



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 13199-17

AGENCY DKT. NO. 2018 26773

S.D. ON BEHALF OF J.D.,

Petitioner,

v.

MATAWAN-ABERDEEN REGIONAL

BOARD OF EDUCATION,

Respondent.

Seth N. Broder, Esq., for petitioner (Broder Law Group, P.C., attorneys)

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: September 25, 2018

Decided: October 1, 2018

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

Petitioner, S.D., on behalf of her minor son J.D. (born in May 2006), seeks out-of-district placement at the Newgrange School (Newgrange), reimbursement for S.D.'s payments to Newgrange for the 2016–17 school year, compensatory education, and other costs due to the alleged failure of the Matawan-Aberdeen Regional School District (MA or District) to provide a free appropriate public education (FAPE) to J.D. The District

alleges that J.D. made meaningful educational progress during the two years he attended school within the District, and that it has been willing to implement the recommendations of the plaintiff's expert in a proposed individualized education program (IEP).

PROCEDURAL HISTORY

J.D. previously resided in Newark, New Jersey. On March 25, 2015, the Newark School District prepared an IEP for J.D. based upon the classification "other health impaired." The IEP noted J.D.'s learning, language, and speech-therapy needs. The IEP placed J.D. in Newark schools and provided one-half hour per week of language therapy and one-half hour per month of occupational therapy. An extended school year was not offered.

In September 2015, J.D. became a resident within MA, when S.D. accepted him into her home as a foster parent in anticipation of J.D.'s adoption, which was finalized by her on April 19, 2016.

On October 22, 2015, MA issued its transfer IEP and placed J.D. at Lloyd Road Elementary School, Matawan, a public elementary school. MA issued and implemented additional IEPs on January 30, 2016, May 2, 2016, and October 6, 2016.

On July 22, 2017, petitioner's special-education school advocate advised MA that J.D. would be unilaterally placed for the September 2017–18 school year at Newgrange as the result of the District's failure to provide FAPE.

On August 1, 2017, the petitioner filed a due-process petition with the New Jersey Department of Education, Office of Special Education Programs. On September 1, 2017, the petition was transmitted to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On September 14, 2017, a settlement conference was conducted. On September 18, 2017, an initial telephone conference was held after the matter did not settle. The hearing was held on January 17 and 30, February 14, and March 2 and 28, 2018, before

the Hon. Joseph Ascione, ALJ. The parties submitted post-hearing summations, and the record closed on April 30, 2018.

Before the decision could be written, however, Judge Ascione required medical leave and became unavailable. The parties were advised by the Hon. Edward Delanoy, ALAJ, of the regulation governing this situation,¹ and the matter was then re-assigned to undersigned. The matter was re-opened and a telephone conference was held with counsel on September 24, 2018, to discuss the options available. On September 25, 2018, they advised that they and their respective clients were satisfied that the matter could be decided on the testimony and evidence presented at the hearing.² The record closed on September 25, 2018.

¹ N.J.A.C. 1:1-14.13, Proceedings in the event of death, disability, departure from State employment, disqualification or other incapacity of judge:

(a) If, by reason of death, disability, departure from State employment, disqualification or other incapacity, a judge is unable to continue presiding over a pending hearing or issue an initial decision after the conclusion of the hearing, a conference will be scheduled to determine if the parties can settle the matter or, if not, can reach agreement upon as many matters as possible.

(b) In the event settlement is not reached, another judge shall be assigned to complete the hearing or issue the initial decision as if he or she had presided over the hearing from its commencement, provided:

1. The judge is able to familiarize himself or herself with the proceedings and all testimony taken by reviewing the transcript, exhibits marked in evidence and any other materials which are contained in the record; and

2. The judge determines that the hearing can be completed with or without recalling witnesses without prejudice to the parties.

(c) In the event the hearing cannot be continued for any of the reasons enumerated in (b) above, a new hearing shall be ordered by the judge.

(d) An order or ruling issued pursuant to (b) and (c) above may only be appealed interlocutorily; a party may not seek review of such orders or rulings after the judge renders the initial decision in the contested case.

² Transcripts had been made of the testimony. The hearing recordings were also reviewed.

FACTUAL DISCUSSION

Testimony

For respondent MA:

Lauren Kelly, a licensed school social worker, was J.D.'s case manager. She was assigned to the Lloyd Road School and assisted in preparing IEP's for the fourth and fifth grades. She was accepted as an expert in school social work and case management.

In preparing an IEP, Kelly would look at the current IEP and school records. In August 2015 she became responsible for J.D.'s IEP after he transferred into the MA district from Newark. Kelly did not discuss J.D.'s IEP with Newark. Previously, he had been enrolled in the Toms River school district, and she reviewed old evaluations prepared by that district. J.D. was classified as "other health impaired" (OHI); he was language and learning impaired. J.D. had also been diagnosed with attention deficit hyperactivity disorder (ADHD) and post-traumatic stress disorder (PTSD). He was assigned to a self-contained class for his specific learning disability.

The procedure that was followed was to accept the transferred IEP from Newark and then have a new IEP meeting about five weeks after the school year commenced. Kelly did not recall all of the specifics of the first meeting with S.D.; however, she did recall that the child study team's recommendation was to follow the prior IEP from the Newark School District. S.D. raised concerns regarding J.D.'s communication-skills impairment and his PTSD. The IEP prepared by MA provided for placement in the Language and Learning Disabilities (LLD) Program, with a pull out weekly for a thirty-minute speech-therapy session and an increase from the Newark District's IEP, specifically in providing occupational therapy individually to J.D. for thirty minutes per week.

The goals and objectives that were included were based on the previous evaluations Newark had done. Newark had not indicated that J.D. required an extended school year (ESY), so that was not included in J.D.'s IEP. No counseling services were offered to J.D. Kelly felt the IEP was appropriate for J.D., as it considered his disability.

The IEP was there to support a student who struggled with attention deficits in the classrooms. No concerns of PTSD, anxiety, or depression were raised. They did not feel they needed to address PTSD in his program, as they had heard no concerns.

During the school year, Kelly observed students, including J.D., in their classrooms two times per week for about five to twenty-five minutes. At the end of the 2015–16 school year a progress report was prepared.

The IEP did not change for school year 2016–17, except that it was amended to provide for ESY during the summer of 2016 in an LLD self-contained class for 240 minutes. J.D. did not attend ESY 2016 within the District; instead, he attended Camp Excel.

The academic information Kelly had was received from J.D.'s teacher. The IEP for October 2016 included the same placement, with an additional speech session.

J.D.'s teacher felt he was typical and was making progress. The parent consented and the IEP went into effect. A triennial review was expected to be completed in January 2017, to include a social history, psychological evaluation, administration of the WISC-5, an educational evaluation, the Woodcock-Johnson Test of achievement, plus speech, language, and OT evaluations.

J.D. tested with a full-scale IQ of 84, indicating low average. In the Woodcock-Johnson he tested at 75 in basic reading skills; 79 in reading comprehension; 73 in reading fluency; 92 in math; 82 in math problem solving; and 80 in written expression. The social history indicated that he had been with his parent for a short time, and the Division of Child Protection and Permanency (DCP&P) provided the background information.

In October 2016 the mother first mentioned homework meltdowns and tantrums. J.D. was placed in the homework club for an hour after school, but the mother expressed concerns that J.D. was not getting his homework done.

At the November 30, 2016, IEP meeting, no concerns were expressed about J.D.'s program, although the advocate retained by the mother sought more specific information. No changes were made to J.D.'s program; he remained classified as OHI. No specific learning disability was seen in any other area. J.D.'s mother signed the IEP and agreed with his eligibility. The Present Levels of Academic Achievement and Functional Performance (PLAAFP) was not updated because the regular IEP meeting had just been held in October.

