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

Pennsylvania Special Education Hearing Officer Final Decision and Order

CLOSED HEARING

ODR File Number:

25592-21-22

Child's Name:

F.B.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

James Gerl, CHO

Date of Decision:

March 14, 2022

BACKGROUND

The parents filed a due process complaint seeking reimbursement for a unilateral placement of the student in a private school as well as a prospective private placement for future years in the same school, contending that the school district violated IDEA and Section 504 by denying the student a free and appropriate public education. The school district contends that it provided a free and appropriate public education to the student. I find in favor of the school district with regard to the issues raised by the due process complaint.

PROCEDURAL HISTORY

Although the parties are to be commended for agreeing to a large number of joint exhibits, they agreed to only a handful of stipulations of fact, which unnecessarily prolonged the hearing session. Despite the minimal stipulations, the hearing was concluded in one virtual hearing session. Five witnesses testified at the due process hearing. Joint exhibits J-1 to J-17 were admitted into evidence; parent exhibits P-1 through P-12 were admitted into evidence, and school district exhibit S-1 was admitted into evidence.

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

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

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

ISSUES PRESENTED

The due process complaint, as explained and clarified at the prehearing conference convened for this matter, presents the following issues:

1. Whether the parents have proven that they should be reimbursed for unilateral private placement of the student and a prospective private placement?

2. 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 student is a resident of the school district.

2. The school district is a recipient of federal funds.

3. The student was unilaterally placed by the parents in a private school on October 5, 2021.

4. The student is eligible for services under IDEA.

5. The parents sent a proper 10-day letter, notifying the school district of the unilateral placement, prior to the placement.

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

6. The student is [redacted]. (NT 228)

7. The student is a [middle school aged] student whose date of birth is [redacted]. (J-1, J-17)

8. The student attended school in the school district from kindergarten through the beginning of the current school year. (NT 152)

9. The student began exhibiting problems with reading and writing in [early elementary school]. During the student's [redacted] school year, on December 9, 2016, the school district found the student to be eligible for special education as a student with a specific learning disability in reading, written expression and mathematics and other health impairment due to deficits in attention. A reading specialist evaluated the student and recommended that the student participate in a small group reading program. The school district developed an IEP for the student. (J-1; NT 152, 155)

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[1] (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits, and "J-1," etc. for the joint exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT___").

10. The school district conducted a reevaluation of the student on May 13, 2019, [redacted]. A reading specialist conducted a formal reading assessment as a part of the reevaluation. It was determined that the student continued to be eligible for special education under specific learning disability and other health impairment, but speech language impairment was added because of deficits in articulation. It was also determined that the student should receive occupational therapy services. (J-2)

11. By the end of the [school year], the student had mastered the annual IEP reading decoding goal, the math computation goal and was near mastery of the reading accuracy goal. The student was eligible for extended school year services for reading and writing. (J-3)

12. The student's IEP team met on June 4, 2019, and the parents approved a Notice of Recommended Educational Placement for the student's [2019-2020] educational program. (J-3)

13. On June 4, 2019, because of concerns regarding off task behavior, inattention and relations with peers, the school district developed and implemented a positive behavior support plan designed for the student. Thirty minutes of direct social skills instruction weekly was added to the IEP. (J-3)

14. For the [2019-2020] school year, the student participated in the general education classroom daily and received thirty minutes of daily small group reading decoding instruction and thirty minutes of daily small group guided reading. The school district utilized the Sonday program for reading instruction, which is built on the Orton – Gillingham methodology. The student participated in small group writing instruction each day for thirty minutes with a replacement curriculum. For math, the student participated in the general education classroom and whole group instruction and received thirty minutes each day of small group for re-teaching of concepts and thirty

minutes each day of small-group math computation instruction. The student's IEP also provided for thirty minutes of direct occupational therapy and thirty-minute weekly speech language therapy sessions. (J-5; NT 60)

