 reevaluation report recommended that the student continue to be eligible under the primary disability category of Other Health Impairment with a secondary disability category of Speech/Language Impairment. As a part of the reevaluation, the school psychologist conducting the reevaluation made a phone call to the student's private social worker/therapist and received a return phone call. The therapist stated that the focus of his work with the

student involved underlying issues related to adoption and conflict issues. The therapist noted that the student had been antagonized and ridiculed by other students when the student began attending the private school. (P-28; NT 495 – 499, 503 – 504, 510 - 511)

58. The parents agreed with the results of the June 2023 reevaluation report. (NT 134)

59. At a July 25, 2023 IEP team meeting, the team reviewed the reevaluation results and developed goals for the student in speech, oral reading fluency, executive functioning, social skills and sensory processing. The IEP included special education in small group instruction in the area of fluency and decoding for 30 minutes per day, direct instruction in social skills for 30 minutes per week, direct instruction in executive functioning weaknesses for 50 minutes per week, speech language therapy for 30 minutes per week, occupational therapy for 30 minutes twice per week, and a number of accommodations, modifications and specially designed instruction. The parents did not raise any concerns with the IEP at the July 25, 2023 IEP team meeting. (P-29; NT 237)

60. Pursuant to the recommendation of the report of the appeal determination of the parents' discrimination complaint, the school district proposed placing the student at a different elementary school in the school district for the 2023 – 2024 [redacted] grade school year because of the parents' concerns about the student's peer relationships at the previous elementary school in the district. (S-23, P-29; NT 204, 237-238)

61. The parent's rejected the school district offer of FAPE in a 10-day letter dated August 7, 2023. (P-31; NT 204)

CONCLUSIONS OF LAW

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

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., (hereafter sometimes referred to as "IDEA"): an identification violation, an evaluation violation, a placement violation or a failure to provide a free and appropriate public education (hereafter sometimes referred to as "FAPE"). IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. The child must be assessed in all areas related to the suspected disability. The evaluation must be comprehensive. Perrin ex rel JP v Warrior Run Sch Dist, 66 IDELR 254 (M. D. Penna. 2015); IDEA § 614; 34 C.F.R. §§ 300.301, 300.304 – 300.305; 22 Pa. Code § 14-123.

3. 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).

4. 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).

5. 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).

6. IDEA does not require a school district to guarantee a particular result or to close the gap between children with disabilities and their non-disabled peers. Abigail P by Sarah F v Old Forge Sch Dist, 82 IDELR 227 (MD Penna. 2023), *aff'd* Abigail P by Sarah F v Old Forge Sch Dist, 124 LRP 21769; JN and JN ex rel. JN v. Southwest School District, 56 IDELR 102 (M.D. Penna. 2015); see, Kline Independent School District v. Hovem, 690 F. 3d 390, 59 IDELR 121 (5th Cir. 2012); HC and JC ex rel. MC v. Katonah – Lewisboro Union Free School District, 59 IDELR 108 (S.D. NY 2012); District of Columbia Public Schools, 111 L.R.P 77405 (SEA D.C. 2011). Progress toward a FAPE is measured according to the unique individual circumstances of the individual student and not in comparison to other students. See, GD by Jeffrey and Melissa D v. Swampscott Public Schs, 122 LRP 6305 (1st Cir. 2022). The Third Circuit has specifically ruled that IDEA does not require that all (or even most)

disabled children advance at a grade-level pace. KD by Dunn v. Downingtown Area School District, 904 F. 3d 248, 72 IDELR 261 (3d Cir. 2018).

7. 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); 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).

8. Services are not categorical under IDEA; IDEA does not concern itself with labels, rather, once a child is eligible under one of the enumerated disability categories, the IEP of the child 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 School District v. Sims ex rel. BS, 841 F. 3d 996, 56 IDELR 282 (8th Cir. 2011). The child's identified needs and not the child's disability category determine the services that must be provided to the child. School District of Philadelphia v. Post, et al, 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Penna. 2017); See, Minnetonka Pub Schs, Independent Sch Dist No. 276 v. M.L.K., by S.K. and D.K, 81 IDELR 123 (8th Cir. 2022); Maine School Administrative District No. 56 v. Mrs. W. ex rel. KS, 47 IDELR 219 (D. ME 2007); see also, Analysis of Comments to Proposed Federal Regulations, 71 Fed. Reg. 156 at pp. 46586, 46588 (OSVP August 14, 2006); In re Student With A Disability, 52 IDELR 239 (SEA WVa 2009).

9. In order to receive reimbursement of tuition and related expenses resulting from the 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).

10. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of his or her disability be excluded from participation and/or denied the benefits of or be subject to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1. To establish a violation of Section 504, a parent must prove: 1) that the student is disabled; 2) that the student was otherwise qualified to participate in school activities; 3) that the school district receives federal funds; and 4) that the student was excluded from participation in and denied the benefits of or subject to discrimination at the school. To offer an appropriate education under Section 504, the school district must reasonably accommodate the needs of a handicapped child to ensure meaningful participation in educational activities and meaningful access to educational benefits. To comply with Section 504, a school district must provide education and related aids or services that are designed to meet the individual needs of handicapped students as adequately as the needs of non-handicapped students are met. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); Strepp ex rel MS v Midd West Sch Dist, 65 IDELR 46 (M.D. Penna. 2015).

11. Bullying is defined as aggression within a relationship where the aggressor has more real or perceived power than the target and the aggression is repeated over time. Students with disabilities are

disproportionately affected by bullying. Dear Colleague Letter, 61 IDELR 263 (OSERS 2013). The failure of a school district to stop or address the bullying of a student with a disability that adversely affects the education of the student may constitute a denial of FAPE or a violation of Section 504. Shore Regional High School Board of Education v. PS, 381 F. 3d 194, 41 IDELR 234 (3d Cir. 2004). See, TK and SK ex rel. LK v. New York City Dept. of Educ., 779 F. Supp. 2d 289, 56 IDELR 228 (E.D. NY 2011), *aff'd* 810 F. 3d 869, 67 IDELR 1 (2d Cir. 2016).

12. The parents have not proven that the school district evaluations were inappropriate or in violation of the law.

13. The parents have not proven that the school district's IEPs denied FAPE to the student. The parents have not proven that they are entitled to compensatory education or reimbursement for a unilateral placement,

14. The parents have not proven that the school district violated Section 504.

DISCUSSION

1. Whether the parents have proven that the school district's reevaluations of the student were not appropriate?

The parents contend that the school district's reevaluations of the student were not appropriate because they did not identify areas of need for the student. The school district contends that its evaluations were appropriate and consistent with the requirements of IDEA.

Some of the arguments raised by the parents' posthearing brief need to be addressed. First, in support of their argument that the school district

reevaluations did not identify areas of need, the parents presented the testimony of a reading teacher from the private school that the student currently attends. The teacher testified that the student needs the following: small group instruction; instructors trained to instruct children with language-based learning disabilities; instruction in Wilson methodology daily for 45 minutes; and concepts of Wilson methodology embedded in other subjects throughout the school day. This argument is rejected.

A fair reading of the evidence presented at the due process hearing reveals that the school district's reevaluations of the student during the relevant time period were comprehensive in nature. The evaluations utilized a variety of assessment tools and strategies to gather relevant information. The assessments were conducted by trained and knowledgeable personnel, and the student was assessed in all areas of suspected disability. Moreover, the school district's reevaluations appropriately identified the student's areas of educational need. The school district's reevaluations of the student met all of the IDEA requirements.

It is clear that the parents want the student to receive an ideal education. The parents equate the student's "needs" with what would be best for the student. It is not surprising that any parent would want their child to have the best possible education. However, the law does not require a school district to provide the best possible education for a student. It is clear from the record evidence that the school district's reevaluations appropriately determined the student's educational needs.

In addition, the parents seek to compel the school district to provide a specific educational methodology. The areas of "need" which the parents' witness claimed that the school district failed to identify are directly related to the Wilson reading methodology. It is clear that the parents and the private

school that the student attends are advocates for the Wilson reading system. A parent cannot, however, compel a school district to use a particular methodology. As the case law indicates, the choice of educational methodology is within the sound discretion of school authorities. The parents' contention that the student had a need for a specific type of educational methodology is not supported by the evidence in the record.

The testimony of the school district staff was more credible and persuasive than the testimony of the parent and the private school reading teacher called by the parent. This conclusion is reached because of the demeanor of the witnesses, as well as the following factors: the reading teacher at the private school is a certified teacher in New Jersey, but she is not a licensed special education teacher or a certified school psychologist. Her opinion is entitled to less weight on this issue than the testimony of the school district's certified school psychologist. Moreover, the private school that the student now attends utilizes the Wilson reading methodology for every student who receives reading instruction unless they no longer need it. It is clear the parents and the private school the student now attends are advocates for the Wilson reading method. The use of a standard cookie cutter frequency and duration of the same methodology for every student, regardless of the individual circumstances or needs of each individual student, renders the testimony of the witness not credible or persuasive. The credibility discussion in the following sections of this decision is incorporated herein by reference.

The parents have not proven that the reevaluations conducted by school district violated IDEA.