For school year 2016–17, an additional speech-language group was added, so now J.D. had language three times per week, with one session focused on speech or articulation and two on language. J.D. was also found eligible for ESY in the summer of 2017, in a general-education “supplemented” program that had yet to be developed. The OT session was recommended to change to a “consult” model (the therapist consults with teachers regarding strategies). J.D. would then be transitioning in the 2017–18 school year to sixth grade.

The November 30, 2016, IEP went into effect. In December, the mother called about setting up a meeting in January to review J.D.'s “smart goals.” In January, the mother requested that a psychiatric evaluation be performed due to a change in J.D.'s behavior at home. The teacher reported that she saw no need, and the District thought it was not necessary, but in March 2017 the District agreed to the evaluation. The mother also asked about social skills in the classroom, but the IEP was not changed.

On July 6, 2017, a meeting (but not an IEP meeting) was held with the mother after an educational evaluation had been prepared. The mother wanted an out-of-district placement; a private evaluation she had obtained recommended a specific reading program, as well as counseling.

Instead of preparing a new IEP, the November 2016 IEP was amended; reading was changed from a self-contained classroom (slightly less restrictive) to pull-out resource plus counseling. New counseling goals and objectives were added.

During school years 2015–16 and 2016–17, J.D. was using READ 180 (which focused on comprehension) or System 44 (for lower-level readers, which focused on decoding and phonics). In the proposed amended IEP, the pull-out resource session was going to be using a Wilson reading program. Wilson would be designated as J.D.'s reading program for forty to fifty minutes per day of his seventy-two-minute language-arts block. The teacher would be a certified Wilson instructor. All other subjects in the self-contained classroom would use Orton-Gillingham (OG), and the teacher would work on content area using OG strategies. Counseling with the school social worker would also be added at the parent's request.

The goals and objectives were changed, and the pull-out resource room was added to the IEP. This amended IEP was sent to the parent on July 19, 2017. The District scheduled a visit for the parent to see the program in operation at the middle school, and she was able to attend during the ESY session. About two days after the parent's observations, the District was notified that J.D. was going to Newgrange at the start of the school year.

Kelly felt that the proposed changes to J.D.'s IEP were appropriate: it included one of the evaluator's recommendations and targeted some of his deficit areas. Kelly felt that the District had provided FAPE in school years 2015–16 and 2016–17, and that J.D. had made progress during school year 2016–17.

The IEP that was prepared in October 2015 was based on a previous district's IEP, and MA felt it was appropriate based on what they received from Newark. J.D. had been diagnosed with ADHD and required a small-class setting at a slower pace. The goals and objectives developed by MA came directly from Newark. This IEP had originally been developed when J.D. was in the middle of third grade.

Kelly did not recall the mother raising concerns about the IEP. J.D.'s IQ had tested as 92 at the 2013 evaluation. After a psychological assessment in November 2016, his IQ tested as 84. This decrease did not concern her, because it was a new version of the intelligence test (WISC) and the new subtest could have had some impact on his score.

The PTSD was included in Newark's IEP, but nothing in Newark's IEP addressed that, so MA went along with it. The IEP noted issues with reading and language literacy. J.D. did not recognize blends, diagraphs, or root words, but goals in MA's IEP addressed that. Neither were long vowel sounds or sight-word recognition listed as a goal. Nothing was in the IEP about learning appropriate grade-level sentence structure without needing assistance to do it. No multi-step math-problem solving had been addressed either. J.D. did not know his times tables, and no goals and objectives addressed this. J.D. needed word problems and directions read to him, but no goals and objectives addressed this. Kelly said there was no need, as it was a modification that he needed, but this was not in the IEP modification section either.

Kelly said the goals and objectives would be measured through J.D.'s writing activities, tests, and data collected by the teacher from the program the class was using. The data collected would indicate progress. Kelly believed that J.D. made educational progress and received FAPE.

J.D. participated in an intensive foundational reading program the class used (System 44), but the program was not specific to J.D. System 44 targeted instruction focused on phonics and decoding and included software, small groups, independent reading, and whole groups. Teachers were trained, not certified. System 44 was a stand-alone program for J.D. As a matter of school policy, the IEP did not state the reading program used by the child.

Kelly did not know what accommodations were made to J.D. for his ADHD. System 44 did not deal with this. J.D. received no assistive technology, as it was not presented as a need.

The amended November 2016 IEP was proposed to be amended again in July 2017 to include counseling, LLD class, POR for English/language arts, OT, counseling, multisensory-based structured language curriculum, and social skills in his program in class. Wilson reading would be how they would implement a multisensory integration approach, which was to be taught by a pull-out language certified instructor. The LLD teacher was to be OG trained. However, the IEP did not mention the Wilson language

method, and only his pull-out resource instruction was to use Wilson. The OG/Wilson instructional method needed to be reinforced throughout his instructional program, but the IEP did not say that. Multisensory instruction was not included in his goals and objectives.

The IEP did not include a way to measure or to monitor J.D.'s progress in fluency. The approach was to wait and see how he did in the new program. Audio textbooks would assist J.D., but assistive technology was not included in the IEP. Kelly said that J.D.'s progress would be monitored quarterly, and that if the teacher were using Wilson, the teacher would comply with its protocols, but the recommendations of J.D.'s expert had been for careful monthly progress monitoring. The recommendation sought multisensory classes, including social studies, math, and science, but this was not incorporated into the IEP, although J.D. would have a Wilson instructor in pull-out resource and OG in the rest of his classes. The instructors were to collaborate on teaching strategies.

The District used the STAR assessment, which is done on a computer. J.D. took the STAR assessment, and was also assessed by the System 44 program. Kelly said he had received multisensory teaching in the fourth and fifth grades, but he was not getting Wilson, OG, or Lindamood-Bell language instruction. He was just receiving some supplemental Wilson instruction from his teacher. Although J.D. did have some difficulty reading, the school did not test or screen him for dyslexia.

Kelly saw no evidence of PTSD in J.D., but the school records indicated he had it. Providing services for PTSD would depend on the behavior displayed by student. Kelly said he displayed no signs of PTSD while at MA, although sometimes he needed to be redirected, which was included in the modifications section of his IEP. One time in fifth grade there was an incident in gym class, when he alleged that a boy picked on him.

Although Kelly testified that she never saw behavioral issues in the school, the July 2017 IEP recommended counseling. This was incorporated into the proposed IEP even though it had never been in J.D.'s IEP before. Services were based on needs and

observations, but counseling had not been a need for J.D., so it had not been incorporated into his IEP.

J.D. received social-skills training in the classroom by his teacher in a group of ten to twelve students as part of regular classroom instruction. Self-esteem issues were raised by the mother and the advocate, but the teacher had not seen it or reported it.

Kelly saw no issues of episodic mood dysregulation in the school setting. Services were based on need, not the diagnosis. But the psychiatric report made recommendations including mental-health services, pharmacologic management, and individual and group therapy, and indicated that J.D. would benefit from educational supports, small student-teacher ratio, in-class support, access to therapeutic behavior supports, OT, speech and language services, group-therapy social skills, counseling, and frequent monitoring of educational progress. Physical therapy and adaptive functioning were also suggested. Kelly noted that the parent had never made a request for a PT evaluation.

A new program called “Effective School Solutions,” which would be run by a third-party company, was being developed for the District. That program was not in J.D.’s IEP. The new program would have to see if J.D. were appropriate for it. Social workers would be checking in with students twice a day. Frequent monitoring of academic progress would have continued.

