



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NOS. EDS 13578-18 &
EDS 11409-19
AGENCY DKT. NOS. 2019-28493 &
2020-30389

F. AND M. ON BEHALF OF S.,¹

Petitioners,

v.

MORRIS BOARD OF EDUCATION,

Respondent.

Julie Warshaw, Esq., for petitioners

Jamie Epstein, Esq., for petitioners

Marc Mucciolo, Esq., for respondent (Methfessel & Werbel, P.C., attorneys)

Record Closed: July 13, 2020

Decided: August 10, 2020

¹ To assure anonymity, the initials "F," "M," and "S" have been substituted for the initials of the father, the mother, and the student.

STATEMENT OF THE CASE

S placed out of interventions and remediation for reading and math before he enrolled in high school. Yet petitioners demand reimbursement for a private reading program during ninth grade and funding for a private math program after S graduates from high school. Must respondent meet these demands? No. The law requires that an individualized education program (IEP) be reasonably calculated to provide significant learning and meaningful benefit in the least restrictive environment.

PROCEDURAL HISTORY

On July 13, 2018, petitioners filed a request for due-process hearing with the Department of Education, Office of Special Education Programs (OSEP).

On September 18, 2018, OSEP transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.5.

The case bears agency docket number 2020-30389 and OAL docket number EDS 13578-18.

Settlement negotiations ensued, attorneys were substituted, and settlement negotiations continued, but the parties could still not reach an agreement.

On July 17, 2019, petitioners filed another request for due-process hearing with OSEP.

On August 19, 2019, OSEP transmitted that case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23,

for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.5.

That case bears the same agency docket number, 2020-30389, but a different OAL docket number, EDS 11409-19.

Settlement negotiations ensued once more, but the parties could still not reach an agreement, so the case proceeded to hearing on dates convenient to the parties.

On February 25, 2020, and April 1, 2020, I held the hearing. Earlier dates in March 2020 were adjourned due to the world-wide pandemic and the subsequent closure of the OAL to in-person hearings.

For recordkeeping purposes, the parties chose to submit post-hearing briefs, and the parties chose July 10, 2020, as the date to submit them.

On July 13, 2020, petitioners submitted an additional document that was inadvertently omitted from their post-hearing brief, and on that date, I closed the record.

FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

1.

Nicholas Pomponio

Pomponio is a school psychologist and is the case manager for S. Pomponio has drafted and implemented hundreds of IEPs for students over the course of his six-year career in the Morris School District and was admitted as an expert in school psychology in general and as an expert in special-education programming for high-school students in

particular over the objection of petitioners based on his education, training, and experience. Pomponio became the case manager for S during the summer before S began high school, between eighth and ninth grades, during the summer of 2017, and has remained the case manager for S throughout his high-school career.

A. IEP for the 2017–18 School Year (Ninth Grade) dated July 28, 2017 (July 30, 2017, to June 25, 2018)

The reevaluation eligibility determination and annual review took place on July 28, 2017. Pomponio testified that he first met petitioners during eighth grade, during an IEP meeting in February 2017, when petitioners first expressed their concern about the evaluations for their son. When the parties met again for the IEP meeting on July 28, 2017, petitioners again expressed their concerns, this time about reading. According to Pomponio, petitioners thought that their son was struggling with reading, but as Pomponio testified, the data did not support this supposition, as S tested out of remediation for both reading and math for ninth grade.

In fact, Pomponio testified that S did “phenomenally well” with the reading interventions that were administered during eighth grade, and that S had continued with the reading interventions over that summer, meeting four times with the reading interventionist, who was willing to meet with S more, but petitioners were unable to do so based on their schedules.

More pointedly, Pomponio referred to the report card from eighth grade, which Pomponio said he reviewed at the beginning of ninth grade, and spoke to the outgoing case manager at that time to learn more about S, his likes and dislikes. Referencing the report card, Pomponio kindly stated that S was an average student, a “C” student, receiving a mix of C’s and B’s in his core classes, with an occasional D or A, and all A’s and B’s in his other classes. Nevertheless, Pomponio explained that motivation was a concern for S, among others, including his ability to pay attention, to stay focused, and to remain organized, but that S had improved his achievement and motivation in general, and in language arts in particular, throughout the course of the school year.

The neurological evaluation dated May 25, 2017, noted that S was eligible for special education and related services under the classification “other health impaired” because S was diagnosed with attention deficit hyperactivity disorder (ADHD), predominantly inattentive type to a mild degree, and that S had difficulty reading unfamiliar words, some related to attention, but some related to difficulty with double vowel sounds/blends, and even long vowel sounds and silent “e’s.” As a result, many accommodations were recommended, namely preferential seating, repeated direction, reinforcement for checking over work, extra time for tests, modification of assignments, and reading strategies—all of which were discussed with petitioners and included in the IEP for ninth grade.

The educational evaluation dated January 3, 2017, noted that S demonstrated inconsistency with reading. His broad reading skills and his reading-comprehension skills were average, but his basic reading skills, which emphasize decoding, were well below average. Likewise, his broad written-language skills were somewhat below average because his expressive-writing skills were average, but his phonics and spelling were well below average. Meanwhile, his broad math skills were somewhat below average.

When some reading and writing subtests were re-administered later than month, on January 26, 2017, due to questions concerning the accuracy of the earlier scores, the scores were considerably higher, and they were considered, without challenge, a closer approximation of S’s actual skills in these academic areas.

This was something petitioners’ experts did not know when they wrote their reports and rendered their expert opinions.²

The psychological evaluation dated December 16, 2017, noted that the Full Scale Intelligence Quotient was 96 (low average) and that S was stronger in the verbal-reasoning domain than in the visual-reasoning and the visual-perception domains, but

² Petitioners’ experts did not know that these subtests were re-administered and did not learn that the scores were considerably higher until they were informed at the hearing during their cross-examinations.

given the scatter between the composite scores, the General Ability Index of 101 (51st percentile) was interpreted as the more accurate measure of cognitive ability. Given the below-average performance on speeded visual tasks, it was suggested that S get extended time on multi-step tasks, which was included in his IEP. Overall, S presented as bright but self-conscious, with a developing sense of self, but also with a decidedly negative attitude about himself and school.

Understandably, petitioners stated that they were concerned about S being ready for college when he graduated. They also stated their desire for S to receive one-on-one direct reading instruction. Although one-on-one direct reading instruction was not included in this IEP, this concern was discussed among all members of the IEP team, including petitioners, and petitioners still signed the IEP.

Ultimately, this IEP for ninth grade, dated July 28, 2017, which was projected to start on July 30, 2017, and end on June 25, 2018, placed S in in-class support for his core classes, language arts, math, science, and social studies, together with an extended-school-year program in a special class for mild/moderate learning or language disabilities.

B. IEP for the 2018–19 School Year (Tenth Grade) dated February 28, 2018 (March 16, 2018, to February 27, 2019)

The annual review took place in the middle of ninth grade, on February 28, 2018, and by this time, S had been diagnosed with central auditory processing disorder and dysgraphia. Pomponio testified that S's teachers reported that S had trouble staying on task in the classroom throughout the school year, and that S had trouble completing and turning in homework during the first half of the school year, but that S eventually did better with the latter during the second half of the school year. Pomponio continued that S also had trouble succeeding in math, but that he had a very good relationship with his math teacher, so the decision was made for the math teacher to give S extra support. All of this was reflected in the Present Levels of Academic Achievement and Functional Performance (PLAAFP), which provided a snapshot.

In that section of the IEP, S's social studies teacher reported that S had earned a B (83%) in the first marking period, but an F (53%) in the second marking period because S had failed to complete assignments, to make changes, and to stay on task during class, whether on his own or with an instructor. On the other hand, S's social studies teacher reported that S had benefited from his accommodations. Moreover, S's social studies teacher reported that he had been working with S through individual conferencing to make S feel more comfortable completing tasks.

Likewise, S's math teacher reported that S had difficulty staying focused, that S needed to be reminded to take out his materials to take notes, but that he had modeled for S how to do these things and stay organized. S had earned a C (71%) for homework in the first marking period, but, unfortunately, S had earned an F (38%) for homework in the second. Nevertheless, S's math teacher reported that S had benefited from his accommodations, including one-on-one instruction, and that S had received two A's (100%) and a B (88%) in the beginning of the third marking period for his first three homework assignments and a B (80%) on his first chapter test. Moreover, S's math teacher reported that S's ability to work independently had improved.

S's language arts teacher reported that S had struggled with organization and homework during the first marking period (seeming to forget to bring in his homework, computer, or book), but that S still managed to keep up with the class and had earned a B (85%) for the first marking period. S's i-Ready Diagnostic Assessment on September 26, 2017, placed him on Level 8 overall, but on Level 9 for comprehension. Like his math teacher, S's language arts teacher reported that S had been having difficulty staying organized in the second marking period, but that he benefited from one-on-one instruction as well as from the use of graphic organizers. Moreover, S's language arts teacher reported that S's progress had been checked consistently, and that S still succeeded in the second marking period, scoring an 89 out of 94 on his first paper, a 75 out of 94 on his second paper, and a 95 out of 100 on a large project, finishing with a B (84%) for the second marking period.

S's science teacher reported that S had earned a D for the first marking period and a C- for the second marking period, but was earning a D for the third marking period

because of his inability to stay focused and complete assignments, as well as his struggles with math, which S's science teacher noted dampened S's enthusiasm. S's science teacher, however, reported that S had become more comfortable with the material as it became more multisensory. Moreover, S's science teacher reported that S benefited from one-on-one instruction, that they had been working on increasing S's capacity to work, and that she expected S to improve his overall performance during that second half of the school year.

This was the information the Child Study Team was working with when it began to draft the IEP for tenth grade.

When Pomponio returned to the subject of reading intervention, he testified that the reading intervention S had received during the second half of eighth grade, from February 2017 through June 2017, had been so successful that less restrictive, more embedded support was all that was needed, as memorialized in the IEP:

From February 2017 to June 2017, [S] received one to one pull out Reading Intervention by a Reading Intervention Teacher 2–3 times a week for 30 minutes each session. This support utilized a multi-sensory approach as well as researched best teaching and instructional methods to address identified areas of weakness, including phonics, fluency, and comprehension. [S] achieved great success in the program. In fact, [S's] improvements were so thorough and rapid, that this intense configuration of service was determined to be more restrictive than needed. As a result, a slightly less intensive, more embedded reading support arrangement is proposed going forward. Please see Supplementary Aids and Services.