2. Whether the parents have proven that the IEPs developed by the school district denied the student a free and appropriate public education?

The parents contend that the IEPs offered by the school district during the relevant timeframe were substantively inadequate, arguing that they failed to provide the student with a free and appropriate public education. The parents seek compensatory education for the period from March 21, 2022 to June 14, 2022. The parents also seek reimbursement for a unilateral placement for the 2022-2023 and 2023-2024 school years. The school district argues that its IEPs were appropriate and that they provided FAPE to the student.

Specifically, the parents' posthearing brief argues that the testimony of the student's reading instructor at the private school shows that the student's IEPs were inappropriate because they did not include the following: small group instruction; instructors trained to instruct children with language-based learning disabilities; instruction in Wilson methodology daily for 45 minutes; and concepts of Wilson methodology embedded in other subjects throughout the school day. The parents also asserted a failure to implement the student's IEP from March of 2022 through June of 2022 at the prehearing conference, but the parents' posthearing brief provides no argument concerning that issue and no credible evidence of failure to implement was introduced at the hearing; the issue is therefore deemed to be waived. The school district contends that the parents have not proven that reimbursement is appropriate or that the school district denied FAPE to the student. An analysis of whether FAPE has been provided and of the three prongs of the Burlington/Carter/TA analysis follows:

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

The parents have not proven that the school district IEPs were inappropriate in violation of IDEA. The record evidence shows that the student's IEPs contained all required elements, were developed by properly constituted IEP teams and were reasonably calculated to provide meaningful educational benefit in light of the student's unique individual needs as determined by the comprehensive and thorough reevaluations conducted by the school district.

The basic thrust of the parents' argument in this case is that their "ideal" private school is better for the student than the public school. The record evidence shows that the parents are seeking an ideal education; equating the student's "needs" with what they feel would be best for the student. The mission statement of the private school that the parents selected, for example, is to allow students to reach their fullest potential. As the testimony indicated, however, most, if not all, students would do better in very small classes in a private school. The test for whether a school district must pay for a private school education, however, is not whether the private school program was better than the school district program. It is clear from the "needs" that the parents argue were not being met by the student's IEPs that the parents are utilizing a potential-maximizing standard. Although it is hardly surprising that a parent would want the best possible education for their child, it is not required by IDEA that the school district provide an ideal education.

As the testimony of the private school reading teacher made clear, a large part of what the parents seek is to have the student receive a specific

educational methodology: the Wilson reading system for which the private school is a strong advocate. The “needs” that the parents argue were not addressed by the school district’s IEPs are directly related to the Wilson methodology. A parent cannot, however, compel a school district to use a particular methodology. See previous discussion.

Also, some of the testimony of the parents and the parents’ witnesses involved an analysis of the student’s performance as opposed to the grade level equivalent of the student’s nondisabled peers. Such “gap analysis” is not appropriate. The Third Circuit has specifically ruled that IDEA does not require that all or even most disabled children advance at a grade level pace.

Moreover, much of the evidence presented by the parents at the hearing and argued in their posthearing brief involves comparisons of the student’s percentile ranks on various assessments over the years. The argument advanced by the parents in this regard involves flawed statistical analysis. The unrebutted testimony of the school district’s school psychologist was that such comparisons are statistically invalid because they are not comparing “apples to apples.” The conclusions drawn by the parents in making such comparisons are not supported by the persuasive and credible evidence in the record.

The record evidence demonstrates instead that the student’s IEPs challenged herein were reasonably calculated to confer meaningful educational benefit in light of the student’s unique individual needs as identified by the comprehensive reevaluations of the student conducted by the school district. Moreover, even though IDEA does not require a school district to show that a student made actual progress under an IEP, but rather only that an IEP is reasonably calculated to confer meaning progress in light of the student’s unique circumstances at the time that the IEP was written, in this case, the student actually did make meaningful progress under the student’s

IEPs. The credible and persuasive testimony of the student's teachers was that the student was making progress across all areas under the student's IEPs while the student was in the school district for third grade.

The testimony of the school district staff was more credible and persuasive than the testimony of the parents and the parents' witnesses. This determination is made because of the demeanor of the witness and the following factors: the testimony of the student's mother was impaired by an evasive and combative demeanor on cross-examination. The student's mother also gave inconsistent testimony concerning when the parents began searching for a private school. The mother's testimony that the parents did not decide to send the student to a private school until just before notifying the school district is also contradicted by the documentary evidence. The parents sent an e-mail to the school district stating that they had found an "ideal" private school for the student. This e-mail was sent on March 26, 2022. In addition, the student's mother requested that the school district conduct certain testing as a part of its reevaluation of the student because it would facilitate the student's acceptance into the parents' preferred "ideal" private school. The student's mother could not provide answers to questions concerning what had happened between July 15, 2022, when the parents signed a NOREP approving the student's IEP and August 5, 2022, when the parents sent the school district a 10-day letter notifying the school district that they would be sending the student to the private school and seeking reimbursement. The mother's testimony was not credible or persuasive. See also discussion of credibility in the other sections of this decision.

