



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

(CONSOLIDATED)

H.D. AND N.A. ON BEHALF OF N.D.,

Petitioners,

v.

WEST ORANGE BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 01468-17

AGENCY DKT. NO. 2017 25445

WEST ORANGE BOARD OF EDUCATION,

Petitioner,

v.

H.D. AND N.A. ON BEHALF OF N.D.,

Respondents.

OAL DKT. NO. EDS 01469-18

AGENCY KT. NO. 2018 27426

WEST ORANGE BOARD OF EDUCATION,

Petitioner,

v.

H.D. AND N.A. ON BEHALF OF N.D.,

Respondents.

OAL DKT. NO. EDS 05300-18

AGENCY DKT. NO. 2018 27800

H.D. AND N.A. ON BEHALF OF N.D.,

Petitioners,

v.

WEST ORANGE BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 05303-18

AGENCY DKT. NO. 2018 27790

Bradley Flynn, Esq., on behalf of H.D., N.A., and N.D.

Jared S. Schure, Esq., on behalf of West Orange Board of Education

Record Closed: June 14, 2019

Decided: June 28, 2019

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

H.D. and N.A. on behalf of their minor child N.D., dispute the Individualized Education Plan (IEP) of West Orange Board of Education (District) to provide N.D. with FAPE, seek independent evaluations and compensatory education for the 2018 due process petition. The District denies that IEPs do not provide FAPE and that independent evaluations are necessary.

PROCEDURAL HISTORY

These matters were transmitted to the Office of Administrative Law (OAL) as contested matters on February 1, 2017, and April 12, 2018. The cases were assigned to the undersigned in January 2018. Hearings were held on April 13, 2018, June 1, 2018, June 25, 2018, August 23, 2018, and September 20, 2018, November 28, 2018, December 12, 2018, February 2, 2019, March 18, 2019, and June 26, 2019.

FACTUAL DISCUSSION AND FINDINGS

Testimony

Dr. Amy Dorst

Dr. Amy Dorst (Dorst) has been a school psychologist with the District since 2003. She has a certificate as a school psychologist and does psychological evaluations for the District. These evaluations include cognitive assessments, and IQ, tests for behavioral and emotional functioning. She is also the case manager of N.D.

Petitioners were argumentative and confrontational at the IEP meetings. Dorst never spoke about petitioners' culture, religion, or national origin to them. She was never given a report by petitioners that she threw in the garbage. All of the reports for N.D. were put in his child study file.

On March 4, 2015, a decision not to evaluate N.D. was signed by the parties. The child study team (CST) has never lacked sufficient reliable evaluative information for N.D. N.D. has had two neuropsychological evaluations.

IEP progress reports are different than report cards. The IEP reports note progress made, maintaining, or no progress. It reports on the IEP goals. Petitioners were not provided with IEP progress report in the 2014-2015 school year. At that time the progress reports were not generated from the program that was being used. The program that began being used in 2016 could generate the IEP progress reports.

The child study team recommended N.D. be in self-contained class Language Learning Disability (LLD) and discrete trials. Discrete trials are generally not done in general education classes. The LLD class is a single-grade class.

Dorst was never sure if N.D. was on medication or not. One parent would say that he was, and one would say that he was not. She was never told what medications N.D. takes or the dosage.

The March 4, 2015, IEP relied on evaluations as well as staff and service providers. Dr. Morgan's report of July 2013 is referenced. Dr. Morgan describes N.D.'s behavior as inattentive, fidgety, and hyperactive. N.D. answered Dr. Morgan's questions to the best of his ability. Dr. Morgan believed that N.D.'s language scores were an understatement of his abilities. Dr. Morgan did not believe the WISC-IV scores were accurate because they rely on intact language skills and N.D. has a language disorder.

Dr. Morgan's results are included in the November 2016 IEP and were used to develop the IEP. Dr. Morgan noted that N.D.'s attention to task in speech was inconsistent and that N.D.'s hyperactivity interfered with his ability to answer questions. The IEP considered whether N.D.'s behavior impeded his learning or that of others but determined it did. N.D. did not have a behavior modification plan. He did have distractibility and hyperactivity issues.

Dr. Morgan found that N.D. had ADHD in a July 2013 evaluation. On the September 26, 2016, reevaluation planning consent for additional assessment form a functional behavioral assessment was not listed.

Dorst collaborated on N.D.'s psycho-educational report of October 24, 2016. She did the psychological portion of the report. N.D. scored a sixty-one on the auditory processing task subtest. She assisted with the draft IEP of October 19, 2017. It included LLD classes and Language Arts in the primary autistic class for ninety minutes.

Dorst reviewed the report of Dr. Kornitzer in approximately January 2017. Dr. Kornitzer was a doctor that petitioner took N.D. to for an evaluation. Her concern with this report is that Dr. Kornitzer did not request N.D.'s educational history or CST records

from West Orange. The report recommends that N.D. receive 504 accommodations, but N.D. has been classified as special education student since he was three years old. She is concerned that he was given inaccurate information. She is concerned about how Dr. Kornitzer made an educational recommendation without access to N.D.'s educational records.

Dr. Kornitzer's diagnosis of auditory processing disorder, which petitioners did not share initially with the district, does not change the appropriateness of the IEPs. Auditory processing disorder can be accommodated with the use of an FM sound-modification system.

Dorst requested a report from the developmental pediatrician, Dr Dolan, from petitioners. Petitioners did not provide her with the report. She received it through the District's attorneys. The report does not change the appropriateness of the IEP. N.D. has a significant difference in his verbal and non-verbal IQ. His IQ score on this test was ninety. That was based on one non-verbal and two verbal tests. The four or five comprehensive intelligence tests N.D. has been given is a more accurate determination of his IQ. His functional performance is not that of a student with an IQ of ninety. Dorst does not agree with Dr. Dolan that N.D. should be placed in a general education Math and Science class. Dr. Dolan and Dr. Kornitzer never observed N.D. in class, spoke to his teachers, or requested his educational records.

Dorst disagrees that N.D.'s Language Arts placement caused him to regress. The discrete trials helped him gain skills that would let him move into LLD class. Petitioners want a resource placement in Language Art and Math for N.D. This is not appropriate because a resource program cannot support his needs.

N.D.'s fourth-grade report card, where his grades were modified, show that he was below-grade-level expectation. His grades are based on the goals of the IEP. In Science his reading comprehension interfered with his ability to learn new material. Answering open-ended questions was very challenging for N.D. In Math he had difficulty applying Math skills to open-ended questions and he could not do language

problems. He needed constant redirection and support from the teachers and para-professionals to complete his work. In Language Arts N.D. had two non-discrete trial programs along with discrete trial programs. He was assessed using the Fountas and Pennell reading system which is used in the general education curriculum. N.D. was in mid-year fourth grade at the time of the test which showed he was reading at the end of the first-grade level.