[J-3 at 6.]

This less restrictive, more embedded support the Child Study Team proposed was threefold. First, the team proposed that S receive direct instruction one hour per week after school for reading intervention and remediation for the remainder of the school year. It would be a research- and evidence-based program that would address his areas of need. As an example, the IEP stated that the direct instruction would address word attack

by creating and improving word-attack strategies, which could be generalized, especially in science and social studies. The IEP also stated that the direct instruction would address his spelling, fluency, and comprehension.

Second, the team proposed that an educational learning consultant assist his teachers in implementing these strategies across all subjects. The educational learning consultant would also observe S in class and possibly talk with S, as well as his classmates, so S would not feel singled out or stigmatized. The goal was to help his teachers implement the strategies S learned to help his reading.

Third, the team proposed that S receive counseling through Teen Pride, an outside, third-party counseling service, embedded within the school, to assist S with whatever topics or issues he wanted to address. As examples, the Child Study Team wrote in the IEP that S could receive counseling to address organizational skills, anxiety, or depression, or to help develop positive peer relations. The IEP noted that S could receive counseling at least once a week for thirty minutes, but that he could receive more counseling depending on his need, as the counseling was student driven. Toward this end, the team also recommended or suggested that S see a psychiatrist for an evaluation so the psychiatrist could assist with or recommend a plan to address possible anxiety or depression.

Petitioners, however, rejected all three.

Pomponio testified that petitioners rejected the interventions and the counseling because S did not want them. According to Pomponio, who had gotten to know S, S did not like the stigma. He wanted to be like everyone else. This is something Pomponio emphasized time and again throughout his testimony.

In addition, Pomponio testified that the private reading intervention program proposed by petitioners at the Lindamood-Bell Learning Center was specifically discussed during the IEP meeting, but that the Child Study Team believed that it was not needed and too restrictive.

Regardless, petitioners insisted that respondent place S in the private reading intervention program at the Lindamood-Bell Learning Center in Morristown, the Seeing Stars Program, for four hours a day during the school day for five to seven weeks, and that respondent also place S in a private school, Fusion Academy, also in Morristown, for the school instruction S would miss at Morristown High School while attending the private reading intervention program at the learning center.

Petitioners also insisted that once S completed the private reading intervention program at the Lindamood-Bell Learning Center, S continue with private tutoring at the Lindamood-Bell Academy, also at the Lindamood-Bell Learning Center, but for six hours a day, two more hours than was required for the reading program.

Ostensibly, the Child Study Team rejected this request because it believed that this private program and placement was too restrictive and not needed.

The Child Study Team, however, had other concerns. It was concerned about S's ability to earn enough credits to pass ninth grade in the short term; it was concerned about S's ability to integrate with his peers at the high school for the remainder of ninth grade and during tenth grade; and it was concerned about S's ability to graduate by the end of twelfth grade. In addition, the Child Study team was concerned about the quality of instruction at Fusion Academy, since the possibility existed that the none of the instructors at Fusion Academy would be certificated, and the lack of peer modeling in its entirety, since the instruction at Fusion Academy was exclusively one-on-one. Moreover, the Child Study Team was concerned about the fact that none of these programs, whether at Lindamood-Bell or Fusion Academy, would be offering counseling to S by a licensed practitioner:

This program was rejected because it is placing [S] in a more restrictive environment and removes him from school where he is receiving college prep instruction along with reading strategy and support. There are concerns about [S] then being able to earn appropriate high school credit for his current 9th grade courses, integrate back into Morristown High School, and remain on track to graduate in four years. LMB agreed that integration back into Morristown High School

may be challenging. LMB works with Fusion Academy to provide the course content that [S] would need to remain on track to graduate. Fusion Academy may not provide instructors who are certified or highly qualified in the subject areas. Appropriate peer models at Fusion Academy presents a concern.

The parents also requested that their son attend the LMB Academy Program, which consists of a total of 6 hours a day with the remaining 2 hours a day being used to apply some of the strategies he learns to the other content areas such as history and science. This program was rejected because it is placing [S] in a more restrictive environment from school with the majority of students who are middle school aged. This would not be an appropriate peer group for him. [S] is currently enrolled in college prep 9th grade courses in the general education setting.

Neither LMB nor Fusion Academy offer licensed mental health counselors to address the parents' concerns related to [S's] possible anxiety and depression.

[J-3 at 15.]

Above all, Pomponio testified that S was progressing, as reflected in his progress reports and report cards for the 2017–18 school year, ninth grade, but not his standardized tests from that year. Pomponio stated that the PARCC Assessment indicated that S had partially met expectations, but explained that S had not given full effort. In particular, Pomponio noted that the Mathematics Assessment Report revealed a score of 713, Level 2, Partially Met Expectations, but that the English Language Arts/Literacy Assessment Report revealed a score of 705, Level 2, Partially Met Expectations, which indicated that S had done little more than write his name. As such, Pomponio asserted that S's final grades the 2017–18 school year, ninth grade, painted a better picture of S, revealing a C student who sometimes gets a B and sometimes get a D, since S got a B in language arts (English), a C in math (Algebra), a C in social studies (History), and D in science (Physics).

Indeed, Pomponio added that S received an A+ in Physical Education because he participated fully in this special, but a D+ in Entrepreneurship, a D in Health, and

withdrawals in Personal Finance and Spanish because S failed to participate fully in these subjects and activities.

Meanwhile, Pomponio asserted that the progress reports from the beginning of March 2018 (ninth grade) to the end of February 2019 (tenth grade) evidenced that S had either achieved his goals and objectives, had progressed satisfactorily toward his goals and objectives, or had been progressing gradually toward his goals and objectives during those school years.

Moreover, Pomponio reiterated that this information and this interpretation were what he learned and what he gleaned from talking with S, his parents, and his teachers.

Thus, this IEP for tenth grade, dated February 28, 2018, which was projected to start on March 16, 2018, the middle of ninth grade, and end on February 27, 2019, the middle of tenth grade, continued S in in-class support for his core classes, language arts, math, science, and social studies, together with counseling, but petitioners rejected the IEP and filed a request with OSEP for a due-process hearing.

Meanwhile, Pomponio believed, in his expert opinion, that IEP was appropriate.

C. IEP for the 2019-20 School Year (Eleventh Grade) dated May 9, 2019 (May 9, 2019, to May 8, 2020)

The annual review took place at the end of tenth grade on May 9, 2019. Pomponio testified that S was still able to learn with support, that he had made meaningful progress in the classroom with support, and that S had just wanted to be “one of the guys.” Pomponio emphasized that S did not want to be separated or stigmatized. Once again, the PLAAFP provided a snapshot.

In that section of the IEP, S’s math teacher (Geometry) reported that S was progressing in math and that he had earned a C- (70%) for the first marking period, a C (74%) for the second marking period, but a D- (61%) for the third marking period. S’s math teacher reported that S had benefited from guided notes, preferential seating,

concrete examples, frequent check-ins, positive reinforcement during class, prompts to review directions and restate information, extra time, and modified versions of quizzes and tests when taking quizzes and tests, which is why S had earned a C (75%) average for his quizzes and tests, but that S still needed to complete his homework and classwork on time, which is why S had earned a D- (60%) in the first marking period for completing homework and classwork and a C- (70%) in the second marking period for completing homework and classwork. Worse, S's math teacher reported that S was earning an F (32%) in the third marking period for completing homework and classwork. Thus, S's math teacher reported that she sought greater effort from S in these areas.

Pomponio testified that this lack of effort, which was also seen in science below, was why the Child Study Team believed that the counseling component it proposed was more important than the reading program petitioners sought, especially when petitioners were the ones who had requested a psychiatric evaluation.

Indeed, petitioners had requested, and were granted, an independent psychiatric evaluation, only to reject the counseling respondent proposed.

S's science (chemistry) teacher reported that S was progressing in science, but that S had earned a D+ for the first marking period, a D for the second marking period, a C for the third marking period, and was earning a C for the fourth marking period because S was not completing his homework and classwork. Like his math teacher, S's science teacher reported that formal assessments revealed a basic knowledge and understanding of the subject matter, and that S was able to recall and correctly respond to questions that required sequential steps, but that S still needed to manage his deadlines and complete his classwork more consistently. Significantly, S's science teacher reported that he gave S a binder with organized sections at the beginning of the school year, but that S refused to use it.

Happily, S began to use the binder during the second marking period, and S's science teacher reported that S benefited from it, as it enabled S to prioritize tasks of high value.

Similarly, S's science teacher reported that S benefited from individual conferencing, breaking down tasks into understandable steps, and redirection during class.

Additionally, S's science teacher reported that S benefited from test review sheets, calculators, the pairing of verbal and written directions and instructions, the repeating and rewording of those directions and instructions, practice problems, and the reteaching of previously learned materials.

Thus, S only needed to improve his time on tasks—as his preparedness and participation in class had improved and were satisfactory.

S's social studies (history) teacher reported that S earned an A+ for the first marking period, a B for the second marking period, and an A- for the third marking period. Unlike his other classes, S completed his homework on time both thoroughly and consistently. S's social studies teacher reported that S had, in fact, been very successful in his class, and that S would continue to benefit from the same placement the following year. Moreover, S's social studies teacher reported that beneficial modifications included repeated instructions, verbal instructions, check-ins, extended time on tests and projects, chunked assignments, clearly stated timelines and due dates, graphic organizers, checklists, and the opportunity to review classwork assignment responses with a teacher before submitting them.

In fact, S's social studies teacher was extremely complimentary. He reported that S was motivated, focused, determined, and respectful, and he emphasized that S was engaged in all class lessons and activities and contributed thoughtful responses to class discussions. As such, S was reportedly comfortable asking questions, seeking assistance, and receiving feedback.

S's language arts (English) teacher reported that S still struggled with organization and homework but was still earning a C- (70%) for the third marking period because S was better about completing his homework and assignments. S's language arts teacher reported that S was a reluctant reader but the modifications had helped, namely,

modifying homework, checking on progress and understanding, rewording and rephrasing instructions, using a multi-sensory approach, extra time on written work, reducing paragraphs, and conferencing weekly. S's language arts teacher reported that the plan for the fourth marking period was to focus on S's writing skills—to slow the work down and help him organize his thoughts with the use of graphic organizers and the chunking of assignments into smaller parts.

