



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

OAL DKT. NO. EDS 03237-19

AGENCY DKT. NO. 2019-29355

**S.M. AND T.M. ON BEHALF OF Z.M.,**

Petitioners,

v.

**BRANCBURG TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**Lori M. Gaines**, Esq. for petitioners (Barger & Gaines, attorneys)

**Rita F. Barone**, Esq., for respondent (Purcell Mulcahy Flanagan, attorneys)

Record Closed: May 8, 2020

Decided: May 27, 2020

BEFORE **TAMA B. HUGHES**, ALJ:

**STATEMENT OF THE CASE**

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, S.M. and T.M. (collectively “petitioners”) have requested a due process hearing on behalf of their son, Z.M., who is classified as eligible for special education and related services. Petitioners contend that the Branchburg Board of Education (the “Board” or District”), failed to offer their son an Individualized Education

Program (IEP) that delivered a Free and Appropriate Public Education (FAPE) for the 2018/2019 and 2019/2020 school year. Petitioners unilaterally placed Z.M. at Somerset Hills Learning Institute (SHLI) and seek continued placement at SHLI, reimbursement for their expenses including but not limited to tuition, transportation costs and attorney's fees.<sup>1</sup>

### **PROCEDURAL HISTORY**

The request for due process was received by the Office of Special Education Programs (OSEP) on February 4, 2019. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on March 7, 2019, pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13.

Hearing dates in this matter took place on July 10, 2019, September 11, 2019, September 27, 2019, January 14, 2020, and April 20, 2020. Closing briefs were submitted on March 31, 2020, with supplemental briefing received on May 8, 2020, at which time the record closed.

### **FACTUAL DISCUSSION AND FINDINGS OF FACT**

#### **Testimony:**

**Alison Elizabeth Eby (Eby)**, the District's Board-Certified Behavior Analyst (BCBA), testified that she graduated from the University of California with a degree in Psychology. Thereafter she received her Master's from the University of Washington in Special Education with an emphasis in Applied Behavior Analysis (ABA). Thereafter, in September 2013, she received her BCBA. (R-45.) Eby was qualified as an expert in the area of Behavior Analysis and Educational Programming for students with Autism Spectrum Disorder (ASD).

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<sup>1</sup> While the relief requested in the Petition for Due Process and Amended Petition for Due Process sought Compensatory Education (Relief Requested, Paragraph 12), petitioners have indicated they are not seeking Compensatory Education.

She has experience in performing Functional Behavior Assessments (FBA) since 2010 as an undergraduate. Eby described an FBA as a process that identifies: specific target behavior; the purpose of the behavior; and what factors maintain the behavior that is interfering with the student's educational progress. Thereafter, a Behavioral Intervention Plan (BIP) is developed.

Eby stated that she has extensive experience in data collection and overseeing or monitoring program books. If she works with a general education teacher, she has a different type of data system than she would if she were working with Z.M., who would have a full-time registered behavior technician (RBT). An RBT is overseen by a BCBA and are required to have forty hours of specified course work and pass a competency exam. In her current position and prior positions, she has provided training and oversight of RBTs.

According to Eby, there are specific assessments that are administered to autistic children, some of which are standardized, others are not. Some of the non-standardized assessments are used to show developmental progress. One such test is the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP). Another test is the Assessment of Basic Language and Learning Skills - Revised (ABLLS-R). These tests assess the student on all of the skills that a typically developing student should have by the age of three or by age five. The tests are helpful in targeting what interventions would be beneficial for a student and thereafter a program can be created in the areas of need. They are also helpful in developing goals and objectives in an IEP.

Her first interaction with Z.M. was in June 2018, when she observed him at the SHLI. (J-17.) Prior to this visit, she reviewed the March 2018, report by petitioner's consultant, Dr. Hannah Hoch, BCBA (Dr. Hoch) who had observed and prepared a report of her observation of Z.M. six months prior.

At the time she (Eby) observed, Z.M., he was a couple of months shy of turning three-years-old. She and her colleague, Heather Lilly (Lilly) were at the school for approximately three hours. While there, she observed that Z.M. was quite compliant with programming and that his verbal skills were average overall. She did note some social pragmatic skills deficits such as eye contact or appropriate responses to questions asked. There were a few episodes of non-compliance such as pushing things away or refusing to go outside. When this occurred, she saw how Z.M.'s teachers handled the situation by redirecting Z.M. She did not observe nor did his teacher indicate, that Z.M. exhibited aggressive behavior

Circle time took place during the observation. Since a number of students were out that day, Z.M. was in circle time by himself and did nicely. According to his teacher, when other students are present, he requires prompting to participate effectively. During circle time, Z.M. was very interactive with them – continuously turning around and smiling. When he made something, he would show it to them. The only social interaction that they witnessed with another child was when Z.M. interacted with his sister at snack time and on the playground. Eby noted that this was one of the deficits with the school - the lack of peers that were good models for him. The only peer with whom he interacted with was his sister who was also on the autism spectrum, were the other children in the classroom who also displayed social and behavioral deficits.

Elopement was a concern raised by Dr. Hoch and the petitioners; however, she did not observe this behavior during her visit. SHLI had been teaching Z.M. a “waiting” program. When told to “wait”, he would stay still. The District would have done a similar program and would have also attempted to extend it into the home environment. It was Eby’s impression that the overall program at the SHLI was effective for Z.M. in redirecting his behaviors. The District addressed this concern in the IEP and would have attempted to model their program similarly without any major changes.

Eby went back to the SHLI on June 11, 2019, to observe him in his morning session. One of the things that Dr. Hoch and Z.M.'s teachers at the SHLI found was that Z.M. had a number of deficits when it came to generalization of skills in multiple

settings. During her observation on this date, she noted that with staff members whom he was more familiar with, he had better social skills, used complete sentences and made eye contact. With other staff members whom he was not as familiar with, he did not continuously display the same skills. While she saw a BCBA in the classroom, she was not working with Z.M., rather observing him and giving feedback to the instructor who was working with him.

She did not have the opportunity to review Z.M.'s SHLI school records prior to her June 2018, observation or before the July 2018, IEP was drafted because the records were not received until the day prior to the July 19, 2018, IEP meeting. (P-52.) The records were voluminous, and she started going through Z.M.'s program binder while in the meeting.

In going through the records, she noted that the teachers at SHLI were working on targets or in phases with Z.M. – the skill sets broken down into components. As Z.M. progressed in a skill or activity, the supports would slowly be withdrawn, and the targets would then change to a new one.

In comparing SHLI's program to goals and objectives found in an IEP, she stated that the objective in an IEP is where you want the child to be at year end. For a student with ASD, you start at an easier level and work up slowly. Goals are broken down into smaller pieces and then the small pieces are measured along the way to ensure that adequate progress is made towards the goals.

In Z.M.'s IEP, the Child Study Team (CST) tried to identify his areas of need based on his current level of functioning. It was the District's intention to continue with some of the targets identified by SHLI's as they appeared to be meaningful to Z.M. The results of the evaluations (Social History; Speech/Language Evaluation; Occupational Therapy (OT) Evaluation; Battelle Developmental Inventory (Battelle)), were also integrated into the IEP as were the recommendations by Dr. Hoch. (P-7, J-11, J-12, J-13, and J-14.)

Regarding Dr. Hoch's recommendations, other than the full time BCBA, most of the recommendations were addressed in the IEP. A full time BCBA was not included because of the staff qualifications at the school. The classroom where Z.M. would be placed would have an RBT with him throughout the day as well as a certified special education teacher who had completed the BCBA course work and supervised hours but had not passed the BCBA test.

In discussing the recommended program in Z.M.'s IEP, Eby stated that the CST initially recommended a split program. In the morning Z.M. would be in the preschool disabled classroom. In the afternoon, he would be in an inclusion classroom. (J-22.) The same teacher would be with Z.M. throughout the day as well as the same RBT. The RBT would have a thirty-minute break when Z.M. went to lunch. At lunch and recess, he would not be alone as other children also attended the full day program and another RBT or a qualified aid would be present. If Z.M. was scheduled to receive group instruction during either segment, he would most likely be pulled out and provided individual instruction on specific programming.

In the inclusion class, he would work on specific skills and have a staff member assigned to him. At the time of Dr. Hoch's observation, there were eleven students in the inclusion classroom – seven were general education students and four were special education students. There was also a teacher and two aids. If Z.M. had attended, an additional staff member – an RBT, would have been added in the inclusion classroom to assist him.

In discussing the merits of an inclusion classroom, Eby stated that one of the biggest benefits of an inclusion class would have been Z.M.'s ability to work with typically developing peers. According to Eby, peer models are effective in teaching young students social pragmatic skills. Given the fact that preschoolers are incredibly forgiving of social transgressions, it was a good time to begin the integration process with Z.M. in a controlled environment. The goal being generalization of the skills to peers which he was unable to do at SHLI. She acknowledged that there were readiness criteria that needed to be present before a student could truly benefit from an

inclusion class, but she felt that Z.M. met the criteria and would benefit. He did not have a high level of interfering or disruptive behavior; he did not have such high communication delays that he would not have been able to understand language or speak in a way that he could interact with typical peers; and his cognitive skills were average.

According to Eby, Z.M. would initially be pulled aside to see what his areas of strength were. The inclusion would start with snack time with his peers and then he would be integrated into the play centers. Some of the IEP goals would be worked on through the social play. Thereafter, they would slowly see how he did in small groups and if that was successful expand him into larger groups. He wouldn't start out in every activity. The afternoon would also have included either a discrete trial or individualized ABA instruction that was not a discrete trial or both. Eby went on to note that in Dr. Hoch's report, among her list of recommendations, was the transitioning of Z.M. into a less restrictive environment. (P-7.)

While the number is fluid, at the time of Dr. Hoch's observation, contrary to her (Dr. Hoch's) report, there were eight students in the special education classroom and three staff members. Had Z.M. attended the school, an additional staff member – an RBT, would have been added to accommodate Z.M.'s needs such as prompting him in group instruction. In discussing group instruction, Eby stated that Z.M. would initially start with individual instruction until progress was made and then he would slowly be introduced into group instruction with one student at a time if possible.

Z.M. would also receive a full day of Applied Behavior Analysis (ABA) programming with parts of it being a discrete trial type of programming. He would receive prompting and modeling and there would be data collection on specific goals and targets that he was working on. Specific teaching procedures would be used to teach the targets.

The IEP also recommended related services such as speech/language services and OT services. Group speech therapy was twice per six-day cycle and individual

speech therapy was once per six-day cycle. They would occur either in a pull out setting or in the classroom. Unlike SHLI, the District had on staff speech and language pathologist, occupational therapist to facilitate these services. Additionally, Z.M.'s RBT would be with him regardless of where the services were provided.

Data from the various targets would be collected by whoever was working with Z.M. at the time. If it was the related service provider, he/she would collect the data. If it was the RBA or teacher, they would be recording the data. The data is typically recorded on a clipboard. Whoever was working with him would have the clipboard - so at all times the data would be collected. Every time a program is run – which is daily, data is collected. Thereafter, the information would get graphed. According to Eby, goals and objectives in terms of progress are derived from the data collection on the targets.

During her observation at SHLI, she did not see any data collection. Apparently, it is the school's procedure to take data once maybe twice a week - not every time a program is run or even on a daily basis. Eby went on to state that it is important to gather as much data as possible. If you are only taking data once or twice a week, it may be weeks before you realize that a student is not making progress on a program. In addition to the other services, the IEP also recommended behavioral support by a BCBA three hours a week. In describing how she had initially envisioned the support occurring, Eby stated that she would be in consultation with Z.M.'s teacher and the RBT. She would not have direct contact with Z.M. only with his teacher and the RBT would. The BCBA's job is to supervise and coach the teacher and the RBT in the programs. However, that did not preclude additional services if needed. Eby went on to state that individual consultation was specifically added in the revised IEP. (J-65.) Over the course of a year, she may work directly with five students.

No FBA was done on Z.M. as the extent of his behavior at the time did not require one. SHLI had behavioral supports in place and the District would have mirrored it and put similar supports in their BIP. Among the target behaviors were non-compliance and pushing away tasks. Strategies that the District would have used in



their BIP would have included preventing a problem behavior from occurring; teaching Z.M. new skills that he could use instead of the problem behavior; and staff reaction/handling the behavior such as redirection. Additional strategies such as positive reinforcement when he was compliant would have also been used. An example of this would have been the use of a token board where Z.M. would receive tokens for positive behavior that could be exchanged for a reward.

In discussing the Battelle conducted by Early Intervention (EI), Eby stated that Z.M. was found to have weaknesses in his adaptive skills and personal social skills. (J-13.)

As part of the IEP, petitioners were also offered parent training. The goal of parent training was to work on generalizing the skills that were taught in school into the home environment. Also discussed was how to transition Z.M. from his EI program that he had at Somerset Hills into the school. (J-22.)

According to Eby, after the IEP meeting in July 2018, the petitioners asked to observe a self-contained classroom which they did along with Dr. Hoch in October 2018. After the observation, Dr. Hoch generated a consultation report of her observation of Z.M. at SHLI which was sent to the District. (P-31.) Prior to that no feedback had been provided regarding the proposed IEP and Z.M. did not attend the 2018/2019 school year in the District.

In review of Dr. Hoch's report, it appeared that she had observed Z.M. at SHLI in September 2018, and that he had made significant progress since her last observation in January 2018. There were segments of his day that he did not have a one-on-one staff – rather shared staff. This implied that he was showing growth in his ability to follow directions and work in groups. Eby stated that she had personally observed how far Z.M. had progressed in this regard when she went to SHLI to conduct her observation. During that observation, Z.M. was participating in group for twenty minutes. According to Eby, in the District, Z.M. would have been taught how to work in a group such as he's following directions or attending when other children were present.

The time in group would have been gradually built up. It would have been similar to the SHLI program with the exception being in District, Z.M. would have been with typical peers.

In going back to Dr. Hoch's report, Eby noted that there were several inaccuracies in her reporting. One such inaccuracy was her reporting of the student to teacher ratio in the inclusion classroom. Another inaccuracy was the report of a child running around on the playground on his own. The child in question was playing tag with other children for the duration of recess and was also continuously being shadowed by an aid. Eby also noted that Dr. Hoch was distracted during her observation when she visited the school – continuously taking phone calls which may be the reason her report contained inaccuracies. Another inaccuracy was the report that SHLI collects data daily. This finding was not supported by the data documentation provided by SHLI. (P-52.)

Aside from Dr. Hoch's report, no additional information was received prior to the issuance of a revised IEP in January 2019. (J-34.) The proposed changes were itemized and highlighted on a separate sheet. The changes took into consideration the SHLI progress reports received the day before the July 2018, IEP meeting and Dr. Hoch's report. In the revised IEP, several of the goals were edited and more clarification and detail were added surrounding the services. An example of this was the provision of more detail on the ABA instruction – specifically amount and frequency. Also added or clarified in the IEP, was weekly data overview by a BCBA. Eby went on to state that the proposed changes were not just for staff consultation – she would also work with Z.M. personally.

She is familiar with the Applied Behavior Analysis Treatment of ASD - Practice Guidelines for Healthcare funders and Managers (Guidelines) which outlines recommended BCBA oversight based upon the number of hours of programming. According to Eby, the Guidelines were created for health care funders and managers. (P-47.) She went on to state that many ABA services were currently provided through health insurance providers who were learning how to fund the ABA services. To

educate the health care providers, the Guidelines were created to assist them in understanding what ABA services should look like. The model provided was for home-based services - so in that model, for every ten hours of RBT, it was recommended that there be two hours of BCBA oversight. There is no teacher involved in that model just the RBT and the BCBA. In the school's program, there would have been an RBT, a teacher and the BCBA. Additionally, the teacher in question was highly qualified in ABA and would have been able to provide full time support for Z.M. in addition to her three hours of support.

The revised IEP, based upon Dr. Hoch's recommendation, also reduced the amount of time that Z.M. would be in the inclusion room from a half to a quarter of the day. The District felt that it was important for him to have a certain level of exposure as that is where he would learn best - those group skills, play skills and social pragmatic skills that he had deficits in. Z.M. would have been with the general education peers for snack, play based instruction, small group math, science/story lab.

Also offered as related services was additional parent training from two to eight hours monthly. SHLI was currently providing eight hours and the District was attempting to match the hours. The transition statement was also updated to address the regression concerns raised by Dr. Hoch. In this regard, the District was willing to work with SHLI on whatever recommendations they may have as it related to transition services.

In March 2019, as part of the Due Process Mediation, she was asked to observe Z.M. at SHLI and perform a data review of his program. On three occasions in March 2019, she and Lilly went for observations at SHLI for a total of five and a half hours. Thereafter, an observation report was generated. (R-54.) During this time Z.M. received one-on-one instruction for four hours, he was in a dyad – paired with another student for instruction, for forty-five minutes and was at lunch for forty-five minutes. It was her impression that Z.M. had made significant progress in his ability to work in a group since September. He also progressed on certain programs such as toilet training, waiting and following directions. She also observed quite a bit of large group

instruction in which he was doing quite well. This confirmed her belief that Z.M. would have benefitted from group instruction in the District.

Eby went on to state that one of the things that was of concern in her observation of Z.M. was the fact that he was the only preschool aged student in the classroom. This was concerning because a preschooler works on different skills than school aged children. Additionally, the student that Z.M. was paired with was also on the autism spectrum and had a number of language and social pragmatic deficits as well as difficulty with making eye contact. Several times during the observation period, the teacher had to prompt one or both of the children to look at each other. Z.M.'s partner also had a speech impairment and was difficult to understand. As a result, he was not a good verbal role model for Z.M. Three of the students in the class displayed disruptive behavior to the point that some of the children had to be removed from the class by the supervisor. When this occurred, the classroom was left without a supervisor for a period of time.

