

*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:**

23863-19-20

##### **Child's Name:**

D.M.

##### **Date of Birth:**

[redacted]

##### **Parents/Guardians:**

[redacted]

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##### **Hearing Officer:**

James Gerl, CHO

##### **Date of Decision:**

September 23, 2020

## **BACKGROUND**

The parents filed a due process complaint alleging violations of IDEA involving evaluations, the student's placement, and an alleged denial of a free and appropriate public education. The school district raised an affirmative defense asserting that the statute of limitations prevents some or all of the parents' claims. I find that the school district has proven that the statute of limitations prevents the parents' evaluation claims and any claims regarding older IEPs, but not the parents' claims with regard to the student's seventh and eighth grade school years. I find further that the parents have failed to show that the relevant IEPs failed to provide a free and appropriate education to the student or that the student's placement in regular education classes for eighth grade math and English with an itinerant level of support was inappropriate.

## **PROCEDURAL HISTORY**

This hearing required two separate virtual sessions. The hearing was unnecessarily protracted by the failure of counsel for the parties to agree to any stipulations of fact.

Seven witnesses testified at the hearing, and one witness testified again in rebuttal. The parties offered a voluminous amount of exhibits. Parent exhibits P-1 through P-11 were admitted into evidence. School district Exhibits S-1 through S-33 were 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.

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 and the response thereto raised the following issues:

1. Whether the school district has proven that the statute of limitations bars all or some of the parents' claims?
2. Whether the parents have proven that the student's placement in general education classes with an itinerant level of support rather than in special education classes with a supplemental level of support violated IDEA?
3. Whether the parents have proven that the student's IEPs denied the student a free and appropriate public education?

## **FINDINGS OF FACT**

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact.<sup>1</sup>

1. The student is a lot of fun, works hard, and is wise beyond the student's age. (NT 110, 172)

2. The student has been diagnosed with congenital hydrocephalus and Arnold Chiari malformation. The student has a shunt to relieve intracranial pressure. The student also has a kidney condition. (S-13; NT 27 – 29)

3. The student enrolled in the school district in 2011 when the student was in kindergarten. The student will be entering the 9th grade for the 2020 – 2021 school year. (NT 32, 68 – 69; S-9)

4. When the student enrolled in the school district in 2011, the student was approximately two years behind grade level. (NT 73 – 74, 80; S-28)

5. The student's mother was aware that the student had cognitive deficits since the time the student was first diagnosed, and the student's mother believed that cognitive deficits had been a problem for the student through elementary school and middle school. (NT 94 – 95)

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<sup>1</sup> (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT\_\_\_\_").

6. The school district requested permission from the parents to conduct cognitive assessments of the student in 2011. The student's mother questioned the cognitive testing and the student's parents asked that the school district not conduct cognitive testing on the student. (S-17; NT 88, 94 – 95, 275 – 277)

7. The student's parents often advocate for both of their children together at the same time because they have similar needs. (NT 56, 188; S-30; S-31; S-32)

8. On August 25, 2016, the former attorney for the parents sent a letter to the former attorney for the school district requesting an independent educational evaluation for the student's sibling based in part upon the contention that the school district had wrongfully failed to conduct a cognitive assessment of the sibling. (S-33)

9. From May 26, 2018 through June 1, 2018, when the student was about to enter seventh grade in the school district, the student's mother sent e-mails to the director of special education for the school district praising the student's IEP and the district's special education teachers and the progress that the student had made under the student's IEPs in the district. The student's mother described the student's IEP as "not broke ..." and as "obviously working for [the student]." (S-28)

10. On June 1, 2018, the student's mother sent an e-mail to the school district stating that the student's special education teacher had developed an "effective IEP" for the student and that the special education teacher was the reason that the student was "so successful in school today." (S-28)

11. The school district conducted a reevaluation of the student, as reflected in a report issued on May 2, 2019. The evaluation included a

review of parent input and all recent assessments of the student. The reevaluation included a cognitive assessment of the student. The district's school psychologist administered the Wechsler Intelligence Scale for Children – Fifth Edition- to the student. The student was assessed in all areas of suspected disability with a variety of assessment tools and strategies to gather relevant information. The instruments used were technically sound and administered in accordance with their instructions. The assessments were administered by trained and knowledgeable personnel and were valid and reliable. (S-10; NT 234 – 249)