S's language arts teacher also reported that he met with S weekly to go over his assignments to make sure that S remained on track and understood what needed to be done, but S's language arts teacher continued that S often declined to use the graphic organizer, which is why S did not develop theses in his writing, remained disorganized, and went off on tangents. It is also why S had received a 63 on his most recent essay. S's language arts teacher added that S often declined to use speech-to-text software (Co:Writer) and that S had declined to use audible books (Bookshare) as well.

Pomponio testified that in addition to what the teachers reported, the Child Study Team considered all the new evaluations, including the ones from Lindamood-Bell. To begin, the learning evaluation from Lindamood-Bell from the previous year, ninth grade, dated February 28, 2018, noted that S exceeded his grade level on the picture vocabulary test, the learning aptitude test, and the oral reading test, including the comprehension section, but that S still had difficulty in spelling, word attack, math computation, and conceptualization. As such, the test results suggested that S continued to make progress, as also reflected in the updated education evaluation the following year, but with the same ongoing challenges.

In fact, the updated educational evaluation from tenth grade, dated February 21, 2019, noted that S's reading abilities were average, with below-average scores in oral reading and word fluency only. S could decode both real and non-words with average skill, but his accuracy when reading more than a word in isolation was compromised at times. Unknown multi-syllabic words were troublesome, as he was unsure where to break the words apart. Reading and connecting words within a time constraint also proved difficult due to his weak processing speed. Nevertheless, his ability to infer and draw information based on evidence as well as prior knowledge was average and stronger than

his skill in recalling information immediately after hearing it. Indeed, S's recall of explicit information was strong.

S's listening comprehension and overall language abilities ranged from average to below average, but his skill in naming pictured items and skill in listening to a series of passages were strengths, relative to his understanding a series of increasingly complex directions. For example, following two-step directions was easier than following three-step directions, especially when the demands increased. Thus, the evaluator stated that it was essential for those working with S to consider pairing visual with auditory information.

Writing in general produced average scores, but his low spelling subtest brought the cluster down dramatically. Conversely, his poor spelling did not reflect his reading and writing capabilities. Accordingly, the evaluator recommended that S use editing tools to ensure that his spelling did not take away from the whole.

Meanwhile, S's problem-solving data was average, while his calculation skills remained undeveloped.

Pomponio testified that this picture of S was well established, so much so that nearly all the recommendations from the psychiatric evaluation from Jennifer Platt, D.O., dated March 13, 2018, were already in the IEP. Petitioners had wanted the evaluation because M was concerned that S was depressed and unmotivated, so Pomponio made the referral and the evaluation was considered. In her report, Platt wrote that S reported that he is generally happy, does not feel inadequate, but is sometimes anxious about having enough time to finish his schoolwork. S reported that his family is "good" and that his parents are "very supportive." When asked what would be helpful to him in school, S answered a computer to help type essays, extra pencils (because he often forgets his), and a chair separated from a desk. There was nothing else.

Platt wrote that M reported that S received a significant amount of individualized, in-class support during elementary school, but with the transition to middle school, and especially since transitioning to high school, S struggled to understand academics and

often felt overwhelmed, which could result in depression and anxiety, and since both family and staff reported some symptoms suggestive of depression and anxiety, Platt concluded that the information suggested an adjustment disorder and sought further clarification when S felt he understood the academic material as it was presented to him. Platt listed a series of recommendations for staff—as well as a separate series of recommendations for family. Yet none of the recommendations from Platt included a reading program or private tutoring, let alone a more restrictive environment.

More specifically, the academic recommendations included preferential seating, cues to stay on task, and the reinforcement of double checking. The recommendations also included the establishment of an organizational system to help S remember what materials he needed for assignments, how to structure his homework time, and reminders when to hand in that homework. The recommendations continued with simplifying and repeating directions, giving concrete examples, and having S repeat directions or ask for clarification. Finally, monitoring was to be done by trained staff with “frequent liaison” among all concerned.

To underscore, Pomponio testified that nearly all these recommendations for staff had already been incorporated in the IEP, and nearly all, if not all, the recommendations for family were being performed by the family. In addition, Pomponio testified that counseling through Teen Pride was again offered but again rejected. Although a reading program was not offered (because the Child Study Team did not think that S needed it any longer based on his success in the reading program the previous year), the Child Study Team still offered another reading evaluation—but this too was rejected.

More significantly, Pomponio further testified that S had been progressing, and that such progress was reflected in his report cards, progress reports, and standardized tests. Regarding the report cards, Pomponio explained that S had received C’s in his academic subjects (Chemistry, English, Geometry, and Spanish), and A’s in the subjects that interested him (US History, Driver Education, Wood Design, and Physical Education), and regarding the progress reports from the beginning of May 2019 to the beginning of May 2020, Pomponio likewise explained that S had also progressed. Stated otherwise, Pomponio testified that no evidence existed that S had not progressed.

Regarding the standardized tests, Pomponio testified that the PARCC Assessment from the 2018–19 school year indicated that S had again partially met expectations, but explained that S had improved. In particular, Pomponio noted that the mathematic assessment revealed a score of 716, Level 2, Partially Met Expectations, which was slightly better than the previous year, but that the English Language Arts/Literacy Assessment Report revealed a score of 730, Approached Expectations, which was significantly better than the previous year. Indeed, S had met expectations in both reading and writing.

As before, this IEP for eleventh grade, dated May 9, 2019, which was projected to start on May 9, 2019, and end on May 8, 2020, continued S in in-class support for his core classes, language arts, math, science, and social studies, together with counseling, but as before, petitioners rejected the IEP and filed a request with OSEP for a due-process hearing.

And once again, Pomponio believed, in his expert opinion, that the IEP was appropriate.

Messina

Christine Messina is a learning disabilities teacher consultant (LDTC) and an LTDC interventionist. In her many years of experience as an LDTC, Messina has, among other things, conducted comprehensive educational evaluations as a member of child study teams, and has analyzed data to develop appropriate programming for students with learning disabilities. As a reading interventionist, Messina has provided small-group literacy interventions and individual literacy interventions to special-education and general-education students, including the use of the Corrective Reading Program, the Fountas and Pinnell Leveled Literacy Intervention Program, and the Orton-Gillingham Approach. Messina has training in these reading intervention programs and approaches but has no certifications from them. Nevertheless, I accepted Messina as an expert in learning disabilities and reading interventions over the objection of petitioners, who

sought her disqualification for having only training and no certificates in any of these reading interventions.

At the hearing, Messina testified about the data she reviewed from the reading intervention program from the 2016–17 school year. She explained that S never dipped below the line for which reading intervention would be recommended (save once), and that he was reading on an eighth-grade level at the end of eighth grade. She also explained that the i-Ready reading assessment comported with the Fountas and Pinnell reading assessment, and that S tested into the highest level of the Corrective Reading Program. As a result, Messina concluded that S did not need the reading intervention program for ninth grade—which is summarized in the email message below:

Attached are [S's] reading assessment from when I worked with him for reading instruction from February 2017–June 2017 (8th grade). Here's a quick summary of the results: [S] tested into Corrective Reading level C (highest level of the program). He meets the timed words per minute fluency goal for each lesson we completed. [S] also met the word reading accuracy goal for all but 1 of the CR lessons completed. [S] passed the Corrective Reading Level C Mastery Test 1, earning 100%. On 6/9/17, [S] read a Fountas and Pinnell 7th and 8th phonics/word analysis assessment with 86% accuracy.

On a Fountas and Pinnell Benchmark assessment in February 2017, he scored at an instructional level of Y. He read with 99% work reading accuracy and he earned 6/10 on comprehension. In June 2017, he placed at an instructional level of Z (7–8 grade level) with 98% accuracy and limited proficiency of comprehension.

[R-12, MBOE 0130.]

Messina, however, was not aware that S had been diagnosed with a central auditory processing disorder or with dyslexia, mainly because she saw no evidence of it impacting his reading so as to require intervention.

Regardless, Messina maintained that S did not need the reading intervention program for ninth grade, or any other grade for that matter, for the reasons stated above, and believed, as a result, that the IEPs at issue were appropriate.

Schwartzman

Lucy Schwartzman is the director for the Lindamood-Bell Learning Center in Morristown, New Jersey, where S received instruction during ninth grade, from February 2018 through June 2018. Schwartzman received a bachelor's degree in psychology from Hollins University in Roanoke, Virginia, in May 2014, and has been the director of the Lindamood-Bell Learning Center in Morristown since 2019. Schwartzman began as a clinician at the center in 2017 and is fully trained in the Lindamood-Bell Learning Process.

Schwartzman was offered and accepted as an expert in the Lindamood-Bell Learning Process without objection—but Schwartzman has no training in any other methods or processes, and she has no education, training, or experience that would permit her to teach in a public school, let alone opine about the appropriateness of an IEP, which rendered her testimony less persuasive, less meaningful, and less impactful than the testimony of both Pomponio and Messina.

Nevertheless, Schwartzman provided genuine and earnest testimony.

Schwartzman testified that S was evaluated at the learning center on February 13, 2018, and then reevaluated at the learning center on June 21, 2018. At the hearing, Schwartzman recited the test results and the recommendations contained in the evaluations. After the initial evaluation, the Lindamood-Bell Learning Center recommended Lindamood-Bell instruction for four hours per day, five days per week, for five to seven weeks at its learning center. The recommendations section specifically stated that S “may benefit” from such instruction. It did not say that S “needed” the instruction or suggest that the IEP for either the 2018–19 or 2019–20 school year would be inappropriate without it.

More specifically, the Lindamood-Bell Learning Center recommended its Seeing Stars Program, which provides “sensory-cognitive development of symbol imagery,” that is, “the ability to visually image sounds and letters within words.” The recommendations section explains that dual coding with imagery and language supports the development of phonemic awareness through the multisyllable level, visual memory, word attack, word recognition, spelling, contextual reading, and reading comprehension. As such, “[the Seeing Stars Program] develops the imagery-language connection for spontaneous self-correction and accurate, fluent contextual reading.”

In addition, the Lindamood-Bell Learning Center recommended its Lindamood-Bell Academy, which is an accredited private school, for additional instruction, anywhere from four to six hours per day. The recommendations section specifically stated that S “may also benefit” from its differentiated curriculum and content with the support of its sensory-cognitive instruction and language. Again, it did not say that S “needed” the instruction or suggest that the IEP for either the 2018–19 or 2019–20 school year would be inappropriate without it.