On the subject of the classroom supervisor, Eby noted that the supervisor at SHLI, while having completed all of the course work and supervised hours to become a BCBA, had not yet taken the test. As such, she had the same level of qualification as the teacher in the District for the 2018/2019 academic year. Additionally, the supervisor at SHLI throughout the entire observation period spent a total of forty-four minutes with Z.M., the rest of the time, she worked with staff members. She did not know what credentials if any the staff members held. A BCBA was present in the classroom for a total of eight minutes over the course of her three-day observation, however, later conceded that none of her observations allowed her to observe what occurred during the entire school day.

Eby went on to testify that the last IEP offered to Z.M. was in July 2019. (J-65.) It was very similar to the ones previously presented to the petitioners. The new IEP called for ESY, however, the petitioners instead sent Z.M. to SHLI inclusion preschool camp – their rationale being the concern that he would be stigmatized by his peers. According to Eby based upon her experience this is not typically a problem with three-

year-olds. Another change in the IEP was the increase in BCBA support from three hours weekly to six hours weekly. This was done because the teacher in the class was not going to be the same as the one previously offered. The teacher had received training in ABA and would continue to receive ongoing training but had not done all of the course work. As such, the BCBA hours were increased to make sure that Z.M. was supervised in his program. If more time was required, it would have been provided. Parent counselling/training remained the same. The transition section was amended to allow for transition over the extended school year program, with Z.M. spending more time in the District program and having staff from both programs present during the transition period.

The goals and objectives were also amended to reflect Z.M.'s progress and what he had already mastered. Z.M.'s progress was identified based upon his recent progress reports from SHLI and her data review in March 2019 when she observed him at SHLI. Z.M.'s participation in the inclusion class remained at a quarter of the day wherein there would be a slow transition into group sessions.

Eby went on to testify that all of the proposed IEPs offered Z.M. FAPE in the least restrictive environment. Since the initial evaluations, Z.M. was deemed to be a student in need of a full time ABA program who would also benefit from time spent with typical peers. SHLI did not offer such a program. The District offered a comprehensive ABA placement which would allow Z.M. to flourish and provide him the opportunity to be with typical peers in the least restrictive environment. As Z.M. progressed so to would the program as it would evolve with him as his needs changed. Unlike SHLI who utilized token rewards as part of their ABA program, the District's program would have included Pivotal Response Training (PRT). Due to the District's preschool curriculum having a significant amount of time dedicated to structured play, the staff would have embedded a lot of instruction into that play. This would have been in a group or individualized. Other types of ABA methodology would also include such things as discrete trial instruction, specific prompting procedures and reinforcement procedures. Peer mediated interventions and self-management intervention would have also been

used. It was Eby's belief that the District offered more opportunities to provide generalization of skills because there were more students for Z.M. to work with.

On cross-examination, Eby was questioned about her responsibilities. In response she stated that among other things, she performs FBA's, data assessments, staff training and consultation throughout the District. There are approximately forty teachers and eighteen aids in the District that she works with at various points throughout the school year. In addition to the above, over the course of the past year she had been involved in approximately thirty IEP meetings but consulted in only about twenty of them.

She acknowledged that in the 2018/2019 school year, she was not at the Whiton Elementary School on a daily basis, however, stated that she worked very closely with the CST and the case manager who is there full time with the students. According to Eby, while the sign in sheet for the school identified her as signing in only five times in September 2018, she was there significantly more times as the sign-in system had not yet been fully developed. (J-38.) In going through the sign in sheet for October through November 2018, she agreed that at times she was at the school once or twice a week and on some of those visits, she was not there to modify programs or train staff.

When questioned about the classroom teacher, Eby acquiesced that the teacher in the inclusion classroom while having all of the requisite coursework and training, had failed the BCBA test twice. She also agreed that only a BCBA or a BCBAD can supervise an ABA program and that the classroom teacher was neither of them.

In going through her first observation of Z.M. at SHLI, Eby agreed that during her observation, a BCBA was overseeing the classroom and that there was also a BCBAD in the classroom. Also present in the classroom were five students and five staff members in addition to the BCBA and BCBAD. The school had thirty students and five BCBA's which was a six to one ratio, however, as Eby noted later, that did not mean that there was always a BCBA present and supervising in a classroom.

When questioned about how many staff members she oversaw as opposed to the ratio's at SHLI, Eby agreed that numerically, there was a significant discrepancy, however, the comparisons were not the same. This was because the District had a different profile than SHLI - more specifically, the students within the District had fewer academic and/or behavioral needs than a student who is placed out of District.

Eby was also asked about the recommended caseload range in the Guidelines for a BCBA supervising comprehensive autism program - six to twelve students to one BCBA. (P-47, Page 35.) More specifically, she was asked about her email to the Director of Special Services, wherein she commented on why she felt that three hours of supervision sufficed and that anything less would be harder to "defend" as a "quality Comprehensive ABA program". (J-18.) In answer, Eby stated that she did believe that what had been put forward was a Comprehensive ABA program for a school program given the high level of ABA supervision. She went on to reiterate that the program in the Guidelines was not a school-based program.

When questioned further about the level of supervision that was recommended in the July 2018, IEP, she agreed that she would not have provided the same amount of direct supervision recommended in the Guidelines which was thirty to forty hours/week of one-to-one direct treatment. However, she would have if Z.M. required it. Regarding the recommended caseload, while she supervised twenty to thirty other students over the course of the year – her supervision occurred at different times and none of the students had a Comprehensive ABA program as prescribed for Z.M.

Eby acknowledged that prior to the IEP meeting in July 2018, there was discussion about the proposed programming and also a draft IEP had been prepared based upon their discussions. (J-51.) However, the District would have welcomed feedback from the parents and considered anything that they put forward. She agreed that the IEP was not explicit on how much ABA instruction would have been provided or if there would be BCBA consultation, however, this was clarified in the next IEP. (J-22, J-59, and J-65.)

In discussing the July 2018, wherein it was proposed that Z.M. attend the inclusion class for half the day, Eby was asked about the basis for that recommendation. In response, she stated that in looking at his evaluations, his deficits were primarily social skills. It was their belief that he would have benefitted from an inclusion segment in his day. She herself had not performed any assessments nor had she interviewed the petitioners. The only thing that she did was conduct her initial observation and ask questions of Z.M.'s teachers at SHLI. (J-17.) Z.M.'s other assessments were still being conducted by the District, so it was unknown at the time what the recommendations were going to be. While the teachers at SHLI were asked to fill out the teacher input form, they did not and instead sent Z.M.'s progress notes.

Eby was also questioned about the verbiage in the IEP as it related to the benefits of placing Z.M. in the general education classroom. She responded by stating that placing Z.M. in a class with typically developing peers would provide him with good role models and would be better partners for him in social interactions. She acknowledged that on the Battelle, which was one of the things relied upon by the District, Z.M.'s scores on peer interaction skills were very low. She went on to state that this was not the case when she observed him at SHLI when he interacted with his sister.

Eby was also asked why the District believed that it would be beneficial to Z.M., who according to the Battelle had no awareness of his peers, to be placed in an inclusion class. In response she stated that he would have been slowly introduced into the small group instruction and that he would have benefitted from his peers as they do not need as much prompting. She noted that this was also discussed with the petitioners at the IEP meeting. When shown the scheduling for the 2018/2019 school year, she acknowledged that the schedule did not call for one-on-one instruction and most of the activities involved group instruction, however, it was a general schedule outlining the timetable for activities - it was not individualized for Z.M. (J-41.) She also acknowledged that the IEP did not specifically call for one-on-one instruction, however, later on in her testimony, after refreshing her recollection, she revised that statement.



When challenged about her testimony that the District had addressed all of Dr. Hoch's concerns with the exception of having a BCBA on site daily, she stated that she believed that the District did address all of the concerns. Upon further questioning, she agreed that Dr. Hoch's biggest concern revolved around Z.M.'s placement in an inclusion class and that the District did not take Dr. Hoch's recommendation in that regard. Nor did the District solicit SHLI opinion on the appropriateness of the placement. Eby went on to point out that one of Dr. Hoch's recommendations in her original report was for Z.M. to be transitioned into a less restrictive environment when deemed ready. According to Eby, there were a couple of schools of thoughts surrounding the level of skills necessary before a student could be introduced into an inclusive environment. Based upon current research, it was her belief that students can benefit from inclusion early on – even before they show some of the prerequisite skills and that they can gain the skills in question sometimes faster in an inclusion environment when there's a typical peer to practice with. (R- 56 and R-58.) SHLI does not have the ability to offer peer mediated instruction.

In showing Eby a December 17, 2018, email from Douglas Haan and questioned who he was, she stated that due to his years of experience in special education and case management, he was brought in to consult with the CST when the second IEP was being developed. (J-33.) The email was captioned "Litigation 101". According to Eby, there was a caricature attached to the email.

Regarding the ESY offered by the District, Eby stated that the summer program was five times a week for three hundred and sixty minutes a day which was less than a school day during the academic year. She was aware that the SHLI summer program hours remained the same as the academic year and that Dr. Hoch had recommended the same level of programming during the summer months.

**Heather Lilly (Lilly)**, a Learning Consultant and Case Manager for the District for the last four years, testified that she holds an elementary certification (K – 5) and has a Learning Disability Consultant Certification. Prior to working in the District, she was a general education teacher in the Montgomery Township School District for

fourteen years - nine of which was in an inclusion classroom along with a special education teacher. (J-53.) Over the years she has worked extensively with children on the autism spectrum. She was qualified as an expert in the area of case managing students with disabilities including students on the autism spectrum.

In 2018/2019 school year, her caseload included working with thirty-nine students - five of which were in either the pre-school disabilities classroom or the integrated preschool classroom. In describing the EI Program, Lilly stated that it was a State program that is provided to children before the age of three who are developmentally delayed (physical; cognitive; communication; social or emotional; and adaptive). The District receives referrals from the State through the EI System. Once a referral is received, a transition planning conference meeting is set up four months prior to the child's third birthday.

She is one of the District's representatives who meets with the parents and the EI Coordinator to gather information about the student such as what programs they had already received and their progress. Three months prior to the child's third birthday, an Identification Planning Meeting is held at the school at which time the student is brought in along with the parents to determine if the District should do their own individual testing.

Z.M. went through EI and had participated in Developmental Intervention by the time the Identification Planning Meeting was held in May 2018. According to Lilly, at the time of the meeting, the District, was unaware of that Z.M. had been attending SHLI's Pilot Program since October 2017. No transitional planning meeting was held prior to the Identification Planning Meeting because the District had been informed that the parents were already aware of its programs having already had another child go through the EI Program.

According to Lilly, EI conducts testing once a year to monitor progress. Z.M.'s initial testing was done when he was nine-months-old at which time the Battelle – an assessment which addresses the five areas of developmental weakness, was

performed. He was reevaluated a year later, and the District was provided a copy of both of the assessments. (J-1, and J-4.) At the time of the meeting it was determined that EI would complete the exit Battelle and the scores would also be sent to the District. (J-13.)

In discussing the first Battelle assessment which was done when Z.M. was nine months old, Lilly stated that the assessment was based primarily upon the parent's input. The second assessment which was done a year later provided a comparison between the first and second assessment as did the third. (J-4 and J-13.) Based upon the results of the assessments, Z.M. was classified as preschool disabled. In looking at his scores year over year, there was a notable decrease in the adaptive domain; slight decreases in personal/social domain and motor domain and an increase in the communication domain. The cognitive domain remained constant in the average range.

According to Lilly, due to the weaknesses that were noted, additional testing in speech/language and motor were conducted as well as classroom observations. A social history was also obtained to get a better overall picture of Z.M. and see if he had met developmental milestones or whether there were other areas that were challenging for him. The social history also outlined petitioner's concerns for Z.M. some of which were later incorporated into the IEP with goals developed to address them. (J-11.) No preschool cognitive assessment were done because he fell within the average range and this domain did not appear to be an area of weakness.

In review of the OT Evaluation that was conducted, certain areas of weakness were noted. (J-12.) Z.M. scored in the fifth percentile for locomotion, object manipulation and grasping. Based upon these findings, goals and related services were put into the proposed IEP to address the areas of weakness. According to Lilly, the District has a full-time occupational therapist and brings in a physical therapist if needed.

The Speech and Language Evaluation found that Z.M.'s "receptives" – how much language he was taking in and understanding, was within the average range at fifty-five percentile of nationally normed peers the same age. (J-14.) His expressive language was slightly lower but still within the average range – forty-second percentile. An area of weakness that was noted was in Z.M.'s pragmatic language which is the application of skills for social communication. To address this weakness, it was recommended that the IEP include speech and language therapy. According to Lilly, the school uses a program called Social Thinking. It was also recommended that he continue to be exposed to typically developing peers to further develop his social skills competency. In the oral motor examination, Z.M. demonstrated adequate strength for coordination and range of motion for all articulators.

Lilly testified that she and Eby conducted classroom observations of Z.M. at both SHLI and at his residence during one of his EI sessions. (J-16 and J-17.) While observing Z.M. at SHLI, she noted that Z.M. was able to follow a picture schedule, independently retrieve his task baskets needed for his activities, and was utilizing a token board system. The token board system was a reward system which consisted of a board that had five tokens. If Z.M. followed a direction, he was rewarded with a token which in turn could be used towards a prize. The prize may consist of a toy or the opportunity to go out to the playground. According to Lilly, the District also uses token boards in its preschool disabilities classroom and utilizes a similar reward system. It also would have provided the same picture schedule utilized at SHLI.

During their observation, Z.M. was very curious about them, continuously turning around to look at them – clearly aware of their presence. Lilly stated that sometimes students on the spectrum are not aware of their surroundings or who is around them. In Z.M.'s case, he was certainly aware of their presence. He also displayed spontaneous language. During circle time, which typically includes two other students, he was the only student present. The assistant went through the weather and sang songs among other things. She continuously prompting him throughout. At one point the assistant showed Z.M. a cookie to refocus him and to remind him of the reward that he would receive if he completed his tasks. According to Lilly, the District also provides

circle time in its preschool disability classroom and the integrated preschool program also includes interactive technology.

During the observation period, she found that Z.M. could, for a short amount of time, work or play independently. He was able to sustain his attention with a preferred activity for about three minutes which was average for a three-year-old. Except for snack time, she did not see him interact with any peers other than his six-year-old sister, whom he played with on the playground. At snack time, with the aid of assistants and the BCBA, conversation was facilitated between the students. Lilly went on to note that the District had a similar type of setup.

In discussing SHLI's student/teacher ratio in the EI classroom, Lilly noted that it was a one-to-one ratio. During circle time there was one assistant working with Z.M. At some point during the day, Z.M. would work directly with the teacher in the class who, during circle time, was working with another student. There is a rotation every forty-five minutes. There were typically four students in the class including Z.M. who was the youngest and four adults. Also, in the classroom was a BCBA overseeing the classroom.

According to Lilly, after the testing and observations were completed, the CST met to go through the results and developed a draft IEP in anticipation of the upcoming IEP eligibility and development meeting. The proposed IEP took into consideration and incorporated many of the recommendations of Dr. Hoch, such as ABA instruction, oversight by a BCBA, discrete trial teaching, a fulltime RBT, family training, among other things. (J-22.) One of the recommendations by Dr. Hoch was to systematically increase Z.M.'s participation in small group instruction. The District would have provided Z.M. this instruction through slow integration into the small group setting when they felt he was ready. Given his test scores and the fact that Z.M. did not exhibit many disruptive behaviors, he appeared to be ready for some inclusion time.

Also included in the proposed IEP was speech and language therapy – both group and individual as well as OT, also both group and individual. These services

could be either pull-out or pushed-into the classroom. Also included was a BIP. While teacher input forms were requested from SHLI, none were provided. Instead, SHLI sent Z.M.'s progress reports which were not received until the day prior to the eligibility meeting. (J-10.) The draft IEP noted that once the progress reports were reviewed, the IEP would be revised if needed. According to Lilly, this did in fact occur in the second IEP.

Thereafter, they met with the parents and the CST for the Initial Eligibility Meeting on July 19, 2018. The meeting was audiotaped. (J-21 and J-63.) During the first part of the meeting, the evaluators went through the results of the testing with the petitioners. The second part of the meeting was to further develop the IEP. (J-21.) There was no question that Z.M. was eligible for preschool disability. His cognitive and communication skills were average. He was verbal during all of the testing and observations. The area of weakness that was noted was the adaptive and the personal/ social piece - so the District wanted him to be around typical same age peers to give him exposure.

The draft IEP proposed a half day in the preschool disability class – a self-contained classroom and the other half of the day in the inclusion classroom which would have both special education and regular education students. Small group would have been slowly introduced in both settings and his teachers would ensure that he had the requisite skills before introducing him into a new setting. Lilly went on to state that it was important for Z.M. to have the inclusion time with his typically developing peers as they would have the language that could interact and engage with him and the RBT would be there to facilitate the interactions.

While the July 2018, IEP provided for ABA instruction in the “Modifications” section of the IEP, due to the concerns raised by Dr. Hoch that Z.M. would not be receiving ABA instruction, in the January 2019, IEP, it was clarified further. (J-34.) Under the related services it stated, “ABA based instruction, and this would be done in the general education and special education classrooms” and again under

“Modifications” where it stated “Individualized data-driven instruction based on the principles and procedures from the science of Applied Behavior Analysis”

Lilly testified that she strongly believed that an out of District placement was inappropriate for Z.M. By staying in District, Z.M. would be provided an inclusion program which was important for him given his area of weakness - the language piece of communicating socially. By attending school within the District, he could start learning that language from his peers who are the same age, which was not something that SHLI could provide. Additionally, the District would support Z.M. behavior wise with a BIP that provided him BCBA oversight, a teacher who was highly skilled in ABA instruction and a full time RBT to support him.