In his fourth- and fifth-grade classes N.D. has the FM system in his general education classes and resource Math. The FM system is not used in the discrete trials because an adult sits directly across from N.D. N.D. began using the FM system in December 2017.

Dorst was the case manager for N.D.'s older brother. She has known the family for over a decade. Petitioners have never asked for an interpreter or stated that they did not understand anything. They never request that the IEP be translated into Arabic. They appeared to comprehend what was said and asserted what they wanted for N.D. and objected to what they did not want for N.D.

Petitioners knew that some of the students in the Language Arts class were autistic. Petitioners did not provide supplemental data that would change the appropriateness of the IEP.

N.D.'s IEP does not provide for social skills groups. No teacher has voiced concerns about N.D. social interactions with his peers. No one has told her that N.D.'s social skills are interfering with his ability to make educational progress. No one has indicated that N.D. needs a behavioral-intervention program. N.D.'s behavior that interferes with his learning is his off-task behavior, which is a neurological disability that is beyond his control. It is not a behavior that he engages in by choice. N.D. relates to his peers at a level that is consistent with his intellectual functioning and language development. Children with a neurological disability are not as responsive to behavior modification as other children.

Dorst has received reports from a facility that evaluates students with auditory processing disorder. The majority of the time the facility does not make programming or placement recommendation, but they always recommend FM system for sound amplification.

Michael Steinhardt

Michael Steinhardt (Steinhardt) has a Ph.D. in neuropsychology. He is a licensed clinical psychologist. He evaluated N.D. on June 5, 2017, and June 13, 2017. The testing for each day was three hours. For the cognitive test, he used a core battery of eight subjects. He also did a classroom observation of N.D. on June 9, 2017. He administered a variety of tests to N.D. The Cognitive Assessment System second edition (CAS-2) looks at general cognitive functioning. N.D. had a history of global developmental delays. A Wechsler Preschool and Primary Scale of Intelligence third edition (WPPSI-III) was administered to N.D. in 2012 revealed an IQ of sixty-three, which is in the first percentile. His score was below the range of borderline impaired, which is seventy to seventy-nine. In October 2016, N.D. was administered the Woodcock-Johnson tests of Cognitive Ability fourth edition (WJ-IV COG). His score was fifty three, which is in the low range of cognitive functioning. N.D. had an evaluation done at the Institute for Child Development. He was not able to review this evaluation, although he requested it from petitioners. Steinhardt's findings are consistent with N.D.'s prior evaluations.

In Dr. Steinhardt's interview with N.D., N.D. was pleasant but required frequent redirection. Steinhardt had to repeat instruction due to N.D.'s inattention. When he gets excited he flaps his hands. When N.D. saw his reflection in the window, he waved at it. He said that school was difficult. Dr. Steinhardt evaluated N.D.'s non-verbal tests and processes as well as domains other than language to determine if the difference between Arabic and English is the sole reason for his deficits. In copy design where there are visual puzzles and connect the dots N.D. was in the low-average range.

N.D. can comprehend on a basic level but his performance across the board is not consistent with a child of average intelligence from a bilingual background. N.D. was administered the Vineland Adaptive Behavioral Scale. These scales are measured by parents input. N.D. scored in the low to average range in communication and daily living.

N.D. has ADHD. He is distracted, restless, fidgety, and needs constant re-direction. He has difficulty remaining on task and is prone to distraction.

Steinhart's impressions were that N.D.'s cognitive function was extremely low; he had significant difficulty in all underlying domains including: attention, learning, academic function, memory, language, visual, and fine motor skills. He has a limited cognitive capacity. This is not the result of his bilingual background. N.D. has global developmental delays and intellectual impairment. N.D.'s neuro-psychological condition will not change over time. He does not know if a Functional Behavioral Assessment was done for N.D.

Cognitive functioning is a stable trait. There is no reason to assume it will change over time. N.D. is teachable in the right environment. He can improve academically with proper instruction.

N.D. struggles in Math with complex visual or language-based problems. He has difficulty with open-ended questions. In Social Studies N.D. struggles with communicating his thoughts and ideas. He has difficulty explaining reasoning with abstract or high-level thinking. He often needs re-direction and re-teaching. In Science and Social Studies N.D. does nothing independently. A first step for N.D. is a self-contained class for all academic subjects. N.D. has begun to become upset because other students finish assignments before him.

Steinhardt recommends that N.D. be placed in a self-contained special education class with a small class. The individualized instruction that Steinhardt saw at

Redwood school would be appropriate for N.D. The November 17, 2016, IEP is appropriate in the least restrictive environment.

Dr. Steinhardt agrees that the special education in the November 19, 2017, IEP is an improvement but N.D. may need more special education services. Steinhardt received an email from Dorst which showed the N.D.'s fourth-grade Social Studies program in the stay put program. That program is inappropriate for N.D. because it is too advanced for him academically and in terms of attention. He would need constant supervision and redirection to do the work. Academically N.D. cannot read many of the words.

Auditory processing disorder is not in the DSM-V. It is a controversial diagnosis. Steinhardt does not recall being given any information from anyone regarding N.D. having auditory processing disorder. N.D.'s Auditory Processing Evaluation was done six months after Dr. Steinhardt's evaluation of N.D. He did not see the Auditory Processing Report prior to the day of his testimony.

Colleen Grandinetti

Colleen Grandinetti (Grandinetti) is a learning disability teacher consultant (LDTC) and a teacher of the handicapped. She has an LDTC advanced certificate. She can provide evaluations, case manage, and consult with teachers on special education.

Grandinetti knows N.D. She did the educational portion of his evaluation. Dorst did the cognitive portion. She observed N.D. in Language Arts class. He worked nicely with the teacher. He would fidget and needed to be reminded to stay on task. He could answer basic comprehension questions, but questions had to be repeated. She reviewed N.D.'s teacher's reports as well as his student records. N.D. had a hard time focusing during the evaluation. He has problems with distractibility.

N.D. should be in special education class with an intensive approach to education. He needs a more intense environment. An LLD class is appropriate for N.D.

Nicole Emmolo

Nicole Emmolo (Emmolo) is a speech pathologist. She did a speech language evaluation of N.D. in September 2016. She has provided speech services to N.D. twice a week in small groups since he was in Kindergarten. She does not believe that N.D. needs a functional behavioral assessment.

She observed N.D. in pull-out Math class. N.D. needed to have verbal instructions repeated often. He attempted to initiate conversations. He required prompting with initiating conversation. He needed prompting to attend to task even in one-to-one setting. He needed a great deal of prompting. The level of prompting is consistent whether he is in a small class, small group, or one-to-one setting. The Clinical Evaluation of Language Fundamentals test was given to N.D. His results were in the range of a child five years old to six years-five months old. He performed four years below average. He had a core language score of seventy. The average range for this test is eighty-five to 110.