Parenthetically, the Lindamood-Bell Academy is not an approved private school for students with disabilities according to the New Jersey Department of Education.

Nevertheless, what can readily be seen from the evaluation summaries is that S made progress in the proprietary program.

These summary evaluations were better summarized by Jaime Lehrhoff, an LDTC and reading specialist hired by petitioners to write a report and testify at the hearing. Lehrhoff’s report is dated February 21, 2019, and her summary is reproduced below. According to Lehrhoff, S improved his reading fluency, reading comprehension, word attack, and oral reading at the learning center:

In February of 2018, [S] entered the Lindamood-Bell program, and a pre-evaluation (February) and post evaluation (June) of various tests were administered. On the Peabody Vocabulary Test, a standard score of 110 was found on both dates (75th percentile) while on the Detroit Tests of Learning Aptitude-4

(Word Opposites), [S] received a standard score of 13 in February (84th percentile) and 14 in June (91st percentile). On the Detroit Tests of Learning Aptitude (Verbal Absurdities), a standard score of 39 was achieved in February and 38 in June. On the Oral Directions portions, [S] performed at the 63rd percentile both times. Most significant findings were from the Gray Oral Reading Test, Form A, where his Rate of reading went from the 16th percentile to the 25th percentile and his accuracy improved from the 25th percentile to the 50th percentile. Taken together, a fluency score at the 9th percentile in February now proved Average in June. Similarly, [S's] Comprehension improved from the 25th to 50th percentile by the time the program was complete. Other subtests were administered from the Woodcock Reading Mastery Tests-III, Form A (Word Attack) and while a score at the 14th percentile was discovered in February of 2018, it was at the 21st percentile by June. On the Slosson Oral Reading Test-R3, a slight improvement was seen three months later (57th to 62nd percentile). A standard score of 87 on the Lindamood Auditory Conceptualization Test-3 was determined in February while in June a significant increase demonstrated functioning at the 79th percentile (SS=112).

[P-V at 4.]

This improvement notwithstanding, the Lindamood-Bell Learning Center still recommended additional Lindamood-Bell instruction for four hours per day, five days per week, but this time for four to six weeks, instead of five to seven weeks. The recommendations section specifically stated that it recommended this instruction “to establish the imagery-language connection for [S].” More specifically, the Lindamood-Bell Learning Center recommended its On Cloud Nine Math Program, which provides “sensory-cognitive development of numeral imagery and concept imagery to improve mathematical concepts and computation.” The recommendations section explains that dual coding with imagery and language is introduced with manipulatives and then extended to computation. Indeed, Lindamood-Bell and Schwartzman asserted that the rate of learning had increased “substantially” during this short period of time—so much so that as of April 1, 2020, the date she testified, Schwartzman concluded that S only needs Lindamood-Bell instruction one or two days a week because his foundations are “strong.”

Inexplicably, Schwartzman testified that neither she nor anyone else from Lindamood-Bell discussed this instruction or this progress with anyone from the Child Study Team for the drafting of the IEP for either the 2018–19 or 2019–20 school year and is not aware of anyone from the Child Study Team reviewing any of these records from Lindamood-Bell in preparation of the IEP for the 2018–19 and 2019–20 school years. In fact, Schwartzman understood that S’s learning problems in district were emotional (not reading related), and she is not aware of anyone from Lindamood-Bell attending an IEP meeting in district.

Finally, Schwartzman acknowledged that Lindamood-Bell made no school-based recommendations for S—only continued private instruction at its learning center.

Thus, Schwartzman provided no expert opinion about whether or not the IEPs at issue were appropriate.

Lehrhoff

Jamie Lehrhoff is the owner and director of the Livingston Educational Center in Livingston, New Jersey, where she evaluates students for possible learning disabilities and provides remediation in all academic subjects. Lehrhoff opened her educational center in 2006 and implements the Orton-Gillingham Reading Programs there. Lehrhoff has taught Wilson Reading to small groups of fourth- and fifth-graders at a private school, but she has no education, training, or experience with the Lindamood-Bell Learning Process. She also has no experience consulting or teaching in public school—save from 2000 to 2004 when she taught fourth-graders at an elementary school in Maplewood, New Jersey. Nevertheless, Lehrhoff was offered and accepted as an expert without objection in her capacity as an LDTC, in her capacity as a reading specialist and consultant, and in her capacity as an educational expert. Throughout her examination, Lehrhoff provided earnest and energetic testimony, but as will be seen below, her testimony was not nearly as complete as that of Pomponio. As a result, it was not as reliable.

Lehrhoff conducted an educational evaluation of S on February 21, 2019. As part of her evaluation, Lehrhoff administered numerous tests, which she listed in her report: the Woodcock-Johnson IV Tests of Oral Language (WJ-IV OL); the Woodcock-Johnson Tests of Achievement; selected subtests from the Comprehensive Test of Phonological Processing, Second Edition (CTOPP); the Test of Word Reading Efficiency, Second Edition; and the Gray Oral Reading Test, Fifth Edition. As Lehrhoff stated, “All testing administered was used to gain additional information regarding [S’s] current level of functioning and to determine if the supports match his level of academic functioning.”

By way of background, Lehrhoff began that petitioners reported that S “lacks internal motivation for most things,” “thinks kids at school think of him as dumb because he says the teacher is always on him,” and “does not have much self-confidence at all.” Lehrhoff continued that petitioners want S to go to college, and would be happy for him to go to community college, but S no longer wants to go to college. Lehrhoff explained that S is anxious, was diagnosed with ADHD in first grade, took medicine on and off in eighth and ninth grades, but hated it and stopped in tenth grade: “His parents tried several types, but it was a daily fight to get [S] to take it. He felt sick and anxious and never wanted to eat while taking them. He stopped taking his medicine in 10th grade.”

But as noted above, petitioners did not seek counseling for S. Indeed, Platt had recommended counseling to petitioners as early as March 2018 when S was in eighth grade. Moreover, this notion that S and his parents differ about his future (and therefore differ about the focus of his studies and the account of his struggles, as intimated by Pomponio and noted by Lehrhoff) is an undercurrent in this case, which remains unaddressed.

Lehrhoff further wrote that petitioners reported that S struggles with reading, writing, and math; that he does better verbally; but that he has organizational issues due to his auditory processing disorder. Lehrhoff continued that petitioners believed that S needs one-on-one attention with math as well as organization, because he is “always missing assignments and does not seem to know what is going on,” and has “given up” with school as a result. Woodshop, however, was different. Lehrhoff explained that S

“loved” woodshop, was maintaining an A+, and had applied to the Morris County VoTech for welding. He got in.

At the hearing, Lehrhoff emphasized that S has low processing speed because of his auditory processing disorder, added that S needs visual aids paired with verbal instructions, and surmised that S had shut down in the classes in which he could not keep up. Lehrhoff harkened back to the Educational Assessment from January 9, 2017, to assert that S still has “significant weaknesses” and “extreme weakness” in reading and in math. The conclusion of that report, which was from eighth grade, states, “[S] appears to have significant achievement weaknesses when compared to same age peers in Basic Reading Skills and Math Calculation.”

Lehrhoff explained that she made her characterization based on the test scores from that evaluation, but Lehrhoff later acknowledged on cross-examination that she did not know that an addendum had been issued later that month, on January 26, 2017, which noted that the Basic Reading score placed S in the 24th percentile, not in the 2nd percentile, and is “average.”

In other words, the test score was not to be interpreted “with extreme caution,” as the educational evaluation initially stated, and as Lehrhoff was led to believe.

Based on this testing, and without the benefit of the addendum, Lehrhoff further testified that she believed that S should have been classified as having a specific learning disability in math, but this issue was never raised as an issue before the hearing, whether an issue of law or fact, and no request was ever made to amend the prehearing order to include it as an issue to be decided. Regardless, even if it had been included as an issue to be decided, Lehrhoff provided no standard or calculus for her supposition. As such, I merely mention it as Lehrhoff intended: that Lehrhoff believed that S had “significant weakness” and “extreme weakness” in reading and math as a matter of fact (not that S had a specific learning disability in reading and math as a matter of law).

On February 8, 2019, Lehrhoff observed S in his classroom and documented it. In her report, Lehrhoff wrote that upon entering the classroom, the students were getting

ready to go to the library to pick out a new book for independent reading, but S was inattentive, did not respond well to redirection, and was one of only three students at the end of the period not to pick out a book. Lehrhoff described how S put in next to no effort before he put a pair of earbuds in his ears and went on his phone. Lehrhoff continued: Back in class, the teacher asked the students to take out their Chromebooks and open an original document about the subject of “rhetoric.” S was seated in the front of the class, but once again, he failed to put forth effort. He leaned on his hands and failed to open the document and follow the lesson. During a video presentation, S was both on and off task, taking very few notes. The implication was that S failed to participate in any class discussion too.

At the hearing, Lehrhoff excused the behavior. She stated that the instruction was primarily oral, and suggested that S could not process it without a one-to-one aide. Yet nowhere in her report and at no time during the hearing did she ever assert or even recommend that S should have a one-to-one aide. Her testimony and report had begun to diverge.

Returning to her report, Lehrhoff wrote that during the testing, S appeared motivated, answered questions to the best of his ability, and asked for clarification of instructions when needed. Lehrhoff expanded that even with more challenging questions, S remained focused and did not show any excessive impulse-control problems or distractibility. Thus, Lehrhoff considered the test results accurate and reliable. It also highlighted the difference respondent reported between when S puts in effort and when he does not.

Lehrhoff continued that the test results indicated that S’s reading abilities were generally average with below-average scores in oral reading and word fluency. His listening comprehension and overall language abilities were below average to average, and his skill in naming pictured items and his skill in listening to a series of passages were relative strengths compared to his proficiency in understanding a series of increasingly complex directions. Writing in general produced average scores, with his spelling bringing down the cluster score dramatically. His ability to problem-solve was average,

but his calculation skills were underdeveloped. Lehrhoff believed that this was because S had become too reliant on a calculator and his processing speed was very low.