Throughout the IEP meeting, the petitioners were repeatedly asked if they wanted to provide any input regarding the goals, recommendations or if they had any thoughts or concerns. Understandably, the petitioners indicated that they wanted to review the proposed IEP further and also requested the opportunity to see the proposed program and ESY program along with their expert.

According to Lilly, the petitioners did come in to observe the ESY program which, at the time, was not the full program due to the integrated preschool program not being offered in the summer. The ESY program was geared towards the severely disabled students so that they did not regress over the summer. Prior to the petitioner’s coming in to observe the ESY program, the school received a letter indicating that petitioners were unilaterally placing Z.M. at SHLI for the start of the school year. (J-24.)

Once the school year started, arrangements were made for the petitioners and their expert, Dr. Hoch, to come in to observe both the preschool disability classroom and inclusion classroom on various dates in October 2018. (J-27.) The first communication that they received regarding the July 2018, draft IEP was when they received Dr. Hoch’s report in December 2018. (P-31.) Prior to that nothing had been received from or on behalf of the petitioners as far as feedback on the initial proposed IEP nor had any additional documentation been provided from SHLI regarding Z.M.’s

progress. Upon review of Dr. Hoch's report as well as the progress reports that had been provided back in July 2018, the initial draft IEP was revised (January 2019, IEP). (J-34.) Attached to the January 2019, IEP was an outline of the areas that had been revised. (J-34.)

Among the changes in the revised IEP was a start date for implementation which was January 2, 2019 – the hope being that SHLI and the District would collaborate and transition Z.M. over into the District's program in the New Year. The goals were also adjusted to make the programming similar to what SHLI was providing. Also changed was the amount of inclusion time – decreasing it to ninety minutes. This was based on Dr. Hoch's recommendation that Z.M. was not yet ready for inclusion. Another change was the provision of increased parental training. Despite the changes made to the IEP, the petitioners did not accept the same.

In March 2019, over a period of three days, after the petitioner's had filed a Due Process petition, she and Eby went to the SHLI to observe Z.M. The purpose of the observations were to gather updated information on Z.M.'s classroom performance. (R-54.) Prior to the observation dates, additional information had been received which included, among other things, Z.M.'s progress reports from May 2018 – January 2019; school and home program data; and parent training logs. The focus of her observation was to see Z.M.'s classroom readiness skills.

As part of her observations, she noted that Z.M. was able to identify shapes and colors; was able to count up to five and count two objects which for aged three was impressive. During playtime, he had nice vocalization when he was playing with a car. He was completing puzzles independently – matching shapes and letters. She also noticed that he was able to answer W/H questions such as "what is your age?" or "what color is grass?".

According to Lilly, this was significant and could be generalized in the inclusion environment and in the preschool disability classroom. She also observed him working in a dyad, which was similar to a small group, and having group instruction – noting that



Z.M. sat appropriately, with his legs crossed and looking at his book. He was not turning around or looking at other things. He was paying attention to the story that was being read aloud and was not distracted. When the teacher asked questions, he was able to provide two or three-word responses. While at times he needed prompting to raise his hand, so did the other children in the group. Lilly went on to state that circle-time in the District would have been similar to the SHLIs' program except that Z.M. would have had an RBA assisting him during circle time unlike SHLI whose ratio was two students to one assistant.

Lilly went on to state that in preparation of the hearing, she reviewed some of the discovery provided which included the petitioner's observation notes of the District's ESY program. (P-26.) In so doing, she found that petitioners may have been confused or misunderstood the program – explaining how each child's programming is different and individualized depending on the child's needs.

Given the timing of the litigation, a new IEP was required for the upcoming 2019/2020 school year. (J-65.) While a request was made to hold an IEP meeting before the expiration of the current IEP, no meeting was held. (P-66.) Information had been requested in the beginning of May from SHLI – specifically teacher input, however, the information was never provided. A few days prior to the issuance of the new IEP, the District received Z.M.'s progress reports from SHLI and based upon that information, some of the proposed goals were updated. (P-64.)

According to Lilly, the 2019/2020 IEP proposed a full day in the preschool disabilities classroom with sometime in the inclusion classroom. Parent counselling and training was still being provided. The BCBA support was increased because the teacher in Z.M.'s 2019/2020 preschool disabilities classroom did not have as much ABA experience. With regard to transitioning, the IEP called for transitioning over the summer – with the transitioning take place in both locations with the assistance of staff from both the District and SHLI. She herself would have worked closely with the staff, parents and administration to make sure all aspects of the IEP were implemented. More specifically, Z.M.'s data would have been reviewed frequently to see where he

was making growth, hold meetings with the parents and go into the classroom make sure that things were being implemented.

Lilly went on to state that she believed all of the IEP's (July 2018, January 2019, and July 2019 IEPs) provided FAPE in the least restrictive environment to Z.M. The CST thoroughly evaluated his scores on standardized testing compared to same age peers and it was their strong belief that Z.M. needed to have opportunities in an inclusion classroom to have those necessary social interactions. The District would have provided him those opportunities in conjunction with the appropriate supports.

On cross-examination, Lilly acknowledged that she is not a BCBA and that the only ABA training she has received is through the workshops that she has attended. Nor does she have any certification in the area of autism or autism education. She was assigned Z.M.'s case when he was first presented to the District through EI. When she first met with the petitioners at the Identification Planning Meeting, the petitioner's provided several reports from Z.M.'s doctor – Dr. Farrell, M.D. (J-2, J-3, and J-8.) Through these reports, she learned that Z.M. had an autism diagnosis and required substantial supports. One of the recommendations by Dr. Farrell was that Z.M. receive twenty-five to thirty hours a week of ABA.

Lilly further acknowledged that Dr. Hoch's reports, which had also been provided, opined that Z.M. presented with significant deficits in all areas and recommended continued placement at SHLI; full time oversight by a senior level BCBA; and a full day of individualized instruction. (P-7.) She agreed that the District did not have a senior level BCBA or a BCBA on site daily.

In looking at the Proposed Action in the Initial Identification and Evaluation Planning Meeting, Lilly acquiesced that she herself did not conduct any formal testing and that the Battelle, which was relied upon by the District, was performed by EI in June 2018. (J-13.) In looking at the results of the Battelle, in the Adaptive area, she agreed that Z.M. scored in the first percentile - a significant discrepancy from the mean. The same on the Personal-Social area, where he fell within the seventh percentile. In

drilling down on this section, for adult interaction, Z.M. fell within the sixteenth percentile. In peer interaction, he fell within the first percentile having received zero points in the area of awareness of the presence of other children. Lilly went on to explain that the personal, social and adaptive findings were based upon the parent's responses to the assessment and observation.

In questioning Lilly about her observations of Z.M. at SHLI, she confirmed her report that there were five students present in the class, five staff members and a BCBA present in the classroom on a daily basis. (J-17.) She was aware that every forty-five minutes, the staff members rotate with Z.M. so that he was not working with the same staff member all day. She also confirmed that unlike the District, SHLI had other BCBA's on staff and that the school had only thirty students. In discussing her observations of Z.M. with his sister, she acknowledged that throughout the time Z.M. was interacting with his sister, he required prompting to engage with her and vice versa.

In going through the July 12, 2018, and July 18, 2018, emails from Eby, she acknowledged that the email were generated prior to the IEP meeting with the parents; was without their input; and that recommended BCBA oversight was less than what was recommended by Dr. Hoch. (J-18.) Lilly went on to state that the recommendation of ten percent supervision as opposed to twenty percent as recommended by the Behavior Analyst Certification Board was due to the highly trained teacher who would have been in Z.M.'s class. (P-47.) She was unaware that for a program to be deemed "Comprehensive", it must provide thirty to forty hours of one-on-one ABA instruction.

In explaining why Z.M. was not being placed in the autism classroom, Lilly stated that the District was offering a preschool disabilities classroom because that was what he was classified under and because the District could provide him with the requisite services in that setting. Additionally, while the exact number of hours were not specifically set forth in the first proposed IEP, Z.M. would have been receiving ABA services throughout the day. Regarding direct BCBA supervision of Z.M., Lilly stated that while the proposed IEP did not specifically word it as such, such services were

being provided as set forth under “Supports” in the IEP where it stated, “consultation with behavioral specialist”.

She acknowledged that Dr. Hoch did not recommend participation in an inclusion classroom at that time, however, pointed out that she did recommend systematic transitioning into a least restrictive environment when he was ready. According to Lilly, despite what the Battelle results indicated – specifically that Z.M. had no awareness of his peers, the District felt it was appropriate for Z.M. to spend a half a day in the general education classroom with his typical peers with support. No other options were considered at that time.

While SHLI was not invited to participate the initial IEP meeting, they were asked for input which was not received until the day before the IEP meeting. The information provided was Z.M.’s progress notes. Lilly acknowledged that upon review of the same, it did not appear that SHLI believed he was ready for an inclusion classroom. The District did not immediately revise the IEP after review of the information as they were hoping for some feedback from the petitioners regarding the proposed IEP.

When questioned about the classroom schedule for the 2018/2019 school year, Lilly acknowledged that many of the itemized activities were group activities and did not reflect any individualized instruction. (J-41.) She went on to state however, that the schedule was not student specific – rather it was an overall classroom schedule and within that schedule, individualized instruction would occur.

In discussing Dr. Hoch’s second consultation report wherein she reiterated her belief that Z.M. was not ready for an integrated preschool classroom and expressed her concern for his placement in the self-contained classroom, Lilly stated that the District, upon review, provided a revised IEP. No formal IEP meeting was held prior to its issuance. (J-34.) The CST took into consideration Dr. Hochs’ concerns and decreased Z.M.’s time in the inclusion classroom, however, it was still their belief that it was important for Z.M. to be in an inclusion classroom with support. The BCBA hours and oversight were also refined in the revised IEP. According to Lilly, the rationale for not

increasing the BCBA hours was based on the data which showed that Z.M. was making consistent progress and that there was an absence of high intensity disruptive behaviors. When questioned whether the progress and lack of disruptive behavior was because he was being monitored by a BCBA daily, she replied that there would have been a teacher in the classroom providing the same level of instruction and oversight.

Lilly was also questioned about her second observation of Z.M. at Somerset Hills and her conversation with the schools Director – Dr. Kevin Brothers. She acknowledged that Dr. Brothers informed her that Z.M. was ready to try to spend time in a nearby preschool, however, he did not say that Z.M. was ready to be in an inclusion class. Lilly went on to state that the revised IEP proposed a decrease in Z.M.'s time in the inclusion time to a quarter of the day – not the half day that had previously been proposed.

In discussing the proposed IEP for the 2019/2020 school year, Lilly stated that she did not observe Z.M. in the home setting or in the community, however, Eby did. One of the concerns raised by the parents was Z.M.'s ability to, for instance, see a dentist or get a haircut. She had informed the petitioners that goals could be incorporated in the classroom setting to work on these issues. She was aware that SHLI provides support for the students for some of the activities and stated that the District had the ability to do the same.

Lilly was also questioned about an email sent by Douglas Han to her on December 17, 2018. In response she stated that he was not part of the IEP team but was a member of the CST at that time. He never evaluated Z.M. and did not participate in his IEP meeting or observe Z.M. at SHLI. It was her belief that the attachment to the email, symbolized the adversarial system that has been created within special education and was not directed at the parents. (J-33, P-68.) She was aware that the petitioner's daughter was also attending SHLI and that they had filed litigation against the District but that all occurred prior to her employment with the District.

**Hanna Hoch (Dr. Hoch)**, a BCBA-D was qualified and testified as an expert in Autism, ABA, and supervision and development of autism programs. She is familiar with the petitioners, having evaluated their daughter J.M. in the past. In early January 2018, the petitioners contacted her to conduct an evaluation of Z.M. and provide them with an assessment of his skill and functioning level in preparation of him entering pre-school. (P-7.) Z.M. was not quite three-years-old at the time of evaluation and had already been receiving services through EI and SHLI which was an ABA based school for children with autism.

As part of her evaluation, she interviewed the petitioners, spoke to staff members from SHLI, reviewed school data and progress reports, and also reviewed medical reports by Dr. Farrell. (J-2.) In so doing she learned that Z.M. had been diagnosed with autism and required substantial supports. Dr. Farrell had recommended twenty-five to thirty-five plus hours a week of ABA and parent training with a BCBA which suggested that Z.M. had significant deficits and required a significant level of intervention.

The data reviewed had been collected by SHLI and measured a skill or a behavior of Z.M. (P-52.) The occurrence was graphed and examined for trends and/or progress. The example provided was maintaining eye contact for three seconds. Data is taken on whether the child can do it and when. According to Dr. Hoch, the purpose of graphing is to allow visual inspection and analysis to detect whether there is progress – either an increase for skill acquisition or a decrease for behavior reduction.

In looking at Z.M.'s data, there were some skill areas that where he made quick progress with interventions in place. However, there were also areas that took him longer and he required more teaching and modifications. These findings were also reflected in Z.M.'s progress reports which was based on the data.

On January 9, 2018, as part of her evaluation process, she went to SHLI to observe Z.M. At the time of observation, he was involved in a variety of instructional activities and programs that were grounded in the principles of ABA. One of the

instructor's present was his primary data analyst who also provided home programming for Z.M. and his family. The analyst was under the supervision of the classroom supervisor, the Assistant Director. The school also had several BCBA's on staff of which a couple were on the doctoral level. The BCBA's supervised the children's programming.

During her observation, Z.M. participated in one-to-one teaching sessions which is not uncommon for children with autism in an ABA program as they require intensive instruction in a one-to-one format so that they can focus without distraction. The ultimate goal is for the child to participate in group instruction with typical peers, however, they need the prerequisite skills for that to happen. Some of the prerequisite skills would include among other things: the ability to sit quietly and answer questions in a group; respond to questions within a group setting; being able to respond to peers; and observational learning. Z.M. did not at that time, have the necessary pre-requisite skills to be in a group learning setting with other disabled students or typical peers.

Dr. Hoch went on to state that ultimately, group learning would be in a large group setting with typical peers. However, incremental steps would have to be taken to achieve that goal, starting with small group (two students) using dyad instruction. As the child advanced, the group would be expanded. However, if the child is in a special education program, the small group should consist of children who were also special education students.

She also noted that Z.M. was being taught by a several instructors which meant that the school was programming for generalization which is frequently done in an ABA program. Also noted was the fact that SHLI utilized a token board or motivational system for reinforcement of particular skills. This too is not uncommon in teaching children with autism. Z.M. was being reinforced every few minutes which meant that his need for reinforcement was significant.

In discussing the importance of having a BCBA present in the classroom, Dr. Hoch stated that an ABA program is a very complex system of instruction – therefore

ongoing training and support by the BCBA is important. With a BCBA present in the classroom, the training is hands-on. There were also different program models – “Focused ABA Treatment” and “Comprehensive ABA Treatment”. (P-47) Focused ABA Treatment is implemented for a limited number of targets (e.g. addressing a specific challenging behavior). The Comprehensive ABA Treatment, which is what Dr. Farrell had recommended for Z.M. and what SHLI was implementing, addresses multiple affected developmental domains. The program calls for thirty to forty hours of treatment per week plus direct and indirect supervision and caregiver training.

SHLI was following the ABA curriculum with their one-to-one instruction under BCBA oversight where Z.M.’s pre-requisite skills were being worked on. This would eventually provide him the necessary tools to participate in small group formats and build up from there.

In describing the treatment methodology, Dr. Hoch stated that initially the treatment calls for one-to-one staffing which would gradually build up to include small group formats as appropriate. Oversight of the program is through a tiered service delivery model wherein the BCBA supervises the individuals providing the direct treatment. BCBA supervision includes among other things: monitoring the data; making changes to the intervention techniques; assessing and developing goals; treatment planning; and hands on training. The recommended “dosage” of case supervision by a BCBA is two hours for every ten hours of direct treatment.

Therefore, if a student is receiving thirty hours of ABA instruction, there should be six hours of BCBA supervision and eight hours if there were forty hours of instruction. In a Comprehensive Program, the recommended caseload for a BCBA is six to twelve students if they are unsupported. If they are supported, the recommended caseload is twelve to sixteen students. It was her belief that SHLIs’ program fell within the recommended guidelines.

In addition to the school observation, she also conducted observations of Z.M. in the home environment. Z.M. was working with T.M. on his home program which had



been developed by SHLI. SHLI had trained T.M. in both the home and school environments, so that she could continue the programming in the home environment. She also spoke with the petitioners who expressed concerns such as eloping, tantrums, social concerns and echolalia.

Based upon her findings, it was her belief that while Z.M.'s maladaptive behaviors and skill deficits were being addressed at home and in school, formal and systematic training procedures needed to continue because he was still demonstrating deficits in all areas related to his diagnosis. It was her further opinion that he should remain at SHLI as the school was aware of his needs and areas of deficits and the interventions that were appropriate for him. Additionally, the school also had trained and experienced personnel working with him which was significant as was the BCBA oversight that the school provided. He was getting one-to-one instruction which he needed and was not ready for group instruction, even if an aid was sitting right next to him. It was her belief that leaving the SHLI program, even if it was to another comprehensive program, would have resulted in a significant regression.

