

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 Due Process Hearing Officer

Final Decision and Order

ODR No. 27178-22-23

CLOSED HEARING

Child's Name:

R.S.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

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Hearing Officer:

James Gerl, CHO

Date of Decision:

May 25, 2023

BACKGROUND

The parents filed a due process complaint alleging that the IEPs in place at the school district for the student did not provide the student with a free and appropriate public education. The parents seek compensatory education for the period from September 20, 2020 through November 15, 2021. The parents seek reimbursement for tuition and transportation costs for a unilateral placement at a private school from November 15, 2021 through the end of the 2022 – 2023 school year. The parents also contend that the school district should be required to pay for an independent evaluation of the student. The school district contends that the student was provided with a free and appropriate public education by the school district. The school district denies that it should be required to pay for the private evaluation.

I find in favor of the school district on all issues presented by the instant due process complaint.

PROCEDURAL HISTORY

Counsel in this case did an excellent job of stipulating to a large number of facts and of agreeing upon joint exhibits. Unfortunately, the hearing and decisional process was delayed because of the sheer volume of evidence submitted by the parties in this case. The due process hearing required two full-day in-person sessions. Joint Exhibits 1 through 49 were all admitted into evidence at that hearing. Eleven witnesses testified at the due process hearing.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. Because of the extreme volume of evidence submitted, the parties were permitted an

unusually large page limit of 25 pages for their written closings. 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 in this case, presents the following issues:

1. Whether the parents have proven that the school district denied a free and appropriate public education to the student?
2. Whether the parents have proven that the private school in which they unilaterally placed the student was appropriate?
3. Whether the equities favor reimbursement?
4. Whether the parents have proven that the school district should reimburse them for the expense of an independent evaluation?

FINDINGS OF FACT

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

1. The student's date of birth is [redacted]; the student is [redacted] years old.

2. The student and the student's parents reside within the boundaries of the school district and the school district is the local education agency for purposes of IDEA and is the recipient of federal assistance for purposes of Section 504 of the Rehabilitation Act.

3. At all relevant times, the student was eligible for special education under IDEA and was an individual with a disability under Section 504. The student's current primary IDEA classification is autism with secondary classifications of emotional disturbance and speech language impairment.

4. The student has been diagnosed with Generalized Anxiety Disorder, Unspecified Depressive Disorder and attention deficient hyperactivity disorder.

5. The student currently attends the private school in which the student was unilaterally placed by the parents and is a [redacted] grade student.

6. The student attended the school district from [redacted](2015 - 2016) school year through November 14th of the [redacted] grade (2021 - 2022) school year.

7. For the 2020 - 2021 school year, the student attended [redacted] grade at an elementary school in the district.

8. At the start of the 2020 – 2021 school year, the January 6, 2020 IEP was in place. An IEP revision meeting was held on December 11, 2020.

9. The student’s annual IEP for the 2020 – 2021 school year was held on January 5, 2021. Revision meetings were held on January 25, 2021, March 26, 2021 and June 10, 2021.

10. During the 2020 – 2021 school year, the student received an itinerant level of special education support.

11. During the 2020 – 2021 school year, the student did not participate with nondisabled peers for speech and occupational therapies and social skills group. The student did participate with typical peers in all academic areas.

12. At the June 10, 2021 revision meeting, the student’s transition to the [redacted] center in the district for the 2021 – 2022 school year and parental concerns were discussed. In addition to speech and occupational therapies and social skills group, participation in a functional skills special education class two times per week was added to the student’s IEP for the 2021 – 2022 school year.

13. The student transitioned to the school district’s [redacted] center for the 2021 – 2022 school year.

14. The student began the 2021 – 2022 school year under the January 5, 2021 IEP, as revised on January 25, 2021, March 26, 2021 and June 10, 2021. Revision meetings during the 2021 – 2022 school year were held on October 12, 2021 and November 10, 2021.

15. During the 2021 – 2022 school year, while attending the school district’s [redacted] center, the student received an itinerant level of special education support.

16. During the 2021 – 2022 school year, while attending the school district’s [redacted] center, the student did not participate with nondisabled peers for occupational therapy, functional skills class, and social skills group. The student did participate with typical peers in all academic areas.

17. The student received consultative speech and language services during the 2021 – 2022 school year.

18. The parents formally withdrew the student from the district on November 14, 2021, and the student began attending the private school at issue on November 15, 2021.

19. The parents obtained an independent educational evaluation during the spring of 2022. A copy of the report was provided to the school district on July 14, 2022.

20. The parents sent an e-mail to the district on August 15, 2022 stating the following: “As you know, our (child) (the student...) is a special education student of the (...) school district who has been attending private school. We do not believe that the school district has offered an appropriate program and placement for (the student...) for the upcoming school year, leaving us with no other option but to continue (the student’s...) enrollment in private school for the 2022 – 2023 school year. The student will continue attending the (private...) school and we ask the (...) school district fund the tuition.”