Mary Biagianti testified that she is the special-education teacher of the LLD class at the Lloyd Road School, and primarily teaches fourth and fifth grades. She is certified as a teacher of the handicapped and in elementary education and has been a certified Wilson 1 teacher for at least ten years. She was accepted as an expert in upper-elementary special education and Wilson 1. Wilson is a multisensory program of instruction designed for students in grade four and up who have not yet picked up on decoding. The program is extremely systematic and quite comprehensive. It is not provided in the general curriculum.

J.D. transferred in for school year 2015–16. Biagianti saw his IEP from Newark dated February 24, 2015, and signed March 25, 2015. She saw something from Toms River about a reading disability and possibly a math disability and some things about behaviors. After reviewing the documents, she had no concerns.

The class for school year 2015–16 was a mixed-grade class heavy on fourth graders. At first there were twelve students in the class, but it ended up with ten, plus one paraprofessional for one student and one instructional assistant.

J.D.'s typical day of language-arts instruction involved using READ 180, which focused on comprehension, versus System 44, which focused on phonetics and decoding. Biagianti used a blended-model half-hour of READ 180, then three twenty-minute sessions for System 44, which used audio books, worksheets, and a computer. One third of the time is on the computer. Units would take more than a month. It is not a fast progression. J.D. would also have social studies, lunch, recess, math with an assistant for twenty minutes, and the computer for twenty minutes, then science, and then specials for forty minutes. Math was done in a small-group setting. Social skills were done once a week in the classroom with the entire class, instead of science.

J.D. adjusted well. His issues were more with reading than math.

At his first evaluation on September 24, 2015, J.D. tested as a beginning reader. When he was assessed again on June 15, 2016, his level was 346, which correlated to a first-grade level (and he was at end of fourth). He was in the eleventh percentile.

J.D.'s goals and objectives were measured in System 44 classwork, participation, and tests. By the end of fourth grade, he had not mastered any of ten goals in reading. He was making progress in math and met three goals out of four. J.D. needed help with articulation, and Biagianti believed he received language therapy.

The IEP of October 22, 2015, accepted the PLAAFP, as well as goals and objectives, from Newark. There was no discussion of behaviors; they thought he was settling in well.

Biagianti thought the LLD program for language arts with social studies, embedded math, and science was appropriate for J.D. Sometimes J.D. needed help with decoding, but she had no major or minor concerns with J.D. in her class. After fourth grade, he went to Camp Excel for ESY, which included an hour of academics.

In fifth grade, all the students in the class were fifth graders. The reading program was System 44 as a stand-alone. It included fifteen minutes of decoding, and three group sessions of twenty-five minutes each. READ 180 was gone.

J.D.'s first reading test score for school year 2016–17 was 482, which indicated that his level was beginner second-grade reading. His next testing was January 23, 2017, and his score was 528, indicating second-grade range. His final test of the year was May 30, 2017, and his score was 539. An average fifth grader is at 635. J.D.'s projected reading goal based on starting at 482 (second-grade range) had estimated he would go 130–180 points higher during the year. The material became harder and decoding became more complex. J.D.'s growth was tapering off; it was only a third of what had been expected. His reading score grew 136 points when he went to Camp Excel.

MA did not provide formal Wilson training, although it did provide Wilson strategies for a half-hour per week as a supplement to System 44.

J.D.'s STAR testing in math showed a grade equivalent on October 14, 2015, of 2.9; on January 20, 2016, of 2.9; on May 17, 2016, of 2.7, but he was allowed to re-take the test the next day and scored 3.7; on September 22, 2016, of 2.9 (same as October 14, 2015); on January 9, 2017, of 4.3; and on May 17, 2017, of 3.7, and on re-test two days later, 4.4.

In reading, in October 2015 he tested at grade level 2.3; in May 2016 at 2.6; in September 2016 at 2.8; in January 2017 at 2.9; and in May 2017 at 3.0. His reading scores increased more slowly than his math scores. His percentile rank nationally went down 5 percent from October 2015 to January 2016, and another 5 percent by May 2016. The IEP at the end of fourth grade for the following school year included no social-skills

goals and objectives, as J.D. did not present with a need for them. Biagianti was aware of the PTSD diagnosis and that nothing in the IEP addressed that because they saw no behavioral issues at school.

An IEP meeting was held in October 2016, which Biagianti attended. J.D. adjusted well to fifth grade and no formal changes were made to his program. The PLAAFP indicated that J.D. learned best through multisensory and kinesthetic methods. His mother had concerns about homework, and he joined the homework club.

The November 20, 2016, IEP meeting showed he was progressing on three out of five reading goals and objectives, as opposed to more the last time. During the rest of the year (February, April, and June), data collection showed he was progressing, but he was not mastering the goals. He made limited progress, with a success rate under 70 percent. The goals and objectives did not specify how many times a skill needed to be achieved or the percentage of success. While math had some percentages, science and social studies did not.

In April, Biagianti met with J.D.'s mother and advocate. A psychiatric evaluation had been completed, which recommended counseling, but Biagianti had seen no behaviors in J.D. Biagianti agreed that J.D. had made slower progress in fifth grade. The July 2017 IEP was the same as before: the input for the PLAAFP was from October 2016. The only change in the proposed IEP was for a pull-out language arts resource room with a multisensory approach for English and language arts. J.D. would be receiving full Wilson instruction one period a day, and other subjects would be taught by a teacher certified in OG. In addition, he would receive counseling services. Biagianti thought this proposed IEP was appropriate.

For petitioner:

S.D. is the adoptive mother of J.D., and provided personal information about J.D. and his brother C., who is one year older.³ (C. is also classified and is in an out-of-district

³ The information had been provided to S.D. from the DCP&P when she initially became the foster mother for J.D. and C.

placement.) The two boys moved in with S.D. in July 2015. After fostering them, she was able to finalize the adoption of both children in April 2016.

J.D. is one of nine children from his birth mother. He had a complicated childhood: J.D. was born prematurely at thirty-six weeks. In the neo-natal intensive care unit, he had jaundice and oxygen-intake issues. Many evaluations were performed on him. He had speech delays. He had eaten paint chips off the walls. Social-skills concerns and concerns about autism have been present since infancy. Allegations of sexual and physical abuse were noted in his history.

J.D. attended Toms River early-intervention programs, but his birth mother did not follow up with recommendations, and after five and a half years he ultimately was removed from her care. J.D. was placed in foster-care homes for another four and a half years.

While in foster care in October 2014, J.D. started to say things about hurting others and his behaviors intensified. His foster parents could not handle the situation, so J.D. was removed from the home. Emergency services were called, and he spent eight days in the crisis unit. He was then placed in a therapeutic home in Newark for nine months, which offered a higher level of foster care, involving social training, therapies, and behaviors. During this time, he attended Newark public schools and was classified as OHI. After that, he was placed with S.D.

The rights of J.D.'s biological parents were terminated. J.D.'s natural mother died a year ago, but she had not been allowed to see him. His natural father surrendered his rights. The adoption was then finalized.

J.D. is diagnosed with PTSD, ADHD, and expressive language disorder. He has had these issues since he was two or three years old. Psychiatrists gave these diagnoses before he was five and a half. J.D. also suffers from anxiety, which first stemmed from separation. Two therapists came to the home during the first two years he lived with S.D. J.D. would have meltdowns after he came home from school. He would be asking for food, which his natural mother had denied, so that had been an issue. Then he would

get demanding, rude, yelling, crying, screaming, for up to an hour at a time. J.D. was attending the Lloyd Road School and was in an after-care program, and the therapist would pick him up and bring him home.

J.D. had no anxiety about going to school. He had problems with attention and took medication for tics and nervousness. He would be very hyper without the medications and is distractible.

J.D.'s first year at Lloyd Road School was in the fourth grade. His social-skills deficits were apparent, especially in Boy Scouts and at meetings. He struggled with children and did not connect with them. He did better with adults. He is slowly progressing and is generally a happy child.