As part of her evaluation, she provided twelve recommendations going forward which SHLI was already implementing. (P-7, Page 12.) The basis for the recommendations was because Z.M. continued to demonstrate deficits that needed to be addressed by an intensive behavioral program. In discussing the rationale for each of her recommendations, Dr. Hoch opined that Z.M. needed an individualized formal teaching curriculum based on ABA principles and procedures which addressed all areas of his skill deficits and challenging behaviors. The prescribed program, which should be year-round, required full-time supervision and staff training and a senior-level BCBA on site daily so as to supervise all aspects of Z.M.'s program. The program itself should be a data-based approach to instruction with the data analyzed on a regular basis which would allow the staff to evaluate the effects of the teaching and treatment interventions. The staff itself should include special education teachers, instructors and aides with specific training and education in ABA and education. The rationale being that Z.M. was receiving instruction from a variety of instructors and all of them needed to be appropriately trained. Z.M.'s family should also continue to be consulted to

ensure maintenance and generalization of skills and address any problems occurring in the home environment.

With regard to her recommendation that Z.M. participation in small group instruction should systematically increase, Dr. Hoch testified that if such a move were to occur, it should be carefully planned and systematically approached. She went on to state that at the time of her evaluation, Z.M. was not ready to be in a program with group instruction as a daily portion of his day, much less transition into a less restrictive environment.

Dr. Hoch noted that subsequent to the issuance of her evaluation, she had occasion to review Z.M.'s June 2018, Battelle. She noted that under the section for peer interaction, his raw score was zero which meant that he had met none of the skills or milestones for his age and his "Z-Score" was negative three. (J-13, Pages 1 and 3.) These findings corroborated her belief that he was not ready for group learning.

She was also asked to review the draft IEP that the District had provided to the petitioners in July 2018. She did not agree with the District's placement of Z.M. in an inclusion class for half the day because he was not capable of learning in that group environment. She also had concerns about the other half of the day in the preschool disabilities classroom. Additionally, the IEP did not call for thirty to forty hours of one-to-one ABA instruction or supervision by a BCBA. In fact, the BCBA consultation was for three hours a week which was not the recommended dosage of six to eight hours. Even if Z.M.'s teacher had ABA training, it did not eliminate the need for BCBA supervision for the recommended hours, nor did the IEP call for daily data review and modifications as needed.

In September 2018, the petitioners requested a second evaluation. As part of this evaluation, she observed Z.M. at SHLI. (P-31.) At the time of observation, Z.M. was still receiving one-to-one teaching, however, he was participating in circle time with several other students. Initially he participated in this activity for ten minutes, however, the time was reduced to five minutes due to his lack of progress which was a sign that

he wasn't ready to participate in group instruction. Even in the five-minute participation in group instruction, she observed the instructor sitting within two feet of Z.M. - repeatedly giving him snacks to reinforce on-task behaviors. This underscored her opinion that he was not ready for an inclusion class such as group literacy, math or any other group activity.

She also went to the Branchburg preschool special education class to observe both a disabled classroom as well as an inclusion classroom. The self-contained classroom had eight students, one teacher, one special education teacher and two paraprofessional students. Most of the instruction was in small and large group activities - which in her opinion, Z.M. would not have benefitted from. (J-41.) Even if he had been pulled out for one-to-one instruction, it would not have been appropriate given the configuration of the room. Lunch was in a group setting with the preschool disabled students eating with the third graders. It was noisy and chaotic and not conducive for promotion and teaching of social interactions.

Data collection was also of concern as the data recording and graphing were done on the same sheet of paper. Dr. Hoch opined that the primary method of data analysis in an ABA program is visual analysis and the process used by the District makes visual analysis very challenging. Additionally, the District's BCBA does not view or analyze the data unless requested to do so by the Special Education teacher. According to Dr. Hoch, this is inappropriate as only the supervising BCBA should be monitoring and analyzing the data and even that needs to be done on a regular basis. The District's BCBA was only in the building where Z.M. would attend, three days a week – not daily. Therefore, not only would Z.M. receive less than the recommended number of hours of BCBA oversight, the BCBA would not be available on a daily basis.

Based upon the totality of her evaluation, it was her opinion that Z.M. continued to present with significant deficits in all areas related to his autism. While he had made progress, he still needed the intensive program with qualified staff members which was what SHLI provided.

On cross-examination, Dr. Hoch acknowledged that her doctorate was in psychology and that there was no doctorate of BCBA. In going through her professional experience, specifically the Alpine Learning Center, New York Center for Autism Charter School and the Reed Academy, she also acknowledged that typical students did not attend those schools, nor has she ever taught typical students. She also testified that over this time period which had some overlap, she oversaw over one hundred students in terms of assessments and developing and implementing behavioral intervention plans among other things. Dr. Hoch also agreed that there was a difference between a BCBA who supervises specific students, in terms of how many hours should be dedicated to that, versus conducting assessments or implementing a BIP.

Dr. Hoch concurred when questioned, that while used in schools, the Guidelines were developed to help medical professionals and medical insurers to understand ABA protocols for insurance payment purposes. She also agreed that if you are not a BCBA, then you must be qualified as an RBT to deliver an ABA program and that every child has different needs, therefore, each child's programming should be unique to that child.

Dr. Hoch acquiesced that she issued a report for Z.M.'s older sister and that she had made the exact same recommendations for her as she had for Z.M., despite her earlier testimony that each child's program should be individualized. Later in her testimony she clarified that the proposed recommendations for both children were "general features" but that their instructional programs would be individualized. She also agreed that when she evaluated Z.M. in January 2018, he wasn't quite two-and-a-half-years-old - not almost three-years-old as she had testified to on direct examination. By then, Z.M. had already been unilaterally placed in SHLI by the petitioners.

In discussing Z.M.'s diagnosis, Dr. Hoch stated that she was aware that Z.M.'s initial diagnosis was autism without accompanying language impairment or intellectual ability. (J-2.) She was also aware that on the Battelle, a standardized test, Z.M.'s scores in communication and cognitive fell within the average range. When she

observed him for the first time in his home environment, he displayed basic play skills such as appropriate interaction with toys, exhibited “nice joint attention”. He also responded well to instructional pauses which he was able to generalize in the home setting.

Dr. Hoch was also questioned about the teaching staff at the SHLI program during the time of her first observation. In response she stated that Z.M.’s instructor, who was not a BCBA, was also his data analyst home programmer. She reiterated her earlier statement that at the time of observation, Z.M. did not have the requisite skills to participate in a group setting with other disabled students or in an inclusion classroom. She acknowledged, however, that she has not seen Z.M. since September 2018, therefore she cannot say whether he has since developed the necessary skills.

In going through the prerequisite skills that she had again identified in her second evaluation, Dr. Hoch agreed that if the data from SHLI now revealed that Z.M. was demonstrating the prerequisite skills, her opinion may change as to his readiness to move into a more inclusive environment. (P-31.) When asked to go through Z.M.’s progress report of June 2019, Dr. Hoch acknowledged that Z.M. had attained many of the prerequisite skills that she had identified in her last evaluation of September 2018. However, the progress report alone did not change her opinion as other factors such as further observations, review of other data, and interviews with the staff and Z.M.’s parents were necessary. Additionally, while she had itemized a number of prerequisite skills, the list was not exhaustive, and the skills took time and a significant amount of instruction to develop.

Dr. Hoch was also questioned about her earlier testimony regarding the July 2018 IEP – specifically her criticism that Z.M. was not being provided thirty to forty hours of ABA programming. She acknowledged that the IEP did call for Z.M. to have an RBT more than thirty hours a week and provided parent training by the BCBA in the home environment two times a month. The IEP also provided for BCBA consultation three hours a week. Z.M.’s teacher, while not a BCBA was trained in ABA. She was also aware that the IEP called for transitional services.

Regarding BCBA supervision, Dr. Hoch was asked whether a BCBA needed to be in the classroom throughout the day. In response she said “no”, however, SHLI was providing six hours a week of BCBA supervision. During her first observation of Z.M. at SHLI, the classroom trainer was a BCBA who was in the classroom daily. She was not sure what credentials the classroom trainer held during her second observation but regardless, it was her opinion, despite what the Guidelines say regarding the educational requirements for an RBT, Z.M.’s instructional staff should at a minimum hold a bachelor’s degree.

According to Dr. Hoch, unlike the District, SHLI has a tiered hierarchy of structure. At the top was the BCBA supervising the overall program. In the classroom, there is a trainer who may or may not be a BCBA. This individual provides a significant portion of the training and support. There is also a lead teacher, who similar to the trainer, may or may not be a BCBA. This individual provides direct instruction to the students and assists the trainer with paperwork and provides training to other classroom instructors on data collection and analysis. There are also classroom instructors who have at a minimum a bachelor’s degree. When questioned about her earlier testimony that only a BCBA could provide training and supervision, Dr. Hoch backtracked stating that a lead teacher, while providing training and supervision to the classroom instructors, was not supervising the educational program of the students, that was the role of the BCBA.

Dr. Hoch was also questioned about her second report wherein she noted that a BIP was going to be developed due to Z.M.’s low intensity disruptive behavior. More specifically, she was questioned about the fact that SHLI did not have one in place. In response, she stated that the school possibly felt that he did not require one. When questioned further about the observation by Eby and Lilly that Z.M. was easily redirected within thirty seconds, she agreed that it was quite plausible that Z.M. did not actually need a BIP.

**T.M.**, testified that she has two children, a daughter, J.M. who is eight and Z.M. who was four. J.M. is autistic and after Z.M. was born, she and her husband suspected that he too may be autistic because he was demonstrating some of the same autistic behaviors as J.M. In describing Z.M.'s early years, T.M. stated that early on, they realized that Z.M. was not meeting certain developmental milestones such as sitting up and talking. When he did start to verbalize it was for a short period of time and then he stopped.

Given their suspicions, they had Z.M. evaluated when he was five-months-old and again when he was eight-months-old. When he was sixteen-months-old, they took him to see a Neurodevelopmental Pediatrician - Dr. Cristina Farrell (Dr. Farrell) who determined that he met the criteria for ASD. (J-2.) Dr. Farrell found that Z.M. had pervasive deficits in social relatedness, communication and interest. She also determined that Z.M. demonstrated restricted and repetitive patterns of behavior. In describing some of Z.M.'s behavioral issues, T.M. stated that there were issues with feeding and eating. Additionally, he would not speak, make eye contact nor would he interact with his sister.

According to T.M., Dr. Farrell recommended that Z.M. receive ABA twenty-five to thirty-five plus hours a week. She is familiar with ABA because her daughter was being provided ABA through her program at SHLI where she has attended for the past five years. She herself had been trained on ABA through the school so that J.M.'s programming could be carried over into the home environment.

When Z.M. was first diagnosed, he received EI services which included physical therapy and developmental intervention. He was also enrolled in an ABA program at Search – an ABA based program for young children. He attended that program for approximately four months after which they enrolled him in SHLI. Once there, the school provided her training specific to Z.M.'s needs as well.

They moved Z.M. from the Search program to SHLI for a couple of reasons – one of which was the quality of the program and the second reason being that their

daughter also attended the school. It was logistically easier to transport the children to the same school as opposed to juggling two different school calendars.

After Z.M. had been at the school for about a year, they started to see some progress. He started to verbalize again, and his eye contact improved. Additionally, some of the repetitive behaviors diminished. Despite his progress there was still some concern, so they took him back to Dr. Farrell in April 2017, and again in September 2017. Dr. Farrell determined that Z.M. continued to meet the criteria for autism and recommended that Z.M. receive thirty-five hours of ABA services weekly. (J-3, J-5.)

While at SHLI during the 2017/2018 school year, they received Z.M.'s progress report which reflected that Z.M. was making progress. (J-6.) According to T.M., she met with the staff members frequently both at home for training which was weekly and in the school setting.

When Z.M. was approaching his third birthday, EI referred him to the District's CST. Prior to this, they took him to see Dr. Hoch, who had in the past evaluated their daughter, to get some guidance as to what Z.M.'s needs would be when he turned three. She found that Z.M. was doing well at SHLI, however, was not ready to go to a regular preschool. She instead recommended that he continue at SHLI where he could continue to receive thirty-five hours a week of ABA. (P-7.) She agreed with Dr. Hoch's findings that Z.M. displayed deficits in all areas and that were he to transition into a different program, such as the District's program, he would significantly regress.

In May 14, 2018, they met with the District for an Initial Identification and Evaluation Planning Meeting. (J-9.) The District's BCBA was not in attendance at the meeting which was of concern to her. As a result of the meeting, the District felt that evaluations of Z.M. were warranted and proposed certain testing which she and her husband consented to. Provided to the District at the time of the meeting, was a copy of Dr. Hoch's evaluation. The District also informed them that they were going to rely upon the Battelle that was going to be done by EI. (J-13.) The study was done in June



2018, and when the results came in, she and her husband were troubled as it appeared that Z.M.'s scores were lower than the testing from the prior year.

In or around this same time period, Z.M.'s next progress report was received from SHLI which showed that he continued to make progress, however, there were still some concerns. (J-10.) The Initial Eligibility Determination and IEP Development meeting took place on July 19, 2018, at which time it was determined that Z.M. was eligible for special education services. (J-21.) According to T.M., when they attended the meeting, the District had already prepared an IEP and they were shocked to see that what was being proposed was a half a day in the inclusion classroom and that Z.M.'s BCBA hours were cut in half. The IEP also stated that no other options had been considered which made them believe that Z.M.'s placement had been pre-determined without any discussion about the appropriateness of the same. (J-22.) In describing the proposed program, the District informed them that Z.M. would have an RBT with him throughout the day and that there would be discrete trials. He would also be placed in the integrated preschool class with his typical peers, which to date, SHLI had not yet recommended. She also felt that such a move was inappropriate at that time based upon what she was seeing at home and in the community. Z.M.'s program at SHLI consisted of a self-contained classroom with one-on-one instruction throughout the day with little to no group interaction.

T.M. went on to state that they did not provide any feedback to the District at the time of the meeting because they wanted to observe the proposed program first and digest the IEP which had been handed to them on the day of the meeting. However, in review of the IEP, one of the immediate concerns was the lack of BCBA oversight/hours. The proposed hours fell far short of what was recommended by Dr. Hoch and what Z.M. was currently receiving at SHLI. Additionally, the IEP was not clear whether the RBT would be with her son throughout the day including when he was in group learning or whether he would receive one-on-one instruction throughout the day. Nor was there any indication that a special education teacher would be present in "specials classes" (art, gym, music).

According to T.M., other areas of concern were also inadequately addressed in the IEP. In looking at the Social History Evaluation, she reported to the evaluator twelve areas of concern, however, these areas of concern were not properly addressed in the proposed IEP. Some of the concerns included among other things: self-help skills (brushing teeth, dressing); eliminating; stereotypical repetitive behaviors without adult prompting; elopement; problem behaviors; doctor's appointments; nighttime routines and screaming. T.M. went on to state that SHLI was helping them with these issues but the proposed IEP did not address them. While the IEP offered training twice a month at home, SHLI offered training at home and in the school setting and more frequently than what the District had proposed.

Also, disconcerting, was the summer program that was being offered. It was different than what was provided during the school year. According to T.M., the SHLI summer program was a continuation of the school year program which was something Dr. Hoch endorsed. Due to the fact that the ESY program was different than the academic year program and their inability to observe the academic year program until after the school year began, they sent a letter to the District informing them that Z.M. was unilaterally being placed at SHLI until they had an opportunity observe the school setting. (J-24.)

In discussing her observations of the ESY program, which she formalized in an observation note, T.M. stated that the program fell short of what SHLI provided. (P-26.) For instance, there was no token board, behavior specific praise or an RBT in the room at the time. Therefore, it was difficult to envision how Z.M.'s program would work. Additionally, while "verbal stereotypy" was observed, it was not corrected nor were any contingency statements given to the students. They were also informed that the BCBA was out for the entire month, therefore, there would have been no BCBA oversight for their son had he attended the ESY program which was contrary to Dr. Hoch's recommendations.

Additionally, based upon their prior experience with her daughter and the District, during "specials classes", there would be no supervision by either a special education

teacher or teachers with training in ABA. While they had not yet observed an inclusion class, there was consternation of over the possible class size believing that the students would outnumber the BCBA's on staff commenting that SHLI had a total of thirty students with five BCBA's on staff.

According to T.M., Z.M. attended the SHLI summer program after which he went right into their Pre-K program. He continued to receive primarily one-to-one instruction and was making progress. (J-28.) In October 2018, they (T.M., S.M. and Dr. Hoch) went to the Whiton Elementary School to observe the inclusion classroom. As with their summer visit, she and her husband formalized their observations. (P-29 and P-30.)

One of the things noted was the size of the classroom which was at eleven children versus SHLI classroom size of five children. The location where the discreet trials were conducted was another area of concern. It was in the corner of the room by the cubbies and separated by a partition. This did not sit well with them because not only was their son not ready for an inclusion classroom, he would be excluded from that same classroom during discreet trials. It did not make sense.

Also, disconcerting was the class schedule that had been provided to them by the District. (J-41.) The self-contained part of the day consisted of "group instruction" throughout the morning. The afternoon session was the "inclusion" part of the day and consisted of "specials classes" as well as other classes that consisted of group instruction. During their observation time at the school, they sat in on one of the gym classes. It was T.M.'s belief that her son would not be able to do what the other children were doing (organized games/activities) and the proposed IEP was silent on whether Z.M. would have to participate in these activities. Additionally, during their observation period, they did not see any token boards in place or behavior specific praise. They also did not see any disruptive behavior or stereotypy from the children that were present. The children they observed were able to sit quietly at a table and remain engaged throughout an activity. According to T.M., this was not something that Z.M. was capable of, due to his disruptive behavior and stereotypy which continue to

manifest. Unlike SHLI who had daily BCBA oversight, the District had one BCBA (Eby) who had to divvy up her time between three schools within the District.

Data collection and assessment was also another concern. According to Z.M., student progress is assessed by the District weekly and thereafter there are quarterly reports generated to track progress according to the IEP goals. This was different than the SHLIs' program which provides discrete trials all day every day.

