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:
26970-22-23

Child's Name:
A.M.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
James Gerl, CHO

Date of Decision:
December 7, 2022

BACKGROUND

The parents filed a due process complaint seeking reimbursement for a unilateral placement of the student in a private school, in addition to compensatory education, contending that the IEPs developed by the school district did not provide a free and appropriate public education. The parents also contend that the extended school year services offered by the school district were inappropriate, and the parents allege that the school district violated Section 504 by discriminating against the student on the basis of disability.

I find in favor of the parents with regard to the allegations that the school district violated Section 504 by excluding the student's class from a Field Day extracurricular activity and by assigning the student to an inappropriate music class. I find in favor of the school district with regard to all other issues raised by the due process complaint.

PROCEDURAL HISTORY

Because counsel in this case did an excellent job of stipulating to a number of facts and by objecting only to a small number of the exhibits offered by opposing counsel, the hearing was concluded in one efficient virtual hearing session. Parent exhibits P-1 through P-46 were admitted into evidence, and school district exhibits S-1 through S-16 were admitted into evidence. Four witnesses testified at the due process hearing.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the

arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

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

ISSUES PRESENTED

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

1. Whether the parents have proven that the school district should reimburse them for tuition and expenses for unilateral placement of the student in a private school during the 2022 – 2023 school year?

2. Whether the parents have proven that the school district failed to provide services comparable to the transfer IEP of the student from April 20, 2021 to June 2021 and whether the school district denied a free and appropriate public education to the student from June 2021 to September 30, 2022?

3. Whether the parents have proven that the school district denied a free and appropriate public education to the student by failing to provide appropriate extended school year services during the summers of 2021 and 2022?

4. Whether the parents have proven that the school district has discriminated against the student on the basis of disability in violation of Section 504 by excluding the student's class from Field Day and by assigning the student to a music class that was beyond the student's abilities?

FINDINGS OF FACT

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

1. The student is a [teenaged] resident of the district. [redacted]

2. The student is eligible for special education services under IDEA as a student with autism, an intellectual disability, developmental delay, sensory integration disorder and receptive–expressive language disorder.

3. The student moved to the district from another state in approximately April of 2021.

4. Prior to moving to the district, the student resided in a public school district in another state.

5. While in the previous state, the student had been attending the private school which is the subject of the unilateral placement in this case.

6. During the 2020 – 2021 school year, prior to moving to the school district, the student was attending the private school that is the subject of the unilateral placement in this case by virtual instruction.

7. While attending the private school that is the subject of the unilateral placement in this case the student had great difficulty with remote learning.

8. Upon the student's enrollment in the school district, an initial IEP team meeting was held on April 21, 2021.

9. The student began attending an intermediate school in the school district on April 26, 2021 as a [redacted] student.

10. While enrolled in the school district, the student attended a full-time autistic support classroom staffed by the intermediate unit.

11. The school district continued the student's autistic support placement during the 2021 – 2022 school year. The student attended the school district program in person.

12. [redacted].

13. The student's parents withdrew the student from the school district on September 28, 2022 and enrolled the student at the private school which is the subject of the unilateral placement in this case.

14. Google Maps shows that the private school which is the subject of the unilateral placement in this case is 65 miles, or approximately one hour and 12 minutes (without traffic) from the parents' house.

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

15. The student is an active and loving child [redacted]. (NT 133; P-13)

16. When the student enrolled in the school district in April 2021, the school district offered services comparable to the IEP that had been in place

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

in the previous state before the student transferred. The school district determined that the student would receive in-person instruction rather than virtual instruction, which the student had been receiving in the previous state. (S-1, S-2; NT 95 – 96, 138)

17. The school district completed an evaluation of the student and issued an evaluation report dated June 1, 2021. The student was assessed using the verbal behavior milestone assessment and placement program (VB-MAPP) as a part of the evaluation. The evaluation concluded that the student continued to be eligible for special education and identified the student's needs, including the need for a highly structured environment. The evaluation noted that a new functional behavioral analysis was needed and should be completed at the start of the 2021 – 2022 school year. (S-3)

18. The parents challenged the school district evaluation in a previous due process hearing. In the decision in that case, the school district's evaluation was found to be to be appropriate. It was concluded by the hearing officer in that case that the evaluation properly identified the student's special education and related services needs in all areas of suspected disability. (Hearing Officer Decision ODR File No. 25967–21-22)

19. The student's mother informed the student's classroom teacher that the mother felt that the regular education music class that the student was attending in the school district was too advanced for the student. The student's special education teacher and 1:1 aide agreed that the music class was too advanced for the student. In approximately May 2021, about one month after the student had enrolled in the school district, the student's mother asked that the student no longer attend the regular education music class, and the school district agreed and stopped sending the student to the music class. (NT 267 – 268, 59-60, 125 – 127)

20. The school district developed an IEP for the student on June 3, 2021 which provides that the student would attend a full-time autistic support class at an intermediate school in the district. Utilizing the results of the evaluation report, the IEP identified needs for the student in the areas of manding, tacting, motor imitation, reading survival signs, identifying more or less, matching numbers to quantities, name copying, completing multistep functional tasks, improved speech production, improving receptive and expressive language, and functional communication. The IEP contains ten goals targeting the student's needs and numerous specially designed instruction and modifications. For related services, the IEP requires a 1:1 aide, as well as transportation, adaptive physical education, occupational therapy, speech language therapy, and physical therapy. (S-4)