15. Orton – Gillingham reading instruction is a type of program under the umbrella of structured literacy methodology. (J-11; NT 124 – 125)

16. The school district offered as a part of the student's educational program a number of related services and other services to the student that were declined by the parents, including occupational therapy and speech language therapy. The parents also refused social skills instruction for the student. (NT 118 – 120, 212 – 214)

17. The student's parents enrolled the student in a private school for approximately two weeks in February 2020, but the parents reenrolled the student in the school district thereafter because the private school concluded that it could not meet the student's special education needs. (NT 162 – 164)

18. Soon after the student returned to the school district from the private school, schools were closed because of the COVID-19 pandemic. The student's educational program was delivered virtually beginning at that point, with the exception that the school district reading specialist came to the student's home to provide 1:1 Orton-Gillingham reading instruction daily before the student's virtual instruction. (NT 174, 176, 341-344)

19. The student made good progress in the student's educational program throughout [the school year]. The student advanced from an instructional reading level of beginning of third grade to a reading level equivalent of the end of third grade from September to January. The student mastered annual IEP goals in math computation and application, both writing goals, the reading accuracy goal and the speech articulation

goal and made progress in reading skills. The student qualified for extended school year services in reading and writing and for occupational therapy to prevent skill regression. (J-5: J-15)

20. At the August 14, 2020 IEP team meeting, the parents requested that the school district fund a private school placement for the student. The parents had looked at the private school that the student is now attending as a potential placement for the student prior to the request. (NT 207 – 209)

21. The school district issued a prior written notice / Notice of Recommended Educational Placement on August 31, 2020, rejecting the parents' request that the district fund a private school placement. (J-4)

22. For the [following] school year (2020 – 2021), the student received intensive reading supports, including daily in-home individual Orton – Gillingham reading instruction with a certified reading specialist for one hour every day before the virtual learning format began and two hours of daily instruction in the general education curriculum. The student's reading specialist consulted with the student's special education teacher concerning generalization of skills. The student was in the regular education classroom approximately 70% of the school day (J-10; NT 210 – 212, 300 – 304, 312 – 314)

23. The school district reevaluated the student on November 5, 2020 and determined that the student continued to be eligible for special education under the categories of specific learning disorder, other health impairment and speech language impairment. (J-6)

24. The student made good educational progress [during the 2020-2021 school year]. By the end of January, the student had made significant improvement in understanding alphabetic principles, segmentation skills, and sound pronunciation; the student demonstrated significant growth in the

areas of consonant sounds, vowels and multisyllabic words; the student was at the highest level for deletion skills. The student mastered the reading accuracy goal at the fourth grade level and a new reading accuracy goal was added at the fifth grade level. By the third marking period, the student had mastered the annual math computation goal. (J-5, J-8, J-10, J-14, NT 300 - 308)

25. The student responded well to the 1:1 Orton – Gillingham reading instruction and the student also showed improvement in handwriting and reading confidence as a result. (NT 175 – 183, 244-247; J-14)

26. On April 13, 2021, the parents provided the school district with a written report of an outside evaluation by the parents' dyslexia expert. Among the evaluator's recommendations for the student were that the student continue to receive daily instruction in a "structured language" curriculum, both during the school year and over the summer. The dyslexia expert did not speak to the school district's reading specialist, the student's teacher or to any of the other staff at the student's school before completing the evaluation. The parents consulted with the dyslexia expert because they wanted to obtain a diagnosis that the student has dyslexia. The evaluator found that the student had made personal gains in reading under the school district IEPs but concludes that the school district program was not appropriate because of an achievement gap between the student and non-disabled peers. (J-9; P–4; NT 31, 49 – 55)

27. In April 2021, the private school that the student now attends evaluated the student and accepted the student for admission into its program. (P-7; NT 214)