12. The student's seventh grade IEP was implemented in the special education environment with a supplemental level of support. The placement involved special education and supports provided by special education personnel from 20% to 80% of the school day. (S-5; S-6)

13. The school district and the parents discussed transitioning the student to the regular education environment for English language arts at a December 2018 IEP team meeting. The parents were reluctant to have the student transition to general education classes at that point, and the IEP team agreed to wait and develop a plan to transition the student to the regular education environment. (S-5; NT 208 – 210, 282 – 284)

14. The school district utilized a school psychologist consultant to determine whether and how to transition the student to the regular education environment. (NT 280 - 287)

15. At the May 2019 IEP team meeting, the parents agreed with the other members of the IEP team that it would be appropriate to transition the student to the regular education environment with an itinerant level of support for both English language arts and math for the eighth grade school year. (NT 224 – 226; 218-219)

16. The student's IEP includes numerous supplementary aids and services to help the student be successful in the student's eighth grade classes, including: extended time, spacing of materials, chunking of information, an option to take tests with an aide or in a different location, ability to retake tests, reteaching and reflection, overlearning, placing time limits on the amount of homework, repetition of multistep directions and pairing verbal and written directions. The IEP has two goals and sets forth accommodations and specially designed instruction. The IEP includes specially designed instruction to address the student's health and well-being (S-3; NT 120 - 127, 155 - 163, 284 - 285)

17. On April 27, 2020, a school psychologist issued an independent educational evaluation of the student. The evaluator conducted cognitive and achievement testing of the student. The report of the independent educational evaluation includes a chart that compares the student's predicted scores to the student's actual scores in seventeen academic areas. In sixteen of the seventeen areas, the student's actual scores exceed the student's predicted scores. In eight of the seventeen areas, the student's actual score was more than the student's predicted score by 1.5 or more standard deviations. The evaluator's report includes over nine pages of recommendations, including that the student continue to receive a supplemental level of learning support rather than an itinerant level of support. (S-18; NT 250 -253)

18. The student's eighth grade IEP did not include the recommendation of the independent educational evaluator that the student remain in special education with a supplemental level of support; instead, the student was placed in regular education for math and English language arts with an itinerant level of support. Many of the other recommendations of the independent evaluator were included in the student's IEP. Some of the

recommendations were standard teaching practices that were available to all students. (S-3; S-18; P-5; P-6; NT 253 – 255; 287-300)

19. An independent speech language evaluation of the student was conducted on February 3, 2020. The evaluator found that the student's core language score was in the average range. The student's receptive language score was also within the average range. The student's expressive language score was in the below average range, but this was primarily due to the student's performance on two subtests – the sentence repetition and the sentence assembly subtests. Extension testing by the evaluator showed that when the student was given a cue or repetition, the student was able to correctly produce sentences. Three of the student's four teachers easily understood the student when the student spoke in the classroom. In the recommendations section, the evaluator noted that the IEP team may consider a trial period of speech language therapy. The evaluator noted that because the student is not comfortable listening the student's own speech, therapy may not be productive. (S-19)

20. The student's eighth grade IEP does not provide direct speech language therapy for the student. The student's IEP provides for speech language consultation and support services throughout the school year. The focus of the speech therapy support is upon generalization of skills and other strategies to support the student. (S-3; S-19)

21. On January 13, 2020, an independent occupational therapy evaluation of the student was conducted. The evaluator noted that the student continues to demonstrate difficulty with legible handwriting, but that the student had used assistive technology in an efficient method to address the student's handwriting needs. The evaluator notes that the student's use of technology is one of the student's strengths. The evaluator did not recommend direct occupational therapy services but instead recommended



continued occupational therapy support for the student. (S-20; NT 313-315)