21. The June 3, 2021 IEP provides that the student had qualified for extended school year (ESY) services for the summer of 2021. The ESY goals were developed by using the results of the VB-MAPP assessment of the student. The student attended extended school year services during the summer of 2021. (S-4; NT 254 - 256)

22. There were seven to eight students in the autistic support class that the student attended in the school district. The autistic support class has a special education teacher, as well as two associate teachers and a paraprofessional. The classroom teacher is a certified special education teacher. The staff in the autistic support classroom receive training on the implementation of applied behavior analysis (ABA) techniques. The student was permitted to go to a dedicated sensory room each day. (NT 239, 246 - 250, 259 – 260)

23. The educational program used in the autistic support classroom that the student attended in the school district is based upon the principles of applied behavior analysis (ABA), including a highly structured environment,

individualized one-on-one intensive teaching trials, wall schedule, natural environment training, errorless teaching, reinforcement strategies, daily communication sheet, and data collection processes. (NT 196-200)

24. The autistic support classroom that the student attended in the school district uses a trans-disciplinary model to integrate occupational therapy and speech skills into classroom instruction. The autistic support classroom devotes a substantial portion of each day to working on the students' communication skills which are integrated into the daily curriculum. (NT 239-240, 250)

25. The autistic support program is individualized for each student. Each student has a data collection sheet correlated to the student's IEP goals. Items used to reinforce behaviors are also individualized. In addition to instruction in reading, math and fine motor skills, the autistic support classroom utilizes intensive one-on-one teaching trials which primarily focus upon skills identified by the VB-MAPP assessment. (NT 199 – 200, 212; P-38)

26. The school district completed a reevaluation of the student on November 18, 2021. The reevaluation included a sensory profile completed by the occupational therapist, a physical therapy evaluation, and an updated functional behavioral analysis completed by a board-certified behavior analyst (BCBA). In a previous due process hearing decision, the hearing officer in that case determined that the school district's reevaluation of the student was appropriate. (S-5; Hearing Officer Decision ODR File No. 25967)

27. Based upon the reevaluation report, the school district developed an IEP for the student on December 10, 2021. The present levels of performance in the IEP included the results of an updated VB-MAPP assessment. The new IEP includes an updated statement of student needs, transition services and goals, and a positive behavior support plan. At the request of the student's parents, music and art classes were removed from

the IEP; the IEP provided that the student's school day would be 100% in special education. (S-6; NT 267 – 268)

28. At the December 10, 2021 IEP team meeting, the student's parents expressed concerns about an increase in the student's behaviors and inquired about potential placement of the student at a private school. (S-6, S-8)

29. On December 14, 2021, the student's mother sent an e-mail to the school staff who were members of the student's IEP team stating that the parents had decided not to move forward with the changes to the student's IEP made by the IEP team. In the e-mail, the student's mother states that the program offered by the school district was improper and that it would not allow the student to reach the student's "highest potential." The e-mail includes a list of five private schools at which the parents would like to have the student placed. (P-38)

30. Progress monitoring in January 2022 indicated that the student had made progress from the June baselines on IEP goals for tacting, reading comprehension, identifying more or less, following two component nonverbal instruction, as well as occupational therapy and speech goals, among others. (S-4)

31. On February 14, 2022, the IEP team convened at the request of the parents' attorney to discuss concerns with the student's educational program. The student's mother stated that she believed the student's current placement was inappropriate. The parents' attorney requested at the meeting that the student be placed at the private school that the student currently attends. The IEP team revised the student's IEP to include daily communication sheets and behavior frequency data. (S-8; NT 103 – 104, 238)

32. Because of staffing shortages, the intermediate unit did not have a speech language therapist to provide speech-language therapy to the student from October 18, 2021 to January 12, 2022. The intermediate unit sent a letter to the student's parents notifying them that the speech- language therapist had resigned and stating that any missed speech therapy time for the student would be made up. The student missed 480 minutes of speech-language therapy while the position was vacant. The student had made up 80 minutes of that time before the student left the school district for the unilateral placement. (S-8, S-16; NT 297 – 298, 304 – 305)

33. On March 16, 2022, the student eloped from the school building while transitioning to gym. The student's 1:1 aide had gone to the restroom and had asked an assistant teacher to walk the student to the gym. When they arrived at the gym, the assistant teacher did not continue to supervise the student, and the student went out a side door. The student was located outside the building approximately three minutes later and reentered the building. The student had picked up ice-melting, rock salt while outside of the school and was taken to the school nurse. The student was checked by the nurse and had no injuries. (S-9; P-42, P-46, NT 232, 234, 266 – 267, 292 – 294).

