This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 29370-23-24

CLOSED HEARING

Child's Name:
M.W.

Date of Birth:
[redacted]

Parents:
[redacted]

Local Education Agency:
Abington School District
970 Highland Avenue
Abington, PA 19001

Counsel for LEA
Emily Beck, Esq.
Wisler Pearlstine
460 Norristown Road
Blue Bell, PA 19422

Hearing Officer:
James Gerl, CHO

Date of Decision:
August 9, 2024

BACKGROUND

The parents' complaint raises two issues: whether the February 20, 2024 IEP placing the student in an autistic support classroom without [redacted] services constitutes a denial of a free and appropriate public education, and whether the school district committed a procedural violation by allegedly removing [redacted] services unilaterally rather than through an IEP team decision. I find in favor of the school district with regard to the issue as to whether the February 20, 2024 IEP provides a FAPE. I find in favor of the parents with regard to the procedural violation.

PROCEDURAL HISTORY

The parties to this case really do not like each other. The toxic relationship of the parties is reflected in the tortured and very confusing procedural history of this case.

The parents' initial complaint, the one that was the subject of this hearing, was filed by a special education lawyer. The special education lawyer who had been representing the parents withdrew from this case, and the parents proceeded to hearing as unrepresented parties. Thereafter, the school district filed a due process complaint against the parents alleging essentially the same facts as the first complaint by the parents. Later, the unrepresented parents filed yet another due process complaint also alleging substantially the same facts. The hearing officer directed the parties to file written briefs addressing the reason why three separate due process complaints needed to be heard involving the same parties and substantially the same facts. Thereafter, the school district withdrew its due process complaint, and that complaint was dismissed. Both parties submitted written briefs concerning the issue of multiple complaints on the same issues. The

school district's brief contained inaccurate statements asserting that the school district's complaint, which it had since withdrawn, had alleged that the student's current placement was dangerous to the student or others. There were no such allegations in the school district's complaint. After reviewing the briefs, the hearing officer dismissed the second due process complaint filed by the parents on the basis that it was duplicative of their first complaint. The school district also filed a motion to dismiss the instant complaint on the basis that the complaint was improper because the parents did not first file a separate challenge to the school district's reevaluation. Because the school district cited no legal authority to support its motion, and because no such authority exists, the hearing officer ruled that a parent is not required to first separately challenge an evaluation before exercising their IDEA procedural safeguard of filing a due process complaint. The motion to dismiss was denied as completely lacking any legal basis. The numerous meritless filings in this case seem to indicate that the parties have lost sight of the fact that the dispute underlying all of this legalistic maneuvering involves the education of a young person.

Continuing their toxic pattern, the parties were not able to agree to any stipulations of fact in this case. Their failure to do so undoubtedly delayed and prolonged both the hearing and the decisional process.

The hearing was conducted in one in-person session. Parent exhibits P-1, P-2 and P-6 were admitted into evidence at the hearing. All other parent exhibits were withdrawn and not admitted into evidence. Joint exhibits J-44 and J-53 were excluded on the basis of relevance. The following joint exhibits were admitted at the due process hearing: J-1, J-4, J-9, J-32, J-34, J-37, J-40, J-43, J-46, J-52, J-54, J-55, J-57, J-58, J-61, J-64, J-66, J-67, J-68, J-74, J-75, J-77, J-85 through J-89, J-94, J-96, J-97, J-98 and J-100. All other joint

exhibits were withdrawn and not admitted into evidence. Seven witnesses testified at the due process hearing.

After the hearing, each party presented written closing arguments/ post-hearing briefs and the school district submitted 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 in this case, presented the following two issues:

1. Whether the parents have proven that the February 20, 2024 IEP offered by the school district with an out-o- district placement for an autistic support classroom without [redacted] services was a denial of FAPE?

2. Whether the parents have proven that the school district committed a procedural violation by unilaterally removing [redacted] services from the student's IEP rather than submitting a recommendation to the IEP team?