T.M. went on to state that Dr. Hoch also prepared a report after observing the District's program in October 2018, and her observations of Z.M. in the Somerset Hills program. Based upon her observations, she recommended that Z.M. remain at SHLI believing that it was the most appropriate placement for him given his needs and success. (P-31.) This report was shared with the District along with a request that the District agree that continued placement at SHLI was appropriate, however, the District did not set up another IEP meeting. (J-32.) Instead, what was received was a revised IEP. (J-34.)

In review of the same, it appeared that the proposed IEP increased Z.M.'s time in the self-contained classroom, however, there was still a component of Z.M. attending the inclusion classroom. The amount of BCBA oversight remained the same at three hours a week. The IEP also had an effective date of January 2, 2019, which meant that the first IEP would have been in place from September 2018, through to December 31, 2018. Upon receiving the revised IEP, she sent it to Dr. Hoch and, also sent a letter to the District stating that they disagreed with the proposed IEP. (J-35.)

Z.M. remained at SHLI for the entire 2018/2019 school year. His January 2019, progress report noted that he continued to have certain deficits and it was her belief that he was not ready for an inclusion classroom and wouldn't be for quite some time. In May/June 2019, the District attempted to set up an IEP meeting for the 2019/2020 school year, however, when she sent them possible dates, they never responded, therefore no formal meeting took place. (P-66.) In June 2019, a notification was sent to the District which placed them on notice that petitioners were unilaterally going to

continue Z.M.'s placement at SHLI. (J-40.) According to T.M. her son was making progress at SHLI and it was the school's belief that he was not ready to transition into the District's program. Subsequent to sending the letter to the District, an IEP was received for the 2019/2020 school year. The proposed IEP continued to call for partial placement in the inclusion classroom.

T.M. went on to state that she hopes that someday her son can progress to the point that he can transition from SHLI into a less restrictive environment, however, he is not there yet.

On cross-examination, when questioned about her earlier testimony that Z.M.'s language came back once he started attending SHLI, T.M. acknowledged that in January 2017, Dr. Farrell found that Z.M.'s autism was without an accompanying language impairment, however, she did find that he had receptive expressive language delay. (J-2.) She also acknowledged that his cognitive scores fell within the average range on the Battelle as did his expressive and receptive language scores. (J-4 and J-13.)

Regarding her testimony that she was surprised that Eby was not at the Identification Meeting, T.M. stated that she did not know what EI had sent over, therefore, she was unaware that the District, including Lilly, had no notice that Z.M. was autistic. She also acknowledged that the District was not provided all of her son's documentation in advance of the meeting, including Dr. Hoch and Dr. Farrell's reports. (J-15.) When questioned, about Dr. Hoch's report, T.M. acknowledged that Dr. Hoch had been hired prior to EI referring Z.M. to the District for the sole purpose of opining on the appropriate placement. When questioned why Z.M. was not brought to the meeting, she stated that she was not told to bring him.

T.M. went on to state that she felt that the District had already predetermined the type of program and placement her son would receive when they attended the meeting in July 19, 2018. She believed that this was supported by the fact that the proposed IEP stated that no other options other than an in-district placement had been

considered; Eby did not interview either her or her husband or request to speak to Dr. Hoch; and it was also based upon her past dealings with the District which resulted in litigation. This position was further bolstered by Eby's email wherein she spoke about "defending" her recommendations which T.M. took to mean in litigation. She acquiesced, however, that if the District had not come prepared with a proposed IEP, they would have been remiss. T.M. also agreed that the District had asked for their input as the IEP was a "working" document and that the District was not required to agree with their expert's recommendations. However, it was her position that they did not even consider Dr. Hoch's report or SHLI opinions. Regarding Eby's email and her earlier interpretive testimony regarding the same, she acknowledged that there could have other plausible explanations behind the email.

According to T.M., at the time of the meeting, she did not realize that the District was offering an ABA program, however, did see that the IEP provided an RBT throughout the day and BCBA oversight. Nor did she realize that in addition to the RBT, there would be a certified teacher present.

When questioned about her notes surrounding the ESY observation, specifically her comments that there were no token boards utilized and no BCBA present, she admitted that the program that she observed would not have been the same for Z.M. as his would have been individualized. She also agreed that based upon her own notes, which were contrary to her testimony, there was token boards in the room. Additionally, she did not know the needs of the children that were present, therefore, she was not qualified to say whether BCBA supervision was required.

Regarding her testimony wherein she criticized the level of supervision during her fall observations of the "Specials" classes – specifically, the lack of a special education teacher in the gym class, she agreed that her testimony was contradicted by her husband's notes but went on to state that she herself did not see a teacher.

When questioned about Z.M.'s May 2018, progress report from SHLI, T.M. stated that she was aware that Somerset Hills had started introducing her son to

“group” a couple of months prior. (J-10.) As of June 2019, Z.M. had been introduced to multiple small group programs, some of which included typical peers, and that he had mastered several skills. While she felt that SHLI were experts in their field, however, did not hold the same level of confidence about the District.

When pressed, T.M. stated that she does not believe her son is ready for a less restrictive program at this time. No one has told her that he is ready, and she has little faith in what the District says.

**Kevin Brothers, Ph.D., BCBA-D, (Dr. Brothers)**, the Executive Director at SHLI, testified on behalf of the petitioner. He was qualified without objection and testified as an expert in the areas of Autism, ABA and the Development of Educational Programs for Students Using Applied Behavior Analysis.

He is very familiar with the Guidelines, which are geared towards the treatment of individuals with autism. He himself has been working with individuals with autism for the past thirty-five years. In describing autism, he stated that it was a disorder of the brain that can affect all areas of development. He went on to state that it can be seen in four problem areas or “umbrellas” as he characterized them - language, cognitive or academic or pre-academic, social skill deficits and behavioral control issues. According to Dr. Brothers, children with autism require a different type of instruction than their typically developing peers. He analogized the BCBA’s role to that of an optician – understanding how to magnify the antecedent variables and the consequent variables around a given skill and to figure out the right magnification of those variables until they work. Using scissor skills as the example, he described how a child would be systematically prompted to master the skills necessary to use scissors and cut on a line.

In describing ABA, he stated that it was a discipline which focused on the analysis, design, implementation and evaluation of social and other environmental modifications to produce a meaningful change in human behavior. It can help reduce problem behaviors and/or work on skill acquisition such as reading and writing.

Individuals who are properly trained and credentialed can teach ABA. The qualifications are different for each level of licensure. For instance, an RBT required a high school degree. However, a BCaBA is a Board-Certified Assistant Behavior Analyst and requires a bachelor's degree. A BCBA requires a master's degree and the BCBA-D, is a Board-Certified Behavior Analyst – Doctoral.

According to Dr. Brothers, the BCBA role is to engineer the environment to produce the desired socially significant behavior change. It is about creating antecedent and consequent variables which was the role of the BCBA or BCBA-D. He went through the four core characteristics of ABA as well as the seven dimensions. (P-47, Pages 10 – 11.) He also discussed the eleven essential practice elements of ABA.

There are two identified ABA treatment models – Focused ABA and Comprehensive ABA. The Comprehensive ABA program, which is what the SHLI offers, provides up to thirty to forty hours of one-to-one direct treatment to the student weekly. The intensity of the instruction was important to produce a positive outcome. With the number of hours of intense instruction, high levels of supervision - both direct and indirect, were necessary by the BCBA.

In describing the difference between direct supervision versus indirect supervision, Dr. Brother stated that direct supervision meant that the BCBA was in the classroom, directly observing and ensuring that the program was being followed. Indirect supervision involves among other things, analysis of the data, teaching the instructors on what to do, coordinating care, writing progress notes or progress reports that evaluate the data and making the necessary program changes depending on the data. All of this requires a significant amount of time for each student. Under the Guidelines, the recommended “dosage” of case supervision was two hours of supervision for every ten hours of treatment. If a child received thirty to forty hours of treatment weekly, the BCBA supervision would equate to between six to eight hours per week. Given the time commitment, the recommended caseload for a BCBA who operates without support should be between six to twelve students.



In describing the SHLI, Dr. Brothers stated that the school, which is an approved school by the New Jersey Department of Education, is exclusively for children with autism and can provide services for up to thirty children. Thirty students currently attend the school, twenty-nine of which were placed by the student's sending District.<sup>2</sup> On staff, SHLI has six BCBA's which is a ratio of five students to every BCBA which is well within the Guidelines. The BCBA's are on site daily and provide both direct and indirect supervision to the children and caretaker training both in the school and home setting.

According to Dr. Brothers, children that are referred to SHLI go through a screening process to ensure that the school would be able to meet their needs. The school offers services to children from diagnosis up to the age of twenty-one. If students advance to the point that they can mainstream back into the District's school system - which is one of their goals, they would help facilitate the transition.

SHLI staff members, including himself, work directly with the referring District's case manager in developing an IEP for the student. The IEP is typically developed about a month after the student starts attending SHLI which allows the instructors an opportunity to get to know the student and work with them and allows the SHLI staff the ability to better understand their needs.

Dr. Brothers went on to state that the school has six classrooms. Four of the classrooms provide a one-to-one teacher/student ratio, the other two classrooms have five students and four teachers – so almost a one-to-one ratio. Each teacher is assigned three to five IEP objectives that they are responsible to teach. The students rotate teachers every forty-five minutes to promote generalization of skills. Each classroom has at least one certified teacher. For every five students in the classroom, there is a BCBA that consults with the teacher(s). Further oversight is also provided by other instructors which include a masters level board-certified behavior analyst and himself.

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<sup>2</sup> Z.M. was unilaterally placed by his parents.

Each student has a “data notebook”. (P-52.) It is divided up by IEP goals and objectives. Behind each section are four elements – graph or visual display of the student’s progress, response definition, measurement section, and a teaching section.

Dr. Brothers went on to state that when a child first starts at the school, they typically start with one-to-one teaching. This is because the children are usually younger and have learning histories that are complicated – meaning that they have learned the wrong things. An example of learning the wrong thing would be pulling hair to get a glass of milk or learning a mispronounced word is the way to say the word.

To correct this, the school provides direct instruction on foundational skills which are necessary for the child to progress. Once it is determined what foundational skills are lacking, they are worked on both at school and in the home environment for consistency and reinforcement. When a student is deemed ready to progress to, for instance, a group learning situation, they do so with other students who also attend the school and are autistic. This is because the child/children still require a lot of support, prompting and rewards which could be in the form of candy or a token. Also, initially, the children may not have the generalization of directions yet - such as sitting still, imitating prompts or looking at a person. When introducing a student into a group setting, the school follows the Guidelines by introducing the child into a small group setting and gradually build them up to a larger group.

Dr. Brothers has known Z.M. since birth. He is familiar with the family because Z.M.’s sister, J.M., who is also autistic, attends the SHLI. Z.M. was enrolled at the SHLI in 2017/2018 school year when he attended the EI program. He was not quite three-years-old at the time.

When Z.M. first started, he was delayed in a variety of ways such as his pace of responding, lack of interest and focus on his own agenda, lack of verbal skills to name a few. According to Dr. Brothers, he required a comprehensive ABA program from the start – receiving between thirty to forty hours a week of ABA instruction as well as

caregiver instruction to his parents which initially occurred on the average eight or nine times a month. All of this was charted to track his progress. (P-69.) He did not start participating in any type of group session until January 2018, which was when he started in ten minute sessions with two other students. Prior to that he was in a one-to-one instructional setting and receiving home programming.

In discussing Z.M.'s January 2018, progress report, Dr. Brothers went through the identified goals of which there were nine, and their respective objectives. Many of the goals (i.e. discrimination skills, direction following skills, demonstrate imitation skills, etc.), were foundational to more advanced learning. He also went through Z.M.'s performance on a couple of the goals. The progress report covered October, November, December 2017, and most of January 2018, and Dr. Brothers noted that from the start, Z.M.'s level of need was tremendous at the foundational level.

When Z.M. started in group session in January 2018, there were three children including him. Z.M. was still one-on-one and the other two children shared a teacher. A token economy system was utilized which was a way of delivering positive reward consequences and was frequently delivered to Z.M. Starting in February 2018, and over the ensuing months, the teacher started fading back two feet behind Z.M. to shift the control to the group leader.

While Z.M. was making progress, he was not ready to be moved into a less restrictive environment. According to Dr. Brothers, when a student is ready to be transitioned, there is a process to facilitate it. The parents are brought on board and then the school district is contacted and invited to take a look at the data and SHLI recommendations to start the transition process by setting up goals for the transition. SHLI works with the school in identifying, for instance, the best teacher to support the student, a classroom that has a smaller number of students, a classroom with an aide etc. This dialogue and transition occur months before the child actually starts in the District. When the child starts in the District, a SHLI staff member will initially sit in the classroom ensure that the programming gets off to a good start. Z.M. was not anywhere near that point.

Dr. Brothers also went through Z.M.'s May 2018, progress report. (P-10.) At that time, he was showing progress and also mastering some of the foundational skills that were necessary for more advanced learning. He was also showing some generalization but even that continued to need work. Out of a six hour day, Z.M. participated in a one ten minute group activity per day. According to Dr. Brothers, Z.M. continued to need a Comprehensive ABA program and was not ready to be with typically developing peers for any portion of his day. This was consistent with the Battelle results of June 2018, wherein his peer interaction skills were for the most part non-existent. (J-13.)

He recalls when the District staff came to SHLI to observe Z.M. who was still thirty hours of one-to-one ABA instruction and two hours of BCBA supervision for every ten hours of ABA instruction. At no time did the observers ask if Z.M. was ready for an inclusion classroom with typical peers or what his educational needs were.

Z.M. remained at SHLI through the summer and the following school year of 2018/2019. He had turned three-years-old by then. Over the summer of 2018, Z.M.'s group time decreased to five minutes a day because he was not imitating his peers appropriately and was engaging in disruptive behavior. His token economy system was changed so that he could receive more rewards for behavioral compliance. In September 2018, Z.M.'s teachers started working on the skills and directions that he was not following well in the group setting.

In looking at his September 2018, progress report which covered the prior four months, Z.M. once again made progress, however, still had areas of need which necessitated a Comprehensive ABA program and high level of BCBA supervision. (J-28.) In Dr. Brothers' opinion, despite Z.M.'s progress, he was not ready for a half a day in an inclusion classroom as he still required the one-to-one instruction to learn skills necessary to, for instance, participate in a group lesson.

Over the ensuing months, Z.M.'s time in group instruction incrementally increased back up to ten minutes a day, however, the frequency of reinforcement

remained high. (P-69.) In looking at Z.M.'s January 2019, progress report, Dr. Brothers once again noted the progress that Z.M. had made. However, in going through his goals and objectives, he again noted that Z.M.'s level of needs in several areas were still significant. (J-36.) Foundational skills were still being worked on at the time but had become more sophisticated. According to Dr. Brothers, if Z.M. had been placed in an inclusion classroom, he would have been isolated because he only focuses on himself and would not have been engaged.

Also added over the ensuing months were other forms of "group" settings. For instance, in February 2019, a "lunch" group or session was introduced into Z.M.'s program wherein he was taught a variety of skills such as eating new foods without gagging or protest, using a napkin and utensils, drinking from a cup etc. In March 2019, board games, story time and arts and crafts were also added. For this activity, there was one teacher for every two students which allowed for group-oriented instruction, story comprehension, fine motor skills and playing board games with classmates

In May 2019, Z.M. started to attend trips to the local library for story time. According to Dr. Brothers going to the library for story time is one way to gauge a student's generalization skills and ability to acquire skills under a less structured environment. In Z.M.'s case, he was observed engaging in a variety of off-task behaviors such as lying on the floor, grabbing toys and not interacting with his peers. Based upon these observations as well as Z.M.'s overall progress, it was apparent that Z.M. still required a more structured environment and was not ready to be in any type of group instruction - including small group instruction with typical peers.

Dr. Brothers testified that he was aware that the District conducted another observation of Z.M. on various dates in March 2019, and thereafter generated a report. (R-54.) He was also aware that one of the comments in the report stated that Z.M.'s main supervisor in the classroom, while having completed the requisite training and coursework, had not yet passed the BCBA exam. According to Dr. Brothers while that was an accurate statement, what was omitted was the fact that there were two BCBA's that oversaw Z.M.'s overall program. Comments as to data collection were also

erroneous. The District reported that data was only being collected once or twice a week for a majority of Z.M.'s program. Dr. Brothers stated that that was not SHLI normal practice as they collect data at least once a week and at most once a day, with a majority of the programs getting collected two or three times a week. He was also non-plussed by the District's comments that at times students in crises had to be taken out of the classroom by the classroom supervisor. He did not feel that this impacted Z.M.'s programming needs which at all times were being met by the remaining highly trained staff members. Regarding Eby's comments about the level of BCBA supervision observed, he felt that the numbers were intentionally misleading because Eby's observation was over a period of three days, not one. He also vehemently disagreed with Eby's representation that SHLI concurred with the District that Z.M. would benefit from part of his school day spent in an inclusion classroom.

He did agree however, with the District's comment that Z.M.'s biggest deficit so far has been his ability to generalize his acquired skills to new materials, settings, peers and adults. To him, this suggests that Z.M. was not ready to be in an inclusion class - cautioning that if the structures that have helped Z.M. succeed to date were peeled away too rapidly, his performance would decrease – a fact which he believed had already been evidenced.

Review of Z.M.'s June 2019, progress report revealed that Z.M. continued to show progress for the remainder of the school year – progressing to the point that several of the programs were discontinued as he had met the criteria. (P-64.)