28. The school district proposed that the student receive extended school year services for the summer of 2021 consisting of Orton – Gillingham reading instruction four days per weeks, as well as writing and

math. The parents declined the extended school year services and instead sent the student to a summer program at the private school that the student now attends. Not receiving the proposed extended school year services had a negative impact upon the student's reading. The parents did not inform the school district that the student had participated in the private school's summer program. (J-8; NT 117 – 118, 191 – 192, 200 – 202, 230 – 231; J-9)

29. On September 1, 2021, counsel for the parents provided a report of a dyslexia consultation by the parents' expert speech language pathologist. The evaluator did not perform the types of assessments that she would normally use because of the recent dyslexia evaluation. The evaluator observed the student in the student's classroom on June 8, 2021, which was during the last week of school but was not a typical school day for the student. The evaluator did not contact the school district's reading specialist about the student's program. The evaluator concluded that the school district program for the student was inappropriate. The evaluator recommended immediate placement in a specialized "out of district" school and that the student receive forty-five to sixty minutes daily of structured literacy instruction. The recommendation was made pursuant to a handbook concerning students with dyslexia. (J – 11, P -1; NT 95 – 99, 114 – 115, 120 – 125)

30. The school district adopted most of the recommendations of the parents' two private evaluators, with the major exception that it declined to fund an "out of district" private school. (J-5, J-10, J-12; NT 60, 211 -212, 305-306, 124-125; record evidence as a whole)

31. On September 17, 2021, the school district proposed adding daily push-in services by the student's reading specialist to help facilitate generalization of reading strategies by the student. (J-17; NT 43, 139)

32. The student's issues with inattention continue to be a major obstacle to the student's success in reading. (P-12, J-1, J-5, J-3; NT 254-255, 68, 70-71)

33. The student's current private school is an out of state special education school that accepts only students with disabilities. The student's reading teacher at the private school is a teacher in training whose certification in the Wilson reading program is still in progress; this is the teacher's first year teaching. The private school staff recognizes the student's issues with inattention and that they constitute a substantial barrier to the student's reading skills. The private school has not implemented a positive behavior support plan or other behavioral intervention plan or other supports to address the student's problems with inattention. (P-12, P-6; NT 235, 253 – 254, 276, 292 – 294, 288)

34. The student made substantial progress under the student's IEPs at the school district. The student mastered a number of IEP goals, progressed through multiple grade levels on the Orton – Gillingham structured literacy reading instruction, advanced in DRA-2 grade levels, demonstrated improved handwriting, attainment of reading confidence while attending school with general education peers were approximately 70% of each school day. (J-3, J-5, J-8, J-10, J-14, J-15; NT 175 - 183, 211 – 212, 244-247, 300 – 309; 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(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. 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).

3. Prospective private placements as relief for violations of IDEA are rarely made by hearing officers or courts; the clear preference is to educate students in public schools; placement in a private school is the exception. See, RH by Emily H & Matthew H v. Plano Independent Sch Dist, 607 F.3d 1003, 54 IDELR 211 (5th Cir 2010). Although hearing officers and courts clearly have broad equitable power to award appropriate relief where there has been a violation of IDEA, awards of prospective private placement have been made only in egregious cases where the school district cannot provide FAPE. See, Draper v. Atlanta Independent School System, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008); Upper Darby Sch Dist, 120 LRP 27028 (SEA Penna. 2020).

4. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the child's unique circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. ___, 137 S. Ct. 988, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

5. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, supra; LB by RB and MB v Radnor Twp Sch Dist, 78 IDELR 186 (ED Penna 2021).

6. The appropriateness of an IEP in terms of whether it has provided a free appropriate public education must be determined at the time that it was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; instead, it requires an educational plan that provides the basic floor of educational opportunity. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); DS v. Bayonne Board of Education, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009).

7. 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, 56 IDELR

102 (N.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).