22. The student's eighth grade IEP provides for 15 minutes of occupational therapy support per quarter. The occupational therapist also consults with the student's case manager and the assistive technology specialist concerning the student's use of assistive technology. The purpose of occupational therapy for the student is to support the student's use of assistive technology for writing assignments. The IEP provides for typing to the maximum extent possible, consultation with teachers on slowing down the speed of the student's writing, access to class notes in advance, chunking of materials, and reduction in written responses. The occupational therapist consults with the student's teachers at least once per month. (S-3; NT 304 - 318)

23. The student is proficient in the use of assistive technology. The student quickly learns new technologies and using assistive technology is one of the student's strengths. (NT 156 - 159, 205, 305 - 306; S - 20)

24. The school district has provided assistive technology for the student, including an iPad, which the student could use independently; a program called Notability to annotate notes and import pictures and .pdfs and to permit the student to directly make accommodations; and Google Docs to enable the student to access materials digitally. (NT 156 - 159, 312- 313; S - 20)

25. The school district's occupational therapist consulted with the school district's assistive technology specialist to support the student, particularly during the transition to general education classes in eighth grade. (NT 205 - 207, 307 - 309)

26. The student did not have an extensive number of absences during the student's seventh and eighth grade school years. (NT 164 – 166, 192-194; P-8)

27. The student last missed school because of a surgery for the student in second grade. When the student missed school because of medical absences, the school district staff worked to support the student to receive continued instruction, including instruction in the home during one medical absence. (NT 71 – 73, 164 – 166, 192 – 194)

28. Executive functioning refers to a broad set of skills that includes managing one's self in the order to achieve a goal. It includes skills such as self-advocacy, study skills, personal growth, and planning and organization. The school district attempted on a number of occasions to persuade the student's parents to permit the school district to provide direct instruction in executive functioning to the student. The student's parents rejected the school district's proposal to provide executive functioning instruction for the student. (NT 52 – 53, 150 – 152, 214 – 215; S-28)

29. The school district suggested to the parents at the IEP team meeting after the report of the independent evaluator that the student receive school-based counseling. The parents refused school-based counseling for the student. (NT 219-221, 48-50, 59-61, 153)

30. The student was a success story during the student's enrollment in the school district. During the student's seventh and eighth grade school years, the student made substantial progress under the student's IEPs. (NT 119, 147 – 148, 194 - 220; S-28)

31. The student was reading on grade level at the start of seventh grade and was testing at the sixth grade level in math during seventh grade. The student was one of the strongest performers in seventh grade direct

instruction math and in seventh grade direct instruction English language arts. (NT 129, 149, 202 – 204, 281; S-3; S-5)

32. The student made significant progress in math from the start of seventh grade to the end of the eighth grade. (NT 204; 139; S-3)

33. The student continued to make good progress and earn good grades once the student transitioned into the regular education environment with itinerant support for math and English language arts. The student performed well and the student's teachers were thrilled with the student's progress. The student became more independent and demonstrated increased self-advocacy skills. (NT 149, 169 – 171, 209 - 211; P-7; S-18, p. 28 – 26)

34. The parents filed the instant due process complaint on June 24, 2020. The parents had filed a previous due process complaint on behalf of this student on September 12, 2019. The parties entered into a tolling agreement shortly after the filing of the previous complaint pending the outcome of an independent educational evaluation. (P-11)

### **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 due process complaint filed under the Individuals with Disabilities Education Act (hereafter sometimes referred to as "IDEA") 20 U.S.C. § 1400, et seq. must be filed within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. IDEA § 615(b)(6) and 615(f)(3); 34 C.F.R.

§ 300.511(e), 300.507(a)(2); GL by Mr. GL and Mrs. EL v. Ligonier Valley School District Authority, 802 F.3d 601, 66 IDELR 91 (3d Cir. 2015).

2. 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 IDEA: an identification violation, an evaluation violation, a placement violation or a failure to provide a free and appropriate public education. IDEA §615(f)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

3. 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 education classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2); IDEA § 612(a)(6)(A); 22 PA Code § 14.195.

4. Supplementary aids and services are defined as "...aids, services and other supports that are provided in regular education classes, other education related settings and in extracurricular or non-academic settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate in accordance with..." the least restrictive environment requirements. 34 C.F.R. § 300.42.