21. An IEP team meeting was held on August 22, 2022. The proposed IEP offered the student a supplemental level of support.

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

22. [redacted] (NT 141)

23. At the January 26, 2020 IEP team meeting, the parents reported that they were “very pleased with the growth that we have seen in (the student’s) abilities over the last several years.” The IEP created at the January 6, 2020 IEP team meeting added end of the day conferences with the student’s regular education teachers or learning support teacher so that the student could decompress to avoid falling apart when the student went home. The student was receptive to these conferences and talked about things that were bothering the student. (J-5; NT 195 – 197)

24. The student had a number of problem behaviors at home during the COVID school closures. The student threw chairs, broke a television and put holes in the wall. The school district provided strategies for the parents to use at home with the student during virtual instruction. (J-10; NT 184 – 185)

25. On October 26, 2020, the school district went back to in-person instruction; those students with IEPs attended school in-person classes four days per week. (NT 58 – 59)

26. In November of 2020, the student’s parents became concerned that the student might [self-]harm. On November 2, 2020, the student’s

¹ (Exhibits shall hereafter be referred to as “J-1,” etc. for joint exhibits; and references to page numbers of the transcript of testimony taken at the hearing is hereafter designated as “NT___”).

mother told the school district that “if (the student) needs a crisis assessment or other type of testing done with (the student’s) reevaluation, I am requesting that these be done ASAP.” On November 18, 2020, a [redacted] Rating Scale for the student was conducted by district staff in response to the parents’ request. The student [made several concerning statements]. (J-10, J-13; NT 65)

27. The student matured while at the school district and a decrease in duration and frequency of the student’s problem behaviors and an increase in the student’s ability to use coping strategies occurred during the student’s [2020-2021] year. (NT 182)

28. In the [2020-2021], the student was performing above average to well above average according to the Aimsweb National Reading Assessment. (J-19; NT 202, 501 – 502)

29. On December 11, 2020, an IEP team meeting was held to review the results of the [redacted] Rating Scale and to provide additional supports, including the student seeing a prevention specialist once per week. The student subsequently made significant progress with the student’s ability to self-regulate and demonstrate appropriate social skills. (J-14, J-15)

30. The school district prevention specialist saw the student for six weeks starting in January of 2021, after which the prevention specialist felt it was no longer necessary to continue the sessions. During their sessions, the student would identify the student’s feelings, thoughts about school and anything else the student wanted to discuss, and review coping strategies. (J-26; NT 177, 189 – 191)

31. At the January 5, 2021 IEP team meeting, a crisis plan, extra check-ins with the student’s emotional support teacher and counseling

services were added to the student's IEP to address the student's negative self-talk, thoughts of self-harm and issues with depression. (J-16; NT 173)

32. A January 25, 2021 IEP team meeting was held to discuss the behavior the student's parents were seeing at home. The school district staff did not see these behaviors at school except for one instance in October of 2022 where the student hit the student's self with the student's lunch bag. The IEP was revised to include a positive behavior support plan and a crisis plan. (J-10, J-18; NT 173 – 174, 183 – 185)

33. On March 8, 2021, another reevaluation report was developed because the student and evaluator needed to quarantine during the original testing because of COVID. Speech and occupational therapy evaluations were conducted. The student scored in the average to above average areas in past areas of need, including making inferences; interpersonal negotiations; multiple interpretations and supporting peers. The parents agreed with the reevaluation report. (J-19)

34. The student made progress with regard to anxiety and transitioning goals from September 2020 to March 2021. (J-9; NT 123 – 125)

35. On March 26, 2021, an IEP team meeting was held to discuss the reevaluation report and COVID compensatory services. The team determined that the student's social skills significantly regressed during the COVID closures. Assessment results showed progress in reading. The IEP team determined that the student was still in need of speech, occupational therapy and social skills instruction. COVID compensatory services were added to the IEP to begin on June 14, 2021. (J-21; NT 101)

36. An IEP team meeting was convened on May 21, 2021 to discuss the student's transition to the school district's [redacted] center. At the meeting, the student's mother stated that the student had made progress with

the student's social skills and that she felt that the social dynamics class was now below the student's needs. The mother said that the student's emotional behavior issues were much better since the student had begun in-person instruction. The IEP team decided to stop the system of daily charts and instead implement a weekly communication log because of the student's progress on the student's emotional and behavioral target behaviors. (J-22; NT 118, 121 - 122, 178, 197 - 198)

37. The student made progress on social and behavioral skills in [2020-2021], and the student made progress using coping skills in [2020-2021]. (J-24; J-22; NT 198 - 200, 214 - 215, 507 - 509)

38. It is important for the student to be able to apply the social skills the student learns from the social and emotional support teacher in the regular education classroom setting. The student wants to be in regular education classes and does not like to be pulled out of class. (NT 199 - 200, 206 - 207, 410)