NOTE: The parents' brief contained argument concerning four issues: the two issues which are addressed herein and were identified by the parties at the prehearing conference and confirmed at the beginning of the due process hearing, as well as two additional issues, one concerning the sufficiency of the school district's reevaluation and one concerning a placement issue involving least restrictive environment. Because the evaluation issue and the least restrictive environment issue are not issues that were identified by the parties at the prehearing conference, as confirmed at the beginning of the hearing, they are beyond the scope of this proceeding and these arguments were not considered herein. A party may not raise an issue that is not properly before the hearing officer after the evidence has been taken in the due process hearing. See, 34 C.F.R. § 300.511(d)

FINDINGS OF FACT

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

1. The student has a big heart and is very funny. (NT 114 – 116)

2. The student's date of birth is [redacted] and the student just finished [redacted] grade in the school district. (J-74; J-100)

[1] (Exhibits shall be referred to as "P-1," etc. for the parents' exhibits; and "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___").

3. On May 23, 2023, an IEP team meeting was held. At that meeting, the parent revoked consent for school district staff to speak with the medical professionals who work with the student. (J-52)

4. On November 13, 2023, the school district issued a Permission to Reevaluate the student. The parent consented to the reevaluation on November 27, 2023. (J-64; NT 130, 188 – 189)

5. The parents obtained a letter from a physician at a children's hospital dated November 27, 2023 that recommends a 1:1 aide for the student and that the student not be placed in an emotional support classroom. The student had a 1:1 aide during the 2023-2024 school year, and the student was not in an emotional support classroom, but rather was in an autistic support program at that time. (P-2; NT 64 – 71)

6. Before the school district reevaluation was completed, on December 27, 2023, the school district issued a Notice of Recommended Educational Placement for an out-of-district full-time autistic support placement with [redacted] services. The parents approved the NOREP. (J-98; NT 400 – 401)

7. The school district made referrals to approximately 14 private schools and worked cooperatively with the parents to attempt to seek a placement at a school of the parents' choice. The efforts to place the student at a private school were not successful. (J-96; NT 401 – 407)

8. The school district completed its reevaluation on January 25, 2024. The reevaluation included a review of records; parent input, teacher and school district staff input; measures of cognitive functioning; measures of academic achievement; [redacted] scales; autism spectrum rating scales; social – emotional and behavioral assessments, and a functional behavioral analysis completed by a behavior specialist; as well as classroom

observations. The review of the student's educational records indicated that the student had difficulty attending classes. The student had attended only four of 25 [redacted] classes during the first marking period. The student's teachers reported that the student was disengaged. The student often refused to attend the general education classes and did not complete assignments. The student continued elope from the classroom and from the school building. On the WISC-V, the student obtained a full-scale IQ score of 101, falling within the average range. (J-74; NT 188-230)

9. The BASC-3 teacher rating scales indicated that the student was experiencing a high level of behavioral symptoms and included clinically significant scores in most of the areas assessed, indicating that the student exhibited significantly more aggression, hyperactivity and behavior problems than was typical of children the student's age and that the student displayed high levels of anxiety, depression and somatic complaints and social skills. The student's self-report on the BASC-3 resulted in clinically significant scores for depression, relation with parents and self-esteem. The Children's Depression Inventory (CDI-2) scores indicated that the student was exhibiting a high level of symptoms of depression. The reevaluation report included a functional behavioral assessment by a behavioral specialist that identified the following behaviors of concern: elopement from the building, refusal, disengagement, leaving the assigned area, physical aggression, verbal aggression, and self-injurious behaviors. The functional behavioral assessment included recommendations for a positive behavior support plan. The results of the Scales for Identifying [redacted] assessment suggested that the parent believed that the student was [redacted], but that the student was not demonstrating characteristics of [redacted] in the school setting. The January 2024 Reevaluation Report made a determination that the student "currently does not meet the definition criteria of [redacted]..." (J-74; NT 188 – 230)

10. On February 1, 2024, the school psychologist who authored the January 2024 Reevaluation Report met with the parents to explain the Reevaluation Report to the parents and answer the parents' questions. (J-74; NT 72 – 74, 176, 228 – 229)