5. The Third Circuit has stated that the least restrictive environment provision sets forth a "strong congressional preference" for integrating children with disabilities in the regular classroom. Oberti v. Board of Education, 995 F.2d 1204, 19 IDELR 908 (3d Cir. 1993). The court adopted a two-part test for determining whether a district is in compliance with IDEA's mainstreaming requirement. First, the court must determine whether education in a regular education classroom with the use of

supplementary aids and services can be achieved satisfactorily. Second, if the court finds that placement outside a regular classroom is necessary for the child to benefit educationally, then the court must decide whether the school has “mainstreamed the child to the maximum extent appropriate,” that is, whether the school has made efforts to include the child in school programs with non-disabled children whenever possible. In determining the first prong of the two-part test, the court sets forth three factors to be considered: First, the court should look at the steps that a school has taken to try to include the child in a regular classroom. Second, the court should compare the educational benefits the child will receive in a regular classroom with supplementary aids and services versus the benefits the child will receive in a segregated special education classroom. Third, the court should consider the possible negative effects of the child’s inclusion on the education of other children in a regular classroom. When considering negative effects, the court must keep in mind the school’s obligation to provide supplementary aids and services to accommodate the child’s disabilities. Oberti, supra.

6. The least restrictive environment mandate is a substantive requirement of IDEA. Oberti, supra, at n.18; see TM by AM and RM v. Cornwall Central School District, 752 F.3d 145, 63 IDELR 31 (2d Cir. 2014).

7. 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 (hereafter sometimes referred to as “IEP”) is reasonably calculated to enable the child to make appropriate progress in light of the child’s circumstances.

Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. \_\_\_\_, 137 S. Ct. 988, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

8. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, *supra*.

9. 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; 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).

10. 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 (M.D. Penna. 2015); see Brian Independent School District v. Hovem, 690 F.3d 390, 59 IDELR 121 (5th Cir. 2012); Kelsey v. District of Columbia, 111 LRP 14802 (D.C. 2015); District of Columbia Public Schools, 111 LRP 77405 (SEA D.C. 2011). The Third Circuit has specifically ruled that IDEA does not require that all, or even most, disabled children advance at a grade-level pace. KD by Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

11. A school district must provide a related service to a student with a disability when the related service is necessary for the student to benefit from special education. Irving Independent School District v. Tatro, 468 U.S. 883, 555 IDELR 511 (1984); Cedar Rapids Community School District v. Garrett F, 526 U.S. 66, 29 IDELR 966 (1999); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 52 IDELR 211 (3d Cir. 2009); IDEA § 602(26); 34 C.F.R. § 300.34.

12. The parents' claims pertaining to cognitive assessments of the student in school district evaluations, as well as the appropriateness of the student's IEPs prior to the student's seventh grade school year are barred by the statute of limitations.

13. The school district appropriately transitioned the student for the eighth grade school year to the regular education environment for math and English language arts with an itinerant level of support and appropriate supplementary aids and services and modifications and accommodations. Said placement is the least restrictive environment that was appropriate for the student.

14. The student's seventh and eighth grade IEPs were reasonably calculated to provide educational benefit that was appropriate in view of the student's individual circumstances.

## **DISCUSSION**

### **1. Whether the school district has proven that the parents have failed to file a timely complaint?**

The school district asserts that the parents' complaint is not timely filed. The parents contend that all issues raised by the complaint are timely filed. The statute of limitations analysis in this case is complicated by the

fact that the parents' complaint alleges multiple violations of IDEA over numerous school years.

The parents filed the due process complaint in this matter on June 24, 2020. However, the parents had previously filed a due process complaint on September 12, 2019. Thereafter, the parties agreed to a tolling agreement with respect to the applicable statute of limitations pending receipt of an independent educational evaluation. Thus, the effective filing date for this matter was September 12, 2019. Accordingly, the parents' complaint is clearly timely with respect to the allegations in the complaint concerning the student's recent IEPs up to and including September 12, 2017 (i.e., seventh and eighth grade IEPs) as well as whether said IEPs appropriately reflect the recommendations of independent evaluators. To the extent that the school district's motion is intended to bar the parents' claims against the student's recent IEPs, therefore, the school district has not met its burden and the statute of limitations argument is rejected.