The Word Test 3 showed vocabulary weakness. His results were in the range of a six year old. His average score on the Word Test three was fifty-seven. The average score is eighty-five to 110. He was in the less-than one percent range. The evaluation was comprehensive and addressed all areas. Emmolo reviewed N.D.'s educational records and prior IEP from 2010 to the time of the evaluation. She did not test for auditory processing disorder. She would notice if N.D. had auditory processing weakness. He has language delays.

In the October 2017 IEP Emmolo noted that N.D. is distracted. His attention to task is inconsistent.

Emmolo wrote N.D.'s speech present levels for the October 2017 IEP. From 2016-2018 N.D. plateaued. LLD would be appropriate for N.D. LLD is structured and individualized. Lessons can be repeated. N.D. performs years below his age level. A placement less restrictive than LLD is not appropriate for L.D.

Julie Wolk

Julie Wolk (Wolk) is a teacher in West Orange. N.D. was in her Social Studies and Science class in 2017-2018. It was a general education class. There were twenty-seven students in the class. N.D. could not do anything independently in class. He needed frequent redirection to stay on task. He rarely answered questions. He grasped concrete concepts for a short time but could not apply or analyze the information. After a short period of time he would have difficulty discussing what he learned. Directions had to be repeated to N.D. His vocabulary assessments that were done in class included a modified study guide. The study guide had the answers in them to vocabulary definitions and open-ended questions. After the test N.D. could not apply the vocabulary far into the future. After a few days, he could not apply the vocabulary. N.D.'s reading is years below his grade level.

N.D. would say concepts in Science and Social Studies were too hard. He would come into the class and stand by the desk. He had to be told to sit. He had to be told to take out his books repeatedly. The class was too difficult for N.D. He has small group and individualized instruction but there was still a large gap. He did not participate in class. His writing was not at grade level. He should be able to write a paragraph but could only write a sentence.

Paige Battista

Paige Battista (Battista) was N.D.'s science and Social Studies and homeroom third-grade teacher in 2016-2017. She has a Kindergarten to eighth-grade teaching certificate. She does not recall if N.D. was on medication. The class was a general education class with nineteen students. N.D. read on a first-grade level. She sent work

home with N.D. weeks in advance so that petitioners could help him at home. When he had to recall definitions or match items, he had success, but if he had to access and answer, he would say it is too hard. N.D. sat at the back table with her for tests. She would read the questions to him and highlight the work.

N.D. had limited writing ability. He could memorize things but not explain his thoughts. He could not write a sentence. He needed constant direction. His participation was limited. He did a rock investigation, which he liked but could not understand. He could not retain concepts. Reading was difficult for N.D. He did not read at grade level. If he had to read to himself, the aid would read to him. She implemented the modifications in the IEP. N.D.'s work was heavily modified. The success he achieved was due to the modifications.

N.D. was never on grade level. He would not take off his coat when he came into class or say what he wanted for lunch. N.D. did not make academic progress in her class. He would do better in small group classes or with one-to-one support. He did better when she worked with him one-to-one. N.D. always asked if he got a good grade. He did not understand if he had a good grade or not.

N.D. had problems with distractibility. He needed constant reminders to stay on task. N.D.'s distractibility was discussed with the CST. Battista was not aware that N.D. had an auditory processing disorder or an expressive or receptive language disorder. N.D. had a classroom aide. He could not complete assignments.

N.D. was given modified assessment in the first marking period, he did well with the assistance of Battista and the aide. He could not memorize definitions or facts.

Deborah Struble

Deborah Struble (Struble) was N.D.'s resource Math teacher from 2017-2018 and a portion of 2015-2016. The resource Math class accommodates students with disabilities outside of the general education setting. The classes are smaller and the

students have accommodations and modifications. The content is delivered at a different pace than general education but at grade level.

In the 2017-2018 resource Math class there were six students. N.D. was fluent in solving basic Math problems of addition, subtraction, multiplication, and division of single digits. He had a difficult time with word problems and open-ended questions. He needed word problems read to him and he needed help with open ended questions. This persisted through the school year. He needed prompting for everything that he was doing in class. He had difficulty with new concepts. LLD would be appropriate for N.D.

N.D. was distractible, fidgets, and needs prompting to stay on task. Struble did not recommend an FBA for N.D. If she saw a behavior that concerned her, she would tell the CST.

Kristin Joy Garces

Kristen Joy Garces (Garces) is a general and special education teacher. She was N.D.'s Language Arts teacher in 2016-2017, 2017-2018 and 2018-2019 school years. The class is self-contained with one-to-one instruction. Garces uses discrete trials in class. The students in the class have multiple classifications. She teaches Kindergarten through fifth grade. In the 2016-2017-year, N.D. had a gap due to regression over the summer. He was in the third grade but reading on a first-grade level. He has made slow progress in reading. His present reading level is that of a student in the middle of the second grade. He made minimal progress in writing. He had to be prompted to write anything. When she worked one-to-one with N.D. she broke the material down into small parts. In 2017-2018 with prompting N.D. could if given a topic do an opening sentence he could have one or two details to support the opening sentence and possibly do a closing sentence. The goal is to generalize a skill, which is where N.D. has difficulty. In 2016-2017, N.D. needed one-to-one instruction. In 2017-2018 he would have benefitted from LLD class.

In determining his reading level N.D. was given a book. He reads in two-or-three-word phrases when he should be reading in five-to-six-word phrases. He skips words and there is little to no self-correction.

In 2016-2017 and 2017-2018 N.D. had internal distractions and difficulty paying attention. He needed prompting to come into the classroom, unpack his bookbag, and to work. Garces is aware that N.D. has a receptive and expressive language disorder and an auditory processing disorder.

Garces gave N.D. a Fantous and Pennel assessment that measured oral reading. His score was ninety three percent. He was reading at the G level for non-fiction. N.D. was tested on the grade level that he was reading on. N.D. was distractible and task avoidant. He did not have any behavior issues. N.D. did not need an FBA.

Susan Palmucci

Susan Palmucci (Palmucci) is a first-grade general education teacher with the Newark Public School. She is a certified Kindergarten to eighth-grade teacher. She has been a teacher for twenty-five years. She is a part-time tutor. She has been to forty IEP meetings and can read an IEP.

She met N.D. when he was in the third grade. She tutors him in reading and Language Arts. He can read and communicate ideas. He has to be redirected at times and fidgets. At times he loses focus. To get him to focus, she touches his hand or tells him to look at her. Palmucci knows that N.D. has a central auditory processing disorder. She knows little about his central auditory processing disorder. He gets distracted during tutoring when his mother is in the kitchen. Repeating and rephrasing helps N.D.