11. The student's IEP team met on February 20, 2024. The February 20, 2024 IEP included goals to address the following needs: work habits/completion, compliance, pragmatic language, social skills, and pro-social behavior. The IEP included a positive behavior support plan addressing the needs identified by the previously conducted functional behavioral analysis of the student. The IEP also included specially designed instruction and goals in social skills instruction, organization tools, coping tools, breaks, use of de-escalation techniques, adult help, a calming area, advanced notice for transitions and changes, minimal distractions, encouraging peer interaction, reminders and props, use of behavior modification strategies to stay on task, provision of choices, checking of assignments, check-ins/checkouts with a trusted adult, adult support during recess, preview of expected behaviors, use of first-then statements, use of visual cues and verbal/nonverbal cues, planned ignoring, redirection, repetition of task, completion of missed assignment during preferred activity time and behavior reflection discussion. The IEP included the following related services: individual counseling for 30 minutes per week; therapeutic group for 30 minutes per week; a 1:1 personal assistant throughout the school day; and social work consultation. The IEP does not mention removal of [redacted] services, but the IEP does not contain any [redacted] goals. (J-100; NT 44 – 47, 53 – 61, 365 – 369)

12. On February 20, 2024, the school district issued a Notice of Recommended Educational Placement reflecting the district's proposed full-time out-of-district autistic support placement, as provide in the February 20, 2024 IEP. The NOREP does not mention the removal of [redacted] services.

The parents rejected the NOREP because the IEP did not include [redacted] services. (J-75)

13. The decision to remove [redacted] services from the student's IEP was made by the school district school psychologist. The decision was not made by the student's IEP team. (J-74, J-100; NT 171 – 172, 351 – 353, 427)

14. On approximately April 23, 2024, the student was accepted at a private school. On about May 20, 2024, the student was accepted at another private school. The two private schools advised the school district of their ability to implement the IEP proposed for the student. The parents rejected the private schools because the schools could not provide [redacted] programming. (J-89, J-94; NT 408 – 410)

15. During the 2023 – 2024 school year, the student did not attend general education classes regularly. On average, the student spent about 15 to 40 minutes in the general education classroom each day. (NT 319 – 321)

16. During the 2023 – 2024 school year, the student did not attend the [redacted] support class consistently. The student would frequently not participate in the class and would sometimes hide in the bathroom or under the desk. The student did not complete any work in the [redacted] classroom. (J-74; NT 219 – 222, 282 – 287)

17. During the 2023 – 2024 school year, the student's progress on the student's [redacted] goals could not be measured because the student had only completed a limited number of assignments. (J-74; NT 293 – 295)

18. The parents obtained an independent psychoeducational evaluation for the student. The evaluation report was issued on June 7, 2024, and the parents provided the report to the school district a few days before the due process hearing. The evaluator concluded that the student would

benefit from [redacted] programing even if the student chooses not to access it. The report recommended certain best practices and suggested methodology for the student's education. (P-6; NT 57 – 58, 74 - 75)

19. The parents obtained a letter dated June 5, 2024 from an art therapist who had been working with the student recommending against a private school placement because of the lack of [redacted] services and recommending an autistic support classroom for the student. The letter was not shared with the student's IEP team. (P-1; NT 61 – 64)

20. As of February 20, 2024, the student had no [redacted] educational needs. (J-74; NT 274, 275, 372- 373)

21. Because of the student's behavior issues and social emotional needs, the student could not access [redacted] services, and the school district was not able to sufficiently provide an adequate and appropriate educational program for the student within the school district as of February 20, 2024. (J-74; NT 358 – 359, 362 – 366, 369 – 372)

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. The Pennsylvania Code establishes procedures for school districts to determine whether a student should receive services as a [redacted] and

eligible for special education are governed by the special education laws, and a single IEP shall be developed and implemented to meet their needs. [redacted]

6. Changes to an IEP must be made by the student's IEP team and not unilaterally by school district personnel. The parents are important members of the IEP team. IDEA § 614; 34 C.F.R. §§ 300.320 – 300.328 and § 300.501; see, Ridley Sch Dist v. MR & JR ex rel ER, supra.

7. 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).