Still, Lehrhoff wrote that S's performance across academic domains, while uneven, showed an ability to sustain attention, and revealed age-appropriate abilities. In fact, when comparing S's Woodcock-Johnson testing from 2017 to 2019, from eighth grade to tenth grade, S had made progress in many areas. More specifically, Lehrhoff wrote that the Broad Reading, Basic Reading Skills, Reading Comprehension, Broad Mathematics, Written Language, Broad Written Language, and Written Expression clusters had all improved. Considerable weakness, however, remained for S's encoding skills and his math calculation skills. As such, Lehrhoff merely mentioned that as the curriculum becomes more challenging, S will simply need greater accommodations. She also stated that S's teachers should simply note when S becomes overwhelmed and provide immediate assistance to alleviate his fears.

At the hearing, Lehrhoff emphasized these points. She echoed that S had, in fact, made progress in many areas, and repeated that S only had weaknesses in math calculation, but she added spelling. She also changed her emphasis. Whereas in her report she stated that S will need greater accommodations as the curriculum becomes more challenging, she stated at the hearing that the accommodations in the IEP were insufficient, and that accommodations cannot take the place of remediation.

Likewise, in her report, Lehrhoff speculated that S's progress was due to Lindamood-Bell instruction, but at the hearing, Lehrhoff was more decisive. She did not speculate. At the hearing, Lehrhoff asserted that this progress was due to Lindamood-Bell instruction, as if that could be calculated. Yet Lehrhoff has no education, training, or experience in or with the Lindamood-Bell processes, and provided no calculus to support that conclusion, instead relying exclusively on the self-serving assessments by Lindamood-Bell. Conversely, Lehrhoff provided no calculus for how the instruction S received in district could be removed from the equation. It mattered not. In the end, Lehrhoff criticized the IEP for the 2018–19 school year for not including Lindamood-Bell processes and for including only one goal for English, not matter how detailed and comprehensive it was:

In English, when presented with informational text from [S's] content area subjects on the middle of 9th grade level, [S] will delineate and evaluate the argument and specific claims in a text, assessing whether the reasoning is valid and the evidence is relevant and sufficient, as well as identifying 1 false statement[] and fallacious reasoning by providing text examples with 80% success.”

[P-V at 13.]

Lehrhoff's criticism of the goal, however, was directed at its focus. More specifically, Lehrhoff criticized the goal for being based on a ninth-grade reading level instead of on S's deficits in reading and writing. “[S's] focus on whether evidence in an argument is valid or not does not speak to his weaknesses nor does it address them,” she wrote.

Lehrhoff then implied that the IEP should have included more goals, but stated that the goals should have focused on building fluency and fluency rate through rereading and timed readings.

More expansively, Lehrhoff wrote that S's IEP needed to reflect his deficits in encoding, mathematics, and attention (based on his weaknesses, not on grade level) and that the short-term objectives were limiting and did not speak to those deficits. Lehrhoff did not believe that the short-term objectives were measurable either. Lehrhoff cautioned, “It will be even more important for those working with [S] to understand that his diagnosis is not only based on his attention and focus, but [also] his difficulty with executing tasks based on his weaker skill sets.”

Lehrhoff emphasized these points too at the hearing: that the IEP needed to address these deficits in encoding, mathematics, and attention better; that they needed to be individualized for S, not merely standardized at grade level; and that S would have realized more of his potential if he had been provided a better reading program like the one at Lindamood-Bell—if not the one at Lindamood-Bell itself. Lehrhoff specified that the reading program needed to focus on remediation with encoding and decoding and

with basic skills in mathematics to gain foundations, and as stated above, she distinguished remediation from accommodation and recommended an evidence-based reading program. Ultimately, Lehrhoff concluded that without a remediation program to address S's deficits, and without measurable goals based on those deficits, the IEP for the 2018–19 school year was inappropriate.

Lehrhoff further testified that S's apparent lack of effort and motivation was because S was frustrated, and blamed respondent for not motivating S, for not making sure S gave greater effort, and for S not fully realizing his potential and having greater success, as if S has no role in that effort.

As a result, Lehrhoff asserted that S should have been placed in the resource room, not in in-class support, and that S should have continued with Lindamood-Bell.

But Lehrhoff had never mentioned the resource room before. Having detailed the findings of her report at the hearing, Lehrhoff detailed her recommendations. None of her twenty-four recommendations, however, recommend placement in the resource room. As such, her recommendation at the hearing that S should have been placed in the resource room was a significant departure from the recommendations in her report.

In her report, Lehrhoff first recommended that petitioners share her report with the Child Study Team. Second, Lehrhoff recommended that S be redirected should he go off task. Third, Lehrhoff recommended that S be allowed to preview class materials so he could become more familiar with them and less distracted by them. Fourth, Lehrhoff recommended that S be given strategies to self-monitor so he can evaluate the difficulty of a task and how much time he should dedicate to it. Toward this end, Lehrhoff recommended a study-skills class.

Fifth, Lehrhoff recommended extended time on all tests with specific accommodations—such as a separate testing location to avoid distractions, directions presented orally, and frequent monitored breaks.

Sixth, Lehrhoff recommended that S receive a reading program instead of a study hall. Curiously, this was her sixth, not her primary, recommendation, and like Schwartzman, Lehrhoff stated that S would “benefit” from such a program, not that he “needed” one. Given S’s gains in the Lindamood-Bell program, Lehrhoff thought S would benefit from similar one-to-one instruction in either an Orton-Gillingham, Wilson, or Lindamood-Bell program.

Seventh, Lehrhoff recommended activating strategies while reading. For example, Lehrhoff encouraged S to ask questions, make inferences and connections, and analyze the text while reading. Although this would slow S down, Lehrhoff thought it would force S to pay more attention to the text. Moreover, in making these recommendations, Lehrhoff wrote and acknowledged that S’s reading skills are “average.”

Eighth, Lehrhoff recommended that S annotate text as he reads. Ninth, Lehrhoff recommended that S should highlight the steps when instructions are given in a series, and that the teacher should check in to make sure that S does this. Tenth, Lehrhoff recommended that S have access to the audible versions of books by having access to such sites as Learning Ally or Audible.com.

Eleventh, Lehrhoff recommended that S not be penalized for spelling mistakes. Twelfth, Lehrhoff recommended that S have access to dictation software such as Dragon. Thirteenth, Lehrhoff recommended that S be given teacher notes to review before and outlines to use during class.

Fourteenth, Lehrhoff observed that S had difficulty initiating work, which she surmised is because S becomes overwhelmed with given tasks, so she recommended having academic material introduced in “an explicit, step-by-step, sequential manner” with intermittent deadlines.

Fifteenth, Lehrhoff recommended that S have work samples or models of what is expected by his teachers, so he can follow the examples, cue himself, and check for accuracy.

Sixteenth, Lehrhoff recommended formal study-skills instruction, including access to online programs, such as SOAR and StudyRight.net, and traditional texts, such as The Regis Study Skills Guide.

Seventeenth, Lehrhoff recommended scaffolding of new information for S, connecting it to previously mastered material, and one-on-one meetings with his teachers to go over his mistakes.

Eighteenth, Lehrhoff recommended that S learn better time management by having his teachers cue him and give him specific time frames for when work should be completed.

Nineteenth, Lehrhoff recommended that S have access to a website, Grammarly.com, where he can edit his work and make appropriate changes. Twentieth, Lehrhoff recommended that S be given clear expectations for writing, as well as ideas and suggestions, so S could incorporate these answers into his work. Twenty-first, Lehrhoff recommended that S should always read his work orally or have someone read it to him before turning it in. Twenty-second, Lehrhoff recommended that S turn in the first draft of his work for comment in case he did not incorporate the answers in advance, so he could revise his work before turning it in for a grade.

Twenty-third, Lehrhoff recommended that S be given direct instruction with review and repetition for math calculation.

Twenty-fourth, Lehrhoff recommended that his math teacher go back to basics in math—the use of a calculator notwithstanding.

Again, none of these twenty-four recommendations mention the resource room.

Petitioners submitted this evaluation, including these twenty-four recommendations, to the Child Study Team for the drafting of the IEP for the 2019–20 school year, and this evaluation, including these twenty-four recommendations, was, in

fact, considered by the entire IEP Team and incorporated in the IEP for the 2019–20 school year.

Yet on cross-examination, Lehrhoff revealed that she did not know if any of her twenty-four recommendations were, in fact, incorporated in the IEP for the 2019–20 school year, but in going through each one of her twenty-four recommendations at the hearing, Lehrhoff stated that she believed that all but six of them were incorporated in the IEP, singling out recommendations 14 and 15 and recommendations 20 through 23.

I disagree. I believe that all twenty-four recommendations were incorporated in the IEP for the 2019-20 school year and will address each of the six Lehrhoff singled out in turn below. I begin with numbers 14 and 15.

Numbers 14 and 15 state that academic material should be introduced in an “explicit, step-by-step, sequential manner” with “work samples that serve as a model of what is expected” so S can self-correct. Yet the modifications in the IEPs for the 2018–19 and 2019–20 school years both state, “Chunking [S’s] class work time and instructional time helps [S] to remain focused,” and “[S’s] assignments should also be chunked and broken down into smaller parts as necessary.” In my opinion these accommodations fairly encompass those recommendations.

Likewise, recommendations 20–22 are also included. Those recommendations state that S should be given clear expectations for writing, that he should be given ideas about what to write, that he should have the work read back to him for his review, and that he should not be held accountable for the first draft he hands in. None of these recommendations are, in fact, explicitly contained in the IEP for the 2018–19 and 2019–20 school years, and I do not necessarily agree that they should be, but no evidence exists that these recommendations or strategies were not implemented. They certainly could have been implemented, and presumably were implemented without evidence to the contrary, under “Modify assignments to demonstrating skill attainment/mastery,” “Allow extra time for task completion of tests/quizzes,” “Assistance with organization of materials/notebooks,” “Provide benchmarks for long-term assignments and/or projects,” “Repeat instructions,” and “Check-in with student to assess understanding of tasks

expected to be completed and monitor on task performance.” Evidence of this presumption are the passing grades S received in his subjects and his improvement over time as reported by his teachers and progress monitoring. Thus, I believe that these accommodations fairly encompass those recommendations as well.