34. After the elopement incident on March 16, 2022, the parents kept the student home from school for a few days. When the student returned to school, the school district staff found that the student was wearing a recording device that was recording audio in the classroom. The staff of the intermediate unit put the recording device in the student's locker and informed the parents that such recording without the permission of those involved is not lawful. (S-10; NT 111 – 112, 264 – 266)

35. On April 11, 2022 at 11:08 a.m., the parents' attorney e-mailed the parents' expert requesting that the expert keep him advised concerning

the expert's observation of the student and the expert's search for appropriate private schools for the student. (S-11; NT 97 – 102)

36. On April 11, 2022 at 2:03 p.m., the student's mother e-mailed the parents' expert witness. The mother's e-mail asks the expert whether the expert wants the mother to contact the private school at which the student is currently unilaterally placed. The e-mail also suggests an additional private school as a possibility for placement of the student. (S-11; NT 97 – 102)

37. On approximately June 6, 2022, the student's school had scheduled a Field Day as an extracurricular activity. A new special education teacher for the student's class had begun work on the previous school day. The student's mother was informed by an intermediate unit staff member that the student's entire class would not be attending Field Day. The student's mother objected in an e-mail to school administrators, and the decision was reversed. The student was then permitted to participate and did participate in Field Day. (P-38; NT 80 – 81, 126 – 129)

38. Progress reports at the end of the 2021 – 2022 school year show that the student made progress on IEP goals from the baselines for following two-step directions, reading comprehension, reading survival signs, calculating money, writing the student's name, completing functional tasks, expressive language, and decreasing target behaviors. The student did not make progress or had mixed progress on certain other goals. (S-12)

39. The autism support classroom had developed a protocol for situations where a student is not making adequate progress based upon weekly data collection sheets. If a student is stagnant or below the target for three consecutive weeks, the teachers would implement an intervention. Throughout the 2021 – 2022 school year, that only had to be done for the student one time with regard to one IEP goal (menu math). (S-12; NT 270 – 272)

40. The student's special education teacher observed that the student experienced significant growth in communication skills during the 2021 – 2022 school year, including making requests to use the bathroom in a complete sentence. The teacher commented on this progress to the student's mother, and the student's mother confirmed that the parents had seen similar progress in the student's communication skills in the home environment. (NT 273 – 274)

41. The IEP team concluded that the student had qualified for extended school year services and the school district offered an extended school year program for the student for the summer of 2022. The student did not attend extended school year during the summer of 2022. (S-6; NT 301)

42. The parents retained an expert witness who is a licensed school psychologist in another state and a board-certified behavior analyst. The expert witness observed the student in the autistic support classroom at the school district on May 9, 2022 and May 20, 2022. The expert witness issued a report on June 24, 2022 that concludes that the school district program is inappropriate because it does not provide strict 1:1 instruction through a clinical ABA model, because the student's classroom is not supervised and managed by a BCBA, and because the expert concluded that the student's classroom failed to incorporate systematic and specialized instruction for the student. In addition, the expert found that the school district had no actual behavior intervention plan. (P-29, P-35; NT 148 – 165)

43. The parents' expert witness issued an addendum to the previous report on July 19, 2022, which includes a compensatory education calculation and an analysis of the appropriateness of the private school the student now attends. (P-30)

44. An IEP team meeting was held on August 9, 2022 to develop an IEP for the 2022 – 2023 school year. At the meeting, the student's mother

expressed a desire for the student to be placed at the private school that the student now attends. The IEP team reviewed and considered the evaluation report prepared by the parents' expert witness but rejected its recommendations and determined that the student would be placed in the autistic support classroom in the school district's high school. At the meeting, school district staff team members told the parents that although a BCBA is involved in the student's program, the supervision of the student's classroom program was the responsibility of the special education classroom teacher. (S-13; NT 119 – 122)

45. The IEP developed on August 9, 2022 includes the addition of a Career Skills class as well as participation in Chorus. The IEP for the 2022 – 2023 school year also provides for weekly consultation from a BCBA for teachers and staff to ensure proper implementation of the positive behavior support plan for the student. (S-13)

46. On September 6, 2022, intermediate unit staff placed the student in a restraint during class by placing the student in a 20 to 30 second bear hug from behind after the student had picked up a heavy pencil case and threw it at other students. This was the first time that the student had been restrained while attending school in the school district. The school nurse examined the student and determined that the student had not been injured because of the restraint. (P-38; S-14; NT 86 – 87, 115-119)

47. The private school at which the student was unilaterally placed by the student's parents and which the student now attends is a private school in a neighboring state serving students with autism, intellectual disabilities and other disabilities. The student suffered substantial regression during virtual instruction while at the private school. Since returning to the private school pursuant to the unilateral placement by the student's parents, the

student has made progress. (P-36, P-37; P-38; NT 89 – 90, 95 – 97; Stipulation No. 7)

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. In order to receive reimbursement of tuition resulting from the unilateral private school placement, a parent must prove three elements: 1) that the school district has denied FAPE to the student or committed another substantive violation of IDEA; 2) that the parents' private school placement is appropriate; and 3) that the equitable factors in the particular case do not preclude the relief. School Committee Town of Burlington v. Department of Education, 471 U.S. 359, 103 LRP 37667 (1985); Florence County School District #4 v. Carter, 510 U.S. 7, 20 IDELR 532 (1993); Forest Grove School District v. TA, 557 U.S. 230, 52 IDELR 151 (2009).

3. The United States Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district

has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the child's unique circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. ___, 137 S. Ct. 988, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

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

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

6. 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).