The parents' complaint, however, also includes a challenge to the school district's evaluations going back to the student's early days in the school district. Although the parents do not contest the current May 2, 2019 reevaluation of the student, they contend that older evaluations were not appropriate. With regard to these claims, the parents assert that they first learned of the student's significant cognitive deficits and of the fact that the district's failure to assess the student's cognitive abilities was allegedly unlawful when they received the report of the independent educational evaluation in May of 2019. The evidence in the record, however, reveals that the parents questioned the district's request to conduct cognitive testing on the student as far back as 2011. In addition, the mother testified that



the student had cognitive deficits “right out of the gate,” that is, throughout elementary school and into middle school.

Moreover, the evidence in the record reveals that the parents, through their previous legal counsel, requested an independent educational evaluation for the student’s sibling on August 25, 2016, on the specific basis that the school district failed to conduct any assessment of the student’s sibling’s cognitive abilities. In their post-hearing brief, the parents reassert objections to the admissibility of the August 25, 2016 letter that were overruled at the due process hearing when the document was admitted into the record. Although the document pertains to the student’s sibling, it is clearly relevant because it shows the parents were well aware of the fact that a failure to conduct cognitive assessment could be argued to be a violation of IDEA. The parents’ brief also asserts that the document should be protected by attorney-client privilege, but the brief contains no legal argument concerning this point and fails to identify any privileged communication between a lawyer and client. Indeed, said letter was sent to a third person, counsel for the school district, and, therefore, could not possibly contain any confidential or secret communication between a lawyer and client. Significantly, this letter shows that the parents were aware, at least as of August 25, 2016, that a failure to conduct cognitive assessments could be argued to be a violation of IDEA. Coupled with the parents’ knowledge that the student had cognitive deficits throughout the student’s entire academic career, this correspondence shows that the correct known or should have known (KOSHK) date is no later than August 25, 2016 for alleged violations pertaining to cognitive assessments during evaluations of the student.

To the extent that the testimony of the student's mother and of the evaluator who conducted the independent educational evaluation are inconsistent with the testimony of school district staff, the testimony of school district staff is more credible and persuasive with regard to this issue because of the demeanor of the witnesses, as well as additional factors. See discussion of credibility in the next sections of this decision.

Accordingly, the school district has proven that the parents' complaint is not timely to the extent that the complaint alleges that evaluations of the student by the school district prior to September 12, 2017 were deficient because they failed to contain an assessment of the student's cognitive abilities. The parents' complaint concerning such evaluations was not timely filed.

**2. Whether the parents have proven that the student's placement in general education classes with an itinerant level of support rather than in special education classes with a supplemental level of support violated IDEA?**

The student's IEP team transitioned the student to the regular education environment for math and English language arts with an itinerant level of support at the start of the student's eighth grade school year. The parents contend that the decision to transition the student to the general education environment violated IDEA. The evidence in the record, however, shows that the transition of the student to itinerant level of support was appropriate.

The student's parents did not object to the student being transitioned to the general education environment with an itinerant level of support for classes in the eighth grade school year at the IEP team meeting during which this decision was made. Indeed, the entire IEP team agreed with the decision.

The record evidence reveals that the student has made great academic progress since enrolling in the school district. The student was a success story. The student's teachers were thrilled with the student's academic progress. The student's progress continued in seventh grade, where the student was one of the strongest performers in the seventh grade direct instruction math course and in the direct instruction seventh grade English language arts course. The student was performing at or near grade level in both reading and math. The school district staff suggested that the student transition to one general education class with itinerant level support at the half-way point in seventh grade, but the parents were hesitant so the IEP team agreed to delay the change and develop a transition plan.

The school district utilized a school psychologist as a consultant to assist the IEP team in deciding whether to and how to transition the student to the regular education environment. The entire IEP team, including the parents, supported that decision to transition the student to general education classes in math and English language arts for the eighth grade school year. The student's IEP provided for numerous and extensive supplementary aids and services, as well as accommodations and supports to help the student succeed in the regular education environment.