39. The student made progress on the student's IEP goals during the [2020-2021] school year. The student received A's in all of the student's classes for [2020-2021], and the grades were determined by using the same rubric that was used for the student's nondisabled peers. (J-22, J-23; NT 192 - 193, 500 - 502)

40. A revision to the student's IEP was done on June 10, 2021 based upon parent concerns. The parents wanted to include a certain peer in the student's class and to avoid a certain guidance counselor for [2021-2022]. (J-22; NT 81 - 83)

41. The student missed the first two weeks of COVID compensatory services, and instead the student attended a special needs camp during those weeks. (NT 79 - 80)

42. In August of 2021, before the new school year started, the [redacted] grade counselor contacted the student's mother in relation to the two requests: the student being paired with a specific friend and the student not being paired with a specific counselor. The [redacted] grade counselor informed the student's mother that the district could accommodate only one of the requests because the counselor could not change the other student's schedule based upon that student's needs. The counselor asked the mother which option she preferred. The parents requested that the student not have the specific counselor. The counselor agreed to the request and also stated that although the preferred student would not be in the student's classes, they would be able to have lunch together. The student and the friend (preferred student) met for lunch beginning the first day of [2021-2022]. (NT 353 – 355)

43. In [2021-2022], the student had a social dynamics class which taught social/peer interaction skills, as well as problem solving two times per cycle. The student also had a functional strategies class which met two times per cycle and was taught by the itinerant autistic support teacher. The functional strategies class has on average 2 – 8 students and uses a curriculum called Positive Actions, which teaches problem solving, and coping strategies through instruction. Other than the social dynamics class and the functional strategies class, the student attended regular education classes for all other classes. (J-22; NT 228 – 230)

44. During the time that the student attended the school district's [redacted] center, the school counselor met with the student approximately thirteen times to ensure that the student had a good transition to the [redacted] center. They discussed the student's feelings and any problems that the student was having. The student did not have concerns about the transition to the [redacted] school building. (NT 355 – 356)

45. On October 5, 2021, the [redacted] grade emotional support teacher observed the student write that the student wanted to [self-harm] and referred the student to the school counselor. The student told the counselor that the student was sad about the student's home situation and the student's relationship with the student's siblings; that the student's [sibling] hurts the student's feelings and the student's [sibling] physically beats the student up. As a result, the counselor conducted a youth [redacted] screening. The youth [redacted] screening consists of five questions. A full assessment was not determined to be necessary based upon the student's answers to the screening questions. The counselor e-mailed the student's parents informing them of her conversation with the student and that she had conducted a [redacted] risk screening. The counselor recommended that the student see the student's outside therapist or a local mental health center immediately. The student's parents got the student an appointment with the student's private therapist that same day. After the youth [redacted] screening was conducted, the student met with the [redacted] grade prevention specialist. (J-30; NT 357 – 364, 478 – 479)

46. On October 6, 2021, the counselor and the prevention specialist together met with the student and told the student that one of them would meet with the student once each week. They reminded the student that the student had a full-time guidance pass to come see them anytime that the student needed to, and they asked the student to think of two goals that they could work on. The student used the student's guidance pass approximately three times. (J-30; NT 471 – 472, 479, 457)

47. An IEP team meeting was held on October 12, 2021 to discuss the [redacted] risk monitoring tool and other supports for the student. The team agreed that the student would not be placed with peers with whom the student had had negative interactions. At the meeting, the parents raised the concern

that the student had difficulty making friends and that the student was having peer conflict. The student's father stated that all [redacted] grade [children] have conflicts. The student's father said that all of the staff at the [redacted] center that work with the student "have been wonderful." The parents commented that 95% of the [redacted] center was okay for the student and only 5% was not. At this meeting, the parents requested that the student be removed from one school team to another and that the student be switched from supported English Language Arts to regular education English Language Arts. (J-29; NT 129 – 130, 371 – 372, 438 – 439, 447 – 449, 460, 593 – 595)

48. On October 18, 2021, the student again wrote statements in functional strategies class that concerned the emotional support teacher, so a [redacted] risk monitoring tool was completed. The risk monitoring tool is used to monitor a student's [redacted]. The counselor contacted the student's parents after completing the [redacted] risk monitoring tool. (J-30; NT 364 – 365)

49. On October 26, 2021, the parents reported that the student and a friend had trash thrown at them on the school bus. The incident was referred to the assistant principal for discipline and the prevention specialist followed up with the student. The student did not raise any other issues about riding the bus after the incident. (J-29; NT 441)

50. On October 27, 2021, the student's class schedule was changed, as decided at the October 12, 2021 IEP team meeting, including removing the student from supported English Language Arts to regular education English Language Arts in response to the parents' request. (J-29; NT 439 – 441)