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, 66 IDELR

102 (M.D. Penna. 2015); see, Kline Independent School District v. Hovem, 690 F. 3d 390, 59 IDELR 121 (5th Cir. 2012); HC and JC ex rel. MC v. Katonah – Lewisboro Union Free School District, 59 IDELR 108 (S.D. NY 2012); District of Columbia Public Schools, 111 L.R.P 77405 (SEA D.C. 2011). Progress toward a FAPE is measured according to the unique individual circumstances of the individual student and not in comparison to other students. See, GD by Jeffrey and Melissa D v. Swampscott Public Schs, 80 IDELR 149 (1st Cir. 2022). The Third Circuit has specifically ruled that IDEA does not require that all (or even most) disabled children advance at a grade-level pace. KD by Dunn v. Downingtown Area School District, 904 F. 3d 248, 72 IDELR 261 (3d Cir. 2018).

8. Where a parent or school district predetermines the student's placement prior to the IEP team meeting, they violate IDEA. LE and ES ex rel MS v. Ramsey Bd. of Educ, 44 IDELR 269 (3d Cir. 2006); See Deal v. Hamilton County Bd of Educ, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); JD v. Kanawha County Bd of Educ, 48 IDELR 159 (S.D. WVa. 2007). The key to compliance with the law is that the parties must keep an open mind regarding placement at the team meeting and duly consider the input of other participants. See JD v. Kanawha County Bd of Educ, supra.

9. 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); TM v. Quakertown Comm. Sch. Dist., 21 F. Supp. 3d 792, 69 IDELR 276 (E.D. Pa. 2017); JL v Lower Merion Sch Dist, 81 IDELR 251 (E.D. Penna 2022); 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).

10. If a child with a disability who had an IEP in a prior school district in another state transfers to and enrolls in a public agency in a new state in the same school year, the new school district must provide the child with FAPE, including services comparable to those described in the IEP from the previous local education agency, until the new public agency conducts an evaluation and develops and implements a new IEP, if appropriate. 34 C.F.R. § 300.323(f); IDEA § 614(d)(2)(C)(i)(ii); Questions and Answers on IEPs, Evaluations and Reevaluations, 54 IDELR 297 (OSERS 2010).

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

12. IDEA requires that the state educational agency maintain qualifications to ensure personnel necessary to carry out special education are appropriately and adequately prepared and trained. IDEA § 612(a)(14); 34 C.F.R. § 300.156(a). in the Commonwealth of Pennsylvania, the Pennsylvania Dept of Education, the SEA, has set forth qualifications to allow individuals to

teach and has established qualifications for special education teachers requiring that they be qualified to "render diagnostic, prescriptive and education services designed within an individualized educational plan (IEP) to serve students who have one or more disabilities." Only certified teachers may supervise a classroom. 24 Pa. C.S. § 12-1201; CSPG 61; Pottsgrove Sch. Dist. v. DH, 72 IDELR 271 (E.D. Pa. 2018).

13. Where a student with a disability has behaviors that impede the student's learning or the learning of others, the student's IEP team must consider the use of positive behavioral interventions and supports and other strategies to address those behaviors. IDEA § 614(d)(3)(B)(1); 34 C.F.R. § 300.324(a)(2)(i); 22 Pa. Code § 14-133; Sean C. by Helen C. v. Oxford Area Sch. Dist., 70 IDELR 146 (E.D. Penna. 2017).

14. A school district must provide extended school year services to a child with a disability only when necessary to provide a free appropriate public education because the benefits the disabled child gains during the regular school year will be significantly jeopardized if he or she is not provided with an extended school year program. 34 C.F.R. § 300.106; LG and EG ex rel. EG v. Wissahickon School District, 55 IDELR 280 @ n.3 (ED Penna. 2011); see, MM v. School District of Greenville County, 37 IDELR 183 (4th Cir. 2002).

15. 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); MP by VC v Parkland Sch Dist, 79 IDELR 126 (E.D. Penna. 2021); Strepp ex rel MS v Midd West Sch Dist, 65 IDELR 46 (M.D. Penna. 2015).

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

17. An IDEA hearing officer has broad equitable powers to order appropriate remedies when a local education agency violates the Act or Section 504. All relief under IDEA and 504 is equitable. Forest Grove Sch. Dist. v. TA, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (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 59, 54 IDELR 212 (3d Cir. 2010); Sch. Dist. of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Area 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. Bd. of Educ., Albuquerque Public Schools, 530 F. 3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student With a Disability, 52 IDELR 239 (SEA WVa. 2009). The conduct of the parties is always relevant when fashioning equitable relief. CH by Hayes v. Cape Henlopen Sch. Dist., supra.

18. Compensatory education is one remedy that may be awarded to parents when a school district violates the special education laws. In general, courts, including the Third Circuit, have expressed a preference for a qualitative method of calculating compensatory education awards that addresses the educational harm done to the student by the denial of a free and appropriate public education. GL by Mr. GL and Mrs. EL v. Ligonier Valley Sch. Dist. Authority, 802 F. 3d 601, 66 IDELR 91 (3d Cir. 2015); Gwendolyn S by Judy S and Geoff S v. Westchester Area Sch. Dist., 78 IDELR 125 (E.D. Penna. 2021), aff'd in unpublished decision 122 L.R.P. 21021 (3d Cir. 2022); see, Reid ex rel. Reid v. District of Columbia, supra. In Pennsylvania, in part because of the reluctance of special education lawyers to provide evidence regarding harm to the student caused by a denial of FAPE, courts and hearing officers have frequently utilized the more discredited quantitative or "cookie cutter" method that utilizes one hour or one day of compensatory education for each day of denial of a free and appropriate public education. The "cookie cutter" or quantitative method has been approved by the courts, especially where there is an individualized analysis of the denial of FAPE or harm to the particular child. See, Jana K. by Kim K. v. Annville Sch. Dist., 39 F. Supp. 3d 584, 53 IDELR 278 (N.D. Penna. 2014).