8. Although a parent may not obtain relief for the parent or student for harmless procedural violations of IDEA, a special education hearing officer may order a local education agency under such circumstances to comply with IDEA procedural requirements. 34 C.F.R. § 300.513(a)(3); IDEA §615(f)(3)(E)(iii). Where there has been a harmless procedural violation, staff training may be an appropriate remedy for a hearing officer to order. Zirkel, Perry; "Adjudication Under the Individuals with Disabilities Education Act: Explicitly Plentiful Rights but Inequitably Paltry Remedies," 56 Conn.L.Rev. 201 (2023).

9. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable and the conduct of the parties is always relevant. Forest Grove Scholl District v. TA, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (at n. 11) 2009; Ferren C. v. Sch. Dist. of Philadelphia, 612 F. 3d 712, 54 IDELR 274 (3d Cir. 2010); CH by Hayes v. Cape Henlopen Sch. Dist., 606 F. 3d 5954 IDELR 212 (3d Cir. 2010; Sch. Dist. of Philadelphia v. Williams ex rel.

LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Sch. Dist., 71 IDELR 87 (E.D. Penna. 2017); see Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Boad of Ed., Albuquerque Public Schools, 530 F. 3d 1116, 49 IDELR 241 (10th Cir. 2008).

10. The parents have failed to prove that the February 20, 2024 IEP proposed by the school district is not reasonably calculated to confer meaningful educational benefit in view of the student's unique circumstances.

11. The parents have proven a procedural violation of IDEA because school district staff unilaterally removed [redacted] services from the student's IEP rather than having the decision made by an IEP team.

12. The procedural violation proven by the parents in this case was harmless.

13. Training of local education agency staff who have worked with the student concerning changes to IEPs by IEP teams is an appropriate remedy to ensure compliance with IDEA procedural requirements.

DISCUSSION

1. Whether the parents have proven that the IEP developed by the school district on February 20, 2024 which provided a full-time out-of-district autistic support placement without [redacted] services constitutes a denial of a free and appropriate public education?

The parents contend that the February 20, 2024 IEP denies FAPE to the student because [redacted] services were removed. The school district contends that the IEP is substantively appropriate and provides FAPE.

A fair reading of the evidence in the record reveals that the parents have failed to prove that the IEP they challenge is not reasonably calculated to provide meaningful educational benefit in view of the student's individual circumstances. As of the January 25, 2024 reevaluation report, the student was no longer functioning as a [redacted] student. The school district's school psychologist testified credibly and persuasively that as of the date of the reevaluation report, the student showed no [redacted] needs. The student's [redacted] teacher testified credibly and persuasively that the student did not have any educational need for [redacted] services and was not participating in the [redacted] class as of January 2024. The student's special education teacher testified credibly and persuasively that the student had extreme difficulty accessing any education and no ability to access [redacted] services as a result of numerous behavioral issues that the student was encountering at that time.

In support of the parents' argument that the student needed [redacted] services, the parents introduced into evidence an independent psychoeducational evaluation and a letter obtained from an art therapist. Neither of these evaluations or reports were provided to the school district until just a few days before the due process hearing. Because the appropriateness of an IEP must be determined at the time that it was written, these reports do not affect the validity of the February 20, 2024 IEP. They were not available to the IEP team at the time that the IEP was written, and therefore, cannot render it inappropriate. Moreover, even if these reports had been timely filed with the IEP team, they do not show that the IEP is inappropriate. It is clear that the evaluators were utilizing an ideal education, or best practices, standard rather than the "appropriate" standard required by law. For example, the report of the psychoeducational evaluation recommends that the student will "benefit from" [redacted] programming

even if the student chooses not to access it. Moreover, the evaluators who completed the report submitted by the parents did not testify at the hearing and gave no additional support for their positions.

The record evidence as a whole demonstrates that the February 20, 2024 IEP was reasonably calculated to confer meaningful educational benefit upon the student in view of the student's unique circumstances. The unique circumstances of this student include serious behavioral issues during the course of the most recent school year. The student's numerous problem behaviors rendered it impossible for the student to access [redacted] services. The school district personnel correctly concluded that the school district could not adequately program for the student and that the student needed an out-of-district placement. Given the student's severe behavioral issues, the student would not benefit from any [redacted] services that might have provided.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's parents with regard to this issue. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: the testimony of the student's mother was evasive and inconsistent on cross-examination. In particular, the student's mother gave inconsistent and evasive testimony concerning whether the parents had earlier agreed to a full-time autistic support placement with [redacted] services for an out-of-district school. In addition, the opinions of the teachers and other school staff who worked with the student is given more weight because of their familiarity with the student in the school setting.