51. The student was making progress with the student's emotions and in using the coping skills that the student was being taught during [2021-2022]. (J-39, J-41; NT 476 – ~~478~~⁴⁷⁸)

52. At the November 10, 2021 IEP team meeting, the parents asked for the student to be able to attend the school district's cyber academy part time because they said that the student did not want to be in the school building. The team made numerous changes to the specially designed instruction, including increasing functional strategies class to every day, and the student completing a rating scale prior to leaving home, when the student arrives at school, and prior to leaving school, as well as an exemption for missed work for band. The IEP team recommended that a functional behavioral analysis (hereafter sometimes referred to as "fba") by a board-certified behavior analyst be conducted in the student's home. The parents reported that the student was refusing to attend school in the morning. The school district staff did not observe school avoidance behaviors while the student was in school. The in-home fba would be designed to identify strategies to help get the student to successfully get to school. The parents refused to consent to the in-home fba. At the IEP team meeting on November 10, 2021, the school district supervisor of special education proposed a psychiatric evaluation of the student be conducted to determine if additional supports were needed or if the student needed a more therapeutic placement. The parents did not return a consent form to permit the psychiatric evaluation. (J-31; NT 89 – 90, 256, 271, 597 – 601, 639)

53. During the first semester of the 2021 – 2022 school year, the student made progress on the student's IEP goals. The student received grades of A and B in all of the student's academic classes. (J-31, J-39, J-41, J-45)

54. The student attended three shadow days at the private school that the student has been unilaterally placed in by the student's parents and now attends as a part of the application/ enrollment process for the private school. One of the student's shadow days was on November 10, 2021. The parents

did not inform the school district staff during the November 10, 2021 IEP team meeting that the student was attending a shadow day at the private school on that day or that they were enrolling the student in the private school. (J-31; NT 108 – 110, 603)

55. On Friday, November 12, 2021, the parents signed a contract with the private school for the student to attend the school. The student's enrollment in the private school was to begin on Monday, November 15, 2021. The parents informed the school district that they were withdrawing the student from the school district and placing the student in a private school on Sunday night, November 14, 2021. The student began attending the private school on November 15, 2021 and the student was the only [redacted] grader in the private school at that time. (J-33, J-34, J-35; NT 109 – 110, 111, 300)

56. The parents retained an expert neuropsychologist who conducted an evaluation of the student with one other co-evaluator in March and April of 2022. The parents' expert neuropsychologist conducted one assessment of the student, the Kaufman Achievement Test. During the writing portion of the test, the student refused to complete part of the assessment and the evaluator offered to and did serve as a scribe for the student. The evaluator serving as a scribe was not consistent with the instructions and procedures of the publisher of the Kaufman Achievement Test. (J-43; NT 104 – 105, 393 – 400, 408)

57. An associate of the parents' expert neuropsychologist observed the student at the private school in which the parents had unilaterally placed the student and the evaluator conducted one assessment, but otherwise the evaluator relied solely upon information provided by the parents and their lawyer. The evaluator did not contact any of the student's teachers at the school district or the other staff at the school district who worked with the student or receive any input from them. The evaluator did not observe the

school district classroom that the student had attended or the classroom that the student would have attended in the school district. (J-43; NT 104 – 105, 392 – 418, 430)

58. The report of the parents' expert neuropsychologist noted that the school district had offered a psychiatric evaluation of the student, but the parents had declined the psychiatric evaluation because the student had already been accepted at the private school and the parents wanted the student to go to the private school. (J-43; NT 406 – 408)

59. The parents' expert neuropsychologist found that the student has weak perspective taking; that is, because the student has autism, the student is not flexible in thinking and has difficulty with empathy. (NT 430 – 431)

60. The parents' expert neuropsychologist made a number of recommendations, including that the student continue at the current private school in which the parents had unilaterally placed the student. Because the student is on the autism spectrum, the evaluator also reports social, communication, emotional functioning and learning concerns. (J-43; NT 385 – 431)

61. The parents received the contract from the private school at which they have unilaterally placed the student for the 2022 – 2023 school year in March of 2022 and signed it on April 20, 2022. The parents paid a \$350.00 deposit with the signed contract. The parents did not notify the school district that they had signed an enrollment contract with the private school. (J-42; NT 93 – 94, 101 – 102, 309 – 310)

62. The parents provided a copy of the report of their expert neuropsychologist to the school district on July 14, 2022. The parents had not requested that the school district fund the private evaluation. (J-43; NT 102 – 103, 134, 606 – 608)

63. After the school district received the report of the parents' independent evaluator, the school district staff reviewed the report. Because of the report's concerns about the student's reading comprehension and writing skills, the special education supervisor conducted a writing sample and a reading comprehension passage assessment to determine baselines for the student. The student refused to complete the reading comprehension assessment. (J-43; NT 608 – 610)