8. A parent cannot compel a school district to use a specific educational methodology. A school district is afforded the discretion to select from among various methodologies in implementing a student's IEP. Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012); see EL by Lorsson v. Chapel Hill – Carrboro Board of Education, 773 F. 3d 509, 64 IDELR 192 (4th Cir. 2014); Lessard v. Wilton – Lyndborough Coop School District, 592 F. 3d 267, 53 IDELR 279 (1st Cir. 2010); In re Student With A Disability, 51 IDELR 87 (SEA WVa. 2008).

9. 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, 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).

10. 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).

11. 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).

12. The parents have not proven that the school district has denied a free and appropriate public education to the student, and, therefore, are not entitled to an award of reimbursement for private school tuition and expenses for their unilateral placement or to a prospective private placement,

13. The parents have not proven that the school district has violated Section 504 of the Rehabilitation Act.

DISCUSSION

1. Whether the parents have proven that the school district should reimburse the parents for the unilateral private placement and a prospective private placement?

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

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

The parents contend that the school district denied a free and appropriate public education to the student. No procedural violations are alleged; the parents contest the substantive adequacy of the student's IEPs. The school district argues that it did provide a free and appropriate public education to the student.

At the heart of this dispute is the parents' contention that the school district must employ a particular educational methodology – a structured literacy reading program. The parents cite four cases in support of their argument that the school district must adopt a parents' preferred methodology. One is an unpublished Third Circuit decision. The Third Circuit, however, has cautioned IDEA hearing officers and district courts not to rely upon unpublished decisions in IDEA cases. DF by AC v. Collingswood Borough Bd. of Educ., 694 F. 3d 488, 59 IDELR 211 (3d Cir. 2012).

Accordingly, the unpublished decision cited by the parents was not considered in rendering this decision.

The two Pennsylvania District Court cases cited in the parents' brief are distinguishable from the facts of this case. In MM v. School District of Philadelphia, 585 F. Supp. 2d 657, 51 IDELR 154 (E.D. Penna. 2008), the school district's IEP was appropriate; the court did not rule that the district's methodology was flawed. In Rairdan M. v. Solanco Sch. Dist., 28 IDELR 723 (E.D. Penna. 1998), the court was reviewing the appropriateness of a private school concerning the use of a particular methodology. Again, the facts of this case are much different.

The parents' brief also cites Rogich v Clark County Sch Dist, 79 IDELR 252 (D. Nev 2021) in support of their argument. The facts of that case, however, are also distinguishable. In that case, the second-tier state review officer wrongfully overturned the first-tier hearing officer's credibility determination. In addition, in that case, the Court made an exception to the general rule that a school district has discretion to select educational methodology where the school district simply ignored recommendations by the parent's independent evaluators. In the instant case, the school district did not ignore the recommendations of private evaluators; rather, it adopted the recommendations of the parents' evaluators with the exception of placing the student in a private school. Thus, the case law cited by the parents' brief does not support the parents' argument that the parents should be able to compel the district to adopt a particular educational methodology.

The Third Circuit has held specifically that the choice of educational methodology is the province of school officials. The parents cannot compel

the school district to adopt their preferred methodology. The parents' argument is rejected.

However, even assuming *arguendo* that the parents have proven that the student required the structured literacy reading methodology in order to receive FAPE, the record evidence reveals that the educational program provided to the student by the school district did in fact utilize the structured literacy methodology. The Orton – Gillingham reading methodology used by the school district is a type of structured literacy. Accordingly, the methodology offered by the school district was the preferred methodology of the parents. The parents' argument concerning the methodology used by the school district is rejected.

An additional theme throughout the testimony of the parent was the parents' focus upon the label attached to the student. The parents wanted the school district to "diagnose" the student as having dyslexia. Clearly, the parents conveyed their concern over the label attached to the student in arranging to have their two experts evaluate the student. One expert was a dyslexia expert and the other prepared a dyslexia consultation. Indeed, the reports of the parents' two experts adopt recommendations based upon the needs of children with dyslexia in general, rather than the unique individual needs of this particular student.