West Orange never reached out to her regarding N.D. In January 2017, she wrote a letter regarding N.D. stating that he was verbal but needed help with

comprehension and fluency. He had weakness verbalizing what he read. His vocabulary was lower than it should have been. When he read out loud, it was choppy and slow. His comprehension was low. His reading improved over 2017, although he was still reading below grade level. His reading was less choppy, and he still had comprehension problems. She did not read a section of material then ask N.D. questions about it because it would have been too much for him.

Initially she tutored N.D. twice a week. Now she tutors him once a week. Palmucci never observed N.D. in school. She never taught him with other children. She never case managed a student or wrote an IEP for a disabled student.

Palmucci believes N.D. will not grow in a class with less developed students. She believes N.D. should have an aide to scribe, sit near the teacher, and the teacher should speak slowly and clearly.

Erin DiFrancisco

Erin DiFrancisco (DiFrancisco) is a teacher in West Orange. She teaches pull-out replacement Language Arts. She is also a special education teacher. She was N.D.'s teacher in the 2016-2017 school year. N.D. loses focus and attention during whole group instruction. He benefits from instruction guides and extended time. His lack of focus inhibits his abilities in class. She never recommended a behavior modification plan for N.D.

H.D.

H.D. is the father of N.D. N.D. only has an auditory processing disorder. He has general education Science and Social Studies classes. His Language Arts class is the primary autistic class. He has pull-out resource replacement Math. There are three other children in different grades in the Language Arts class with one teacher. H.D. does not agree with placement of N.D. in autistic Language Arts class because N.D. is not autistic.

N.D. smiles all the time is smart and social. His non-verbal intelligence is his strength. N.D. is communication impaired because multiple languages are spoken in the home.

H.D. believes that the District is not helping N.D. and he is not progressing. During the September 2016 IEP meeting members of the CST were not present. The principal was present, but H.D. wanted to hear from the teachers. The principal said that evaluations were needed. In November 2016, H.D. received the evaluations but did not understand them. He asked what they meant. A new IEP was developed that moved N.D. to another school. He met with the Superintendent. At that time N.D. changed his medication. He had a bad reaction to the change of medication.

When he was in the second grade, the District stated that N.D. needed to be in LLD classes. H.D. did not know that N.D. was in the autistic class for Language Arts. In the fourth grade N.D. was still in the autistic Language Arts class. H.D. did not agree with N.D. being in the autistic Language Arts class. H.D. has observed N.D. in class, but not often.

Dr. Morgan's report states that the scores on the WISC-IV are not accurate because it relies on intact language skills and N.D. has a severe language disorder. Dr. Morgan's evaluation was done in July 2013. It states that the expressive language scores are likely to underestimate N.D.'s ability. On the WISC-IV N.D.'s non-verbal score was average. His comprehension was average and word reading was low average. Dr. Morgan recommended speech twice a week for N.D.

The February 29, 2016 IEP, which he agreed to, had N.D. receiving speech twice a week for thirty minutes. In November 2017, St. Barnabas Hospital determined that N.D. had an auditory processing disorder. Prior to this determination the District did not recommend an auditory evaluation even though the speech therapist said that N.D. should be tested.

The October 2017 IEP does not include an FBA. N.D. has the following behaviors: fidgets, losing concentration, need to be redirected, and distractibility. The District proposed two schools for N.D. to attend. H.D. visited the schools and felt that they were not appropriate for N.D.

At the September 2016 IEP meeting, H.D. did not feel like he was part of the CST. H.D. understands English. There was no Arabic interpreter offered at the IEP meeting. He did not understand all of the special education terminology. He did not understand what the test results meant. H.D. asked for a chart to translate the terms from English to Arabic. He stated that he asked for an Arabic version of the IEP when N.D. was in first grade and again after filing the due process petition but was told by Dorst that there was only the English IEP. He asked for an Arabic interpreter verbally for the October 19, 2017, IEP meeting. He requested this the day of the meeting and felt that he was being treated differently because he is a Muslim. He stated that Dorst told him three times that his culture does not have this experience, or neuropsychology is not popular in his culture. This occurred in Dorst's office. Although H.D. is taking MBA business classes, the language in those classes are straight-forward, unlike the special education language.

The teachers at the IEP meetings are polite but intimidated by the principal. He felt intimidated by the presence of an attorney at one of the IEP meetings.

H.D. did not have a problem understanding the IEP's until N.D. was placed in the autistic class for Language Arts. His older son was a special education student. H.D. had been at IEP's for his older son as well as N.D. He did not ask for an Arabic interpreter at those IEP meetings. Petitioners participated in IEP's for N.D. The District had previously acquiesced to petitioners wished that N.D. be placed in a general education class in all areas except Language Arts.

N.D. uses an FM system for the auditory processing disorder in certain classes, but not Language Arts.

H.D. spoke to the principal by phone after he visited the autistic class. The principal spoke about the rules which he stated that he did not see the rules. The principal hung up on him. He believes that this occurred because he is a Muslim.

H.D. has never been rude or aggressive at an IEP meeting. The principal and case manager were rude and aggressive at IEP meetings.

N.D. can read. He reads at home. He has English and grammar tutors. Dr. Dolan said that placement in an autistic class was inappropriate for N.D. Dr. Dolan did not observe N.D. in a classroom setting.

H.D.'s older son had special education services and IEPs. He did not have difficulty with those IEPs because his older son's services were speech therapy.

H.D. asked to be present for Dr. Steinhardt's evaluation of N.D. but was denied. He has not observed N.D. in class since the due process petition was filed.

FACTUAL DISCUSSION

The contradictory testimony presented by the witnesses requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or

contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” In re Perrone, 5 N.J. 514, 521-22 (1950); see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to hear the testimony, I **FIND** that all of the witnesses except H.D. to be credible. H.D. testified that he did not understand the special education terminology in the IEP and asked for an Arabic translator in 2016 and 2017. N.D. had several previous IEPs and H.D.’s older son had IEPs. Apparently H.D. had no difficulty with the terminology in those IEPs and did not need an interpreter until the November 2016 IEP, which stated that N.D. was in the primary autistic class for Language Arts. In addition, H.D. is in a program to get his Master’s degree that is not taught in Arabic.

H.D. stated that he believes that he was discriminated against because he was Muslim, but again he stated that this occurred after he realized that N.D. was in the primary autistic class. He stated that Dorst told him that his culture does not have this experience but again this occurs after he became aware that N.D. was in the primary autistic class for Language Arts. He had previously known Dorst from his older son’s IEPs and N.D.’s prior IEPs and did not stated he had any previous issues where Dorst spoke about his culture or religion.