64. On August 15, 2022, the student's parents wrote to the school district stating that they did not believe that the school district had offered an appropriate program to the student for the 2022 – 2023 school year and that they were continuing the student's placement at the private school in which they had unilaterally placed the student for the 2022 – 2023 school year. (J-43)

65. An IEP team meeting was held on August 22, 2022. The school district's [redacted] grade emotional support teacher reviewed the parents' independent evaluator's report and spoke with the student's [2021-2022] case manager prior to the IEP team meeting. The team determined that the student did not need a goal for reading comprehension or written expression. The IEP includes specially designed instruction concerning writing and added a nonpreferred tasks goal which addressed the student's refusal behavior during the school district reading assessment and the private evaluator's writing assessment. The IEP includes an emotional response goal that addresses the student's issues with getting frustrated and angry easily. The team recommended that an updated functional behavioral analysis be conducted by a board-certified behavioral analyst. The IEP adds a goal that addresses the student's weakness with inferences. The IEP includes frequent motor opportunities in the classroom in the specially designed instruction to allow the student to move around. The IEP team determined that the student

needed to continue in social dynamics and functional strategies classes in the emotional support classroom or the autistic support classroom. The student would be in special education classes two periods each day. The student would receive core classes in the regular education classroom. The student would be in the regular education classroom approximately 75% of the school day. At the IEP team meeting on August 22, 2022, the parents did not share any additional needs of the student or raise concerns about the IEP. (J-45; NT 520 – 522, 531, 535 –545, 561 – 562, 567, 611 - 613, 633 – 634)

66. The student's mother spoke with the school district director of communications a few days before the due process hearing in order to prepare for the upcoming hearing. The student's mother asked the director of communications not to tell the school district's director of pupil services about the conversation. (NT 115 – 118)

67. All of the students at the private school the student now attends have disabilities. None of the students at the private school [that] the student now attends has an IEP. (NT 302, 343)

68. The private school which the student now attends does not provide instruction using a researched-based program in social skills or emotional regulation. (NT 323 – 324)

69. The student has made progress while at the private school that the student now attends. (NT 309)

70. The IEPs developed by the school district for the student were reasonably calculated to confer meaningful educational benefit in view of the student's unique individual circumstances. (record evidence as a whole)

CONCLUSIONS OF LAW

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

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*, (hereafter sometimes referred to as "IDEA"): an identification violation, an evaluation violation, a placement violation or a failure to provide a free and appropriate public education (hereafter sometimes referred to as "FAPE"). IDEA §615(b)(6)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. 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 meaningful educational benefit in light of the child's unique individual 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).

3. 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).

4. 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).

5. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes the student a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, *supra*; IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).

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. JN and JN ex rel. JN v. Southwest School District, 66 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, 80 IDELR 149 (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. Where a parent or school district predetermines the student's placement prior to the IEP team meeting, they violate IDEA. LE and ES ex rel

MS v. Ramsey Bd. of Educ, 44 IDELR 269 (3d Cir. 2006); See Deal v. Hamilton County Bd of Educ, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); JD v. Kanawha County Bd of Educ, 48 IDELR 159 (S.D. WVa. 2007). The key to compliance with the law is that the parties must keep an open mind regarding placement at the team meeting and duly consider the input of other participants. See, CH by Hayes v. Cape Henlopen School District, 606 F. 3d 59, 54 IDELR 212 (3d Cir. 2010); JD v. Kanawha County Bd of Educ, *supra*; Rockwell Independent School District v. MC ex rel. MC, 816 F. 3d 341, 67 IDELR 108 (5th Cir. 2016).

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

9. In order to receive reimbursement for tuition 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. The cost of reimbursement of a unilateral private school placement may be reduced or denied if at least ten business days prior to the removal of the child from a public school, the parents did not give written notice to the school district of their concerns and their intent to enroll the student in a private school at public expense. 34 C.F.R. § 300.148(d)(1)(ii); IDEA § 612(a)(10)(C).

11. If a parent disagrees with a school district evaluation, the parent may request an independent educational evaluation at public expense. IDEA § 615(d)(2)(A); 34 C.F.R. § 300.502(b)(1); TP by Michael P and Rita P v. West Chester Area School District, 585 F. 3d 727, 53 IDELR 109 (3d Cir. 2009). When a parent requests an independent educational evaluation at public expense, the school district must either pay for the evaluation or else request a due process hearing to show that its evaluation is appropriate. 34 C.F.R. § 300.502(b)(2).

12. Once a child is determined to be eligible, the child's category of disability is not relevant. Services are not categorical under IDEA; IDEA does not concern itself with labels, rather the IEP of a child with a disability must be tailored to the unique needs of a particular child. 34 C.F.R. § 300.106(a)(3)(i); 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 disability category, determine the services that must be provided to the child. The School District of Philadelphia v. Post, et al., 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Penna. 2017). See, Analysis of Comments to Proposed Federal Regulations, 71 Fed. Reg. 156 at 46586, 46588 (OSEP August 14, 2006).