Regarding recommendation 23, “direct instruction with plenty of review and repetition,” which Lehrhoff explained at the hearing means remediation in math, Lehrhoff did not know that an addendum was written for the educational evaluation from 2017, and that S had scored out of remediation for math in ninth grade. This is significant. She also did not know or had overlooked the fact at the time she wrote her report that S was permitted to use a calculator in class. Even when it came to her testing, Lehrhoff acknowledged that math fluency was better than she implied because S had answered all of the questions that he did answer correctly, and no student was expected to answer all the questions, let alone answer them correctly. In other words, S did not answer the remaining questions incorrectly. He simply did not get to them. Moreover, Lehrhoff answered that this was not a surprise to her because S has deficits in his processing speed.

When discussing the test results from Lindamood-Bell on cross-examination, Lehrhoff acknowledged that some scores went up, some scores went down, and some scores stayed the same, but more significantly, Lehrhoff acknowledged that all the gains, statistically speaking, could have been within the confidence level.

In addition, Lehrhoff acknowledged on cross-examination that she only reviewed the IEP for that 2018–19 school year, and that she never reviewed the IEP for the 2019–20 school year.

On redirect examination, Lehrhoff simply asserted that the IEP for the 2019–20 school year was inappropriate as well, because Lehrhoff believed it had never changed from the 2018–19 school year.

More critically, Lehrhoff revealed on cross-examination that she did not know that petitioners had rejected the recommendations Messina had made for the IEP for the

2018–19 school year—including the offer of a reading program, the offer for Messina to work with S’s teachers to assist them with the implementation and utilization of strategies to help S improve his reading skills across all subjects, and the offer to place S in the resource room.

To repeat, the Child Study Team did discuss the potential of placing S in a resource room, but as M later testified, petitioners rejected the idea.

Regardless, on redirect examination, Lehrhoff asserted that the amount of instruction proposed for the reading program, which was one hour a week, was insufficient, and that it needed to be more like what S received at Lindamood-Bell, which was at least one hour a day, three days a week.

Later during re-cross examination, Lehrhoff was less sure about the reading program. She repeated that she did not know anything about the reading program both Messina and the Child Study Team had proposed, but she rebounded that it would have been insufficient no matter what program they proposed if it was only one hour a week. According to Lehrhoff, it had to be at least one hour a day, now three to five days a week.

Surprisingly, for all her criticism, in her report and at the hearing, Lehrhoff never proposed a program for S, aside from her recommended modifications and accommodations, and merely asserted that the IEPs for the 2018–19 and 2019–20 school years were inappropriate because they should have included all her recommended accommodations and modifications, which, as I wrote above, they essentially did, despite her protestations.

Platt

Platt is a board-certified psychiatrist for children and adolescents and was accepted as an expert in psychiatry for children and adolescents without objection. Although she performed a psychological evaluation of S on behalf of Morris in 2018 when S was in eighth grade—because M was concerned about “depression and poor

motivation”—Platt was called by petitioners to testify on their behalf. In short, Platt provided straightforward testimony consistent with her report.

In her report dated March 13, 2018, Platt wrote that both family members and school personnel reported that S had a history of ADHD-like symptoms, but Platt did not know if S’s inattentive symptoms were a manifestation of his academic confusion or something else, and stated that further diagnostic clarification was needed.

At the hearing, Platt expanded upon this in response to direct questioning about it, but her answer and explanation remained the same. Platt restated that S’s reported ADHD symptoms could have been attributed to something cognitive or to something academic. Her point was clear: A broader context was needed to determine the cause—which is why she referred S for further evaluation and monitoring.

Returning to her report, Platt continued that M reported that S received a significant amount of individualized in-class support during elementary school, but with the transition to middle school and then high school, S felt overwhelmed. In fact, Platt thought S could be at risk: “It should be noted that there can be emotional sequelae, such as depression and anxiety, from long-term academic struggles, and [S’s] experience puts him at risk for these.” Indeed, Platt wrote that school personnel reported symptoms suggestive of depression and anxiety. As such, Platt wrote that further diagnostic clarification was warranted through a more in-depth psychiatric evaluation over time, as well as ongoing clinical monitoring.

At the hearing, Platt further explained that the long-term struggles, which M reported, were actually more suggestive of an adjustment disorder than depression. In other words, Platt believed that the academic struggles were the trigger, and that these struggles, which again had been long-standing, made it impossible to determine exactly when these struggles triggered the suspected disorder. It could have been within the prior three months, or it could have been longer, but either way, it mattered not because knowing the precise nature of the diagnosis would have added nothing to the understanding of S’s needs and the recommendations for his programming.

As a point of emphasis, Platt referred to page eleven of her report and asserted that S was in need of, and would have benefited from, therapy: “It should be noted that this is a time-limited assessment and, as detailed in the recommendations, [S] will need ongoing clinical monitoring. As with all youths, his clinical presentation may change over time through development.”

Although Platt made this recommendation for counseling to petitioners in March 2018 when S was in eighth grade, S never underwent any counseling, and petitioners later rejected the opportunity when the Child Study Team offered it to petitioners through the two IEPs at issue in this case. In fact, petitioners never contacted Platt with any questions about her report. Meanwhile, respondent incorporated all of Platt’s recommendations in the two IEPs.

In short, petitioners’ calling Platt as a witness only highlighted the fact that any perceived academic struggles were more likely attributable to petitioners’ rejection of a school-based counseling program than respondent’s rejection of an out-of-district reading program.

M

M testified at the hearing and provided some history and insight into her son’s struggles. M testified as S’s mother and as a member of the IEP team about what was the root of her son’s problem, and what the Child Study Team proposed during the IEP meetings. On balance, I found her testimony unhelpful. At times, I found it contradictory, and at other times, I found it evasive. Either way, it had no meaningful impact on my decision-making.

M first identified a series of evaluations, consultations, recommendations, and reports from kindergarten through fifth grade, and then a series of emails between her and respondent from eighth through tenth grades to support her lay opinion that S needed the instruction he received at Lindamood-Bell in ninth grade.

M asserted that her son was struggling in school—that he was frustrated and failing—even though he received no failing grades—and that respondent offered no counseling—even though counseling was offered in the IEPs for both tenth and eleventh grades.

M testified that she did not believe that Teen Pride, the counseling respondent offered in the IEPs for tenth and eleventh grades, was in fact counseling, but I did not believe her because the IEPs explicitly state, “Teen Pride is an outside contracted counseling service.”

Putting that entry aside, it is possible that M had confused “student-driven counseling” as counseling given by students rather than counseling given by mental-health professionals, but on cross-examination, M undermined her credibility further when she testified in succession that she did not reject Teen Pride, that she did not remember Teen Pride, and that she did not know if Teen Pride would help.

Regardless, no evidence exists that M sought to provide any form of counseling for her son.

M’s truest statement, however, followed her testimony about counseling. During that portion of the examination, M explained that she was focused on Lindamood-Bell, not counseling, and that she wanted a reading intervention program, not counseling. Thus, respondent’s rejection of the private reading program, not respondent’s alleged failure to provide counseling, is what this case had always been about, and why petitioners’ complaints about counseling lie fallow.

M’s testimony about Teen Pride also made it hard to believe M’s testimony about the resource room. M testified that the Child Study Team did, in fact, offer the resource room as a placement for S for the 2018–19 school year, tenth grade, but that the Child Study Team did not really mean it. According to M, the Child Study Team told her that S did not need such a placement.

But on cross-examination, M testified that she was the one who hesitated about the resource room.

In fact, M stated that the Child Study Team had suggested the resource room as a placement for S in November 2017, during the beginning of ninth grade, but that she hesitated because she wanted to know more about it.

At bottom, M had no idea what respondent did or did not implement in school during the 2018–19 and 2019–20 school years, and whether the IEPs for those school years were appropriate.

CONCLUSIONS OF LAW

FAPE

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to ensure that all children with disabilities have available to them a “free appropriate public education 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). This “free appropriate public education” is known as FAPE.

Another purpose of the Act is to assist states in the provision of FAPE. See 20 U.S.C. § 1400(d)(1)(C). Toward this end, a state is eligible for assistance if the state has in effect policies and procedures to ensure that it will meet the requirements of the Act. 20 U.S.C. § 1412(a). In New Jersey, such policies and procedures are set forth in the State statute, special schools, classes and facilities for handicapped children, N.J.S.A. 18A:46-1 to -55, and the implementing regulations, special education, N.J.A.C. 6A:14-1.1 to -10.2. See *Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg’l High Sch. Dist.*, 116 N.J. 30, 34 (1989).

The issue in this case is whether respondent failed to provide S with FAPE for the 2018–19 and 2019–20 school years.

The Act defines FAPE as special education and related services provided in conformity with the IEP. 20 U.S.C. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, 458 U.S. at 189.

Reasonably Calculated

Yet the Act did not impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, 458 U.S. at 192. In support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972). Rowley, 458 U.S. at 192. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, 458 U.S. at 192–93. The Court also wrote that available funds need only be expended “equitably” so that no child is entirely excluded. Rowley, 458 U.S. at 193, n.15. Indeed, the Court commented that “the furnishing of every special service necessary to maximize each handicapped child’s potential is . . . further than Congress intended to go.” Rowley, 458 U.S. at 199. Thus, the inquiry is whether the IEP is “reasonably calculated” to enable the child to receive educational benefits. Rowley, 458 U.S. at 206–07.

Significant Learning and Meaningful Benefit

The Third Circuit later held that this educational benefit must be more than “trivial.” See Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988). Stated otherwise, it must be “meaningful.” Id. at 184. Relying on the phrase “full educational opportunity” contained in the Act, and the emphasis on “self-sufficiency” contained in its legislative history, the Third Circuit inferred that Congress must have envisioned that “significant learning” would occur. Id. at 181–82. The Third Circuit also relied upon the use of the term “meaningful” contained in Rowley, as well as its own interpretation of the benefit the handicapped child was receiving in that case, to reason that the Court in Rowley expected the benefit to be more than “de minimis,” noting that the benefit the child was receiving from her educational program was “substantial” and meant a great deal more than a “negligible amount.” Id. at 182. Nevertheless, the Third Circuit recognized the difficulty of measuring this benefit and concluded that the question of whether the benefit is de minimis must be answered in relation to the child’s potential. Id. at 185. As such, the Third Circuit has written that the standard set forth in Polk requires “significant learning” and “meaningful benefit”; that the provision of “more than a trivial educational benefit” does not meet that standard; and that an analysis of “the type and amount of learning” of which a student is capable is required. Ridgewood, 172 F.3d at 247–48. In short, such an approach requires a student-by-student analysis that carefully considers the student’s individual abilities. Id. at 248. In other words, the IEP must confer a meaningful educational benefit in light of a student’s individual needs and potential. See T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).