19. The parents have not proven that the school district denied a free and appropriate public education to the student for the 2022 – 2023 school year, and, therefore, are not entitled to an award of reimbursement for private school tuition for their unilateral placement.

20. The parents have not proven that the school district failed to provide services comparable to the transfer IEP for the student from April 20, 2021 to June 2021, or that the school district denied FAPE to the student from June 2021 through September 30, 2022.

21. The parents have not proven that the school district denied FAPE to the student by failing to provide appropriate extended school year services during the summers of 2021 and 2022.

22. The parents have proven that the school district discriminated against the student on the basis of a disability violation of Section 504 by excluding the student from Field Day and by assigning the student to an inappropriate music class.

DISCUSSION

1. Whether the parents have proven that the school district should reimburse them for tuition and expenses for a unilateral placement in a private school during the 2022 – 2023 school year?

The parents seek reimbursement for a unilateral placement of the student in a private school. 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 for the 2022 – 2023 school year?

The parents contend that the school district denied a free and appropriate public education to the student. The parents do not allege any procedural violations; instead the parents contest the substantive adequacy of the student's IEPs. The parents specifically have identified the following reasons for their contention: untrained staff, inappropriate programming and

lack of meaningful one-on one instruction as the basis for their claim. The school district argues that it provided a free and appropriate public education to the student.

At the heart of this dispute is the parents' contention that the school district must provide an ideal education for the student that maximizes the student's potential. The testimony of the mother was focused upon the fact that the student's education at the private school is better than the student's education at the school district. The documentary evidence includes an email from the mother to school officials criticizing the student's program while attending the school district because it does not permit the student to achieve the student's "highest potential." Similarly, the parents' expert concluded that the student's program at the school district was inappropriate because it is "entirely contrary to best practice procedures" and because it did not meet the expert's standard for an ideal applied behavior analysis (ABA) program.

It is understandable that parents would want the best possible education for their child. IDEA does not, however, require a school district to provide the best possible education for a child with a disability. Instead, IDEA requires that a child with a disability be provided with an IEP that is reasonably calculated to provide meaningful educational benefit given the individual circumstances of the student. In the instant case, the school district determined the student's educational needs by conducting an evaluation and a reevaluation of the student. The parents contested the previous evaluations in a separate due process proceeding, and the hearing officer in that case concluded that the school district's evaluations of the student appropriately assessed the student in all areas of suspected disability and properly identified the student's educational needs. Based upon the evaluative data for the student, which is now deemed appropriate as a matter of law because of the

previous due process decision, the school district developed IEPs that were tailored to the student's unique individual circumstances as defined by the needs identified in the evaluation process.

The IEPs contained all legally required components, and they provide for a highly structured autistic support classroom with a low student/teacher ratio focused primarily on the development of communication skills. The student's educational program at the school district was based upon ABA principles and utilized ABA techniques. The student's program included a positive behavior support plan that was developed by a board-certified behavioral analyst (BCBA). Related services were integrated throughout the day. The student was permitted to go to a dedicated sensory room each day. The credible and persuasive evidence in the record reveals that the IEPs developed by the school district were reasonably calculated to confer meaningful educational benefit given the student's unique individual circumstances. Thus, the IEPs were substantively adequate and provided FAPE.

The parents' expert also asserts that the school district's program was inappropriate because it was not in accordance with the more clinical approach to ABA that the expert advocates, in which the classroom is led and supervised by a BCBA, as "captain of the ship," instead of a classroom teacher. The parents cite no authority for the proposition that IDEA requires that a child with autism be educated in a classroom that is supervised or captained by a BCBA.

IDEA requires that the state education agency establish and maintain qualifications to ensure personnel who carry out the provisions of the statute are appropriately and adequately prepared and trained. 34 C.F.R. § 300.156(a). In Pennsylvania, only certified teachers, and not BCBAs, may

teach or supervise a classroom, and the Pennsylvania Department of Education, the SEA, has determined the qualifications for certified special education teachers. See, 24 Pa. C.S. § 12-1201; see CSPG 61. The model that the parents' expert deems as the only appropriate method to educate the student is not permissible in the Commonwealth of Pennsylvania. See, TM v. Quakertown Comm. Sch. Dist., 21 F. Supp. 3d 792, 69 IDELR 276 (E.D. Pa. 2017). In the instant case, the student's teacher was a certified special education teacher.

Even assuming, *arguendo*, that the BCBA as captain of the classroom model advocated by the parents' expert were permissible under Pennsylvania law and IDEA, however, it is apparent that the disagreement concerning the role of a BCBA in the student's educational program boils down to a question of methodology. The Third Circuit has specifically held 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 that the student's program was inappropriate because of the role of the BCBA is rejected.