The parents have not proven that the IEPs developed for the student by the school district denied FAPE. The parent's claim for compensatory education for the [redacted]-grade year is rejected. Also, because the parents have not

proven the first prong of the Burlington-Carter analysis, reimbursement for their unilateral placement must also be denied.

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

The second prong of the Burlington-Carter analysis involves whether the parents have proven that their 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. Even assuming *arguendo* that the parents had proven the first prong, however, they have not established that their private school is appropriate.

The private school that the parents have selected does not require its teachers to be licensed. The reading teacher who works with the student at the private school is licensed as a general education teacher in New Jersey, but she is not a special education teacher.

More importantly, the private school does not utilize individualized plans for its students, but instead employs a cookie cutter approach in terms of determining what methodology to utilize and the duration and frequency of instruction. All students at the private school receive instruction in the Wilson reading methodology for 45 minutes per session five days per week. The method and the duration and frequency are not based upon data or present levels of performance. Such a one-size-fits-all approach is not individualized to meet the specific, unique needs of each student, but rather applies across the board to every student regardless of individual need. The one-size-fits-all approach of the private school stands in contrast to the school district's IEPs

that were individualized to meet the unique needs of this particular student as determined by thorough and comprehensive reevaluations.

In addition, only children with disabilities attend the private school. The student has no interactions with non-disabled peers at the private school. Although this least restrictive environment factor in itself may not render a private school inappropriate, when coupled with the other issues listed above, it is clear that the private school selected by the parents in this case is not appropriate.

The testimony of the school district staff was more credible and persuasive than the testimony of the mother and the parents' witnesses. See discussion of credibility in the previous sections of this decision.

It is concluded that the parents have not proven that their chosen private school is 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 or any other equitable factors might weigh in favor or against reimbursement. It is not necessary to reach the third prong because the parents have not proven either of the first two prongs. Even assuming *arguendo* that the parents have proven the first two prongs, however, they have not established that the equities favor reimbursement.

The evidence in the record shows clearly that the parents did not have an open mind with regard to a potential public school placement for the student. They determined in March of 2022 that they wanted the student to

attend a specific, "ideal" private school which they had identified. The parents informed the school district of their intention to send the student to their ideal private school in an e-mail dated March 26, 2022. In addition, the parents asked the school district to conduct certain testing as a part of its reevaluation of the student to help facilitate the student's admission into the chosen private school. The school district complied with the request and conducted the testing that the parents had requested. The student's mother was not able to answer any questions on cross-examination concerning what had happened to change the parents' minds between July 14, 2022, when they signed a NOREP approving the IEP, and August 5, 2022, when the parents sent the school district a ten-day notice that they were placing the student unilaterally in the "ideal" private school and seeking reimbursement from the school district therefor. It is clear that the parents had no intention of accepting any program offered by the school district, but instead had predetermined that they would only send the student to the specific, "ideal" private school that they had clearly already selected. See discussion of credibility in the previous sections of this decision. By predetermining that only the "ideal" private school was acceptable before the IEP team had a chance to develop and offer a program for the student, the parents behaved unreasonably and, therefore, should not receive reimbursement even if they had met the first two prongs of the Burlington – Carter analysis.

It is concluded that the parents have not proven that the equitable factors in this case favor reimbursement.

The parents have not proven any of the three prongs of the Burlington – Carter analysis. Accordingly, reimbursement for the unilateral private placement must be denied.

3. Whether the parents have proven that the school district has violated Section 504?

The parents also contend that the school district violated Section 504 by permitting the student to be subjected to disability and racial based harassment. The school district denies that the student was bullied or suffered harassment.

The parents contend the hearing officer also has jurisdiction over racial discrimination and harassment. In support of their argument, the parents refer to a *Dear Colleague Letter* by the Department of Education stating that whether or not bullying is related to the student's disability, any bullying of a student with a disability may constitute a denial of FAPE. The parent's brief does not provide a citation to the Dear Colleague letter.