Before the first IEP transfer meeting held at MA, S.D. submitted medical and DCP&P records, including psychological and medical evaluations, to Lauren Kelly, the case manager. She also sent his teacher, Biagianti, an email with all the information she had about J.D.'s background. S.D. noted that J.D. had trouble sleeping, including nightmares. If there had been an incident during the day with yelling, J.D.'s PTSD would be triggered, and he would have nightmares about his birth mother and her boyfriends and abuse. J.D. also had a history of seizures with two different foster parents.

J.D. had been assessed for autism spectrum disorder several times from childhood, but the reports were conflicting. In February or March 2016, one evaluation said he showed some autistic tendencies, but he was not diagnosed with the disorder.

As far as J.D.'s reading, in fourth grade he could not read. In the fall of fifth grade, he had the same issues: he could not read or comprehend language. When J.D. started at Newgrange, he was struggling with sounding out words. Newgrange encouraged him to read twenty minutes a day out loud, and by December he was sounding out words. As far as spelling, in fourth grade he could not spell. His letters were mixed up and his reading program did not change this. He made huge progress in three months at Newgrange; he finally understands how to group letters and his reading is much improved.

His listening skills also improved at Newgrange. J.D. requires basic instruction; he is getting better and is more independent. As for his motor skills, he had no improvement from fourth to fifth grade at MA, even with OT. He could not even tie his shoes. J.D.'s performance in mathematics is better than in language, but he is still behind.

S.D. saw no progress in education, OT, or speech, so she started to raise issues with MA in fifth grade with the advice of her special-education advocate. She pushed for more speech, language, and OT. MA provided some extra OT. S.D. also expressed her concerns about System 44 and J.D.'s work on the computer. She requested counseling for J.D. to Kelly, but it was denied because Kelly and the teacher did not see the behaviors at school.

MA gave J.D. the category of "beginning reader" when he first enrolled. They were not aware of what instruction J.D. had received for reading in Newark, or whether the computer was used, as it was not included in Newark's IEP. In June 2016 J.D. fell into a grade-one classification.

As for ESY, for the summer of 2016 J.D. was enrolled at Camp Excel. The cost was partially paid by the State, as the full-day program had been recommended by J.D.'s State case manager. This case manager was responsible for J.D.'s mental health and therapies and thought the camp would suit him because it was run by certified teachers, had both social-skills and education components, and was an ADHD-based camp.

Biagiante told S.D. that J.D. did well in her class, but that he struggled in gym, lunch, art, specials, and recess and said that the other students were mean to him. He liked Biagiante's class, but as soon as he was in the classes in which he was mainstreamed, he struggled. He hated being outside Biagiante's class.

S.D. addressed social skills at team meetings, and Biagiante and Kelly said they did not see any problems in her fifth-grade classroom. No solution was proposed by the District.

In fourth grade, J.D. had homework issues, it was a battle every night. He could not get it done in his after-care program. In fifth grade, the homework club was tried, but it did not work. J.D. did not like to ask for help, and no one checked to see if he needed it. This caused issues when he came home after school, when he would have a meltdown. MA offered no assistance except to tell S.D. not to worry. But S.D. was worried, because J.D. was not understanding or getting the material. That was when she sought help from the special-education advocate.

S.D. saw no progress in reading or writing; J.D. was at the same very basic first-grade level. He struggled with social skills in baseball and Scouts; he loved seeing everybody, but he did not connect with them. Until April 2017, S.D. did not even know J.D. had been getting social skills at school in class because it was not in his IEP.

When S.D. first enrolled J.D. in the District, the District asked her to give it a chance, so she gave it two years. She saw no change, just the same continued reading programs and nothing else. It was then that she thought about placement, especially since J.D. was moving to middle school. It was only after she had told the District that she was considering placement that it suddenly offered new programs: it suddenly offered therapy, and added social skills to the IEP, and Wilson once per day.

Nothing in J.D.'s last IEP in MA had said he should receive OG reading instruction throughout the school day; J.D.'s reading instruction was with the computer. J.D. was at a second-grade reading level after leaving fifth grade. J.D. needed a multisensory approach to his learning for maximal instructional benefits.

S.D. went to the MA's ESY program to observe, and understood that the teacher was not Wilson certified. She then went to Newgrange and saw Wilson as it was implemented, and it was a very "hands-on" approach to reading. This was confirmed to her because after a few weeks into his placement at Newgrange, both she and J.D. could see the difference. He was "learning."

The MA District did not test for dyslexia; rather, it told her that she would have to test for it. At Newgrange, J.D. receives speech and language three times per week (one

combined with OT), and social skills three times per week. J.D. has Wilson every day with one teacher, and then he is taught with similar methods throughout the school day with Wilson and OG practices. J.D.'s speech and social skills have improved; S.D. has seen growth and fewer tantrums since Camp Excel and Newgrange. He is less distracted, he enjoys school, and he is focused. Language arts and reading are taught by a teacher, not a computer. His homework is now done by him with no tantrums. J.D. always took medication for his ADHD. Since attending Newgrange, his medications have been reduced and adjusted, and his distractibility is getting better. J.D. has made friends and is doing very well at Newgrange. Newgrange is an appropriate placement for J.D.

Susan E. Miller, the assistant director of the Ann Robinowitz Education Center in Princeton, testified.⁴ She is a learning disabilities teacher consultant and performs educational evaluations. She is also a certified Wilson trainer, and conducts workshops on behalf of Wilson Language. She provides training and tutoring for the Education Center. Miller consults with school districts throughout the state of New Jersey, in terms of literacy, to help them develop plans and screening. She was accepted as an expert in special education, particularly in literacy, reading, Wilson, and OG.

Miller reviewed J.D.'s performance on the January 2014 administration of the Woodcock-Johnson Tests of Achievement and his performance on the November 2016 administration of the Woodcock-Johnson Tests of Achievement, including standard scores for each of those sub-tests: Letter Word ID, Word Attack (which is his ability to decode unfamiliar words), and Passage Comprehension and Calculation. There was no mention in the IEP of the use of structured multisensory language, or the use of manipulatives, visualization, or mnemonics to teach him.

A few research-based methods can be effective with students like J.D. who have language-based deficits. However, there was no mention in J.D.'s IEP's of the use of measurable standardized data collection to monitor his progress in reading, writing, math, and speech and language. The use of anecdotal records, such as teachers' reports, is

⁴ The Newgrange School of Princeton, Inc., is the umbrella organization for the Newgrange School, the Laurel School of Princeton, and the Ann Robinowitz Education Center. They are not located together and have separate missions.

not considered standardized data collection. The IEP and the PLAAFP statements referenced teacher-made standards. With this IEP, what few goals were present involved support with teacher prompting. And there was no indication that the teachers were trying to obtain independence, such as “he will independently write a paragraph.” It was, “he will, with teacher support and prompts, write something.” This is hand-holding.

Miller administered the Comprehensive Test of Phonological Processing to J.D. because, in looking back over his files, it had never been given to him. And it is an important test because it looks at three domains: phonological awareness, phonological memory, and rapid naming. And if there were a deficit in one or more of those areas, it would help to inform his instruction; it helps to plan a way of attack to make gains for J.D. The Test of Word Reading Efficiency is timed with real words, to see how quickly and easily he could retrieve his sight words. So, it was two different things being tested. It was sight-word reading in one, and in the other, a list of made-up pseudo words or syllables. As words are made up of syllables, if they cannot be decoded, the whole word cannot be read.