Individualization and the child's unique needs are the key concepts underlying IDEA. Andrew F by Joseph F v. Douglass County School District RV-1, *supra*.

13. A party to a due process hearing waives an argument if it is not properly presented and argued before the hearing officer. JL v Lower Merion Sch Dist, 81 IDELR 251 (E.D. Penna 2022); LB by RB and MB v Radnor Township Sch Dist, 78 IDELR 186 (E.D. Penna 2021)

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

15. The parents have not proven that the school district should reimburse them for a unilateral private placement.

16. The parents have not proven that the school district should be required to reimburse them for the cost of their expert neuropsychologist's evaluation of the student.

DISCUSSION

1. Whether the parents have proven that the student's IEPs for the 2020 - 2021 school year, 2021 - 2022 school year and the 2022 - 2023 school year denied the student a free and appropriate public education?

The parents contend that the school district's IEPs during these three school years denied the student a free and appropriate public education. The parents seek compensatory education for the period from September 20, 2020 through November 15, 2021. The parents seek reimbursement for a unilateral private placement for the period from November 15, 2021 through

the end of the 2022 – 2023 school year. The school district contends that it has provided FAPE to the student throughout the relevant timeframe.

A fair reading of the evidence in this case reveals that the IEPs developed by the school district for the student were appropriate. Although IDEA does not guarantee actual progress and only requires that IEPs be reasonably calculated to provide meaningful educational benefit in consideration of the student's unique individual circumstances, in this case, the student made actual meaningful progress under the student's IEPs. The IEPs in place for the 2020 – 2021 school year, the student's [redacted] grade year, contained all required elements and were reasonably calculated to provide meaningful benefit given the student's unique circumstances. The record evidence reveals that the school district made numerous modifications to the student's IEP during this time frame. After the student returned to in-person learning following the COVID pandemic, the student's IEP added additional supports, including meeting with the school counselor.

When the student engaged in negative self-talk, the school district included a prevention specialist and various check-ins for the student. The student made significant progress with self-regulating social skills, as well as behavioral and emotional goals during this time frame. The student also succeeded academically, receiving grades of "A" in all of the student's classes without modifications to the curriculum.

The student's IEPs for the 2021 – 2022 school year, the student's [redacted] grade year, were reasonably calculated to provide meaningful educational benefit in view of the student's unique circumstances. The IEPs contained all required elements. The IEPs had a positive behavior support plan. The IEPs also included a functional strategies class, a social dynamics class, and a coping strategies class. When the student made comments about

[self-harm] related to problems the student was experiencing at home, the school district conducted a risk assessment and increased supports for the student by providing weekly check-ins, meetings with a prevention specialist and a full-time pass so that the student could see the counselors at any time. The student's IEP initially provided that the student receive English Language Arts in a supported setting. Because of a request from the student's parents that the student be returned to regular education English language arts, the student's schedule was changed placing the student in the regular education English Language Arts.

The student was telling the parents at home that the student did not want to go to school, but the school district staff was not observing any such issues while the student was at school. The school district staff on the student's IEP team recommended that a functional behavioral analysis be conducted at the student's home and that the student be given a psychiatric evaluation. The unique individual circumstances of this student include the student's statements that [student] wanted to [self-harm] because of issues at home. Given these unique circumstances, it was highly appropriate for the district staff on the IEP team to suggest the in-home fba and the psychiatric evaluation to address the student's needs. Unfortunately, the parents refused to consent to the functional behavioral analysis of the problems occurring in the student's home. The parents also refused to consent to the psychiatric evaluation.

The student made progress on the student's IEP goals and the student's social and emotional skills during the time that the student was attending school in the district for [2021-2022].

After the parents requested that the school district prepare an IEP for the 2022 – 2023 school year, the student's [redacted] grade year, an IEP was

developed and offered to the parents. The proposed IEP includes all required elements of an IEP. The IEP included a positive behavior support plan and research-based instruction in social- emotional skills and executive functioning. The IEP also included occupational therapy and speech therapy as related services. The [2022-2023] IEP was reasonably calculated to confer meaningful benefit in view of the student's unique individual circumstances.

The parents' post-hearing brief fails to address a number of the FAPE-related sub- issues listed by the parents prior to this hearing, including inappropriate goals and an alleged failure to meet the student's academic needs. Accordingly, it is concluded that the parents' claim with regard to the sub-issues has been abandoned and waived. Similarly, the parents have added new sub-issues in the parents' post-hearing brief, including a procedural issue involving alleged inadequate present educational levels. Because this sub-issue was not raised prior to the hearing, it is not properly before the hearing officer. Moreover, even if the issue were properly before the hearing officer, parents' brief does not link the alleged procedural violation to any adverse effect upon the student's education. Accordingly, even if the parents had proven such a procedural violation, it would not be actionable.