In discussing the Z.M.'s 2019 summer program, he stated that Z.M. attended, with a staff member, a local daycare with typically developing peers, for ten days, four hours a day. It was a social, instructional and recreational program and provided SHLI an ability to see their students in a different teaching environment in a larger group setting. Z.M. participated in, among other things: swim time - which was structured; recess, which was unstructured; and story time which was in a group setting. Throughout this time, data was collected and graphed - the goal being whatever areas required attention would be addressed back at SHLI. (P-68.) According to Dr.

Brothers, the purpose of having Z.M. attend the daycare was not due to his readiness to be in an inclusion classroom as part of his school day, rather it was his readiness to evaluate his responsiveness to a looser set of teaching conditions.

In looking at the data on Z.M. from the summer daycare program, his results varied. For instance, on following directions over the course of the ten days, he was able to do so thirty percent of the time which was significantly below what he had been able to do at SHLI. When asked to do something such as “get your books” or “line up”, he averaged thirty-five to forty percent of the time. Z.M.’s “on task” during an activity was about sixty percent. The peers in the group averaged in the low eighties. Another example was the playground session, which was an unstructured environment that provided Z.M. zero prompting. Z.M. was for the most part was isolated and did not initiate interaction with other children nor did he respond to their efforts. All of the data again supported the conclusion that Z.M. was not ready for an inclusion setting.

Throughout the summer, Z.M. continued to participate in a small group session ten minutes a day. At one point they attempted to remove the token board and also introduce a new teacher, however, there was a marked decrease in his performance. As a result, the token system was reintroduced.

According to Dr. Brothers, even with all of the progress that Z.M. had made throughout the 2018/2019 school year, he was not ready for a half-day inclusion classroom in September 2019. He still required a Comprehensive ABA program with a high level of BCBA supervision. He was, however, introduced to a local preschool two mornings a week in November 2019, to “test” the waters – see what his needs were and address them. A SHLI staff member went with him to take data and assist Z.M. if needed. In the afternoon he returned to SHLI where his instructors continued to work on his goals and objectives.

On cross-examination, Dr. Brothers was questioned about his credentials and when he received his BCBA. In response he stated that it was in 2013 when he was the Executive Director of SHLI. He acknowledged that prior to obtaining his BCBA, he

was supervising ABA programs. He clarified, however, that the BCBA credentialing did not exist at the time.

He was also asked about his comments regarding programming that is “socially valuable to the consumer” and whether that means programming requested by the parents. In response he said “yes”. He acquiesced that SHLI goal should be teaching preschool skills so that its students can transition into a less restrictive environment such as public schools. He also recognized that typical peers in a classroom add value

According to Dr. Brothers, SHLI does not conduct any standardized testing when a student is enrolled. He has never seen the proposed IEP for Z.M. and he could not say one way or the other whether the proposed IEP offered Z.M. a FAPE.

When questioned how often, under the Guidelines, the BCBA needed to be in the classroom, he conceded that the Guidelines were silent on that point, but he believed it should be daily. He pointed out, however, that there was a ratio of time of how much supervision was required for every ten hours of ABA instruction. When questioned on this point, he acknowledged that the supervision could be direct or indirect supervision with indirect supervision taking place outside of the classroom setting. It was his position, however, that a majority of the supervision should be direct supervision but subsequently conceded that it should be based upon the individualized needs of the student.

In identifying the prerequisite skills necessary for group learning, Dr. Brothers stated that the necessary skills included: ability to follow directions – individual and group; operate from increasingly delayed reinforcement contingencies - more social rewards than teacher-engineered rewards; ability to generalize skills (language, academics, behavior, social); and ability to operate from increasingly abstract presentation of materials.

He went on to state that Z.M. started group learning with support in a self-contained setting in January 2018. Z.M. had many of the prerequisite skills that he (Dr.



Brothers), had previously identified such as some ability to operate with a delay in reinforcement; the ability to control behavior; and the ability to wait for his turn to some extent. When questioned about Z.M.'s May 2018, progress report, he conceded that Z.M., who was a little over two-and-a-half-years-old at the time of the report, had mastered independently sixty-five one-step directions since the implementation of the program and was working on two-step directions. (J-10.) He also agreed that by the following February 2019, in addition to the small group learning, group lunch had been added which was about forty-five minutes long, and board games, story time and crafts with other students which was an additional fifteen to twenty minutes. There were also the library excursions in May 2019, which according to Dr. Brothers based upon Z.M.'s performance, demonstrated that Z.M. was not ready to be in any type of group instruction.

In questioning him about the discrepancies of reporting between the June 2019, progress report which stated that Z.M. had a ninety-six percent generalization of working in a group setting such as the library (P-64) and his (Dr. Brother's) chart (P-69) which indicated that Z.M. was unable to stay "on task" at the library, he stated that the sampling of data was in essence a snapshot in time and that he would have to look at the data closer. However, Dr. Brothers did acknowledge that Z.M. appeared to have had a successful level of observed intervals of being "on task" at the library.

When asked whether Z.M. was ever placed in an environment where he was side by side in a small group activity with typical and special education peers, Dr. Brothers pointed out that Z.M. attended the local daycare in the Summer of 2019. When questioned about the level of support provided while at daycare, he acquiesced that the staff member was not an RBT nor did the SHLI look to see how their program could be implemented in that environment.

Dr. Brothers was also asked about the preschool that Z.M. started attending in November 2019. According to Dr. Brothers the school is a private school and attended by typically developing peers. He did not know what the teacher's credentials were other than the teacher was a certified preschool teacher and most likely not trained in

ABA. A staff member accompanies Z.M. to school, however, they are not an RBT and are only there to take data and assist Z.M. if needed.

In questioning Dr. Brothers if the District's model for introducing Z.M. into an inclusive environment which included a side by side along with BCBA oversight was an appropriate model for Z.M. to move towards a least restrictive environment, he stated that it was a step in the right direction.

In directing Dr. Brothers attention to the June 2018, Battelle, he was questioned about his comments that Z.M. was needy and developmentally delayed despite the fact that some of his scores, fell within the average range. In response Dr. Brothers pointed out that some of Z.M.'s scores in the "Personal-Social" section fell well below average. (J-13.)

Dr. Brothers was also asked about the twelve exit criteria for leaving SHLI and transitioning into a less restrictive environment. In response he stated that not all criteria needed to be met before a child could leave the school and even if they were met, if the parents wanted their child to stay at SHLI, they could. In Z.M.'s case, even though he was aware of what the District was proposing, no one from the District asked to meet with him them; opened up a dialogue as to Z.M.'s progress; or asked to see his data. Dr. Brothers repeatedly commented that ultimately it was up to the "consumer" (parents). If the parents agreed, then SHLI would transition Z.M. into the District. According to Dr. Brothers, transitioning commences months in advance of the move. He did not recall seeing the District's proposed transition plan.

In discussing the credentials of the individuals who provide services at the school, Dr. Brothers stated that while fine motor skills and communication skills were worked on in the classroom, the services were not provided by a certified speech therapist or certified occupational therapist. Instructors in the classroom all have bachelor of arts degrees and there is at least one instructor in the room who is a certified teacher for every classroom of five children. He does not know what training or qualifications the District teachers have or who would have worked with Z.M. under the

proposed IEP. He also acknowledged that under the Guidelines, an RBT certification requires a high school degree, not a college diploma.

Dr. Brothers was also asked about the main supervisor, Colby Roebuck, in Z.M.'s room in the 2018/2019 school year – more specifically, if she was a BCBA. In response he stated that she had taken the requisite course work and was qualified to take the test but had not yet done so at that time. He went on to state that he and another BCBA oversaw her.

He was also questioned about the Guidelines caseload recommendations for a BCBA of six to twelve children if they are receiving comprehensive treatment and whether the BCBA could also provide services to other students who do not require the same treatment regimen. In response, Dr. Brothers agreed that it was feasible that a BCBA could work with other students at the same time.

Dr. Brothers was also asked about his comments that one of the reasons that Z.M. wasn't ready for an inclusion setting was because of his token system and that it would look odd to typically developing peers. More specifically he was asked if he was aware that a token system is quite often used in kindergarten classroom. In response he stated that he would not be surprised ,however, felt that an autistic child would be stigmatized because they were using a token board. This was based upon his years of experience not research.

He was also questioned about the goals that were set for Z.M., specifically the waiting program due to the parent's concern about elopement. According to Dr. Brothers, because of the structured classroom, and the ABA trained professionals working with him, they did not have an elopement issue with Z.M. Nor did they have an issue with aggressive behavior or tantrums at school. In discussing the class make-up, Dr. Brothers stated that there were no other children the same age as Z.M. in his class, however, to him, age was less relevant than similarly skilled children.

**Discussion:**

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact finder assigns to the testimony of a witness, and it contemplates an overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super 282, 287 (App. Div. 1958).

After hearing the testimony and reviewing the evidence, I make the following **FINDINGS of FACT**:

Dr. Brothers and Dr. Hoch were highly knowledgeable in their respective fields of expertise; however, after hearing their testimony I believe that regardless of what program the District put forward for Z.M. – even if it was identical to what SHLI was providing – they would have been critical of the District's program, and opine that continued placement at the SHLI was in Z.M.'s best interest. As such, while given weight, their testimony and opinions were counterbalanced with the perception that they were biased.

As an example, Dr. Hoch went into great detail about the Guidelines and recommended dosages. According to Dr. Hoch, based upon Z.M.'s needs, he required a comprehensive treatment program which called for thirty to forty hours of ABA instruction. Under the Guidelines, this called for two hours of BCBA oversight for every ten hours of instruction. Dr. Hoch initially testified that the July 2018, IEP was inadequate for among other things, failing to provide Z.M. with the necessary ABA

programming. In actuality, the IEP did call for the requisite number of programming hours as well as parent training and transitioning – all of which were consistent with what she had recommended in her January 2018 report.

Another criticism to note was Eby's breadth of responsibilities in the District. When questioned about her own practice, Dr. Hoch acknowledged that she provided various services for upwards of thirty to forty students and at the same time, had her own private practice wherein she would provide treatment to five autistic students at a time. Dr. Hoch also stated that the three hours of BCBA oversight in the IEP, particularly when it was indirect supervision, was inappropriate. However, when questioned on this, she acknowledged that the Guidelines were not only silent as to whether the BCBA oversight needed to be direct versus indirect and that the Guidelines were created for insurance purposes.

Dr. Hoch further testified, without knowing what credentials the District's teaching staff held, that all of Z.M.'s "instructors" should have, at a minimum, a college degree. This statement was made without support, was contrary to the Guidelines requirements, and clearly, if not intentionally, coincided with the unique credentialing requirements of SHLI instructors.

Dr. Hoch also testified that Z.M. was not ready for group instruction in either a self-contained classroom or inclusion classroom as proposed by the District. Yet, he had been participating in a group setting at SHLI since January 2018. Additionally, in February/March 2019, Z.M. started participating in forty-five-minute group lunch, board games, story time and crafts with other students, which encompassed an additional fifteen to twenty minutes. He also attended library trips, where it was reported that he had a ninety-six percent generalization. When this was pointed out, Dr. Hoch circled the issue stating that even if that were true, it would not change her opinion because other factors such as further observations, review of other data, and staff interviews would have to be taken into consideration.

It appeared that Dr. Hoch's reports were subjective from the start and clearly focused on justifying why SHLI was the appropriate placement for Z.M. This lack of objectivity was evident in her first report, wherein she recommended that Z.M. remain at SHLI, yet had no input or insight as to what the District would have provided him. This subjectivity was seen again when she reported which credentials Z.M.'s instructors should have or the type of BCBA supervision he required; however, she acknowledged on cross-exam that such credentialing and BCBA oversight were not required or inconsistent under the Guidelines.

She also testified that even if an identical program was offered, it would be inappropriate to remove Z.M. from the SHLI program.

Likewise, Dr. Brothers' testimony appeared to be agenda driven. He testified that Z.M. was not ready for small group instruction. However, according to Z.M.'s progress reports and Dr. Brother's own testimony, Z.M. had been in a small group setting since January 2018. This continued over the ensuing months with Z.M.'s instructor systematically fading back and Z.M. remaining on task. By the following February/March 2019, Z.M. was not only participating in small group instruction, but also participating in a forty-five-minute group lunch, board games, crafts, story times and games which was an additional fifteen to twenty minutes, and going to the library for story time.

Regarding the library sojourns, Dr. Brothers stated that due to Z.M.'s inability to stay on task and generalize, it reinforced his position that Z.M. still required a more structured environment and was not ready for group instruction – including small group instruction with typical peers. This statement was belied by the progress report for that time period which found that Z.M. had a ninety-six percent generalization of working in a group setting such as the library, and had in fact mastered a number of the goals that had been set - to the point that some of the programming had been discontinued.

Dr. Brothers also testified that in the Summer 2019, Z.M. attended a local daycare for ten days in the Summer of 2019. The data which was collected again supported the conclusion that Z.M. was not ready for an inclusion setting.

On cross-examination, he acknowledged that, just like the library, the staff member who attended the session with Z.M. was there to collect data only and was not an RBT. He did not know what the credentials of the classroom teacher were, nor was there any effort on SHLI to implement their programming in that setting – once again, the staff member who attended the daycare with him was there for data collection only. He also acknowledged that what the District was proposing – i.e. introducing Z.M. into an inclusive environment with an RBT along with BCBA oversight was an appropriate model for him to move into a least restrictive environment. He also admitted that he had never seen the proposed IEPs and therefore could not say one way or the other whether they provided Z.M. a FAPE.

He also testified about pre-requisite skills that were necessary for a student to participate in group learning. When questioned about the skills necessary, he acknowledged that Z.M. had many of the prerequisite skills in January 2018, which was when he started in a small group setting.

When questioned about the Guidelines and his testimony that a BCBA needed to be in the classroom daily, he acquiesced that the Guidelines were silent on that point. However, it was his belief that a majority of supervision should be direct, which was what SHLI offered. He subsequently acknowledged, however, that it should in actuality be based on the individualized needs of the student.

I found that T.M. testified credibly and has a significant amount of parental experience in dealing with children with autism as her oldest child is also autistic. However, no two children are alike. There is no question that the petitioners have the best interest of their child at heart. T.M. was very candid in her testimony that she had little to no faith in the District given their experience with the District and how they handled their daughter. Therefore, her views and testimony have to be taken in that

context. T.M. was also quick to criticize perceived deficiencies by the District - such as Eby not being present at the Identification Meeting or that a draft IEP had been prepared prior to the IEP meeting. When questioned on some of these points, she acknowledged that the District would have been remiss had they not come with a draft IEP and she was unaware that the District had not been placed on notice that Z.M. was autistic at the time of the Identification Meeting. She also felt that the IEP's did not take into consideration Dr. Hoch's recommendations but failed to realize that most of her recommendations were in the IEPs and that the District was offering ABA instruction throughout Z.M.'s day with BCBA oversight.

I found that Eby and Lilly knowledgeable in their respective fields and testified credibly as to what was taken into consideration in developing Z.M.'s IEP once the information was received.<sup>3</sup> This included among other things, review of Z.M.'s progress reports, program book, Dr. Hoch's evaluations and recommendations, tests, and observations. The District however appeared to be consistently placed at a disadvantage in developing Z.M.'s IEPs as critical information from SHLI was not timely provided (i.e. progress reports) or not provided at all (i.e. teacher input form). Feedback from the petitioners was also dilatory. During the initial IEP meeting, which was taped, the District repeatedly asked the petitioners if they had any questions and on multiple occasions told the petitioners that the proposed IEP was a breathing document and that their feedback was welcome.

Understandably the petitioners wanted an opportunity to digest the proposed IEP and also asked for an opportunity for both the petitioners and Dr. Hoch, to observe the ESY program, the inclusion classroom and a self-contained classroom. Those observations took place in August 2018, September 2018, and October 2018.

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<sup>3</sup> Eby, who at the time of her testimony was pregnant and imminently due to go out on maternity leave, testified that the District was hiring an outside contractor while she was out on leave. Petitioners in their case in chief, introduced a job posting for Eby's job that was dated July 8, 2018 - two days prior to her testimony. Petitioner asserts that Eby's overall credibility should be questioned given the perceived lack of candor. I disagree and **FIND** that insufficient information was presented to make such a quantum leap. Even assuming Eby had provided notice prior to the hearing and was aware that her position had been posted, it did not affect the substance of her testimony which related the appropriateness of the proposed program.



However, feedback was not provided until December 2018 which was when Dr. Hochs' report was turned over - two months after her last observation. Upon receipt, the District revised the July 2018, IEP. Notably, the petitioners created detailed typed observations which were allegedly prepared contemporaneously with the visits months prior and were curiously signed by the petitioners, but were never shared with the District until the eve of trial. Given the comments/concerns that were raised, some of which, by T.M.'s own admission, were assumptions without foundation, one must pause to consider the underlying rationale for their preparation and goes to an overarching perception that petitioners did not have any intention of sending Z.M. to the District system.

With the above in mind and upon giving due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

At the age of eight-months-old, Z.M. was found eligible for EI services in the form of physical therapy due to his inability to sit up independently. When Z.M. turned one-year-old, EI added a session of developmental intervention because he was not yet pointing to objects. In November 2016, Z.M. was re-evaluated by EI using the Developmental Assessment of Young Children. The results showed a delay in Z.M.'s expressive and receptive language, and fine and gross motor skills. He was subsequently referred to a neurodevelopmental pediatrician (Dr. Farrell).

Dr. Farrell examined Z.M. on January 31, 2017. He was sixteen-months-old at the time. She diagnosed Z.M. with ASD, without intellectual impairment and with language impairment.<sup>4</sup> Dr. Farrell further found that Z.M. required support for socialization and substantial support for communication. She recommended that Z.M. receive twenty-five to thirty-five hours of ABA and parent training with a BCBA.