Moreover, it is clear that IDEA does not require that a school district employ a BCBA at all. IDEA specifies that an IEP team must, when the behavior of a child impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports and other strategies to address that behavior. Thus, the involvement of a BCBA is not required in every case. Instead, the legal requirement is that the school district take appropriate steps with regard to the problem behaviors.

In the instant case, the credible and persuasive evidence in the record reveals that the school district took appropriate steps to remedy the student's problem behaviors. The school district conducted a functional behavioral

analysis for the student that has been determined to be appropriate in a previous due process decision. The school district then used the results of the functional behavioral analysis to develop a positive behavior support plan that was designed by a BCBA. Also, in response to parent concerns, the August 9, 2022 IEP added a weekly consultation from a BCBA for teachers and staff to ensure proper implementation of the positive behavior support plan. It is concluded that the school district took appropriate steps to remedy the student's problem behaviors.

Parents presented no additional evidence regarding the alleged lack of training of the staff who administered the student's educational program. The unrebutted evidence in the record shows that the personnel who worked with the student were trained in ABA principles and techniques. The student's teacher was a certified special education teacher. The argument that the staff in the autistic support program were untrained is rejected.

The parents argue further that the student's program was inappropriate because it did not provide a sufficient amount of one-on-one instruction. The school district, however, is obligated to provide a program for the student in the least restrictive environment. Because it was able to provide FAPE to the student in the small group instruction, supplemented by one-on one discrete or intensive trials, the parents' request for a more restrictive placement runs counter to the least restrictive environment requirement. In addition, it must be repeated 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 that the student must be instructed in a one-on-one setting only is rejected.

In their post-hearing brief, the parents also argue that the student's IEPs were inappropriate because the program was disorganized. The

persuasive and credible evidence in the record does not support the parents' contention that the program was disorganized. The student's IEPs provided for a highly structured classroom with a focus upon communication that is based upon ABA principles and utilizes ABA techniques. The program was designed to meet the student's unique individual needs. The persuasive and credible evidence in the record does not support the parents' contention and it is rejected.

In their post-hearing brief, the parents also contend that the school district program was inappropriate because the student was restrained by school staff on one occasion. It is difficult to understand how the restraint incident, a twenty to thirty second bear hug from behind, renders the IEPs substantively inadequate. The parents do not explain how the IEPs in question caused the restraint incident. To the extent that the parents allege a procedural violation with regard to the restraint, there has been no showing that the restraint adversely affected the student's education or deprived the student of educational benefit or significantly impaired the parents' right to meaningful participation in the process. Accordingly, if there was a procedural violation, it is harmless. The parents' argument that a single brief restraint incident constitutes a denial of FAPE is rejected.

The parents also assert that the student's IEPs were not appropriate because the student was not making meaningful progress under the IEPs. IDEA does not require any particular outcome for a child with a disability; instead, the FAPE requirement is that a student's IEP must be reasonably calculated at the time that it was written to confer meaningful educational benefit given the unique individual circumstances of the child. Nonetheless, even assuming *arguendo* that progress was required, the student did in fact demonstrate meaningful progress under the student's IEPs at the school

district. Progress monitoring and progress reports issued by the school district demonstrate that the student made measurable progress on many of the student's IEP goals from June of 2021 through the end of the 2021 – 2022 school year. The student's classroom teacher had to implement an intervention because of progress monitoring for the student only once and that was only with regard to one IEP goal. Moreover, the student's ability to communicate improved substantially while attending the school district in a manner noticeable to both the special education teacher and the student's mother. It is clear that the evidence in the record reveals that the student made meaningful progress under the student's IEPs at the school district. The parents' argument in this regard is rejected.

The testimony of the school district witnesses was more credible and persuasive than the testimony of the student's mother and the parents' expert witness. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: The mother was very evasive and combative during questioning by the lawyer for the school district. Also, the mother testified that the student did not struggle at the private school during virtual instruction during the pandemic. This testimony contradicts both a stipulation entered into by the parties that the student did in fact struggle during remote instruction while at the private school, as well as the documentary evidence in the record, specifically an e-mail by the mother noting the student's substantial regression during virtual learning at the private school. This contradiction severely impairs the credibility of the parent's testimony. The testimony of the parents' expert was impaired by the fact that the expert was not familiar with Pennsylvania or Pennsylvania schools. Moreover, the expert's criticism of the school district was based upon conclusions that were not consistent with the program offered by the school district. Specifically, the expert testified that there was "no actual (behavioral) intervention plan."

In addition, the expert witness testified that there was no systematic and specialized intervention for the student. The expert's conclusions in this regard are wrong and are contradicted by the documentary and other evidence in the record.

Moreover, the testimony of the mother and the parent's expert is not credible or persuasive because the record evidence reveals that they had predetermined that only a private school was acceptable prior to the evaluation by the expert and the August 9, 2022 IEP team meeting. See discussion regarding such predetermination in the discussion of the third prong of the Burlington – Carter analysis below.

It is concluded that the parents have not proven that the school district denied a free and appropriate public education to the student for the 2022 – 2023 school year. Accordingly, reimbursement for unilateral placement must be denied.