The primary thrust of the parents' post-hearing brief is that the student's IEPs at the school district did not properly address the student's social – emotional or behavioral needs. The parents' contention is not supported by the evidence in the record. The school district included numerous supports, check-ins, screenings, assessments and educational programs designed to meet the student's social – emotional and behavioral needs. When the student made concerning statements- including wanting to [self-harm] because of problems at home, the district conducted appropriate screening scales and monitoring tools and actively involved the prevention specialist and the school

counselor in the student's program. Moreover, even though the school district is not required to guarantee progress, the record evidence makes it clear that the student did in fact make significant progress with regard to social – emotional and behavioral issues during the student's time in the school district. The parents' argument is rejected.

The parents also contend that the school district's placing the student in the itinerant learning support placement was not sufficiently restrictive. Although this is a placement issue and not a FAPE issue, it is clear that the least restrictive environment provision of IDEA requires that the student be educated in this less restrictive placement. The more restrictive placement that the parents now allege is necessary would clearly violate the least restrictive environment requirement because the student was making meaningful progress in the less restrictive setting. The parents' argument runs afoul of the least restrictive environment requirement, and it is therefore rejected.

Moreover, the parents' argument that the student should have been in a more restrictive placement is also inconsistent with their prior statements and requests. There is no evidence in the record that the parents ever requested a more restrictive placement from the school district. More importantly, when the student's IEP team did place the student in a more restrictive supported English Language Arts class, the parents objected and requested that the student be returned to the regular education English Language Arts class. The parents cannot have it both ways. First they request that the student be placed in a less restrictive placement, and now they argue

that the school district violated IDEA by not placing the student in a more restrictive placement. The parents' argument is rejected.

In addition, in their post-hearing brief, the parents argue that the school district's failure to place the student so that the student would be with the preferred friend student and not with the nonpreferred counselor constitutes the denial of FAPE. The parents claim that the school district's ability to accommodate those two requests later but not when first requested is a violation of IDEA. The parents provide no legal authority in support of this extremely unusual argument, and no such caselaw exists. Indeed, parents are not able to compel a school district to educate a student in a classroom with certain students or without certain counselors assigned to that classroom. Such minute micromanagement of a student's education is not required by IDEA. Moreover, a fair reading of the record evidence indicates that the school district did try to accommodate the parents' request even if they were not required to do so under the special education laws. The parents' FAPE argument concerning the assignment of personnel and the assignment of various students to the student's classroom is rejected. It is clear that the student's IEPs were reasonably calculated to confer meaningful educational benefit upon the student in view of the student's unique individual circumstances.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's mother and the parents' expert witness concerning this issue. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: The mother was evasive, even on direct examination, when questioned about the student's statements [regarding an incident] at home. The mother also exhibited a very poor memory during cross-examination, including not being able to remember

the side effects of the student's medications. The mother's testimony is also impaired by numerous contradictions, including the reason that the parents refused a psychiatric evaluation offered by the district and the reason that the student attended a summer camp instead of the first portion of COVID compensatory services. In addition, the mother was extremely evasive during her testimony concerning whether she had spoken with the school district's director of communications about the due process hearing a few days before the hearing and whether the mother had asked the district's director of communications not to tell the director of pupil services that the conversation had taken place. Moreover, the mother's testimony is significantly impaired by statements made by the parents at the October 12, 2021 IEP team meeting to the effect that staff at the [redacted] center working with the student "have been wonderful," and that 95% of the [redacted] center was okay for the student and only 5% was not. The testimony of the parents' expert was impaired by the fact that the expert only reviewed information that was provided by the parents or their attorney and specifically did not include speaking with or obtaining information from the student's teachers and other staff at the school district or observing the program the student attended or would have attended at the school district. Moreover, at least some of the expert's conclusions appear to have been based upon the fact that the student has autism. A student's educational program should be based upon the student's individual needs and should not be based upon the student's

category of eligibility. Such stereotypical thinking is inconsistent with the individualized analysis required by IDEA.

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

2. Whether the parents have proven that the private school in which the student has been placed by the parents unilaterally is appropriate?

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

Although the private school selected by the parents accepts only students with disabilities and does not develop IEPs for the students that attend the school and the private school does not use a research-based program of instruction for social-emotional skills or emotional regulation, the school is otherwise appropriate. It was the unrebutted testimony of the head of school that the student was making progress at the private school. In selecting a private school for a unilateral placement, a parent is not held to the same exacting standards that apply to a private school selected by a local education agency. Accordingly, it is concluded that if it were necessary to reach the second prong, the parents have proven that the private school that they selected was appropriate for the student.

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

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

Importantly the parents failed to provide the required ten business days' notice of the removal of the student from the school and that they were rejecting the placement proposed by the school district and intending to enroll the student in a private school at public expense. 34 C.F.R. § 300.148(d)(1)(ii); IDEA § 612(a)(10)(C). The failure to provide the statutory notice weighs against reimbursement.