FINDING OF FACTS

I **FIND** the following **FACTS**:

N.D. was classified eligible for special education services when he was three years old. He was placed in preschool disability class for May 21, 2010 to May 21, 2011. This was a half-day program. He was placed in a full-day program in December 2010 because he needed more support. He has cognitive and communication delays. The preschool disability class had a special education teacher and a class assistant. He had pull-out Speech therapy twice a week.

The IEP for May 2011 to May 2012 also had full-day preschool disability placement. He had speech motor therapy once a week, speech group therapy twice a week, and occupational therapy (OT) once a week. The IEP for June 2012 to May 2013 recommended continuing N.D. until the end of the school year and transitioning him to general education Kindergarten. Psychological, speech language, and OT evaluations were done at this time. The psychological assessment showed that his cognitive development was three percent of the cognitive development of children his age. His IQ score was 63, which is in the low range of functioning. In the Speech Language assessment his score was fifty-five; the average score is between eighty-five and 115. His receptive and expressive scores were one percent, which are extremely low.

N.D. is a student at the Mount Pleasant Elementary School. N.D.'s first Kindergarten class was in a general education class with modifications. At the end of his first Kindergarten school year, the CST had concerns about N.D. going to the first grade. There was a lack of academic progress and behavior problems. There was concerns with N.D.'s memory. When he learned a new skill, he did not retain previously learned skills. He was unable to focus and retain material.

N.D. had neuropsychological testing done in July 2013. The Bracken School Readiness Assessment test was administered. His composite score was sixty-seven. The score should have been much higher. In 2012, when he was administered this test, his score was sixty-five. The results for the test for attention, concentration, and executive function was consistent with ADHD. There was a ninety-nine percent chance of an attention disorder. N.D.'s expressive and receptive language were tested. His receptive language skills were at a two-year-eleven-month level when he was six years old. His IQ test score was 54, which is in the mild mental retardation range. N.D. has clear cognitive impairments. His diagnosis was mixed receptive-expressive language disorder, attention deficit hyperactivity disorder – combined type, and dysgraphia.

N.D. had delays, an inability to process oral language, and difficulty producing oral responses. He had limited language output. The recommendation was for N.D. to

receive continued Speech Language therapy, extended time, and to be close to the teacher. He received these accommodations but he made no progress over the course of the school year.

He repeated Kindergarten. His second year of Kindergarten was in a general education class. He made progress with the assistance of an aide. His communication and articulation level improved but his reading level did not change, and he still had trouble recalling information. He also had difficulty with reading comprehension. He had pull out Language Arts with a special education teacher because of his lack of progress. The resource room had one to one instruction and N.D. needed constant redirection.

The IEP for May 27, 2014 to May 27, 2015, was for the end of his second year at Kindergarten and first grade. The Language Arts teacher believed that N.D. had reached a plateau and that the resource room was not restrictive enough. The IEP states that he communicated more in the second year of Kindergarten than the previous year. However, he could not identify letters or recognize letters in isolation. He needed assistance with writing, he would mix up numbers and letters. N.D. got along well with his classmates. During this year the CST wanted N.D. to be in LLD classes in all four subjects. It was agreed that N.D. would have pull-out replacement Math and self-contained discrete trials in Language Arts. In the discrete trials class, the work is broken down into smaller segments and repeated.

N.D. did not have self-contained Math as listed in the March 4, 2015 IEP. He was in self-contained Language Arts class. Petitioners waived evaluations for N.D. He had progressed in Language Arts. He made more progress in self-contained classes. The school-based portion the CST again recommended all of N.D.'s classes be self-contained but petitioners wanted him in general education classes. The discrete trials helped him retain information. In the general education classes, he had difficulty paying attention. His first-grade report card showed that in Science and Social Studies he was proficient in the first marking period but regressed in the next two marking periods. In Language Arts, he had difficulty understanding and applying skills.

N.D. was given the InView test when he was in the second grade. This is a test of cognitive skills administered to all second-grade students. N.D.'s score was seventy-nine, which is in the low range of function. His total non-verbal score was higher than his verbal score.

The February 29, 2016 IEP was for the second and third grades. N.D. had pull-out Math and Language Arts in a self-contained class. The school-based portion of the CST recommended full day of self-contained placement. The teachers were concerned that he was falling behind and had to be retaught everything. N.D. could not understand concepts in class or read independently. When he could not participate or do a task he would get frustrated and cry. The general education placement was not supportive enough. In the self-contained Language Arts class, he was progressing using discrete trials. He mastered a few skills. He required discrete trials and individualized instruction. The CST again proposed all self-contained classes for N.D. The petitioners refused. It was agreed that N.D. would have self-contained Language Arts and pull-out Math.

His second-grade report card showed that he had regressed in science and Social Studies. He did not understand what was going on in class and had significant focus and attention problems. N.D. had educational, psychological, speech and language, and occupational therapy (OT) re-evaluations at the start of the third grade. He could not keep pace with the general education students. Anything beyond rote generalization was extremely difficult for N.D.

The speech language evaluation showed that his expressive and receptive ability was below average. His scores were in the range of a five to six-year-old when N.D. was nine.

There was a September 26, 2016 IEP where N.D. had special class autism Language Arts five times a week for ninety minutes, pull-out replacement Math and speech-motor therapy twice a week. Petitioners did not want N.D. in the primary autistic Language Arts class. The primary autistic Language Arts class did not consist

entirely of students with autism. The general education classes also had students with autism. There are more autistic students in the general education and resource class than in the self-contained class.

The psycho-educational evaluation of October 2016 showed that N.D. progressed in the self-contained Language Arts class using discrete trials. However, he did not remember many skills when he returned from summer break. Daily reading is difficult for him. He has mastered some spelling words. Extended school year (ESY) was available for N.D., but petitioners declined ESY for N.D. Grandinetti did the educational portion of the report and Dorst did the psychological portion of the report. The Woodcock Johnson IV test was administered to N.D. in two sessions because he tends to stray off task. The Woodcock Johnson IV tests broad reading, basic reading, reading comprehension, reading fluency, broad Math, Math calculation, Math problem solving, broad written language, and written expression. N.D.'s broad reading score, basic reading score, reading comprehension, and reading fluency score were all in the very low range. N.D.'s broad Math score and Math problem solving score was in the low range. His Math calculation score was in the low-average range. N.D.'s broad written language and written expression scores were in the low range. The evaluation that Grandinetti did was comprehensive. A non-verbal assessment was not done.

There was another IEP on November 17, 2016, for N.D. It was based on the functional performance and standard test data. In Math, N.D. had difficulty explaining his reasoning. The work was becoming more language based. N.D. needed one-to-one assistance and redirection. In Social Studies N.D. needed one-to-one teaching and reteaching in smaller groups. The aid would reteach the lesson to him in smaller parts. In Language Arts, N.D. had difficulty using pronouns and would get confused retelling main events of a story. He has weakness in expressive and receptive pragmatic and processing skills. In Science and Social Studies, he often needs redirection and struggles communicating his thoughts and ideas. He was previously given the Woodcock Johnson test and scored a fifty-three, which is in the very low range.