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<sup>4</sup> On page 5 of the report, the notation under ICD-10-CM ICD-9-CM is stated 1. Autism spectrum disorder, requiring substantial support, without accompanying language impairment, without accompanying intellectual disability; 2. Receptive-expressive language delay; 3. Developmental coordination disorder; 4. Congenital hypotonia; 5. Family history of autism in sibling...

In May 2017, when Z.M. was twenty-one-months-old (1.9-years-old), petitioners enrolled him in the SEARCH program where he received ABA programming. EI Services were discontinued at that time. Thereafter, in October 2017, when Z.M. was twenty-six-months-old (2.2-years-old), petitioner's enrolled Z.M. in a pilot program at the SHLI, the same school that his sister, who was also autistic, attended.

By January 2018, Z.M. had many of prerequisite foundational skills for him to start participating in a small group setting.

In March 2018, based upon a January observation and reports received a couple of months prior, Dr. Hoch prepared a consultation report in which she identified Z.M.'s specific areas of need to be: receptive and expressive language; social interactions skills; remaining engaged and focused; coping with distractions and changes in routine; eating a variety of foods appropriately; and functioning outside of typical classroom and home routines.

The report outlined twelve essential components of programming that Z.M. should continue to receive.<sup>5</sup>

In a report generated by Dr. Farrell on May 14, 2018, Z.M., who was thirty-three-months (2.9-years-old) at the time, was diagnosed with ASD requiring substantial support, without accompanying intellectual impairment, without accompanying language

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<sup>5</sup> The twelve essential components identified included: 1) A behaviorally-based education program designed to address skill deficits and behavioral challenges and guide all areas of programming with fidelity; 2) A formal behaviorally-based teaching curriculum that contains systematic programs to address skill deficits and behavioral challenges in all areas; 3) Full-time program supervision and staff training by a senior level BCBA; 4) A variety of research-based teaching procedures to include teacher-directed interventions and child-directed interventions as well as other ABA based teaching techniques that have been empirically demonstrated to promote skill acquisition; 5) A full day of active individualized instruction; 6) A data-based approach to instruction, to systematically evaluate the effects of teaching and treatment interventions; 7) A twelve month program; 8) Special Education teachers, instructors, and aides with specific training and education in ABA and education; 9) A systematic staff training and supervision program; 10) An active family consultation program; 11) Procedures to systematically increase Z.M. participation in small group instruction; 12) Systematic transition to less restrictive environments.

impairment. He was also diagnosed with receptive expressive language delay, developmental coordination disorder, and congenital hypotonia.

On this same date of May 14, 2018, petitioners met with representatives from the District, for the Initial Identification and Evaluation Planning meeting. At the time of the meeting, the District only had the information which had been provided by EI. They did not have the benefit of Dr. Farrells reports in advance of the meeting and were therefore unaware that Z.M. was autistic. Nor was the District aware that Z.M. had been attending SHLI's Pilot Program since October 2017. No transitional planning meeting was held prior to the Identification Meeting because the District had been informed that the parents were already familiar with the program. The District was also unaware at the time, that Dr. Hoch had been retained by the petitioners to render an opinion on the appropriate placement for Z.M. having received her report the day of the meeting.

At the time of the meeting, it was decided that EI would complete the exit Battelle which was subsequently conducted in June 2018. Z.M. had undergone two prior Battelle assessments, one when he was nine-month-old and a second one a year later. The District had already been provided a copy of the assessments. Based upon the results of the assessments, Z.M. was classified as a "Preschool Child with a Disability" a determination which petitioners agreed with. His scores year over year reflected a notable decrease in the adaptive domain, slight decreases in personal/social domain and motor domain, and an increase in communication domain. The cognitive domain remained in the average range. Based upon the identified areas of weakness, additional testing in speech/language and motor were conducted as were home/classroom observations. A Social History was also obtained.

Z.M. was observed at SHLI on two dates - June 8, 2018, and June 11, 2018, by Lilly and Eby. Total observation time was three hours. Z.M. was the youngest in the class of five which had a one-to-one teacher ratio. A BCBA was also present who oversaw the instruction and worked with the staff members. During this time, Z.M. was observed following a picture schedule and independently retrieving his task baskets.

He participated in circle time where a five-token reinforcement board was utilized. Circle time lasted ten minutes and usually had three students one of which included Z.M. A ten-token reinforcement board was utilized when working on his programs. Over the two courses of the two observations, Z.M. received a reward after working on his programs for an average of five minutes. The range of reward time was two to eight minutes. He repeated words and phrases when prompted and at times displayed some spontaneous language. He had six episodes of noncompliance; however, each episode was redirected within thirty seconds. All observed social interactions and reciprocal conversations with peers required verbal prompting by the assistants.

The last observation occurred on June 14, 2018, when Lily went to petitioner's residence and observed an EI OT session. During this session, Z.M. participated in several fine motor skill activities some of which required hand over hand support to help Z.M. utilize both hands during the activities. When distracted, which occurred a couple of times, Z.M. was properly redirected. He was able to transition smoothly transition from each task without a reward. When T.M. left his workspace, Z.M. did not scream or attempt to follow her which was apparently a recent improvement in Z.M.'s behavior.

The following day, June 15, 2018, a Social History Evaluation was conducted wherein T.M. was interviewed. Z.M.'s developmental history was provided as were his past and present programming. T.M. reported several concerns for Z.M. which included among other things: eloping; increasing attention span in class; non-compliance at school; language skills; gross motor skills; problem behaviors; doctor's appointments; self-help skills; eliminating stereotypical/repetitive behavior without adult prompting, to name a few.

The OT Evaluation was conducted on June 18, 2018. The examiner noted that Z.M. had difficulty following directions and attending to the tasks during the evaluation. She administered the Peabody Developmental Motor Scales (PDMS-2) and also received feedback from Z.M.'s teacher at SHLI who completed a sensory processing questionnaire. In review of the results, the examiner found that Z.M.'s fine motor and gross motor skills were in the poor range. Z.M.'s teacher at SHLI indicated concerns

regarding Z.M.'s sensory processing and impacts on classroom performance on the sensory processing questionnaire which the examiner indicated would need to be monitored once Z.M. entered the preschool program.

The Speech and Language Evaluation was conducted on June 27, 2018. The sources of information which were used as part of the evaluation included the Test of Early Language Development (TELD 3) Form A, the Battelle report results, oral motor examination, parent reporting and classroom/playground observation. The overall impression from this evaluation was that Z.M. demonstrated weaknesses in pragmatic language. His spontaneous language was decreased. The evaluator recommended that Z.M. continue to be exposed to typically developing peers to further develop his social skills competency. He also needed to build his self-regulation skills with embedded training throughout his day.

On July 19, 2018, the Initial Eligibility Determination and Initial IEP meeting was held. The CST determined that Z.M. was eligible for special education and related services under the classification of "Preschool Child with a Disability". At the time, he was not eligible for ESY given his age, but he would be in 2019. A draft IEP was presented to the petitioners at that time. It was based on all of the evaluations, observations, standardized testing results, medical records and Dr. Hoch's report that they had at the that time. While the SHLI staff members were sent teacher input forms a month prior and asked to fill them out, they failed to do so. Instead, what was sent, the day before the scheduled IEP meeting, were Z.M.'s progress reports. Given the lateness of the submission, the District was unable to incorporate their findings into the draft IEP. Throughout the IEP meeting, the petitioners were repeatedly asked if they had any questions and informed that the document would and could be modified based upon their feedback and after the District had the opportunity to review Z.M.'s progress reports.

The IEP called for a split day with Z.M. in the self-contained special education preschool classroom for half of his day and an integrated general education preschool for the remainder of his day. It also called for a personal aid – an RBT, throughout the

day (1x daily/375 minutes). Parental counselling and/or training services two times monthly for sixty minutes (2x/monthly/60 min.). Individual OT two times every six day cycle for twenty minutes (2x6 day cycle/20 min), Group OT one time every six day cycle for twenty minutes (1x6 day cycle/twenty min), Speech/Language Therapy: group (not to exceed three) two times every six day cycle for twenty minutes (2x6 day cycle/20 min), Speech/Language therapy: Individual one time every six day cycle for twenty minutes (1x6 day cycle/20 min), special transportation with a bus attendant.

Modifications included: Use a consistent daily routine; provide a highly structured, predictable learning environment; use interests to increase motivation; simplify task directions, provide modeling; orient to task and provide support to complete task; directions repeated, clarified or reworded; provide individualized instruction; refocusing and redirection; maintain communication with home; use of a picture schedule; provide visuals along with oral directions; use of ABA techniques for data-driven instruction.

Under “Supplementary Aids and Services” the IEP again noted that Z.M. would be provided a RBT throughout the day in both environments (self-contained and integrated classrooms) to ensure consistency and generalization of skills in both settings; parent home training by the BCBA two times a month for an hour; prompting and cueing and redirecting student participation and positive reinforcement plan. The IEP also noted that ESY would be written into Z.M.’s 2019-2020 IEP. Also incorporated into the IEP was a transition plan which involved meeting with SHLI staff members and facilitating his transition into the Whiton Elementary School.

Behavioral interventions were also comprehensively set forth. Target behaviors that were identified were noncompliance and pushing tasks away. The IEP provided a description of the positive supports/interventions which would have been implemented. These included antecedent strategies (activity schedule; priming; incidental teaching procedures when possible); new skills (functional communication training); consequence strategies (token board, verbal praise, positive physical contact,

naturalistic teaching procedures; prompting on negative behavior). The frequency and duration of non-compliant would be recorded and monitored. Data collection occurs.

The IEP outlined eleven goals each with corresponding short-term objectives which addressed all areas of Z.M.'s identified weaknesses/needs. Data collection on specific goals and targets would be obtained daily and thereafter graphed. The special education teacher, while not a BCBA, had finished all of the BCBA coursework. The IEP addressed most of the recommendations of Dr. Hoch, including her recommendation that Z.M. be transitioned into a less restrictive environment when he was deemed ready. It addressed Dr. Farrell's recommendation that Z.M. receive twenty-five to thirty-five hours per week of ABA programming and it also, with limited exception addressed petitioners' concerns.

At the close of the July 19, 2018, IEP meeting, petitioners requested an opportunity for themselves and Dr. Hoch to observe the ESY program and the inclusion and self-contained classrooms. With regard to the ESY program, petitioners were repeatedly advised that the current program would not be reflective of the program that Z.M. would be provided in the 2019 ESY program.

A week later, on July 26, 2018, petitioners informed the District that they would be unilaterally placing Z.M. at the SHLI for the start of the 2018/2019 school year. Petitioners did not refuse the July 2018, IEP at that time nor did it provide any feedback on the proposed IEP.

On August 1, 2018, petitioners observed the ESY program on August 1, 2018, and in early October 2018, observed the integrated classroom. No feedback was received from the parents after the observation. Dr. Hoch observed both the integrated classroom and preschool disability classroom on October 12, 2018.

The only feedback that the District received from the petitioners' regarding the July 2018, IEP was a Consultation Report #2 dated November 20, 2018, by Dr. Hoch which was sent to the District on or about December 5, 2018.

The January 2019, IEP built upon the prior IEP and provided further clarity on the goals and objectives and how they would be measured and met. It addressed many of Dr. Hoch's concerns and adapted the IEP accordingly.

More specifically, the IEP called for a reduction of Z.M.'s time in the inclusion classroom from one hundred and eighty minutes to ninety minutes. The personal aide/individual RBT instruction, was increased to four hundred and five minutes daily. The BCBA oversight remained the same, however, was further clarified as to the delivery of services and the justification for the amount of "dosage". Goals and objectives were further refined and updated to include mastery and generalization criteria across people and settings. Parental training services were also increased and modified to be consistent with what was being provided by SHLI.

Petitioners filed a Petition for Due Process in January 2019. Over the ensuing months, Z.M. continued to make significant progress. In February 2019, he started attending group lunches which lasted about forty-five minutes. In March 2019, he also started participating in board games, story time and arts and crafts where there was one teacher for every two students. In May 2019, he started going on trips to the local library for story time which was also attended by typically developing peers. A staff member, who was not an RBT, would accompany him to the library – their primary role being data collection on Z.M.'s performance.

District observations of Z.M. occurred in March 2019, over a three-day period to assess his classroom readiness skills. During this time, he was observed participating in one-to-one instruction for a period of time, instruction in a dyad with another student for about ten minutes and participated in a small group circle time with two other students for twenty minutes.

Z.M.'s June 13, 2019, SHLI progress report, reflected that Z.M. had progressed across the board in several of the identified goals and objectives to the point that many of the programs were discontinued.



On this same date, prior to the issuance of the 2019/2020 IEP which included ESY services for Z.M., the petitioners notified the District that Z.M. would remain at SHLI and attend their 2019 ESY program and 2019/2020 academic year.

Z.M.'s June 2019, progress report was received by the District on July 8, 2019. The July 2019, IEP meeting was waived by consent of the parties after which the 2019/2020 IEP was issued. See Footnote 6 By consent of the parties, the Petition for Due Process was amended to add the 2019/2020 IEP.

The 2019/2020 IEP provided for Z.M. to participate in the District's ESY program in the self-contained special education preschool classroom from July 10, 2019, through to August 16, 2019, five days a week/360 minutes. The program included Speech-Language Therapy Group, not to exceed three students (2x weekly/20 min); Speech-Language Therapy: individual (1x week/20 min); OT: Individual (2x weekly/20 min); OT: Group (1x weekly/20 min).

For the 2019/2020 academic year, which commenced on September 5, 2019, Z.M.'s day was similar to the January 2019, IEP which provided for Z.M. to spend most of his day in the self-contained special education preschool classroom (Daily/255 minutes) and an hour and a half (Daily/90 minutes) in the inclusion classroom. Parental counselling and training remained the same as did the OT, speech/language therapy and ABA based instruction with an RBT assigned to him throughout the day. BCBA consultation was increased to six hours weekly given the fact that Z.M.'s 2019/2020 teacher did not have as much ABA experience as the prior year's teacher. Transition plans were also included which would have occurred over the course of the summer with the assistance of SHLI staff members. Modifications and supplementary aids and services remained the same.

The goals and objectives in the IEP were modified to reflect Z.M.'s progress over the course of the 2018/2019 school year as reflected in the SHLI progress reports; data review as of March 2019; and classroom observations.

As with the prior two IEP's, the 2019/2020 IEP was appropriately ambitious for Z.M. and reasonably calculated to meet his educational needs

### **LEGAL ANALYSIS AND CONCLUSIONS OF LAW**

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482. One purpose of the Act, among others, 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.A. § 1400(d)(1)(A). This “free appropriate public education” is known as FAPE. In short, the Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C.A. § 1401(9). A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the State involved; and d) are provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d).

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). An IEP should be developed with the participation of parents and members of a district board of education’s CST who have participated in the evaluation of the child’s eligibility for special education and related services. N.J.A.C. 6A:14-3.7(b). The IEP

team should consider the strengths of the student and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluations of the student; the student's language and communications needs; and the student's need for assistive technology devices and services. The IEP establishes the rationale for the pupil's educational placement, serves as the basis for program implementation, and complies with the mandates set forth in N.J.A.C. 6A:14-1.1 to -10.2.

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, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (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, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701. The Act did not, however, 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, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. In support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (DC 1972). Rowley, 458 U.S. at 192, 102 S. Ct. at 3043-44, 73 L. Ed. 2d at 703. 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, 102 S. Ct. at 3043-44, 73 L. Ed. 2d at 703-04.

In addition, the Court noted that available funds need only be expended "equitably" so that no child is entirely excluded. Rowley, 458 U.S. at 193, 102 S. Ct. at

3044, 73 L. Ed. 2d at 704, 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, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. Therefore, the inquiry is whether the IEP is “reasonably calculated” to enable the child to receive educational benefits. Rowley, 458 U.S. at 206–07, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

The Board will have satisfied the requirements of law by providing Z.M. with personalized instruction and sufficient support services “as are necessary to permit [him] ‘to benefit’ from the instruction.” G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671 (D.N.J. Feb. 27, 2009) (citing Rowley, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701). The IDEA does not require the Board to maximize Z.M.’s potential or provide him the best education possible. Instead, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). But an IEP must provide meaningful access to education and confer some educational benefit upon the child. Rowley, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. To meet its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. (2017); 137 S.Ct. 988; 197 LEd 2d 335.

“The educational opportunities provided by our public-school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.” Rowley, 458 U.S. at 198, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry, and that “[i]t is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variation in between.” Rowley, 458 U.S. at 202, 102 S. Ct. at 3049, 73 L. Ed. 2d at 709.

The IDEA also includes a mainstreaming requirement requiring education in the “least restrictive environment.” 20 U.S.C.A. § 1412(a)(5) mandates that

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The law describes a continuum of placement options, ranging from mainstreaming in a regular public-school setting as the least restrictive, to enrollment in a residential private school as the most restrictive. 34 C.F.R. § 300.115 (2015); N.J.A.C. 6A:14-4.3. Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3) (2015); N.J.A.C. 6A:14-4.2; Oberti v. Clementon Bd. of Educ., 789 F. Supp. 1322 (D.N.J. 1992).

Courts in this Circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom., Scott P. v. Carlisle Area Sch. Dist., 517 U.S. 1135, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996).

Petitioners assert that all of the IEPs’ were inappropriate to meet Z.M.’s needs – thereby violating his right to a FAPE both procedurally and substantively under the IDEA. Procedurally, the District violated N.J.A.C. 6A:14-2.3(k)2(iii) by failing to have a representative from SHLI present or at a minimum obtain their input for the 2018/2019 IEPs as well as the July 2019/2020 IEP. The District also predetermined Z.M.’s programming for 2018/2019 IEP as evidenced by the draft IEP presented to them at the July 2018, IEP meeting which had been developed without without any input from them.