The Woodcock Reading Mastery Tests were given, as well, in order to take a look at his current levels of reading and comprehension. And then he was given the Test of Orthographic Competence. J.D. received occupational therapy, and Miller wanted to see his presentation of spelling. Students that are found to have below-average scores on any one or more of the subtests were at risk of learning difficulties, since all three domains she assessed were required for learning in all content areas.

J.D. scored poorly in Rapid Naming. Rapid Naming is a timed test where he was presented with a list of real words with a goal of reading as many as he can for forty-five seconds. His retrieval of those words was slow, as he ranked only in the third percentile. This is a child who has not yet established mastery. On phonological awareness (which is the total of three different scores), he scored right on the cusp of average. One percentage point below that, he would have been in the below-average category. Phonological memory was at the twenty-first percentile, which is below average. In terms of phonological awareness, he was in the twenty-fifth percentile, which indicated he was at risk. This was a red flag. He needed an intervention that directly addressed

phonological memory and rapid naming, as these could be improved. What the District had been doing needed to be changed because J.D. was struggling to apply basic letter-sound correspondence. His program needed to become more intensive.

In a chart comparing J.D.'s standard scores on the Woodcock-Johnson Subtests administered between 2014 and 2017, covering the middle of third grade to fifth grade, it appears that over time J.D. was losing ground with his peers. So that gap that was there in 2014 had gotten wider. He was not even keeping pace. At a minimum, J.D. had learning disabilities. He should at least be maintaining any progress, but he had lost a lot of ground.

A multisensory-based structured language curriculum involves motor-memory learning. It is not just tactile, but motor memory, meaning gross motor. Because when more muscles are involved, a deeper memory of what was learned is created. In any Orton-Gillingham curriculum, a series of routines is repeated daily. When errors are made, the teacher would recognize those errors and provide immediate corrective feedback. Based on J.D.'s performance he required a program, such as Orton-Gillingham or Wilson Reading, because of its intensity. Each lesson is fifty to sixty minutes long. In July 2018, a new version will be released, and Wilson teachers are being trained to learn it. The lesson will be a minimum of ninety minutes. It is going to be more intensive to make a difference. Instruction is provided one-to-one, in small, homogeneous group settings. Further, the pieces needed to be reinforced throughout the instructional program in multiple classes.

Progress monitoring of the Reading Intervention program is important. Progress must be monitored regularly to not waste a year. And decisions must be based on that data, such as whether the intervention is intensive enough, or whether the small group is too big.

Miller was somewhat familiar with System 44 (named for the forty-four phonemes in English). She also had an extensive background in dyslexia. A school district in New Jersey has a responsibility to screen students for dyslexia up through the first marking period of second grade. But if an older student had moved into the district, nothing

prevented that district from screening the child. J.D. had never been screened or tested for dyslexia.

Miller did not think that the District necessarily should have evaluated J.D.; rather, she would have spoken to the parent about the reason for the classification of OHI or learning disabled. There are many types of learning disabilities and they needed to know exactly what J.D.'s was. He definitely had a reading disorder. Dyslexia is a very specific type of reading disorder. Miller has seen it in students where their oral language and listening comprehension was on grade level or superior. However, in dyslexia, there would be a big disconnect between decoding and spelling that was consistent with listening comprehension. J.D. presented with weaknesses in his receptive language and in decoding. So, he had multiple deficits in reading and a specific reading disorder of having a deficit in phonological awareness.

As far as J.D.'s PLAAFP, Miller found it to be somewhat vague. In terms of PLAAFP statements and goals and objectives, where there were goals, it was for 70 percent mastery, the equivalent of a C-. The Reading and Language Arts section did not have proficiency listed. Miller was concerned about teaching to mastery, not to 70 percent. It would not be unreasonable to expect to have a goal above 70 percent for someone like J.D. Further, with Orton-Gillingham or Wilson Reading, mastery is required. Progress cannot be made in OG from one level to the next without achieving a level of mastery of 85 percent or higher.

The goals and objectives for J.D., in particular in language arts, reading, and math, were not appropriate because there was no reference to the New Jersey learning standards. And the IEP did not address his needs and his way of learning with specifics.

Miller was somewhat familiar with System 44 and did not feel it was a program that appropriately addressed J.D.'s needs. The program used the "hot" word "multisensory," but it was missing the kinesthetic piece: direct interaction with someone who is certified in terms of the program's scope, sequence, and expectations. System 44 is not multisensory. From the V-A-K-T spectrum (visual, auditory, kinesthetic, and tactile), it is

just audio and visual. The kinesthetic and tactile would not be employed simultaneously, in contrast to the basic principles of OG, which require the V-A-K-T spectrum.

Sitting at a computer cannot be considered multisensory, because although something is being listened to and there is the tapping of the typing, nothing is being gripped. Within the last five years, MRI research compared tapping on a keyboard as opposed to gripping something. And the activity in the brain is more engaged, and there is more blood flow, when something is being gripped as opposed to keyboarding. This is how some children, such as J.D., learn. Programs like System 44 and READ 180 were designed in a certain way for a reason, but there was no independent research on them.

Miller felt that her recommendations were not adequately incorporated into the proposed IEP for 2017–18 because of the proficiency goal set at 70 percent. The IEP had two goals and one objective and was not sufficient in its measurements of achievement. Although his program would be changing to a pull-out resource for language arts, nothing indicated the details. For example, it listed the language-arts program as seventy-two minutes per day, but did not indicate what was to be covered in those minutes, such as reading, writing, decoding, spelling, or comprehension. This is because in an OG lesson, which is fifty to sixty minutes, it is not just the writing. It is decoding and coding, as well as listening comprehension.

There was no indication that the pull-out program was going to be intensive, systematic, and multisensory based, because it just listed the end goal of him being able to read ten words with 70 percent proficiency. Nothing in the IEP or goals and objectives included any reference to the Wilson program. This IEP should explicitly state that Wilson was to be provided to J.D. by a certified teacher. While not required, it would create transparency in J.D.'s IEP.

J.D. is a complex child. He has the reading disorder, he has ADHD, and he also has post-traumatic stress disorder. Miller wanted him in a program that was knowledgeable about how to support a student with that complex profile, with those needs. It was necessary to provide supports and services to assist him in the academic environment. His teachers needed this knowledge base to provide support. As far as

assistive technology, it may be appropriate now that he is older and needs to be exposed to grade-level content.

The Newgrange IEP provides what J.D. needs, and those needs are directly referenced in the narrative of the current teacher. The objectives are itemized, in terms of a scope and sequence that the instructors were following. While MA's IEP says he will read ten words that are multi-syllabic by the end of the year, the Newgrange IEP provides a scope and sequence in the curriculum, and how he will get to read those multi-syllabic words. The Newgrange IEP also holds him to 90 percent proficiency, which establishes mastery. With Wilson or Orton-Gillingham, the child must master the lesson before he moves on.

The Newgrange IEP is the same for math, science, and social studies. The IEP is clear about V-A-K-T being provided in these different areas. The method overflows into all of J.D.'s subjects and addresses his need for multisensory instruction. Each subject area in the IEP follows that method. Wilson is specifically noted in Newgrange's IEP (but was not in MA's).

Miller expressed her professional opinion that while J.D. attended MA for fourth and fifth grade he did not receive an appropriate education and made no meaningful educational progress. The proposed IEP for 2017–18 also did not appropriately address J.D.'s individual needs. The IEP as implemented by Newgrange appropriately met J.D.'s individual needs.

When Miller first evaluated J.D., it was to ascertain where he was, what his strengths and weaknesses were, and how to get him out of the low percentile and move him up. She had materials from the District and the mother. J.D. was not dyslexic, but had a mixed profile of deficits in expressive and receptive language. Although failure to climb, from one year to the next, or even one year to two years later or three years later, would not necessarily be evidence of an inadequate educational program, it could be, depending on the individual.