Once the student transitioned to classes in the regular education environment, the student performed well and was within the average range of performance in nearly every academic area with the accommodations and

supports provided by the student's IEP. Accordingly it is clear from the evidence in the record that the student could successfully be educated in general education classes with appropriate supplementary aids and services. There is no evidence in the record of any negative effects of including the student in regular education classes.

Thus it is clear, given the least restrictive environment requirement of IDEA, that the school district was required to educate the student in the two general education classes with an itinerant level of support and with appropriate supplementary aids and services rather than the more restrictive environment requested by the student's parents in the due process complaint. The parents' argument that the student should be in a more restrictive placement would stand the least restrictive environment mandate of IDEA on its head. It is clear that the student was making appropriate progress given the student's individual circumstances in the general education environment with an itinerant level services.

The primary basis for the parents' contention that the transition of the student to an itinerant level of support in a regular education environment violated IDEA was the recommendation of the evaluator who prepared an independent educational evaluation of the student. An evaluator cannot, however, merely prescribe a student's educational program. Perrin ex rel JP v Warrior Run Sch. Dist., 66 IDELR 225 (MD Penna 2015) adopted at 66 IDELR 254 (MD Penna 2015).

To the extent that the testimony of the independent evaluator is inconsistent with the testimony of school district staff, the testimony of the independent evaluator is less credible and persuasive than the testimony of school district staff because of the demeanor of the witnesses, as well as the following factors: the independent evaluator based his recommendation

upon his own estimate of time during a school day. The independent evaluator was unaware of the district's program or how it provided accommodations or services. Moreover, the testimony of the independent evaluator revealed that his recommendations were based on what he described as "best practices," rather than what is necessary for a student to make appropriate progress. The law does not require that a student be provided with the best possible or an ideal education; instead, the requirement is that the student be provided with an education that is appropriate given the student's individual circumstances. The evaluator's placement recommendation is also contrary to the least restrictive environment mandate of IDEA, and it is given no weight.

To the extent that the testimony of the student's mother is inconsistent with the testimony of school district staff, the testimony of the student's mother is less credible and persuasive than the testimony of school district staff because of the demeanor of the witnesses, as well as the following factors: the student's mother was very evasive and hostile while being questioned on cross-examination. In addition, the student's mother's memory was faulty during cross-examination despite not having any problems with memory during direct examination. The testimony of the student's mother is also impaired by a number of inconsistencies, including e-mails sent by the mother praising the progress that the student made under the student's IEPs and praising the student's teachers for their good work with the student.

The parents' brief makes one additional argument concerning this issue which needs to be addressed. The parents contend that the program provided by the school district was not appropriately ambitious because it provided numerous accommodations and supports for the student. The

“appropriately ambitious” reference is to dicta in the Andrew F. decision. The correct standard for whether an IEP provides a free and appropriate public education, however, is whether the IEP was reasonably calculated to provide appropriate benefit given the student’s individual circumstances. Moreover, the parents’ argument contains a serious logical flaw. If the extensive accommodations and supports provided by the school district were not appropriate, as the parents allege, then the even more restrictive special education environment sought by the parents in the complaint would be extremely inappropriate. The parents cannot have it both ways. This argument is rejected.

It is abundantly clear from the evidence in the record that the unanimous IEP team decision to transition the student to a general education environment for math and English language arts with an itinerant level of support and appropriate supplementary aids and services for the student’s eighth grade school year was the least restrictive environment and the appropriate placement for the student. It is concluded that the parents have not proven that the transition of the student to the general education environment with an itinerant level violated IDEA.

**3. Whether the parents have proven that the student’s IEPs denied the student a free and appropriate public education?**

The due process complaint challenges a number of the student’s IEPs during the student’s enrollment in the school district. As the section on statute of limitations discussion reveals, however, only the student’s IEPs for the student’s seventh and eighth grade school years are properly before the

hearing officer. The parents contend that said IEPs were substantively insufficient and did not provide the student with a free and appropriate public education. The parents do not assert procedural violations.