The November 2016 IEP proposed that N.D. be placed in the Kelly School. He would have LLD classes in Language Arts, Math, Science and Social Studies. N.D. would have Speech language therapy group twice a week, Occupational therapy in a group twice a week. He would also have curb-to-curb transportation to the Kelly School. The principal was present at this IEP meeting. Dorst does not recall the principal cutting teachers off as they were speaking.

Petitioners' retained Dr. Jeffrey Kornitzer for a neurological evaluation in December 2016. He was not provided with any of N.D.'s IEP's. Dorst was part of a conversation with Dr. Kornitzer, who agreed that N.D had ADHD. He thought that N.D. was a high functioning and comfortable in the general education class, which was not accurate. He thought N.D. was in an autism class with children with severe behavioral difficulties all day. This was not accurate, N.D. was in the primary autistic DTI class with some students with autism for ninety minutes a day for Language Arts. Dr. Kornitzer recommended to petitioners that N.D. be tested for conditions that result in mental retardation and inability to learn. N.D.'s diagnosis of auditory processing disorder was not initially shared with the District.

In 2016, petitioners requested an independent neuropsychological evaluation. Dorst contacted petitioners with a list of eight to ten neuropsychologists. The list was narrowed to five and petitioners chose Dr. Steinhardt. On June 6, 2017, and June 13, 2017, Dr. Steinhardt conducted an independent neuropsychological evaluation of N.D. Dorst accompanied Steinhardt on his observation of the general education third-grade homeroom class and the self-contained Language Arts class where ABA discrete trials were done. N.A. worked with a one-on-one instructor in that class. They next went to the Redwood School LLD class, which was N.D.'s proposed placement. They then returned to the Mount Pleasant School third-grade Social Studies class. They also went to the fourth-grade general education Science and Social Studies class where N.A. would be in the next year.

N.D. was evaluated by Steinhardt in June 2017. N.D.'s CAS-2 test composite score of sixty-eight placed him in the extremely low range of cognitive functioning. N.D.

did well in the non-verbal matrix reasoning tests. When he was tested only in non-verbal matrix reasoning he scored in the average range. This was his only subtest in the average range. His scores in matrix reasoning does not pull N.D. out of the low range of intelligence.

N.D.'s score on the basic and complex attention testing was extremely low to low average. He struggled on the sustained attention test which is attention for fifteen minutes. His responses were slow and inconsistent, which is consistent with ADHD. His verbal and visual memory is impaired. His language performance is impaired. His visual perception, construction, and organization scores are borderline. He has difficulty with organizational skills. His motor skills are average. The WISC-IV is not an accurate reflection of N.D.'s intelligence functions. It is heavily reliant on intact language scores.

N.D.'s reading decoding of words was at the first-grade level. His reading comprehension was at upper first-grade level. His reading fluency was at second-grade level. His reading was delayed. His Math concepts were at early second-grade level. His spelling and writing were at early second grade level, which is one-and-one-half years behind grade level. N.D. was behind in all academic areas.

The teacher rating scale rated N.D. as inattentive with learning problems, unusual behaviors, anxiety, depressed mood, social withdrawal, and difficulty adjusting to school demands. N.D. has an inability to carryover and generalize skills learned in an individualized setting.

Dr. Steinmardt observed N.D. in the classroom in the general education class and pull-out class. N.D. was non-disruptive and cooperative. He was lost in the general education class. He could not follow the classes or work independently. An aide had to remind him to stay on task. He required constant redirection and prompting. When other students worked independently, N.D. did nothing. When he was asked what he produced during the assignment, N.D. produced a blank page. His reading and writing level were one-and-a-half-to-two-and-a-half years below grade

level. He lacked the core educational skills to keep up with the class. Steinmardt was sent the Science work of N.D. for the day as well as the work of another student for the same time period. N.D. wrote less than one sentence; the classmate wrote much more. The one-on-one settings were more educationally productive for N.D. There were minimal distractions. One-on-one instruction was appropriate for N.D.

In Dr. Steinhardt's interview N.D. was pleasant but required frequent redirection. Steinmardt had to repeat instruction due to N.D.'s inattention. N.D. struggles in Math with complex visual or language-based problems. He has difficulty with open-ended questions. In Social Studies N.D. struggles with communicating his thoughts and ideas. He has difficulty explaining reasoning with abstract or high-level thinking. He often needs redirection and re-teaching. In Science and Social Studies N.D. does nothing independently.

These evaluation results were consistent with the results of his prior evaluations. Dr. Steinhardt recommended N.D. be placed in self-contained small group special education classes. The LLD program comports with Dr. Steinhardt's recommendations. Throughout N.D.'s third-grade report card it showed that N.D. needed further development in multiple areas. Dorst never received information that N.D. has autism.

H.D. believes that N.D.'s only disability is auditory processing disorder.

The October 19, 2017 IEP proposed that N.D. be placed in the Kelly School. He would have LLD classes in Language Arts, Math, Science and Social Studies. N.D. would have Speech language therapy group twice a week, Occupational therapy in a group twice a week and a personal aide five times a week for 360 minutes. He would also have curb-to-curb transportation to the Kelly School.

In the October 2017 IEP it shows N.D. in fourth-grade Science class did nothing independently. He could occasionally answer simple questions, but he could not transfer ideas to paper without prodding and supervision. His significant weaknesses and disabilities prevent him from participating in a pull-out replacement program. He

produced less and less when he was in the fourth grade. N.D. needed constant redirection for attention and focus. He has severe expressive and receptive language disabilities and cognitive deficits impede his ability to make sense of what the teacher is saying. N.D.'s fourth-grade report card where his grades were modified show that he was below grade-level expectation. His grades are based on the goals of the IEP. In Science his reading comprehension interfered with his ability to learn new material. Answering open-ended questions was very challenging for N.D. In Math he had difficulty applying Math skills to open-ended questions and he could not do language problems. He needed constant redirection and support from the teachers and para-professionals to complete his work. In Language Arts, N.D. had two non-discrete trial programs along with discrete trial programs. He was assessed using the Fountas and Pennell reading system used in the general education curriculum. N.D. was in mid-year fourth grade at the time of the test, which showed he was reading at the end of the first-grade level.

N.D. fidgets, loses concentration, needs to be redirected, and is distractible. The school-based portion of the CST wanted him in classes with other students with cognitive disabilities. In the LLD program all of the classes are self-contained and taught by a special education teacher. It uses the general education curriculum with modifications. Supplemental material and verbal alternatives can be used. LLD has small group and individual instruction. LLD is not required to maintain the same pace as general education.