Appropriately Ambitious

In Endrew v. Douglas County School District, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017), the United States Supreme Court returned to the meaning of FAPE. The Court explicated that while it had declined to establish any one test in Rowley for determining the adequacy of the educational benefits conferred upon all children covered by the Act, the statute and the decision point to a general approach: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at

999, 197 L. Ed. 2d at 349. Toward this end, the IEP must be “appropriately ambitious” in light of those circumstances. 137 S. Ct. at 1000, 197 L. Ed. 2d at 351.

The Court continued that a student offered an educational program providing merely more than de minimis progress from year to year could hardly be said to have been offered an education at all, and that it would be tantamount to sitting idly until they were old enough to drop out. 137 S. Ct. at 1001, 197 L. Ed. 2d at 352. The Act demands more, the Court asserted. “It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Ibid.

Thus, in writing that the IEP must be “appropriately ambitious” in light of the child’s circumstances, the Court sanctioned what has already been the standard in New Jersey: The IEP must be reasonably calculated to provide significant learning and meaningful benefit in light of a student’s individual needs and potential.

LRE

An IEP must not only be reasonably calculated to provide significant learning and meaningful benefit in light of a student’s needs and potential but also be provided in the least restrictive environment. See 20 U.S.C. § 1412(a)(5)(A). To the maximum extent appropriate, children with disabilities are to be educated with children without disabilities. Ibid. Thus, removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Ibid. Indeed, this provision evidences a “strong congressional preference” for integrating children with disabilities in regular classrooms. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993).

To determine whether a school is in compliance with the Act’s mainstreaming requirement, a court must first determine whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. Id. at 1215. If such education cannot be achieved satisfactorily, and placement outside of the regular classroom is necessary, then the court must determine whether the school has made

efforts to include the child in school programs with nondisabled children whenever possible. Ibid. This two-part test is faithful to the Act's directive that children with disabilities be educated with nondisabled children to the maximum extent appropriate and closely tracks the language of the federal regulations. Ibid.

Accordingly, a school must consider, among other things, the whole range of supplemental aids and services, including resource rooms and itinerant instruction, speech and language therapy, special-education training for the regular teacher, or any other aid or service appropriate to the child's needs. Id. at 1216. "If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." Ibid. Indeed, the Act does not permit states to make mere token gestures to accommodate handicapped children, and its requirement for modifying and supplementing regular education is broad. Ibid.

To underscore, the Third Circuit has emphasized that just because a child with disabilities might make greater academic progress in a segregated special education classroom does not necessarily warrant excluding that child from a general education classroom. Id. at 1217.

This Case

In this case, petitioners argue that respondent did not provide FAPE for the 2018–19 and 2019–20 school years because neither IEP provided a remediation program in reading and math. As a corollary, petitioners argue that neither IEP provided goals and objectives to address remediation in reading and math. In addition, petitioners argue that respondent did not provide FAPE for the 2018–19 and the 2019–20 school years because neither IEP mentioned dysgraphia or dyslexia and neither contained any goals or objectives for them. Likewise, petitioners argue that neither IEP provided goals and objectives to address executive functioning or central auditory processing. Ultimately, petitioners argue that respondent did not provide FAPE because neither IEP provided a remediation program at the Lindamood-Bell Learning Center, and later the Lindamood-

Bell Academy, despite the fact that it would have required an increased amount of time out of school and out of district.

For the reasons stated below, these arguments are misplaced. In short, the testamentary and documentary evidence do not support their arguments. To the contrary, a preponderance of the evidence exists that respondent did provide FAPE for both the 2018–19 and 2019–20 school years.

To begin, the parties knew during the annual review in February 2018 that S had been diagnosed with central auditory processing disorder and dysgraphia, and Pomponio explained that S had trouble staying on task and completing homework during the first half of the school year but turned it around during the second half of the school year. The parties also knew that S had trouble with math, but Pomponio explained that S had a very good relationship with his math teacher, and that the decision was made for the math teacher to give S extra support. This was all reflected in the PLAAFP, which specifies that the poor grades S had received during the first half of the school year were due to his failure to complete homework, not because he was incapable of accessing the education.

In particular, S's social studies teacher reported that S had benefited from the accommodations and modifications and that he was working with S individually to make him more comfortable completing his tasks. His math teacher reported that he had modeled for S how to take notes and stay organized, and specified which accommodations S benefited from. S's language arts teacher reported that despite S's struggles with organization and homework, S had still managed to keep up with the class and earn good grades, also due to the accommodations in the IEP.

S's science teacher reported that the reason S earned a D for the first marking period, a C- for the second marking period, and a D for the third marking period was not because S was incapable of doing the work, but because S had failed to finish his homework. S's science teacher, however, did not dismiss S's struggles with math. Nor did she dismiss S's dampened enthusiasm. To the contrary, S's science teacher explained that S had become more comfortable with the material as it became more

multisensory, that S had benefited from one-to-one instruction, and that they were working on S's ability to do more. Although S's science teacher expected S's performance to improve in the second half, it unfortunately did not, and S earned a D for the year.

That S earned a D in science for ninth grade, however, does not render the IEP for the 2018–19 inappropriate. The IEP was a reasonable calculation. Proof of its reasonableness was the grades S earned in his other classes for ninth grade. S earned a C+ in social studies (World History), a C in math (Algebra I), and a B in language arts (English I). As Pomponio stated, S was a C student who sometimes gets a B and sometimes gets a D. In other words, S was an average student doing average work by the measure of his cognitive ability and academic achievement.

Regarding the remediation program for reading, Pomponio explained that it was so successful the second half of eighth grade that S did not need it for high school, and “a slightly less intensive, more embedded reading support arrangement” was proposed instead.

Pomponio further explained that the proposal for S in the IEP for the 2018–19 school year was three-fold: (1) S would receive direct instruction one hour per week after school for reading intervention and remediation in a research-and-evidence-based program to address his areas of need—including word attack, spelling, fluency, and comprehension; (2) an educational learning consultant would assist S's teachers in helping S implement the strategies S would learn in the program; and (3) S would receive counseling to address anything he wanted—including organizational skills, anxiety, depression, and peer relations.

In addition, Pomponio explained that the Child Study Team further recommended to petitioners that S see a private psychiatrist who could assist with or recommend a plan for S to address his possible anxiety and depression.

Petitioners, however, never took that advice. They rejected the school counseling, and they rejected the remediation program. Instead, petitioners wanted respondent to

fund a private program at Lindamood-Bell Learning Center, including the Lindamood-Bell Academy, during the school day.

Pomponio explained that the reading intervention program at the Lindamood-Bell Learning Center was specifically discussed during the IEP meeting, but that the Child Study Team believed it was not needed and too restrictive. Pomponio further explained that part of the concern centered around S's ability to earn enough credits to pass ninth grade, integrate with his peers, and ultimately graduate high school. More specifically, Pomponio explained that the Child Study Team was concerned about the quality of instruction at Fusion Academy (where S would make up the credits he missed in district), including the possibility that none of the instructors would be certificated, as well as the lack of peer modeling (since the instruction was exclusively one-on-one). Finally, Pomponio explained that neither the Lindamood-Bell Learning Center nor Fusion Academy offered licensed mental-health counselors to address S's possible anxiety and depression.

Pomponio's testimony was corroborated and bolstered by Messina, who explained that she had reviewed the data from the reading intervention program from eighth grade, the 2016–17 school year, and that S never dipped below the line for which reading intervention would have been recommended. Messina further explained that S was reading at an eighth-grade level at the end of eighth grade, that the i-Ready reading assessment comported with the Fountas and Pinnell reading assessment, and that S tested into the highest level of the Corrective Reading Program. Messina's acknowledgment that she was unaware that S had been diagnosed with a central auditory processing disorder and dyslexia made no difference to the appropriateness of the program because as Messina explained, she saw no evidence of either the central processing disorder or dyslexia impacting his reading to require intervention.

Meanwhile, the testimony Schwartzman, Lehrhoff, and Platt provided had little impact in my decision-making. Schwartzman has no training in methods other than the Lindamood-Bell Learning Process, and she has no education, training, or experience that would permit her to teach in a public school, let alone opine about the appropriateness of an IEP. Those deficits aside, Schwartzman merely recommended that S receive

intensive reading instruction from her private learning center. Moreover, Schwartzman merely stated in her evaluation (putting aside any potential interest, motive, or bias) that S “may benefit” from such instruction. In other words, she did not state, assert, or opine that such instruction was either recommended, needed, or required for a FAPE.

That S arguably made progress at the Lindamood-Bell Learning Center is hardly persuasive. As respondent convincingly writes in its post-hearing brief, all of S’s scores remained within the confidence interval. Moreover, Lehrhoff, who touted the scores, could not even explain some of them, admitting on cross-examination that she had no training in the Lindamood-Bell Process, did not know its processes and methodologies, and had no documentation from the school district to determine its impact:

With regard to S.V.’s “success” using Lindamood-Bell, Ms. Lehrhoff admitted that on the Lindamood-Bell testing, many of S.V.’s scores either stayed the same or went down, and if they increased, they did so within the confidence interval. Thus, Ms. Lehrhoff was not able to state that S.V. made any actual progress on the Lindamood-Bell testing, except to argue that his scores staying the same, going down, or not improving enough to be outside of the confidence interval, could be considered progress as it happened within three months. Ms. Lehrhoff also agreed that she could not explain some of the testing completed by Lindamood-Bell as she had not been trained in [its] methodology. Finally, Ms. Lehrhoff admitted on cross that she was not provided with any documentation or information, through the parents, or through the parents’ attorneys, to rule out the instruction given to him in school also having an impact on his progress.

[Resp’t’s Br. at 43–44 (citations omitted).]

Taken together, Schwartzman’s recommendations, and Lehrhoff’s attempt to bootstrap them, are unpersuasive, especially since no attempt was made to even discuss this touted instruction and share these purported gains with respondent. In fact, Schwartzman testified that she understood that S’s learning problems were emotional, not educational, and that she made no school-based recommendations for S for reading or for anything else. To be sure, her only recommendation on behalf of the Lindamood-Bell Learning Center was continued instruction—at the Lindamood-Bell Learning Center.