IDEA, however, does not concern itself with labels. Once a student is determined to be eligible under one of the disability categories enumerated by IDEA, the focus then becomes what educational needs of the student must be addressed in the student's IEP. Services and educational programs cannot be based upon a label or the eligibility category. Excessive use of labeling of students with disabilities leads to stereotypical thinking about

people with disabilities rather than the individualized analysis that is at the heart of IDEA.

In this case, the student was found by the school district to be eligible with a specific learning disability, which, unlike dyslexia, is one of the categories of eligibility specified by IDEA. Accordingly, once the student was determined to be eligible, the appropriate analysis is not whether the school district "diagnosed" the student with dyslexia or any other label, but rather whether the school district provided FAPE to the student.

The parents' experts also improperly focused upon the gap between the student's performance and the performance of the student's nondisabled peers. IDEA does not require that disabled children advance at a grade-level pace; an achievement gap does not mean that FAPE has been denied. As the Supreme Court has ruled, the factual analysis to determine whether FAPE has been provided should focus upon the unique circumstances of the individual student. The experts' focus upon such a gap rather than the appropriateness of the student's IEPs is misplaced.

In the instant case, it is clear that the student's IEPs were reasonably calculated to provide meaningful educational benefit to the student in view of the student's unique circumstances. Accordingly, FAPE has been provided. The student was evaluated by a certified reading specialist, and the student's IEPs were designed to provide an intensive Orton – Gillingham reading program, which is a research-based reading program under the umbrella of the structured literacy methodology. The school district's reading specialist who evaluated the student and who provided reading instruction to the student was an experienced and certified Orton-Gillingham instructor. Thus, the record evidence clearly establishes that the school district did use the parents' preferred methodology, and the reading

instruction provided under the student's IEP was individually tailored to this student's unique needs.

The student's IEPs in the school district are also appropriate because they reasonably addressed the student's problem behaviors, and particularly the student's issues with inattention. In addition to other behavior supports and strategies, the IEPs included a positive behavior support plan. As the staff of the private school that the student now attends has confirmed, inattention continues to be an obstacle to the student's reading. Thus, the unique circumstances of this student make it very important that the student's educational program include a positive behavior support plan and other supports that address the student's issues with inattention.

Moreover, although FAPE does not require that the student make actual progress under an IEP, but rather only that the IEP be reasonably calculated to confer meaningful progress at the time that it was written, in this case, the student actually did make meaningful progress under the student's IEPs. The school district's intensive structured literacy based reading program for the student was particularly successful. The parents' brief handpicks certain areas in order to argue that the student was not making progress, but the overall picture painted by the evidence in the record shows that the student was making meaningful progress under the student's IEPs.

The parents' brief also raises an issue with regard to implementation of the student's IEP. The parents contend that the school district's reading program for the student did not properly address generalization of skills. The parents did not raise the issue of implementation in the list of issues submitted by the parents' counsel prior to the hearing. Accordingly, the parents have waived the issue of implementation.

Even assuming *arguendo*, however, that the implementation issue is properly before the hearing officer, the school district has shown that it did properly address generalization of skills in the student's IEPs. The student's IEPs provided that the school district's reading specialist would consult with the student's special education teacher during the [2020 – 2021] school year. After the parents raised further concerns regarding generalization, the student's IEP for [the next] grade added daily push-in services for the reading specialist to further facilitate generalization of learned reading skills. Thus, the record reflects that the student's IEPs were appropriately designed to address generalization of the reading skills being taught by the reading specialist. The parent's argument with regard to generalization of skills is rejected.