Although the parents have identified a number of specific sub-issues that they claim rendered the student's IEPs inappropriate, it should be remembered that the relevant inquiry is whether the student's IEPs in their totality provided FAPE and not whether any specific component of the IEPs was inappropriate.

The parents contend that the level of speech language support provided by the IEPs was insufficient. An independent speech language evaluation of the student was conducted on February 3, 2020. The independent evaluation found that the student's core language scores were within the average range, that the student's receptive language score was within the average range and that the student's expressive language score was in the below average range because of lower scores on sentence repetition and sentence assembly subtests. Extension testing by the evaluator found that the student was able to correctly produce sentences when given a cue to start or a repetition. The evaluator suggested a trial period of speech language therapy for the student, but noted that because the student was not comfortable listening to the student's voice on a tape recording, therapy may not be productive. The student's IEPs did not provide for direct speech language therapy to the student but did provide adequate speech language supports with a focus on generalization of skills and strategies to support the student in the classroom setting.

A related service, such as speech language therapy, must be provided by a school district only to the extent that it is required to assist a student to benefit from the student's IEP. In the instant case, it is clear that the

student made substantial academic progress and growth and that the student was benefiting from the student's IEP. Accordingly, the parents have not proven that the IEPs provided for an inappropriate level of speech language therapy or that an increased level of speech language therapy was required in order to assist a student to benefit from the IEP.

The parents contend that the level of occupational therapy services provided in the student's IEPs was insufficient. In order to prevail on a claim that the school district denied FAPE by failing to provide related services, such as occupational therapy, the parents must prove that the increase in the level of related services is required for the student to benefit from special education. In the instant case, the school district provided numerous occupational therapy supports to the student. In addition to the services provided by the occupational therapist, said supports included typing to the maximum extent possible, consultation with teachers on slowing down the speed of the student's writing, access to class notes in advance, chunking of materials, reduction in written responses, extra time to complete assignments, and consultation to ensure that the student's transition to the general education environment was appropriate. The student made progress with regard to the student's occupational therapy needs. Because of the student's difficulty with handwriting, the student's IEP focused on strategies using assistive technology to allow the student to complete assignments without using handwriting. An independent occupational therapy evaluation of the student was conducted on January 13, 2020. The independent evaluator did not recommend direct occupational therapy services for the student, but rather recommended that the school district continue to provide support to the student, including the use of assistive technology accommodations in particular because of the student's handwriting difficulties. Accordingly, the parents have not proven that the



IEPs provided for an inappropriate level of occupational therapy supports or that an increased level of occupational therapy was required in order to assist a student to benefit from the IEP.

It should be noted that the school district's discussion of the occupational therapy issue in its brief refers to a document that is not in evidence. The school district brief cites a document from the American Journal of Occupational Therapy. Because the document cited by the district is not in the record, it was not considered in the preparation of this decision.

The parents contend that the school district denied FAPE to the student by failing to provide sufficient assistive technology. The record evidence, however, reveals that the district provided significant and appropriate assistive technology to the student. The student was provided with an iPad for typing and the use of a program called Notability to annotate notes, import pictures and .pdfs so that the student could make accommodations directly on documents, as needed; and with the use of Google Docs. The occupational therapist worked with the student and with the school district's assistive technology specialist to consult with the student and the student's teachers on the use of assistive technology. The student was able to successfully utilize the assistive technology provided to the student in order to make significant progress. The use of assistive technology was one of the student's strengths. The parents have not demonstrated that the student's IEPs provided an insufficient level of assistive technology.

It should be noted that, in its posthearing brief, the school district asked the hearing officer to take official notice that the student provided assistive technology assistance to the student's mother during the virtual due process hearing. See footnote 1 of the school district's brief. The

observation noted by the school district is not derived from the evidence in the record, and it would not appear to be appropriate for the hearing officer to take official notice of the observation. The hearing officer expressly declines to take official notice as requested by the school district. The alleged technical assistance by the student was not considered by the hearing officer in writing this decision.