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

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. Assuming *arguendo* that the parents had proven the first prong, however, they have established that their private school is appropriate. Although the private school selected by the parents accepts only students with disabilities and allows the student no opportunity to interact with non-disabled peers, the school is otherwise appropriate. It is quite disturbing that the head of the private school refused to testify at the request of the parent at the due

process hearing. Despite the lack of testimony from the private school officials, however, the evidence in the record supports a finding that the private school is appropriate.

The school district argues that the parents provided only hearsay evidence with regard to the appropriateness of the private school. Although it is true that the parents did provide documents that purported to be from or about the private school as evidence in this proceeding, the parents also presented the unrebutted testimony of the student's mother that the student made progress while at the private school. Accordingly, the school district's argument, which is based upon the residuum rule that a finding of fact in an administrative hearing must not be based solely upon hearsay, is rejected because the parent provided testimonial evidence that the private school was appropriate in addition to the documentary hearsay evidence. Accordingly, it is concluded that if it were necessary to reach the second prong, the parents have proven that the private school that they selected was appropriate for the student.

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 in this case because the parents have not proven the first prong. Even assuming *arguendo* that the parents had proven the first prong, however, they have not established that 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 concerning a public school placement for the student. Where parents adopt an all or nothing approach that only a private school is appropriate, they violate the collaborative nature of the special education process and equitable factors weigh against reimbursement. Rockwall Independent Sch Dist v MC ex rel MC, 816 F.3d 341, 67 IDELR 108 (5th Cir. 2016); See, CH by Hayes v. Cape Henlopen Sch Dist, 606 F.3d 59, 54 IDELR 212 (3d Cir. 2010).

The parents clearly had predetermined that only a private school would be acceptable. At previous IEP team meetings beginning in December of 2021, the parents had made known their desire for a private school placement for the student. On December 14, 2021, the parents wrote to the district and listed five private schools while rejecting implementation of the changes proposed at the recent IEP team meeting. At the February 14, 2022 IEP team meeting, the parent again requested a private placement for the student.

Moreover, it is clear that the parents were working with their expert witness to develop an evaluation that would justify their request for reimbursement for a unilateral placement. On April 11, 2022, the lawyer for the parents wrote to the parents' expert witness concerning the expert's "search for appropriate private schools." The parent then suggested in an e-mail on the same day that the evaluator contact the private school in the which the student is now enrolled. As the school district points out in its post-hearing brief, the timeline here is instructive. Before the parents' expert had observed the school district's program for the student and before the expert had interviewed the school district staff, the expert was working with the parent and the parents' attorney on picking out a private school for the student to attend. It is clear from the evidence in the record that the purpose of the

evaluator in conducting the evaluation of the student was to support a request for reimbursement of the cost of a private placement through this proceeding.

The evidence in the record in this case indicates that the parents had predetermined prior to the August 9, 2022 IEP team meeting that a private school placement was the only placement for the student that the parents were willing to accept. Because the parents clearly did not have an open mind with regard to a public school placement for the student, the equities in this matter do not favor reimbursement. It is concluded that the equitable factors in this case do not favor reimbursement.

The parents have not proven the first or the third prong of the Burlington – Carter analysis. Accordingly, reimbursement for the unilateral private placement must be denied.

2. Whether the parents have proven that the school district failed to provide services comparable to the transfer IEP of the student from April 20, 2021 to June 2021 and whether the school district denied a free and appropriate public education to the student from June 2021 to September 30, 2022?

The parents seek compensatory education for the periods of time described above asserting that the school district IEPs in place did not provide a free and appropriate public education. The school district contends that it provided services comparable to the transfer IEP and provided a free and appropriate public education during the relevant time frame.

The parents assert no new arguments concerning this issue. Instead, they assert the same arguments with regard to the IEPs in place during the

previous time period as they do with regard to the IEP prior to unilateral placement. Accordingly, the analysis for this issue is exactly the same as the analysis for the previous issue. The discussion, findings and conclusions relevant to the previous section are incorporated by reference herein. It is concluded that the parents have not proven that the school district failed to provide services comparable to the transfer IEP from April 2021 to June 2021 or that the school district failed to provide a FAPE to the student from June 2021 through September 30, 2022. The parents' argument is rejected.

3. Whether the parents have proven that the school district denied a free and appropriate public education to the student by failing to provide appropriate extended school year services during the summers of 2021 and 2022?

The parents contend that the school district failed to provide appropriate extended school year services during the summers of 2021 and 2022. The school district argues that it provided FAPE with respect to extended school year (ESY) services.

The school district failed to provide any specific argument in its post-hearing brief with regard to the issue of extended school year services. Nonetheless, the school district's position with regard to this issue is not waived because the school district's brief includes proposed findings of fact that are supported by the evidence in the record relative to this issue.

The record evidence reveals that the student was offered and attended ESY services for the summer of 2021 and that the ESY goals were based upon the results of the VB-MAPP assessment. In addition, the record reveals that the student was offered but did not attend ESY services for the summer of 2022.

The parents offer no new argument concerning the inappropriateness of the extended school year programs that were offered to the student. Instead, the parents' argument is that because the previous IEPs by the school district were inappropriate, according to the parents, the ESY must also be inappropriate. The logic of this argument is flawed, and it is rejected.