To the extent that the parents allege racial discrimination or racial harassment, the hearing officer specifically rejects their contention that an IDEA special education hearing officer has jurisdiction over racial discrimination. The jurisdiction of a special education hearing officer is limited to special education issues and not issues involving racial discrimination. See, IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162. Although the federal Office for Civil Rights may have jurisdiction over certain complaints of racial-based bullying in a school setting, a special education hearing officer does not have such jurisdiction. In addition, the *Dear Colleague Letter* cited by the parents is distinguishable because it applies only to situations involving bullying or harassment that has a substantial detrimental effect upon a student's education. The parents have not proven anything like that in this case, and in any event, to the extent that the letter might be construed to confer authority upon a special education hearing officer to decide racial discrimination complaints, its reasoning is rejected.

Concerning the allegations of disability-based discrimination, the evidence in the record does not support a conclusion that the student was bullied or harassed on the basis of disability while attending the school district. The parents did call certain allegations to the attention of the school district. The school district took the allegations seriously; it conducted a thorough and comprehensive investigation of the allegations. The investigation revealed that three unrelated incidents were substantiated involving other students making comments about the student's birth mother, calling the student stupid and asking the student math questions that the student could not answer. The allegations by the parents of racial name calling were not substantiated. The evidence in the record concerning comments about the student's birth mother and the unsubstantiated racial name-calling do not appear to be disability-based. The investigation concluded that although the conduct of the other students was clearly inappropriate, the conduct was not sufficiently severe, persistent or pervasive to constitute discrimination or harassment. The appeal affirmed the preliminary investigation, but made certain additional recommendations, including that the student and parents be offered an alternative elementary school within the district to attend, if the parents so desired. The conclusions of the school district investigation and appeal are well-reasoned and correctly decided. The student's IEP team met after the conclusion of the investigation and did assign the student to a different elementary school as recommended by the appeal report. In addition, the student's IEP team made changes to the student's IEP in order to add certain specially designed instruction to help the student deal with conflict situations such as these and when practical to separate the student from the other students who had behaved inappropriately.

The parents have not shown that the incidents of improper conduct were sufficiently pervasive or persistent to constitute bullying or harassment as

defined by law. Moreover, the parents have not proven that the incidents alleged had an adverse impact upon the student's education. Bullying or harassment based upon disability violates Section 504 or IDEA only if it has a negative impact upon the student's education.

More importantly, the school district took reasonable and appropriate steps to investigate the inappropriate behavior by other students and to prevent future incidents. The school district conducted a thorough investigation of the allegations and provided an appeal process, which the parents utilized. After the investigation substantiated some incidents, the school district took appropriate steps to ensure that the student would be kept apart from the students who had engaged in the inappropriate behavior when practical, added additional items to the student's IEP to help the student better deal with social conflict and offered the parents an alternative elementary school if it would make the student feel more comfortable. The record evidence reveals that the school district took reasonable and appropriate steps to address the parent's concerns and dealt with the allegations appropriately.

To support their allegations of bullying and harassment, the parents presented the testimony of a private social worker/therapist who worked with the student. The testimony of the therapist, however, was not credible and persuasive with regard to the issue of bullying. Although the therapist testified that he was treating the student for bullying, on cross-examination the therapist admitted that the focus of the therapy sessions that he held with the student involved issues related to the student learning that the student [redacted]. The documentary evidence in the record also supports the conclusion that the focus of the therapy sessions was issues related to the student having been [redacted], as well as helping the student develop skills

for dealing with problem conflict situations which the student experienced at the private school as well as in the school district.

The testimony of the student's mother regarding the student having experienced ongoing multiple incidents of bullying in the school district is also not credible or persuasive. This conclusion is made because of the demeanor of the witness, as well as the fact that the well-reasoned and thorough investigation by the school district found only three substantiated incidents. In addition, the testimony is inconsistent with the documentary evidence that reveals that in March of 2022, the parent sent an email to the district stating that the special education teacher had a plan to address a bullying incident and that the parents agreed with the plan. Said email does not reflect an alleged ongoing series of multiple uncontrolled disability-based bullying incidents. The parent did mention incidents of racial-based bullying in the parent input for the June 3, 2022 reevaluation, but only two racial-based incidents were mentioned in the parent's formal harassment complaint filed with the school district and those were not substantiated by the investigation. Thereafter, on July 14, 2022, the parents, who were represented by counsel at that time, returned a signed NOREP approving the IEP that the school district had developed. See also the previous discussion of the credibility and persuasiveness of the mother's testimony.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's mother, the private school teacher and the student's therapist. This conclusion is made because of the demeanor of witnesses, as well as the factors outlined herein and in elsewhere in this decision.

The parents have not proven a violation of Section 504 or IDEA involving allegations of bullying of the student.

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: August 21, 2024

James Gerl

James Gerl, CHO
Hearing Officer