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 school district staff committed an actionable procedural violation by removing [redacted] services from the student's IEP without that decision being made by the IEP team?

The parents contend that the school district unilaterally removed [redacted] services from the student's IEP without convening an IEP team to make the decision. The school district contends that the student's team did make the decision.

It is rudimentary that any changes to an IEP of a student with a disability must be made by the IEP team and not unilaterally by school district staff.

It was the unequivocal, persuasive and credible testimony of the student's father that the decision to remove [redacted] services from the student's IEP was made by the school district staff and not at a meeting that included the parents. The school district staff witnesses testified to the contrary that the decision to remove [redacted] services was made by the IEP team. The record evidence in this case supports the parents' contention with regard to this issue. Although school district staff testified that the IEP team made the decision, the memories of the witnesses were fuzzy, at best, and no witness could point to any specific discussion of removal of [redacted] services at an IEP team meeting. Moreover, the documentary evidence does not support the school district's position. The student's IEP and the NOREP do not specifically mention removal of [redacted] services. A fair reading of the Reevaluation Report indicates that as a result of the student's test scores and the other information in the Reevaluation Report, the evaluator unilaterally made the decision to remove [redacted] services for the student. This was no

mere recommendation. The removal of [redacted] services unilaterally by school district staff was a procedural violation of IDEA.

The testimony of the student's father was more credible and persuasive than the testimony of school district staff with regard to this issue. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: the documentary evidence supports the parents' position rather than the school district's position with regard to this question. Also, the memory of school district staff concerning this point was fuzzy, at best.

It is concluded, however, that although the school district committed a procedural violation of IDEA by unilaterally removing [redacted] services without convening an IEP team meeting to do so, the procedural violation in this case was harmless. As has been discussed in detail in the previous section, the student had no [redacted] needs at the time that the [redacted] services were removed. Because the student had no educational need for [redacted] services, the procedural violation did not result in any educational harm to the student. In addition, the parents were also not subsequently deprived of participation rights because the school psychologist had met with the parents and reviewed the findings and results of the Reevaluation Report and answered the parents' questions. In addition, an IEP team meeting was convened, and it was clear that there were no [redacted] goals in the student's IEP. The parents recognized that fact when they rejected the NOREP because the IEP did not include [redacted] services. Thus, it is concluded that the parents fully and meaningfully participated in the IEP process. Accordingly, any resulting procedural violation by the school district was harmless.

IDEA does not permit individual relief for the student or parents as a result of harmless procedural violation. IDEA does, however, specifically provide that a special education hearing officer may require compliance with

procedural requirements and issue appropriate relief therefor. Staff training can be an appropriate remedy in such situations. Because of the cardinal importance of the IDEA requirement that any changes to a student's IEP be made by an IEP team meeting including the parents and not unilaterally by school staff, training of local education agency staff who have worked with the student concerning the legal requirements related to changes to IEPs by IEP teams is an appropriate remedy to ensure compliance with IDEA procedural requirements. The school district will be ordered to provide training to all staff who have worked with the student concerning that requirement.

Because equitable relief under IDEA should be flexible and because IDEA is meant to be a collaborative process, Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005), the parties shall have the option to agree to alter or change the relief awarded so long as both parties and any attorneys representing them agree in writing.

ORDER

Based upon the foregoing, it is **HEREBY ORDERED**:

1. Within 180 days of the date of this decision, the school district shall conduct staff training for all staff who have been involved with the education of this student since January 1, 2024 concerning the requirement under IDEA that any changes to a student's IEP must be made by the IEP team rather than unilaterally by school district staff; and

2. The parties may amend or adjust the terms of this order by mutual written agreement signed by all parties and any counsel of record; and

3. Any other relief requested by the due process complaint is hereby denied.

IT IS SO ORDERED.

ENTERED: August 9, 2024

James Gerl

James Gerl, CHO
Hearing Officer