N.D. can understand "what" and "who" questions but not "why" questions. Visual spatial areas are N.D.'s greatest strength. He does better when no language is required. However, most instruction is verbal in general education and resource room classes. N.D.'s social interaction with his peers is not a cause for concern. His social skills do not interfere with his ability to make educational progress. His off task behaviors are a neurological disability which is beyond his control.

In November 2017, St. Barnabas Hospital determined that N.D. had an auditory processing disorder. Prior to this determination the District did not recommend an auditory evaluation.

Petitioners never asked for an Arabic interpreter or an Arabic IEP. Petitioners were not clear with the District whether N.D. was on medication or not. Dorst was never told what medication N.D. takes or the dosage. N.D. continues to have language and memory difficulties. All material must be taught to him twice. He still has difficulty retaining information. He has difficulty building a repertoire of knowledge. Petitioners were not discriminated against due to their religion or culture.

N.D.'s auditory processing disorder is not a primary reason for his delays and difficulties. N.D.'s cognitive difficulties are not the result of his bilingual background.

Dr. Steinhardt is an expert in neuropsychology. Grandineti is an expert learning disabilities teacher consultant and special education. Battista is an expert in general education. Struble and Garces are experts in general and special education. Dorst is an expert in school psychology and case management of students with disabilities.

LEGAL ANALYSIS AND CONCLUSIONS

The 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 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.” 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 assessed 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.

In addition, when scrutinizing a FAPE claim, there is a two-part inquiry. A court must first ask whether the state or school district has complied with the procedures of the Act when developing the IEP, and second, whether the IEP developed through the Act’s procedures is “reasonably calculated to enable the child to receive educational benefits.” Rowley, 458 U.S. at 207. While the IDEA does not require a school district to provide an IEP that maximizes “the potential of a disabled student, it must provide ‘meaningful’ access to education and confer ‘some educational benefit’ upon the child for whom it is designed.” Ridgewood, 172 F.3d at 247 (citations omitted).

Petitioners requested independent neuropsychological evaluation in the due process petition Docket No. EDS 1468-17, which was filed on February 17, 2017. Dr. Steinhardt did an independent neuropsychological evaluation of N.D. on June 5, 2017, and June 13, 2017. Petitioners did not request any other specific independent evaluation.

I **CONCLUDE** the issue of an independent evaluation in the due process petition Docket No. EDS 1468-17 is moot since the independent evaluation was done subsequent to the petition.

The November 2016 and the October 2017 IEPs both provided that N.D. be placed in the Kelly School. He would have LLD classes in Language Arts, Math, science and Social Studies. N.D. would have speech language therapy group twice a week, occupational therapy in a group twice a week, and curb-to-curb transportation to the Kelly School. The October 2017 IEP also provides a personal aid five times a week for 360 minutes.

In 2017, Dr Steinhart found N.D. to have extremely low cognitive functioning with significant difficulty with attention, learning, academic function, memory, language, visual, and fine motor skills. N.D. has difficulty retaining information he had to be re-taught skills. He also needs to be redirected often. He has global developmental delays and intellectual impairment. He has a difficult time focusing and is distractible. In certain classes he did not do any work independently. He needs prompting to stay on task.

The District had previously tried to accommodate the petitioners desire for N.D. to be in general education classes as much as possible, but that is not appropriate for N.D. N.D. has expressive language and receptive language delays.

N.D. was diagnosed with an auditory processing disorder in 2017. This does not account for his distractibility. Difficulty staying on task, not being able to do work independently, or needing prompting to stay on task, enter the classroom, unpack his bookbag, and work. It also does not account for N.D.'s low cognitive functioning or generalizing skills.

The IEPs of November 2016 and October 2017 proposing LLD classes in Math, Language Arts, Science, and Social Studies with group and Occupational Speech/language therapy would provide N.D. with an educational benefit. The classes being smaller and self-contained with individualized instruction would confer an educational benefit on N.D.

I **CONCLUDE** the IEPs of November 2016 and October 2017 would provide N.D. with a free and appropriate education.

Petitioner's due process petition EDS 5003-28 requests compensatory damages. Compensatory education is a remedy not specifically provided for in the IDEA. However, the courts have recognized that "Congress expressly contemplated that the courts would fashion remedies not specifically enumerated in IDEA." W.B. v. Matula, 67 F.3d 484, 494-95 (3d Cir. 1995). Thus, a student deprived of a FAPE may be

entitled to an award of compensatory education, which is an available remedy even after the student has reached age twenty-one. Ridgewood, 172 F.3d. at 249; M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996); Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 536 (3d Cir. 1995); Lester H. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991).

The legal standard for the granting of such relief is summarized by the Third Circuit as follows:

[A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation but excluding the time reasonable required for the school district to rectify the problem.

[M.C., 81 F.3d at 397.]

Awards of compensatory education have included an additional two-and-one-half years of special education where the school district had been lax in its efforts to provide a proper placement, Lester H., 916 F. 2d at 873, and payment of college tuition where the disabled student would apply credits obtained toward acquisition of a high school diploma. Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F.Supp.2d 138, 145-46 (W.D.N.Y. 1999).

In this matter, the District worked to accommodate petitioners request that N.D. be in general education classes. Beginning in the 2014-2015 school year, the District wanted N.D. to be in LLD classes for Language Arts, Math, Social Studies, and Science. The resolution at that time was that N.D. would have self-contained Language Arts. The school portion of the CST at the February 2016 IEP meeting again wanted N.D. to have self-contained classes in Language Arts, Math, Science, and Social Studies to which petitioners objected. It was agreed N.D. would have pull-out Math and self-contained Language Arts. N.D.'s auditory processing disorder is not a primary reason for his delays and difficulties. N.D.'s social skills did not interfere with his ability to make educational progress.

I **CONCLUDE** N.D. is not entitled to compensatory education.

Petitioners request an independent neuropsychological evaluation in the EDS 5303-18 due process petition. N.D. had an independent neuropsychological evaluation in June 2017. This is the last neuropsychological evaluation that N.D. had. The fact that he was found to have an auditory processing disorder does not necessitate the need for a new neuropsychological evaluation requested less than one year after the previous evaluation.

I **CONCLUDE** that N.D. is not entitled to an independent evaluation as requested in EDS 5003-18.

ORDER

It is hereby **ORDERED** that the relief requested by petitioner be **DENIED**.

It is further **ORDERED** that respondents request denying independent evaluations is **GRANTED**.

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.