The parents contend that the school district denied the student sufficient opportunities to make up work missed because of medical reasons. It should be noted that although this sub-issue was listed by the parents prior to the hearing, the parents' post-hearing brief fails to address this sub-issue. Accordingly, the parents have waived this sub-issue. Even assuming, *arguendo*, that the parents had not waived this sub-issue, the record evidence reveals that the testimony of the mother concerning the student's medical absences was greatly exaggerated. The student was not absent as frequently as the parents contend. The student had not missed school because of a surgery since at least second grade. When the student did have absences because of medical issues relating to the student or the student's sibling, the school district provided instruction in the home for the student, and convened an IEP team meeting regarding a medical absence by the student for a revision, and revised the student's IEP to include specially designed instruction to address the student's health and well-being. Also, the student's case manager worked to support the student during absences. The parents have not proven that the school district failed to provide sufficient opportunities to make up missed work after medical absences by the student.

In their post-hearing brief, the parents also contend that the school district failed to provide counseling as a related service. The sub-issue of

counseling as a related service was not one of the numerous FAPE sub-issues specified by counsel for the parents prior to the due process hearing. Accordingly, the parents have waived any sub-issue concerning counseling as a related service. Even assuming, *arguendo*, that the issue of counseling is properly before the hearing officer, however, the evidence in the record reveals that the student's parents refused the district's suggestion that the student receive school-based counseling. The parents cannot both refuse services and then claim a denial of FAPE when the school district does not provide them. More importantly, it is clear from the evidence in the record that the student made substantial progress under the student's IEP. The parents have not proven that counseling was required as a related service in order to assist the student to benefit from the student's IEP.

The parents contend that the school district failed to provide sufficient executive functioning instruction. The record evidence reveals, however, that the school district brought the issue of executive functioning instruction for the student to the attention of the parents, but the student's parents declined executive functioning instruction for the student. Once again, the parents cannot both decline services and then claim a denial of FAPE because the services were not provided. The parents have not proven that the school district failed to offer appropriate executive functioning instruction or supports.

An implied common thread that runs throughout the parents' FAPE arguments and the report of the independent evaluator testifying on behalf of the parents is that the student was allegedly denied FAPE because there is a gap between the level at which the student was performing academically and the student's age or grade level. The Third Circuit, however, has specifically rejected the argument that such a gap is a violation of IDEA. See

KD by Dunn, supra. Moreover, the record evidence reveals that the student was performing at or near grade level. The parents' arguments to this effect are rejected as inconsistent with the requirements of the law and inconsistent with the evidentiary record.

The record evidence reveals that the student made great progress under the seventh and eighth grade IEPs. The student's teachers were thrilled with the student's academic progress. The student was one of the strongest performers in the student's seventh grade direct instruction math course and in the student's direct instruction seventh grade English language arts course. The student was performing at or near grade level in both reading and math. Once the student transitioned to the regular education environment for the eighth grade school year, the student performed well and was within the average range of performance in nearly every academic area with the supplementary aids and services and accommodations and supports provided by the student's IEP. The student also made gains with regard to the student's independence and self-advocacy skills.

Significantly, the report of the independent educational evaluator compared the student's predicted scores to the student's actual scores in seventeen academic areas. In sixteen of the seventeen areas, the student's actual scores exceeded the student's predicted scores. In eight of the seventeen academic areas, the student's actual score was more than the student's predicted score by 1.5 or more standard deviations. The student's IEPs were clearly reasonably calculated to afford, and did afford, the student with the opportunity to make meaningful progress in light of the student's circumstances.

To the extent that the testimony of the student's mother and the evaluator who performed the independent educational evaluation of the student is inconsistent with the testimony of school district staff on these points, the testimony of the mother and the independent evaluator is less credible and persuasive than the testimony of school district staff. See credibility analysis in the previous sections of this decision.

It is concluded that the student's seventh and eighth grade IEPs were reasonably calculated to provide meaningful educational benefit in view of the student's individual circumstances. The parents have not proven that the student's IEPs denied FAPE to the student.

**ORDER**

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

IT IS SO ORDERED.

ENTERED: September 23, 2020

*James Gerl*

James Gerl, CHO  
Hearing Officer