Meanwhile, Lehrhoff, whom petitioners hired to write a report and testify at the hearing after they had already filed the first of these two cases, began in her report that S lacked motivation, was down on himself, and lacked self-confidence. So, from the start, Lehrhoff alerts the reader to emotional issues, not educational ones. More significantly, at the hearing, Lehrhoff harkened back to the Educational Assessment from January 9, 2017, to conclude that S had significant achievement weakness compared to same-age peers in basic reading skills and math calculation, but admitted on cross-examination that she did not know an addendum had been issued later that month, on January 26, 2017, due to questions concerning the initial scores' accuracy, and that the scores were considerably higher.

Likewise, Lehrhoff, who has no experience consulting with public schools, testified that she believed S should have been classified as having a specific learning disability in math, yet Lehrhoff provided no standard and no calculus to support this assertion.

Finally, Lehrhoff fails to explain how the alleged failure to classify S with an additional disability would have changed programming—other than to write in her report that S would need greater accommodations as the curriculum becomes more challenging and immediate assistance should S become overwhelmed.

But then again, Lehrhoff changed her recommendation of accommodation to remediation at the hearing.

In fact, Lehrhoff changed other positions at the hearing as well, including her assertion that S should have been placed in the resource room, because in her report, Lehrhoff never mentioned the resource room—not even once in any of her twenty-four detailed recommendations.

Lehrhoff, however, had written her report without full information. For example, she revealed at the hearing that she did not know that S had scored out of remediation for math, that S was permitted to use a calculator in class, and that S's math fluency was

better than she implied because S had answered all the questions he answered correctly and was not expected to have answered all of them.

Lehrhoff had also revealed that she had only reviewed the IEP for the 2018–19 school year, and that she did not know that petitioners had rejected the recommendations Messina had made for it, namely, a reading intervention program and the offer for Messina to work with S’s teachers to assist them with the implementation and utilization of strategies to help S improve his reading skills across all subjects.

Moreover, Lehrhoff did not know that the Child Study Team had raised the resource room as a potential placement for S for the 2018–19 school year, but petitioners never pursued the possibility and ultimately rejected it.

Finally, the testimony Platt provided helped petitioners not at all. Platt testified about the parties’ initial concern, the concern about potential anxiety and depression, which petitioners, not respondent, failed to address. To underscore, in her report dated March 13, 2018, Platt wrote that both family members and school personnel reported that S had a history of ADHD-like symptoms, but Platt did not know if S’s inattentive symptoms were a manifestation of his academic confusion or something else, and stated that further diagnostic clarification was needed. At the hearing, Platt expanded that S’s reported ADHD symptoms could have been attributed to something cognitive or to something academic, which is why she referred S for further evaluation and monitoring, and why she recommended counseling to petitioners, but S never underwent any private counseling. To be sure, petitioners rejected the opportunity through the district when petitioners rejected the counseling respondent offered in both its IEPs for S. In fact, petitioners never even contacted Platt with any questions about her evaluation. Regardless, Morris incorporated all of Platt’s recommendations in the IEPs that are the subject of this litigation.

Indeed, this counseling component became even more relevant when discussing the IEP for the 2019–20 school year.

At the annual review in May 2019, Pomponio explained that S was able to learn with support, that he made meaningful progress in the classroom with support as reported by his teachers, and that S did not want to be separated or stigmatized. Pomponio explained that S's math teacher reported that S had been progressing in her class, and that S had earned a C- (70%) for marking period one, a C (74%) for marking period two, but a D- (61%) for marking period three because he was earning an F (32%) for completing assignments and participating in class, and S's math teacher was seeking greater effort from him.

Pomponio further explained that this lack of effort, which had also been seen in science, was why the Child Study Team believed that the counseling component it proposed was more important than the reading intervention petitioners sought, especially when petitioners had requested, and were granted, an independent psychiatric evaluation, but petitioners rejected the proposed counseling.

Indeed, S's science teacher reported that S had been progressing in science and that S had earned a D+ for the first marking period and a D for the second marking period, but S had earned a C for the third marking period and was earning a C for the fourth. S's science teacher also reported that S had begun using his binder during the second half of the school year and that S had benefited from other accommodations as well. In fact, S only needed to improve his time on tasks, as his preparedness for and participation in class was satisfactory, and as his report card indicates, S earned a C, not a D, for the year.

Meanwhile, S's social studies teacher reported that S had earned an A+ for marking period one, a B for marking period two, and an A- for marking period three, in part because S completed his homework on time, both thoroughly and consistently, and that S had benefited from both the modifications and the accommodations.

Finally, S's language arts teacher reported that S had been earning a C- in his class, and that the modifications and accommodations had been helpful, but that S often declined to use a graphic organizer, which affected his writing and was the reason why his grade was not higher.

Moreover, Pomponio explained that the Child Study Team had considered all the new evaluations, including the one from Lindamood-Bell, and that they supported their position that S continued to make progress, albeit with the same ongoing challenges. In fact, Pomponio testified that the picture of S was so well established that nearly all the recommendations from the psychiatric evaluation from Platt were already in the IEP. As such, S earned a C- in math (Geometry), a C in science (Chemistry) as already noted above, an A- in social studies (US History), and a C- in language arts (English) for his final grades. So once again, as Pomponio stated, S was a C student who sometimes got a B and sometimes got a D, but now in his junior year, S was a C student who sometimes got an A but never a D. As such, S was an average student doing average work by the measure of his cognitive ability and academic achievement.

To reiterate, Pomponio explained that counseling through Teen Pride was again offered but again rejected, and even though a reading intervention was not offered, because the Child Study Team believed that the previous program was a success, the Child Study Team still offered another reading evaluation, but this too was rejected.

Putting this discussion aside, even if one were to assume that S would have had greater success out of district in the private program petitioners sought—the cocktail of Lindamood-Bell Learning Center, Fusion, and Lindamood-Bell Academy—it did not warrant, to paraphrase the Third Circuit in Oberti, 995 F.2d at 1217, the removal of S from the general-education classroom and placement out of district.

Given this discussion, I **CONCLUDE** that the IEPs at issue, the IEPs for the 2018–19 and 2019–20 school years, were reasonably calculated to provide significant learning and meaningful benefit, that is, they were appropriately ambitious in light of S’s circumstances, and in the least restrictive environment.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the petitions for due-process hearing in this case are hereby **DISMISSED** in their entirety.

This decision is final under 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2020) and is appealable by filing a complaint and bringing a civil action in the Law Division of the Superior Court of New Jersey or in a district court of the United States under 20 U.S.C. § 1415(i)(2) and 34 C.F.R. § 300.516 (2020). If the parent or adult student believes that this decision is not being fully implemented with respect to a program or service, this concern should be communicated in writing to the Director of the Office of Special Education Programs.

August 10, 2020

DATE



BARRY E. MOSCOWITZ, ALJ

Date Received at Agency

August 10, 2020

Date Mailed to Parties:

August 10, 2020

dr

APPENDIX

Witnesses

For Petitioners:

Lucy Schwartzman
Jamie Lehrhoff
Jennifer Platt
M.

For Respondent:

Nicholas Pomponio
Christine Messina

Documents

Joint:

- J-1 IEP dated November 21, 2016
- J-2 IEP dated July 28, 2017
- J-3 IEP dated February 28, 2018
- J-4 IEP dated May 9, 2019
- J-5 Educational Evaluation Addendum dated January 26, 2017
- J-6 Psychological Assessment dated January 9, 2017
- J-7 Pediatric Neurodevelopmental Evaluation Report dated May 25, 2017
- J-8 Psychiatric Consultation dated March 13, 2018
- J-9 English Language Arts/Literacy Assessment Report, 2016–17, and Mathematics Assessment Report, 2016–17
- J-10 Report Card for eighth grade
- J-11 Progress Reports for IEP Goals and Objectives, 2016–17

For Petitioners:

- P-A Not in evidence
- P-B Admitted into evidence as J-1

- P-C Admitted into evidence as J-2
- P-D Not in evidence
- P-E Admitted into evidence as J-3
- P-F Admitted into evidence as J-4
- P-G Admitted into evidence as J-11
- P-H Admitted into evidence as J-9 and J-10
- P-I Occupational Therapy Evaluation dated June 19, 2008
- P-J Vision Evaluation dated February 4, 2010
- P-K Neurological Evaluation dated July 13, 2010
- P-L Speech/Language Evaluation dated October 18, 2010
- P-M Optometrist Evaluation dated August 31, 2011
- P-N Auditory Processing Evaluations dated February 10, 2013, and April 6, 2014
- P-O Auditory Processing Evaluation dated November 15, 2013
- P-P Assistive Technology Evaluation dated January 10, 2014
- P-Q Admitted into evidence as J-5
- P-R Admitted into evidence as J-6
- P-S Admitted into evidence as J-7
- P-T Admitted into evidence as J-8
- P-U Documents from Lindamood-Bell
- P-V Curriculum vitae of Jamie Lehrhoff
- P-W Emails from petitioners
- P-X Not in evidence
- P-Y Not in evidence
- P-Z Not in evidence

For Respondent:

- R-1 Admitted into evidence as J-1
- R-2 Admitted into evidence as J-2
- R-3 Admitted into evidence as J-3
- R-4 Admitted into evidence as J-4
- R-5 Admitted into evidence as J-5
- R-6 Admitted into evidence as J-6
- R-7 Admitted into evidence as J-7

- R-8 Admitted into evidence as J-8
- R-9 Admitted into evidence as J-9
- R-10 Admitted into evidence as J-10
- R-11 Admitted into evidence as J-11
- R-12 Various reading assessment documents
- R-13 Mathematics Assessment Report, 2017–18, and English Language Arts/Literacy Assessment Report, 2017–18
- R-14 High School Transcript for ninth and tenth grades
- R-15 Progress Report for IEP Goals and Objectives, 2017–18
- R-16 i-Ready Student Profile Report, 2017–18
- R-17 Mathematics Assessment Report, 2018–19, and English Language Arts/Literacy Assessment Report, 2018–19
- R-18 Not in evidence
- R-19 Progress Report for IEP Goals and Objectives, 2018–19
- R-20 Curriculum vitae of Christine Messina
- R-21 Curriculum vitae of Nicholas Pomponio
- R-22 Not in evidence