Miller saw a big drop in testing from 2014 to 2016 in one of the Woodcock Johnson subtests (Word Attack). The Broad Reading and Reading Comprehension scores from 2014 through 2016 were within one point of each other. So that would mean that he was not closing the gap, but was making some progress, but it would depend on the tests and how they were normed. The scores (Broad Reading—79 to 78, and Reading Comprehension—77 to 79) showed that his own rate of learning had not increased. Someone with his profile was not going to be learning at the same rate as his peers, which is why the intensity of the intervention needed to be increased. Between 2014 and the current school year, J.D. either lost ground or maintained the gap with his peers in critical academic domains.

Typical students are making progress in leaps and bounds every year. They are learning at a higher, faster rate. In Broad Math, in 2014, J.D. was at 85; and in 2016, at 88. In Math Calculation, he went from an 88 to a 92, a slight increase. This does not mean that he is holding his own and learning at the same rate as his peers. He has progressed, but not at the same rate as they have progressed. He was performing at a lower rate and could not keep up.

Miller was somewhat familiar with STAR testing, which gives a Lexile Framework for Reading measure at which that student is reading. Miller looked at the STAR data and at J.D.'s Lexile measure. It looked to her that he was kind of topping out or flatlining. According to the STAR testing from October 2015 through May 2017, J.D.'s Lexile measure of 100 increased to 335, and a grade equivalent from a 2.3 to a 3.0.

In J.D.'s IEP, under Reading and Language Arts Literacy, Ms. Biagianti says, "J.D. participates in an intensive foundational reading program. According to a Fall 2016 reading inventory, J.D. has a Lexile level of 484. This school year thus far, he has 83 percent decoding accuracy and 78 percent spelling accuracy. According to his Fall 2016 STAR results, J.D.'s grade equivalent for Reading is 2.8. He has completed 39 percent of the scope and sequence of the Reading program thus far." The issue for Miller was what level of mastery. Miller disagreed that J.D.'s Lexile scores showed meaningful improvement over time, because he was still in the second-grade zone. Although J.D.

had improved from his starting point, he was still reading at a second-grade level in the fourth grade.

The goals and objectives should be not only objectively measurable, but chosen in such a way that they address functions that a student is reasonably expected to accomplish within the IEP period. Miller was concerned when the goal said, “By the end of this IEP, when given informational text relevant to a Grade 3 topic or subject area, J.D. will determine the meaning of general academic and domain specific words and phrases in the text with moderate assistance, consistently as measured by the ongoing reading record.” This would not be mastery, because he would require assistance to accomplish the goal.

One of Miller’s criticisms of the MA IEPs was that they included assistance from adults and did not target independent behaviors. MA’s goals and objectives were not appropriate because they were stating end goals. The end goal was that he would do something with moderate physical support and prompting. But that should not be his end goal. The intent of the IEP should be calculated to yield a meaningful educational benefit. Progress monitoring must use additional data that is standardized. Orton-Gillingham is a methodology, and Wilson is an OG curriculum. An IEP that does not identify such methodology, even if the District planned on using it, was not a sufficiently transparent IEP.

Relying on standardized test scores was the only way to determine whether MA was providing an appropriate program in the two years that J.D. was there. Miller’s opinion that MA did not appropriately educate J.D. for two years was based upon the scores on the tests that she looked at and those that she administered herself. She was also concerned that System 44 was being used as J.D.’s reading program when there was no independent research on it. The optimal methodology was for J.D. to use OG methodology and Wilson instruction, which was what was being done at Newgrange.

Roger Hegedus testified that he is the principal of the Newgrange School, and its acting executive director. He has more than forty years of experience in education. J.D.

went through the intake process and was accepted as a student. Hegedus sees J.D. every day, either in a classroom or at lunch.⁵

Kathleen Bostock testified that she is the assistant director of education at the Newgrange School. She is certified in Wilson I and II. She was accepted as expert in special education with focus on Wilson, OG, and literacy. In 2016, J.D. presented with poor decoding skills, poor vocabulary, and poor passage-comprehension skills. He required a structured multisensory language program. He started Wilson and was on step 1.3. J.D. was grouped with three other students at the same level. Wilson provided block learning, decoding, spelling and encoding, and reading; it takes three days for a complete lesson when the protocol is followed properly.

Wilson is a five-year plan with instructors and teachers who are trained properly. Students learn with other students on the same level. It requires fidelity to its approach. Public schools do not use the homogeneous approach. Newgrange does not use READ 180 or System 44, which is computer based. Bostock acknowledged she is not an expert in those reading programs.

When J.D. first came to Newgrange, his reading grade equivalency was at the grade 2.3 level and he was in sixth grade. J.D.'s IEP was prepared at Newgrange after thirty days. It called for the Wilson reading system with 90 percent accuracy. He was also provided with social-skills and emotional goals. J.D. made meaningful progress using Wilson at Newgrange from September until now, learning foundational skills and becoming a more efficient reader.

Bostock acknowledged that Newgrange is approved by New Jersey, but provides no exposure to non-classified peers. Newgrange is looking into pairing with a charter school so that its students can have exposure to neuro-typical peers.

Bostock had not seen the proposed IEP from MA for school year 2017–18, which offered Wilson lessons seventy-two minutes per day. She did not know about the quality

⁵ Hegedus's testimony was cut short by a power failure. The parties stipulated that Newgrange is a State-approved special-education private school and provides an appropriate education to its students.

of MA's Wilson teachers. Bostock questioned why J.D. had not been offered Wilson instruction sooner, since he obviously made substantial progress once the methodology was used with him.

FINDINGS OF FACT

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility conclusions "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

In determining credibility, I am not unaware that the District employees would want to support the program they developed for the child and that they felt that the District's program would provide J.D. with FAPE. I am aware that the parent would try to seek the best program and placement for her child. I am also not unaware that the petitioner's expert, Miller, was employed by the Ann Robinowitz Center, with which Newgrange is affiliated. Nevertheless, the documentary evidence presented supports the testimony that each witness provided to the best of his or her abilities. Indeed, it is not so much the facts that are in dispute, as the IEP's speak for themselves, but rather the inferences that can be made from the evidence and testimony provided by the witnesses in concluding whether the IEP's prepared by the District offered FAPE to J.D.

It is undisputed, and I **FIND**, that J.D. presented to MA with "a very significant, complicated social and emotional history, and diagnostic profile." By the age of ten, J.D. had been removed from his birth mother's care; had been abused physically and emotionally; had been placed in several foster-care placements, including a therapeutic home; had been enrolled in three different school districts; and had been diagnosed with

learning and language disabilities, ADHD, and PTSD. Some characteristics of autism had been noted, but he had not been diagnosed as on the spectrum. He was successfully placed with S.D. in 2015 and was adopted by her in 2016, thereby affording him some domestic stability.

I also **FIND** that when J.D. entered MA, his IEP was that which had been prepared by Newark, his previous district of attendance, and included information from Toms River, J.D.'s first school district of attendance. J.D.'s last evaluation had been completed in January 2014 and it continued to be used by the District. The amended IEP dated November 8, 2015, provided for thirty minutes of speech and OT once per week. The reading goal was 80 percent and the speech goal was 70 percent. MA essentially continued the same program for J.D.; he was classified as OHI and placed in the Language and Learning Disabilities Program, in a self-contained classroom (less than 40 percent of the school day with general-education students).

The IEP from October 2016 continued the same services, with the addition of a speech session once per week. No measurable goals and objectives were included for language arts and reading. J.D.'s reading grade equivalent in fall 2016 as he entered fourth grade was grade 2.8. His reading age equivalent in November 2016 was the age of eight, when his chronological age was ten years, six months.