Moreover, the parents' failure to give the required ten business day notice also shows that the parents' lack of an open mind concerning the programs offered by the school district for the student. When a parent adopts an all-or-nothing approach that only a private school is appropriate, they violate the collaborative nature of the special education process and equitable factors weigh against reimbursement.

In this case, the parents had clearly predetermined that only a private school would be acceptable to them. They failed to give the required ten day notice. They stated at the IEP team meeting that the school district program was not appropriate, but they refused to say why. The parents did not object to any of the provisions of the IEP, including the most recent changes and tweaks. The parents' expert witness did not obtain any information from the

student's teachers or staff at the school district or to observe the school district's programs. The parents also refused to provide consent for an in-home functional behavioral analysis to determine why the student was having school avoidance issues while at home but not in school. Tellingly, the parents also refused to provide consent for the psychiatric evaluation requested by the school district and told their private evaluator that they were not consenting to the psychiatric evaluation because the student had already been accepted into the parents' preferred private school.

Significantly, the student attended Shadow Days as a part of the application and enrollment process at the private school on the same day that the parents and district staff participated in an IEP team meeting. The fact that the parents had a closed mind with regard to the possibility of a public school placement for the student is highlighted by the fact the parents did not tell any of the school district staff at the IEP team meeting that the student was attending Shadow Days at the private school on the very date that the IEP team meeting was happening. The parents had clearly determined before the November 10, 2021 IEP team meeting that the student would attend a private school.

Thus, the evidence in the record indicates that the parents had predetermined that only a private placement was appropriate for the student prior to participating in the various IEP team meetings. Because the parents did not have an open mind with regard to a public school placement for the student, the equities in this matter weigh strongly against reimbursement.

Another equitable factor weighing against reimbursement is the fact that the student's mother tried to keep a conversation a few days before the hearing with the district's communication director about the upcoming due process hearing from being found out by the Director of Pupil Services. The

attempt to hide the conversation is revealing. It is concluded that even if the parents had proven the first prong, they have not proven the third prong because equitable factors in this case do not favor reimbursement.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's mother and the parents' expert witness with regard to this issue. See credibility discussion set forth in the first issue.

4. **Whether the parents have proven that the school district should reimburse them for the private evaluation conducted by the parents' expert witness?**

The parents seek an order requiring the school district to reimburse them for the cost of the evaluation by their expert neuropsychologist. The school district contends it is not responsible for the cost of the expert's evaluation of the student.

The parents cite the provision of the federal regulations that provides that a parent may obtain an independent educational evaluation at public expense under certain circumstances. In order to receive an independent educational evaluation at public expense, however, a parent must disagree with a school district evaluation and request that the school district pay for an independent educational evaluation. If a parent makes such a request, the school district must either pay for the evaluation or without delay file a due process complaint seeking to prove that its evaluation is appropriate.

In the instant case, there is no evidence showing that the parents disagreed with the school district's evaluation. Indeed, the parents agreed with the most recent reevaluation by the school district. In addition, there is

no evidence that the parents requested that the school district pay for an independent educational evaluation. Accordingly, the parents have not met the requirements of the regulation for obtaining an independent educational evaluation at public expense. The parents have not proven the prerequisites to reimbursement.

The parents cite dicta in the Supreme Court decision of Schaefer v. Weast, 546 U.S. 49, 44 IDELR 150 (2000). The cited passage from the Supreme Court decision concerning the burden of persuasion is not authority to support the parents' argument that a parent should receive reimbursement for any independent evaluation. The argument is rejected.

It is true that an IDEA hearing officer has broad equitable powers to issue appropriate relief upon a finding of a violation of IDEA. Such relief clearly includes the power to order a local education agency to reimburse parents for an evaluation where appropriate to remedy a violation of the Act. In the instant case, however, the parents have not proven any violation of IDEA, and, accordingly, it is not appropriate to require reimbursement for the evaluation.

Moreover, as the school district points out in its post-hearing brief, the evaluation conducted by the parents' expert witness was not an evaluation to determine the student's needs as much as it was an effort to provide evidence in support of the parents' due process claim for reimbursement for the private school. Indeed, if the parents' expert neuropsychologist was attempting to determine the student's unique individual needs, the evaluator would likely have obtained information from sources other than the parents, the student and their counsel. The fact that the evaluator did not speak with or obtain input from any of the student's teachers or other staff at the school district and that the evaluator did not observe the school district program indicates

that the expert's evaluation was not intended to be a comprehensive evaluation of the student's needs.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's mother and the parents' expert witness with regard to this issue. See credibility discussion set forth in the first issue. The parents' request for reimbursement for the cost of the evaluation conducted by the parents' expert witness is denied.

ORDER

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

IT IS SO ORDERED.

ENTERED: May 25, 2023

James Gerl

James Gerl, CHO
Hearing Officer