June 28, 2019



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency

June 28, 2019

Date Mailed to Parties:

June 28, 2019

APPENDIX

WITNESSES

For Petitioner:

Susan Palmucci

For Respondent:

Dr. Amy Dorst

Dr. Michael Steinhardt

Colleen Grandinetti

Nicole Emmolo

Julie Wolk

Paige Battista

Deborah Stuble

Kresten Joy Garces

Erin DiFrancisco

EXHIBITS

Joint Exhibits:

J-1

For Petitioner:

- 1 Parents' Five-Day Disclosure Letter - Not Presented to the Court
- 2 Due Process Complaint April 2018
- 3 Pro Se Complaints
- 4 IEP September 2013
- 5 IEP May 2014 - Not Presented to the Court
- 6 IEP March 2016
- 7 IEP February 2016 - Not Presented to the Court

- 8 IEP March 2017 - Not Presented to the Court
- 9 IEP of September 2016
- 10 IEP October 2017 Request for Evaluation dated September 26, 2016
- 11 H.D.'s Consent for evaluations of N.D. dated September 26, 2016
- 12 Neuropsychological Report by Dr. Joel Morgan dated July 8, 2013
- 13 Speech/Language Assessment report from September 28 and 30, 2016, assessments dated October 5, 2016
- 14 Educational Psychological Evaluations from October 7 and 27, 2016
- 15 Neurology report by Jeffrey Kornitzer December 13, 2016
- 16 Developmental Pediatric Evaluations by Dr. Eileen Dolan
- 17 NNAT dated October 24, 2017
- 18 Audiological Evaluations by Dr. Kathleen Delaney dated November 14, 2017
- 19 Letter dated November 21, 2016, from Eileen A. Dolan, M.D. re: Pediatric Evaluation
- 20A Letter dated November 21, 2016, from Eileen a. Dolan, M.D. re: Pediatric Evaluation
- 20A Letter from Dr. Alexander Zodiatis of Totowa Pediatric Group dated December 2, 2016
- 20B Letter from Jeffrey Kornitzer of Rutgers NJ Medical School dated December 13, 2016
- 20C Letter dated January 19, 2017, from Jeffrey Kornitzer, M.D.
- 20D Certification from Gerald Tramintano, Ph.D. of the Neuro Cognitive Institute re: N.D.'s Cortical Functional Testing
- 20 Treating Professionals letter dated December 8, 2018, and notes
- 21 Report by Susan Palmer dated January 23, 2017
- 22 Parents' letters
- 23 Correspondence between parents and district
- 24 Attorney emails between parents and attorneys
- 25A Letter from attorney to ALJ Moscowitz re: Neuro Assessment dated March 28, 2017
- 25 Attorney emails between parents and W. Orange Director of Special Services
- 26 Attorney emails between attorneys

- 27 NOT ADMITTED INTO EVIDENCE
- 28 NOT ADMITTED INTO EVIDENCE
- 29 Work samples
- 30 Power School Grades
- 31 IEP Attendance Sheet dated September 26, 2016
- 32 IEP Attendance Sheet dated November 17, 2017
- 33 Parent emails with administration

For Respondent:

- 1 Petition for due process dated November 22, 2016
- 2 Answer and Cross-Petition dated January 12, 2017
- 3 Parent's letter requesting amendment to case dated January 30, 2017
- 4 New due process petition dated April 4, 2018
- 5 Answer and Cross-Petition
- 6 IEP dated May 21, 2010
- 7 IEP dated May 20, 2011
- 8 Preschool Speech and Language evaluation dated March 22, 2012
- 9 OT Evaluation dated April 24, 2012
- 10 Psychological Evaluation dated May 11, 2012
- 11 IEP dated May 17, 2012
- 12 Report card 2012-2013
- 13 Independent Neuropsychological Evaluation dated July 8, 2013
- 14 IEP dated September 20, 2013
- 15 IEP dated May 27, 2014
- 16 Report card 2013-2014
- 17 IEP dated March 4, 2015
- 18 Report card 2014-2015
- 19 Report card 2015-2016
- 20 InView scores of December 2015
- 21 IEP dated February 29, 2016
- 22 Re-evaluation consent form dated September 26, 2016
- 23 Speech/language evaluation dated October 5, 2016

- 24 Psycho-educational evaluation dated October 25, 2016
- 25 OT Evaluation dated October 27, 2016
- 26 Private development pediatric evaluation dated November 10, 2016
- 27 IEP dated November 17, 2016
- 28 Letter from Totowa Pediatric Group dated December 2, 2016
- 29 Private Neurological Report dated December 13, 2016
- 30 Letter from private neurologist dated January 19, 2017
- 31 Email from C. Salimbeno to S. Nachbar regarding neurologist's letter dated January 20, 2017
- 32 Email from C. Salimbeno to private neurologist dated February 2, 2017
- 33 Notes from telephone conference with Dr. Kornitzer dated February 13, 2017
- 34 Email from M. Mucciolo to D. Rekem dated May 31, 2017
- 35 Email chain regarding WISC and Kornitzer report dated June 5, 2017
- 36 Email and writing samples to Dr. Steinhardt dated June 9, 2017
- 37 Email and attachments to Dr. Steinhardt regarding "stay put" Social Studies dated June 13, 2017
- 38 Independent neuropsychological evaluation dated June 13, 2017
- 39 Work samples – Ms. Hoit
- 40 Report card comments – Hoit
- 41 Progress reporting and communication – Garces
- 42 Work samples and assessments – Garces
- 43 Report card 2016-2017
- 44 Correspondence from M. Mucciolo to D. Rekem dated August 4, 2017
- 45 MAP Scores dated September 29, 2017
- 46 Email regarding crying during MAP testing dated October 1, 2017
- 47 Draft IEP dated October 19, 2017
- 48 Finalized IEP dated October 19, 2017
- 49 Parent's response to proposed IEP
- 50 Private CAP evaluation St. Barnabus dated November 14, 2017
- 51 Email chain regarding CAP evaluation dated December 18, 2017
- 52 Email chain regarding IEP changes dated December 22, 2017
- 53 Email chain regarding communication with parents March 14-15, 2018

- 54 Email from J. Schure to B. Flynn regarding consent to contact Barnabas Hearing Center dated March 21, 2018
- 55 Report card comments (Wolk)
- 56 Progress reporting and communication – Garces
- 57 Work samples and assessments – Garces
- 58 Report card 2017-2018
- 59 CV - Erin DiFrancisco
- 60 CV - Amy Drost
- 61 CV - Danielle Emmolo
- 62 CV - Kristin Garces
- 63 CV - Kristin Gogerty
- 64 CV - Colleen Grandinetti
- 65 CV - Paige Hoit
- 66 CV - Constance Salimbeno
- 67 CV - Michael Steinhardt
- 68 CV - Deborah Struble
- 69 CV - Shaina Weitz
- 70 CV - Julie Wolk
- 71 CV - Julie DiGiacomo
- 72 CV - Michael Steinhardt
- 73 Email