The parent had reported some behaviors, including meltdowns at home regarding homework, and sought counseling. Given J.D.'s emotional and social history, some counseling or therapy was clearly required. Yet, the IEP's for school years 2015–16 and 2016–17 lacked counseling, as the District felt it was not needed because the teacher had not noted the behaviors in school. J.D.'s records noted that he had been diagnosed with PTSD and a psychiatrist had recommended counseling, but it was not part of his IEP. It was not until the fall of 2017 that a proposed IEP included that recommendation.

J.D.'s IQ had tested at 92 at the 2013 evaluation. After a psychological assessment in November 2016, his IQ tested at 84, clearly a decrease. His reading level tested as "beginning reader" in the fall of 2015 and had reached the second-grade reading level at the end of the fourth-grade/beginning of the fifth-grade school year. J.D.'s IEP's

failed to offer FAPE to him. The IEP's were generic and his reading program was one generalized for the class, and not specifically for him and his way of learning. His rate of performance increase was leveling off and not improving. His progress was slowing as the work became more difficult and complex, and he was falling farther behind.

J.D. had particular language and reading deficits which need to be addressed to enable J.D. to access his reading and language program. Clearly System 44, which relied on a computer for a portion of its method, was not the optimal way that J.D. learned. He required the V-A-K-T approach as provided by the OG methodology and Wilson curriculum taught by certified professionals in all subjects. J.D. needed goals and objectives setting forth methods of data collection and independent mastery of skills, not 70 percent mastery with assistance. J.D.'s District IEP lacked the individualization necessary for continuing performance improvements, particularly as the educational curriculum became more difficult.

LEGAL ANALYSIS AND CONCLUSIONS

IEP and FAPE

The issue presented is whether the Board provided J.D. with FAPE for the 2014–15 and 2015–16 school years.

The Individuals with Disabilities Education Act (IDEA) provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982). One of the purposes of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C.

6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court has construed the FAPE mandate to require the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley, 458 U.S. at 203. New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” The Rowley standard was recently questioned by the United States Supreme Court in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____, 137 S. Ct. 988 (2017), which Court remanded for further proceedings consistent with its decision. The Supreme Court determined that a school district must show a cogent and responsive explanation for its decisions that shows that the IEP is reasonably calculated to enable the child to make progress that is appropriate considering the particular student’s circumstances.

The New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit cases require similar inquiry into the educational proposal of the district in compliance with the requirements of Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, 458 U.S. at 200). The IDEA does not require that a school district “maximize the potential” of the student, Rowley, 458 U.S. at 200, but requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995).

In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the IEP provides for “significant learning” and confers “meaningful benefit” to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988), cert. den. sub. nom., Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030 (1989).

In other words, the school district must show that the IEP will provide the student with “a meaningful educational benefit.” S.H. v. State-Operated Sch. Dist. of Newark, 336

F.3d 260, 271 (3d Cir. 2003). This determination must be made in light of the individual potential and educational needs of the student. T.R., 205 F.3d at 578; Ridgewood, 172 F.3d at 247–48. The appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H., 336 F.3d at 271. Rather, the pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

Toward this end, an IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C. § 1414(d)(2) and (4); N.J.A.C. 6A:14-3.7. A complete IEP must contain a detailed statement of annual goals and objectives. N.J.A.C. 6A:14-3.7(e)(2). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general-education curriculum and “be measurable,” so both parents and educational personnel can be apprised of “the expected level of achievement attendant to each goal.” Ibid. Further, such “measurable annual goals shall include benchmarks or short-term objectives” related to meeting the student’s needs. N.J.A.C. 6A:14-3.7(e)(3). The New Jersey Supreme Court has recognized that “[w]ithout an adequately drafted IEP, it would be difficult, if not impossible, to measure a child’s progress, a measurement that is necessary to determine changes to be made in the next IEP.” Lascari, 116 N.J. at 48.

Here, the IEP’s were not sufficiently individualized to J.D. to permit continuing meaningful progress, in light of his learning and language deficits. He required a comprehensive approach that took all subjects into consideration with a methodology and curriculum such as OG/Wilson. While J.D. made some initial progress at school, his progress was lagging as the work became more difficult and complex. He had not mastered the basics and was being called upon to do even more. Although his reading improved somewhat, he was still not on grade level and was falling behind. His IQ as measured by standardized tests had declined. He required counseling to deal with past trauma as the psychologist and psychiatrist recommended, but it had not been forthcoming.

I **CONCLUDE** that the Board failed to offer J.D. FAPE as that term is defined by law, and did not confer a meaningful educational benefit on J.D. The IEP was not a fully

developed education plan, and did not include critical components, such as counseling and reading and language-arts methodology designed to address the complexity of J.D.'s learning disorder, PTSD, and ADHD. I therefore **CONCLUDE** that the IEP's offered to J.D. for school years 2014–15 and 2015–16 did not offer FAPE to him. I further **CONCLUDE** that the IEP proposed by the District for the 2016–17 school year likewise would not have conferred a meaningful educational benefit on him.

Placement

Parents who withdraw their child from public school and unilaterally place the child in a private placement while challenging the IEP may be entitled to reimbursement if the administrative law judge (ALJ) finds that the school district's proposed IEP was inappropriate and that the parents' unilateral placement was appropriate under the IDEA. 20 U.S.C. § 1412(a)(10)(C)(ii); N.J.A.C. 6A:14-2.10(c). Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993); Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359, 370 (1985). More particularly, an ALJ may require the district to reimburse the parents for the cost of that enrollment if "the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and . . . the private placement is appropriate." N.J.A.C. 6A:14-2.10(b); see 20 U.S.C. § 1412(a)(10)(C)(ii). However, parents who unilaterally withdraw their child from public school and place the child in a private school without consent from the school district "do so at their own financial risk." Burlington, 471 U.S. at 374. If it is ultimately determined that the program proposed by the district affords the child a FAPE, then the parents are barred from recovering reimbursement of tuition and related expenses.

Having found that the District failed to offer FAPE to J.D., it must now be determined whether the program devised for him during the 2016–17 school year at Newgrange was an appropriate placement under the IDEA. I **CONCLUDE** that it was. Newgrange provided J.D. with a comprehensive program of Wilson/OG methodology in all subjects, with additional speech, counseling, and social skills. His goals and objectives called for mastery of subject areas. Progress was noted by standardized test, not subjective assessment. J.D.'s improvement was noted within a few months as he

became familiar with the program and learning methods. Further, Newgrange was the least restrictive environment for J.D. to access his education.

I **CONCLUDE** that petitioner is entitled to reimbursement for costs incurred for the Newgrange School for the 2016–17 school year, including tuition and transportation, and reimbursement for the costs of private evaluations and expert witnesses which were obtained by her to assist in understanding J.D.’s disabilities and needs, in planning for his education program and to testify in this matter.⁶ Reimbursement is for out-of-pocket expenses only, and only upon presentation of proof in the form of invoices and cancelled checks that the claimed expenses were actually incurred.⁷

Petitioner also seeks reimbursement for all “private evaluations [and] counseling services” required for J.D. from 2015 to the present.⁸ I **CONCLUDE** that this request for reimbursement must be denied, as no testimony was presented on the nature of such counseling or the providers, and the record offers an insufficient explanation of the relationship of any of these services to J.D.’s educational needs. Moreover, any psychiatric or psychological treatment may be medical in nature or covered by medical insurance, and thus is not the obligation of the District. The evidentiary record sheds no light on this issue, nor does the petitioner’s post-hearing submission. Reimbursement for speech therapy and occupational therapy were not included in the prayer for relief and there was no indication that these services were not provided by the District or that they were independently obtained by the petitioner.⁹ For this additional reason, the request for reimbursement is denied.