The testimony of the school district witness was more credible and persuasive than the testimony of the student's parent and witnesses testifying on behalf of the parents. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: the parent was very evasive and combative during questioning by the lawyer for the school district. Also, the parent testified that the school district did not have a plan in place to address the student's deficits with regard to inattention and focus, even though the school district IEPs contained a positive behavior support plan for the student that was implemented during the fourth, fifth and sixth grade school years. The parent changed her testimony with regard to whether the student attended an intensive summer reading program at the private school that the student now attends. The parent also gave inconsistent testimony with regard to the nature of the Orton – Gillingham instruction that the student received from the school district. In addition, the parent did not give answers to questions concerning whether the parents had toured the private school the student now attends during

the spring of 2021 and whether the parents had discussed the particular private school the student now attends with their advocate during the summer of 2020. The testimony of the parents' experts was not credible or persuasive because of their extreme focus on the label of dyslexia in general rather than the individual needs of this student, their failure to communicate with the school district staff regarding the district's educational program, and the recommendation that the student attend an "out of district" school rather than addressing the program needs that the student requires in order to receive an appropriate education. In addition, the parents' dyslexia expert was very evasive on cross examination.

It is concluded that the parents have not proven that the school district denied a free and appropriate public education to the student. Accordingly, reimbursement for a unilateral private placement, as well as the more extreme and unusual relief of a prospective private placement, must be denied.

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

The second prong of the Burlington – Carter analysis involves whether the parents have proven that the private school is appropriate. It is not necessary to reach the second prong 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 selected by the parents accepts only students with disabilities; at the school, the student does not have any interaction with the

student's nondisabled peers. Clearly, the private placement is not the least restrictive environment that is appropriate for the student. In addition, the student's reading teacher at the private school is a novice, or teacher in training, whose certification in the Wilson reading program is still in progress. This is her first year as a teacher.

More importantly, however, the private school that the student currently attends does not provide a positive behavior support plan for the student even though the private school acknowledges that the greatest obstacle to the student's mastery of reading fluency is the student's problems with inattention. Unlike the school district IEPs, which provided a positive behavior support plan that dealt with the student's issues concerning inattention and lack of focus, the private school program does not adequately address the student's behavioral needs. Accordingly, It is concluded that the parents have not proven that the private school in which they unilaterally placed the student 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 and 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 had proven the first two prongs, however, they have not established that the equities favor reimbursement.

It is clear from the record evidence that the parents did not come to the most recent IEP team meeting with an open mind about a public school

placement for the student. The parents predetermined that a private school was needed. The evasive testimony about the private school by the student's parent supports this conclusion. In addition, the parents failed to inform the school district that the student had attended a summer program at this particular private school before the [next] school year. Significantly, one of the parents' expert witnesses went out of her way to recommend an "out of district" placement for the student. The "out of district" placement recommendation, instead of a description of an appropriate educational program, indicates quite strongly that the expert was expressing the parents' predetermination that only a private school would suffice.

An additional factor weighing against reimbursement is the fact that the parents refused a number of services offered by the school district. The parents refused to send the student to the school district's extended school year program before the [next] school year, which likely harmed the student, as conceded by the parents' own expert. The parents also refused social skills instruction, speech language therapy, and occupational therapy services offered by the school district. The parents cannot refuse numerous services determined to be appropriate for the student by the school district and later claim that the district's educational program was deficient.

It is concluded that the equitable factors in this case do not favor reimbursement.

The parents have not proven any of the three prongs of the Burlington – Carter analysis. Accordingly, reimbursement for the unilateral private placement, as well as the more extreme and unusual relief of a prospective private placement, must be denied.

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

The parents contend that the school district also violated Section 504. In the parents' post-hearing brief, they argue concerning Section 504 only that a denial of FAPE under IDEA also constitutes a violation of Section 504. As the foregoing discussion demonstrates, however, the parents have not proven that the school district denied FAPE under IDEA. Accordingly, the parents present no argument supporting a Section 504 violation, and their contention is rejected.

Moreover, the evidence in the record does not support a discrimination claim. There is no evidence to support the parents' contention that the school district discriminated against the student on the basis of the student's disability. The parents have not proven a violation of Section 504.

ORDER

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

IT IS SO ORDERED.

ENTERED: March 14, 2022

James Gerl

James Gerl, CHO
Hearing Officer