Moreover, even assuming *arguendo* that the logic of the parents' argument was not flawed, the evidence in the record does not support their argument. As has been discussed in the preceding sections of this decision, the parents have not proven that the IEPs developed by the school district denied FAPE. The discussion of the previous issues and the findings and conclusions relevant thereto are incorporated by reference herein. The parents' argument is rejected. Accordingly, it is concluded that the parents have not proven that the extended school year programs offered by the school district for the summers of 2021 and 2022 are inappropriate.

4. Whether the parents have proven that the school district discriminated against the student in violation of Section 504 by excluding the student from Field Day and by assigning the student to regular education music classes that were inappropriate for the student?

The parents contend that the school district discriminated against the student on the basis of a disability in violation of Section 504 by failing to permit the student to participate in Field Day and by assigning the student to a regular education music class that was inappropriate because it was beyond the student's ability level. The school district brief contains no argument and no proposed findings of fact that pertain to these allegations or this issue.

Because the school district has not addressed the issue in any fashion in its post-hearing brief, the school district has waived its opposition to this issue.

Accordingly, it is concluded that the parents have proven that the school district has discriminated against the student on the basis of a disability in violation of Section 504 by excluding the student from Field Day and by assigning the student to a regular education music class that was beyond the student's ability.

Even assuming *arguendo* that the school district had not waived its opposition to this issue by failing to address the issue in any way in its brief, the record evidence supports the parents' contention with regard to these allegations. The music class appears to have been selected without much analysis of the student's ability. Although the least restrictive environment mandate requires the school district to ensure that the student have contact with non-disabled peers, the LRE mandate does not justify having the student attend a music class that is clearly beyond the student's ability. The mother's testimony concerning the music class was corroborated by the testimony of the student's teacher that the teacher and 1:1 aide agreed that the music class was well beyond the student's ability.

The unrebutted testimony of the mother concerning the Field Day extracurricular activity was that the student's entire class was not permitted to participate in the activity. The student was permitted to participate after the mother objected, but the initial decision was to exclude the student's special education class from participating in the activity.

It is concluded that the parents have proven that the school district violated Section 504 by initially failing to permit the student's special education class to participate in Field Day and by assigning the student to a

regular education music class that was significantly beyond the student's abilities.

RELIEF

In this case, the parents have not proven entitlement to either tuition reimbursement or to compensatory education because of substantively inappropriate IEPs or inappropriate extended school year services. The violations that the parents have proven involve discrimination under Section 504 concerning Field Day and the assignment of the student to an inappropriate regular education music class. The parents seek compensatory education to remedy these violations.

Concerning the Field Day violation, the evidence in the record indicates that the student did in fact participate in Field Day after the student's mother contacted school officials by e-mail and complained of the potential exclusion of the student. Because the student did in fact participate in Field Day, the student was not harmed by the initial decision to prevent the student's class from participating in Field Day. The decision was overturned, and the student did participate in Field Day. Because the student suffered no harm as a result of this violation, no relief is awarded therefor.

Concerning the inappropriate music class violation, it was the testimony of the student's mother that approximately one month after the student started attending the music class, the mother objected to the music class. The student's teacher and 1:1 aide agreed. School officials then stopped sending the student to the inappropriate music class. An individualized

analysis of the harm to the student resulting from the inappropriate music class reveals that the student attended the music class for one month. Thus, the duration of the violation was one month, or 4.3 weeks. Accepting the calculation in the parents' post-hearing brief that the student would have attended the inappropriate class two times per week, the appropriate award of compensatory education is the number of weeks of the violation times two. Accordingly, 8.6 hours (=4.3 x 2) of compensatory education is awarded to the student as a result of this violation.

The parent also seeks as relief for the 504 violation, an award of reimbursement to the parents for the fee of the parents' expert witness. The parents' brief cites no legal authority to support the proposition that a special education hearing officer, as opposed to a court, has the authority to award such relief. Even assuming *arguendo* that a special education hearing officer has authority to award such relief, however, it would be inappropriate in this case. The testimony and the two reports of the parents' expert witness do not pertain to the alleged 504 violations concerning exclusion from Field Day or the inappropriate music class. Instead, the reports and testimony of the parents' expert pertain to the parents' contention that the student's IEPs were substantively inappropriate and did not provide FAPE. The parents did not prevail with regard to these contentions. Thus, there is no connection between the expert's conclusions and the relief sought. It would not be appropriate to award reimbursement of the expert's fee when the expert did not provide any evidence in support of the 504 claims upon which the parents have prevailed. The parents' request for an award of expert witness fees is denied.

Because all relief under IDEA is equitable relief and should be flexible, and because special education under IDEA requires a collaborative process, Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2000), the parties shall have

the option to agree to alter the relief awarded herein so long as both parties and their lawyers agree to do so in writing.

ORDER

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

1. The school district is ordered to provide 8.6 hours of compensatory education to the student. The order of compensatory education is subject to the following conditions and limitations:

    a. The student's parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device for the student's educational or related service needs;

    b. Compensatory education services may be used at any time from the present until the student turns age twenty-one (21); and

    c. Compensatory education services shall be provided by appropriately qualified professionals selected by the parents. The cost to the school district to provide the awarded hours of compensatory education may be limited to the average market

rate for private providers of those services in the county where the school district is located;

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

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

IT IS SO ORDERED.

ENTERED: December 7, 2022

James Gerl

James Gerl, CHO
Hearing Officer