⁶ This appears to be Ms. Miller, Ms. Bostock, Dr. Shah, and Dr. Aloisio.

⁷ These evaluations were obtained within two years prior to the filing of the due-process petition, in accordance with 20 U.S.C. § 1415(f)(3)(C) and N.J.A.C. 6A:14-2.7(a)(1).

⁸ Presumably, these alleged expenses were in addition to the cost of experts and other professional evaluations for which reimbursement is granted.

⁹ The petition for due process seeks placement at the Newgrange School; a determination that the IEP offered by MA is inappropriate; a determination that the IEP’s proposed program failed to offer FAPE; an order directing the District to provide compensatory educational services and related services and be responsible for costs attributed to the unilateral placement and compensatory services; a determination that the proposed IEP does not comply with N.J.A.C. 6A:14-1.1; reformation of the IEP to comply with N.J. law; compensation to petitioner for all private evaluations and counseling services required for J.D. from 2015 to the present; and reimbursement for all costs associated with a unilateral placement.

Finally, petitioners seek compensatory education. Our courts recognize compensatory education as a remedy under the IDEA, which should be awarded “for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem.” M.C. ex rel. J.D.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996). Compensatory education requires school districts to “belatedly pay expenses that [they] should have paid all along.” Id. at 395.

I am confident that J.D. received an appropriate educational program during school year 2017–18, albeit at the petitioner’s expense, and will be able to receive an appropriate education at Newgrange for the upcoming year. The petitioner has not indicated or specifically sought any additional services for school years 2014–15 and 2015–16.

Accordingly, I **CONCLUDE** that reimbursement for those educational expenses, as outlined above, compensates the petitioner and J.D. for the District’s denial of FAPE.

ORDER

Based on the foregoing, it is **ORDERED** that the petitioners’ request for due process is **GRANTED** as follows:

1. The District failed to provide FAPE in school years 2015–16 and 2016–17. As such the petitioner is the prevailing party. The petitioner shall be reimbursed the cost of Newgrange School tuition for the 2017–18 school year, including the costs of tuition, transportation, and other related educational services.
2. The IEP for 2017–18 is also determined to not provide FAPE to J.D. The Newgrange School is deemed the most appropriate and least restrictive placement for J.D. He shall be enrolled in the Newgrange School for school year 2018–19 and for so long as the placement is appropriate. The petitioner shall be entitled to reimbursement for the cost of Newgrange School tuition for the 2018–19 school

year, including the costs of tuition, transportation, and other related educational services, as she may have incurred to date.

3. The petitioner shall be reimbursed for the costs of private evaluations and expert witnesses which were obtained by her to assist in understanding J.D.'s disabilities and needs, in planning for his educational program and to testify in this matter: Ms. Miller, Ms. Bostock, Dr. Shah, and Dr. Aloisio. Reimbursement is for out-of-pocket expenses only, and only upon presentation of proof in the form of invoices and cancelled checks that the claimed expenses were actually incurred.

4. The claims for reimbursement for all "private evaluations [and] counseling services" required for J.D. from 2015 to the present and compensatory education are **DENIED** except as indicated above.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2018). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

October 1, 2018 _____

DATE



SUSAN M. SCAROLA, ALJ

Date Received at Agency _____

Date Mailed to Parties

SMS/cb

APPENDIX

WITNESSES

For petitioner:

S.D.

Susan E. Miller, M.A., Assistant Director, Anne Rubinstein Education Center

Robert Hegedus, Principal, Newgrange School

Kathleen Ann Bostock, Assistant Director of Education, Newgrange School

For respondent MA:

Lauren Kelly, Case Manager, Child Study Team

Mary Biagianti, LLD and Resource Teacher

EXHIBITS

Joint:

- J-1 Transfer IEP, dated October 22, 2015
- J-2 Letter from State regarding adoption, dated January 6, 2017
- J-3 Draft IEP, dated November 30, 2016
- J-4 Amendment to IEP, dated May 2, 2016
- J-5 IEP, dated October 6, 2016
- J-6 Psychological Evaluation, dated November 7, 2016
- J-7 Speech Evaluation, dated October 16, 2016
- J-8 Educational Evaluation, dated November 7, 2016
- J-9 Social Evaluations, dated November 16, 2016
- J-10 Eligibility Report, dated November 30, 2016
- J-11 IEP, dated November 30, 2016
- J-12 Psychiatric Evaluations, dated April 3, 2017
- J-13 Diagnostic Reading Evaluation, dated June 7, 2017
- J-14 Meeting Notes from case manager
- J-15 Goals and Objectives Progress Reporting
- J-16 2015–16 and 2016–17 Report Cards

- J-17 2015–16 Class Work
- J-18 2016–17 Class work
- J-19 2016 Summer Speech Work
- J-20 2016 BASC 3
- J-21 Star Assessment Data
- J-22 System 44 Data
- J-23 System 44 Data
- J-24 Correspondence from special education advocate
- J-25 Individual Family Adoption Plan
- J-26 CV of Lauren Kelly
- J-27 CV of Mary Biagianti
- J-28 CV of Allison Arolla
- J-29 Audiological Assessment, dated July 22, 2008, prepared by Kathi Kurmin, MA, CCC-A
- J-30 Autism Evaluation, dated September 12, 2008, prepared by Yvette Janvier, M.D., Children’s Specialized Hospital Development Screening Clinic
- J-31 Occupational Therapy Evaluation, prepared by Kerry Poskay OTR/L Evaluation, dated November 20, 2009
- J-32 Speech and Language Evaluations, prepared by Toms River School by examiner Christine M. Nicholson, MA, CCCSLP, dated January 19, 2011
- J-33 Educational Evaluations prepared by Toms River School by examiner D. Essig, dated January 6, 2014
- J-34 Psychological Re-Evaluation prepared by Jason T. Ruch, Ph.D., dated December 3, 2013
- J-35 Psychological Report prepared by Christophe Trigani, Ph.D., dated January 29, 2016
- J-36 Pediatric Neurodevelopmental Evaluation prepared by Denise Aloisio, M.D., visit date March 21, 2016
- J-37 Team Evaluation Summary prepared by Denise Aloisio, M.D., parent conference, dated April 18, 2016
- J-38 Eligibility Conference Report—Re-Evaluation, dated November 30, 2016
- J-39 Psychiatric Evaluation, prepared by Dr. Hinna Shah, dated April 3, 2017

- J-40 Letter from Robert Hegedus, Newgrange principal, summarizing intake/admissions process, dated July 10, 2017
- J-41 IEP Goals and Objectives Progress Reporting, dated July 12, 2017
- J-42 Letter from special education advocate to David B. Rubin, concerning unilateral placement at Newgrange School for school year 2017–18, dated July 22, 2017
- J-43 CV of Susan Miller
- J-44 IEP, dated February 24, 2015
- J-45 Diagnostic Literary Evaluation dated June 17, 2017
- J-46 J.D. work samples, fourth grade
- J-47 Newgrange School Social Strides Individual Education Plan prepared by Myra Kay McCowan, dated 2017–18
- J-48 Woodcock-Johnson IV Tests of Achievement Report, dated September 29, 2017
- J-49 Newgrange School Student Attendance Academic Year 2017–18, and Report Card
- J-50 IEP, dated September 10, 2017, to September 9, 2018
- J-51 Occupational Therapy/Speech Group Report prepared by Sandee, MS, OTR/I and Melissa Grossman, MA, dated October 2017 and November 2017
- J-52 Back-to-School Night Handout(s)
- J-53 J.D. classroom work product samples, dated September 2017 to December 2017
- J-54 Résumé, Robert Hegedus
- J-55 Résumé, Kathleen Ann Bostock