Petitioner further asserts that the District again procedurally violated FAPE by impeding the petitioners right to participate in formulating the January 2019, IEP and unilaterally developed the January 2019, IEP without holding a meeting, obtaining their input or seeking a waiver in violation of N.J.A.C. 6A:14-2.3(j), N.J.A.C. 6A:14-2.3(k)(4) and N.J.A.C. 6A:14-4.2(a)(4).<sup>6</sup>

Last, petitioner argues that the District violated FAPE not only under the IDEA, but under Section 504 of the Rehabilitation Act of 1973 (“Section 504”) by not providing an educational program that meets Z.M.’s individual needs.

**Procedural Arguments:**

This argument was raised for the first time in petitioner’s closing brief. The issue was not raised in the original Due Process Petition or the Amended Due Process Petition as mandated by N.J.A.C. 6A:14-2.7(c) which requires among other things, that the petition “shall state the specific issues in dispute, relevant facts, and the relief sought”. As such, it is questionable whether it is properly before this Tribunal. N.J.A.C. 1:1-3.2

Even assuming arguendo that the issue is properly before the Tribunal, I **CONCLUDE** that the alleged procedural violations did not impede Z.M.’s right to FAPE, significantly impede the petitioners’ opportunity to participate in the decision making process regarding the provision of FAPE to Z.M.; or cause a deprivation of educational benefits. N.J.A.C. 6A:14-2.7(k)

Unlike K.S. and C.S. o/b/o J.S. v. Hopewell Valley Reg’l Bd. Of Educ. (EDS 15329-12) (Hopewell Valley) where the court found intentional misconduct conduct on

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<sup>6</sup> By letter, dated May 6, 2020, petitioners withdrew their procedural violation argument that the District violated FAPE by issuing the July 2019, IEP without first having convened an IEP meeting and allowing the petitioner’s the opportunity to participate in the decision-making process. Through this letter, the petitioner acknowledged that the IEP meeting was waived by both parties. See also Paragraph 32 of the Amended Petition.

the part of the District, there was no subterfuge on the District's part or intent to exclude the petitioners from the IEP process. Using for example the July 2018, IEP - by T.M.'s own admission, the District would have been remiss had they not prepared an initial template IEP based upon the information that it had available at the time which included, among other things, petitioners experts' report, District evaluations and testing. Additionally, throughout the meeting, the District repeatedly attempted to engage the petitioners in the process. They were continuously advised that once the progress reports from SHLI were reviewed and their feedback was obtained, the IEP would be revised. However, no feedback was forthcoming for several months which was when Dr. Hoch's Consultation Report #2 was received.

As it relates to the January 2019, IEP, there is a divide as to whether the IEP meeting was waived by unspoken consent of counsel given the correspondence exchanges. What is undisputed, however, is the fact that upon receipt of Dr. Hoch's Consultation Report #2, the District revised the July 2018, IEP to address many of Dr. Hoch's concerns and build upon the growth noted in Z.M.'s SHLI progress reports.

The January 2019, IEP was sent to petitioners' counsel for her client's review and comment. The response received was that the proposed program was inappropriate to meet Z.M.'s needs and that the appropriate placement for Z.M. was at SHLI.

The January 2019, IEP did not change Z.M.'s placement nor was it substantively changed other than reducing Z.M.'s time in the integrated classroom. There is no evidence that such action adversely affected the student's or the parent's substantive rights. C.H. Cape Henlopen Sch. Dist. 606 F. 3d. 59, 66-67 (3d Cir. 2010); H.M. v. Haddon Heights Board of Educ., 822 F. Supp.2d 439 (U.S.D.N.J.2011); Kingsmore v. District of Columbia, 466 F.3d 118, 119 (D.C. Cir. 2006); Z.R. v Fort Lee Board of Education, 211 WL 486151 (U.S.D.N.J. 2001), *affirmed* 458 Fed. Appx. 124 (3<sup>rd</sup> Cir.2011); D.S. v. Parsippany Troy Hills Board of Educ., 2018 WL 6617959 (US.D.N.J. 2018).

**Substantive Arguments:**

With regard to the 2018/2019, specifically the July 2018, IEP, petitioners argue that what the District envisioned the IEP would evolve into is not the standard, rather it is what was offered. Lascari v. Bd. of Education, 116 N.J. 30 (1989). More specifically, petitioners assert that the IEP called for Z.M. to split his day between the self-contained special education classroom and the inclusion general education, which based upon Dr. Hoch's testimony and Dr. Bothers was premature. The IEP also failed to provide ABA instruction which was again contrary to Dr. Hoch's recommendations as well as Dr. Farrells. Additionally, the IEP did not offer a Comprehensive ABA Program, which was again contrary to petitioner's experts' recommendations. Last, the IEP failed to plan for generalization. For all of these reasons, the petitioners contend that the July 2018, IEP was not reasonably calculated to meet Z.M.'s educational needs.

The evidence proves otherwise. From the start, the District was placed at a disadvantage. No transitional meeting was held prior to the Identification and Evaluation Planning Meeting because they were informed that the petitioners were already familiar with the program. At the time of the Identification Meeting, the only information that the District had been provided was from EI which included the prior Battelle assessments.

The District was unaware that Z.M. was autistic, that he had attended the SEARCH program or that he had been attending and was still enrolled in the SHLI's Pilot Program since 2017. It did not have the benefit of Z.M.'s records from Dr. Farrell nor was it advised that Dr. Hoch had been retained months prior to opine on the appropriateness of Z.M.'s placement at SHLI.

At the time of the meeting, the parties agreed that EI would complete the exit Battelle, and that additional evaluations would be conducted as well as observations at SHLI.



Based upon the results of the testing, evaluations, observations, data review and reports, which included Dr. Hoch's consultation report, the District prepared a proposed IEP with the expectation that the petitioners would provide feedback and participate in the process. While requested long before the meeting date, the District did not receive anything from SHLI until the day before the July 19, 2018, meeting, therefore, there was no opportunity to incorporate the information into the draft IEP.

The July 2018, proposed IEP provided Z.M. with an appropriately intensive ABA instruction throughout the day as well as an RBT. The level of BCBA oversight was appropriate given the fact that Z.M. would be receiving one-to-one instruction from a certified special education teacher who was highly trained in ABA as well as the RBT. Individualized instruction would have taken place in both settings until the data indicated group instruction would be appropriate for him. Additionally, the IEP provided that Z.M. attend a half a day in the preschool integrated classroom where his social skills, pragmatics and generalization, areas of identified weaknesses, would be addressed. At the time the July 2018, IEP was offered, Z.M. was already displaying readiness for participation in the inclusion classroom which was further indicative of the fact that proposed program was appropriate. The program also called for Speech-Language Therapy, OT and a BIP.

Throughout the meeting, the District repeatedly advised the petitioner that their feedback was important and that the IEP would be modified based upon their input. The petitioner asked for time to review the IEP and also requested the opportunity to observe the ESY program as well as the classrooms.

A week after the meeting, petitioners advised the District that they would be unilaterally continuing their son at SHLI, however, they did not refuse the IEP.

The petitioners observed the ESY program in August 2018, and they, along with Dr. Hoch, observed the integrated classroom in early October 2018. No input was forthcoming until December 2018 – five months after the eligibility meeting and two

months after Dr. Hoch and the petitioners conducted their observations of the District's program. Upon receipt, the District provided a revised IEP (January 2019 IEP).

The issue of parental cooperation in the IEP process and the impact it has on the ability of the District to provide FAPE was touched upon in K.G. v. Cinnaminson Twp. Bd. of Education WL 4489672 (3d Cir. 2018). The Court, in concurring with Administrative Law Judge's determination that the District had offered FAPE found that:

The ALJ's comments clearly arose from his determination that Plaintiff had failed to provide Defendant with a good faith opportunity to comply with the IDEA, not that it lacked the ability, will, or capacity to do so. Rather, the ALJ found that Defendant prepared a proposed IEP in advance of the child study team meeting for the 2015-2016 school year, but Plaintiff did not provide input at that meeting, and she failed to cooperate with Defendant in working on an IEP for R.L. The ALJ further found that Plaintiff prevented Defendant from fully addressing R.L.'s needs or adjusting the IEP to meet her needs by depriving it of the opportunity to demonstrate the education available to R.L. at Cinnaminson....

Consequently, the Court finds that the ALJ did not impose a requirement that a student must "try out" the public school before an alternative placement could be considered, but rather made the finding that Plaintiff's lack of cooperation in the process stymied Defendant's efforts to fulfill its obligations under the IDEA, which required Defendant to determine, in the first instance, whether it could provide R.L. with a FAPE in-district.

In D.S. v. Bayonne Bd. Of Educ., 602 F.3d 553, 564-65 (3d Cir. 2010) the court found that the appropriateness of an IEP must be determined as of the time it is made, and the reasonableness of the school district's proposed program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. An IEP is a "snapshot, not a retrospective." Fuhrmann v East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3rd Cir. 1991), citing Roland M. v Concord School Committee, 910 F.2d 983,992 (1st Cir. 1991). Thus, "in striving for 'appropriateness', an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." Ibid.

Our courts have confirmed that “neither the statute nor reason countenance ‘Monday morning quarterbacking’ in evaluating a child’s placement.” Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3rd Cir. 1995), citing Fuhrmann, supra., 993 F.2d at 1040.

While factually dissimilar to K.G., the underlying issue is the same. At the time the District proposed the July 2018, IEP, it did not have at its disposal, Z.M.’s records from SHLI, or, through no fault of the petitioners, their input. On this note, however, petitioners did not provide any input for several months after the IEP was proposed. Once their feedback was received, the IEP was revised and refined to further advance the progress that Z.M. had made based upon the SHLI progress reports and address Dr. Hoch’s concerns. As such, I **FIND** that the July 2018 IEP, cannot be looked at in a vacuum – rather, in conjunction with the January 2019 in the determination of whether the District offered Z.M. FAPE in the 2018/2019 school year.

However, even if looked at independently, the July 2018, IEP provided Z.M. FAPE given what information/documentation that the District had at the time it was prepared.

The IEP took into consideration not only the evaluations, testing and observations that were done, it also took into consideration Dr. Hoch’s recommendations. With limited exception, most of Dr. Hoch’s recommendations were incorporated into the IEP.

The IEP provided an appropriately intensive ABA program which would have allowed Z.M. to learn skills in a one-to-one setting and then provided him the opportunity to generalize and practice those skills in a less restrictive environment such as small group instruction and inclusion opportunities.

The January 2019, IEP, did not change Z.M.’s placement nor did the IEP substantively change other than reducing Z.M.’s time in the integrated classroom based upon consideration of Dr. Hoch’s comments. The IEP now called for time in the in-class resource room with Z.M.’s general education peers for snack, play based

instruction, small group math/science/story lab and during this time he would have received individualized instruction on playing with peers and small group attending skills. In essence, the IEP built upon the first IEP and provided further clarity on the goals and objectives and how they would be measured and met. While the amount of BCBA oversight remained the same, the provision of services was described in greater detail as were transition services. Parent training was also increased to be consistent with what SHLI provided.

The 2019/2020 IEP, based upon Z.M.'s more recent progress reports, took into consideration Z.M.'s progress over the year with the goals and objectives modified accordingly. The IEP still called for Z.M. to spend most of his day in the self-contained special education preschool classroom and ninety-minutes in the inclusion classroom. BCBA oversight was increased to six hours weekly due to the fact that Z.M.'s teacher for the academic year did not have as much ABA experience.

Based upon the testimony and documentary evidence, I **CONCLUDE** that the 2018/2019 IEPs and the 2019/2020 IEP that were proposed by the District offered Z.M. a FAPE with the opportunity for meaningful educational benefit and progress appropriate in light of Z.M.'s circumstances, within the least restrictive environment.

I **CONCLUDE** that the program offered Z.M. by the District constituted FAPE as that term is defined by law and that the Board has met its burden of proof. N.J.S.A. 18A:46-1.1

The IDEA also includes a mainstreaming requirement requiring education in the "least restrictive environment." 20 U.S.C.A. § 1412(a)(5) mandates that

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school setting as least restrictive, to enrollment in a residential private school as most restrictive. 34 C.F.R. § 300.115 (2015); N.J.A.C. 6A:14-4.3. Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3) (2015); N.J.A.C. 6A:14-4.2; Oberti v. Clementon Bd. of Educ., 789 F. Supp. 1322 (D.N.J. 1992).

Courts in this Circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom., Scott P. v. Carlisle Area Sch. Dist., 517 U.S. 1135, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996).

The Whiton Elementary School is Z.M.’s home school and is the least restrictive environment that will provide Z.M. a meaningful education benefit. Z.M., is autistic and among other things, has a demonstrated weakness in pragmatic language and his spontaneous language is decreased. He has difficulty maintaining attention and demonstrating appropriate play skills and has relatively minor behaviors of non-compliance. The July 2018, IEP appropriately placed him in the preschool disabilities classroom for half a day and the other half in the inclusion classroom.

The program provided Z.M. with a sufficiently intensive ABA program throughout the day in both settings, one-to-one instruction from a certified special education teacher trained in ABA as well as a full time RBT. Based upon the Districts evaluations, testing, reports and observations, the District determined that Z.M. was displaying readiness skills for group instruction. He was also ready for inclusion opportunities – he did not have a high level of disruptive behavior, had an average communication skills

and average cognitive skills. As with group instruction, inclusion opportunities would have been systematically introduced and would allow him work on his social pragmatic skills and social skills.

The January 2019, and 2019/2020 IEP decreased Z.M.'s time in the inclusion classroom based upon feedback from Dr. Hoch and review of Z.M.'s progress reports. As with the July 2018, IEP, the January 2019, and 2019/2020 IEPs provided sufficiently intensive ABA programming throughout the day in both settings, one-to-one instruction from a certified special education teacher as well as two different RBTs. BCBA supervision was increased for the 2019/2020 school year. Parental training hours were increased to mirror what petitioners were receiving through SHLI and an ESY program was offered

When a court examines whether a district has provided FAPE, the appropriateness of an IEP is not determined by a comparison between the private school unilaterally chosen by parents and the program proposed by the District. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Rather, the pertinent inquiry is whether the IEP proposed by the District offered FAPE with the opportunity for significant learning and meaningful educational benefit within the least restrictive environment. G.B. and D.B. ex rel J.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., EDS 4075-06, Final Decision (June 13, 2007), <http://njlaw.rutgers.edu/collections/oal/>. Upon a finding that the District provided FAPE, the appropriateness of the private school program is irrelevant. H.W. and J.W. ex rel A.W. v. Highland Park Bd. of Educ., 108 Fed. Appx. 731, 734 (3d Cir. 2004). The District bears the burden of proof by the preponderance of the competent and credible evidence that it has provided a FAPE to Z.M. in the least restrictive environment. N.J.S.A. 18A:46 -1.1.

The District in this case has proven by a preponderance of the competent and credible evidence that the 2018/2019 and 2019/2020 IEPs proposed by the District offered Z.M. a free and appropriate education with the opportunity for meaningful educational benefit appropriate in light of Z.M.'s circumstances, within the least

restrictive environment. To the extent that I have concluded that the District has provided a FAPE to Z.M., the appropriateness of a placement at the SHLI is irrelevant.

### **Section 504 Claim**

N.J.A.C. 6A:14-2.7(w) states that requests for a due process hearing with respect to issues concerning 504 of the Rehabilitation Act of 1973 shall proceed in accordance with this section. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination and exclusion of persons with disabilities from programs that receive federal funds. 29 U.S.C. s 791, et. seq. 34 C.F.R. 104, Subparts A, C and D. The stated goal of Section 504 is “to the maximum extent possible, [persons with disabilities] shall be fully integrated into American life.’ (Senate Report 1978). Section 504 is broader than the IDEA in terms of the scope with respect to who is protected and the programs in which they are protected. It applies to all persons with a disability including students, employees, patrons of public facilities, etc. and applies not only to school programs, it also applies to extra-curricular programs and after school programs.

Petitioners allege that the District violated Section 504 by failing to provide Z.M. an educational program that met his individual needs, therefore it deprived him of FAPE under Section 504 as well as the IDEA.

As set forth above, just as I have **FOUND** that the District provided Z.M. with FAPE in the least restrictive environment, I **FIND** that the District did not violate Section 504. In this case, the IEPs that were proposed consisted of comprehensive statements of Z.M.’s educational needs and the specially designed instruction and related services to be employed to meet those needs.

Therefore, I **CONCLUDE** that the proposed IEPs provided appropriate and meaningful services and accommodations to Z.M. in order to access his education in accordance with Section 504 of the Rehabilitation Act

### **ORDER**

Based on the foregoing, the due-process petition is **DISMISSED**.



This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.



May 27, 2020  
\_\_\_\_\_  
DATE

\_\_\_\_\_  
**TAMA B. HUGHES, ALJ**

Date Received at Agency

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

TBH/dm

**APPENDIX**

**Witnesses**

**For petitioners:**

T.M.  
Hannah Hoch, Ph.D.  
Kevin Joseph Brothers, Ph.D., BCBA-D

**For respondent:**

Allison Eby  
Heather Lilly

**Exhibits**

**Joint Exhibits:**

- J-1 Battelle Developmental Inventory
- J-2 January 31, 2017, Atlantic Health Summary of Care
- J-3 April 24, 2017, Ambulatory Referral to Behavioral Health/ABA
- J-4 May 23, 2017, Initial BDI-2 Evaluation information Form
- J-5 September 19, 2017, Atlantic Health Summary of Care
- J-6 January 30, 2018, Somerset Hills Learning Progress Report
- J-8 May 14, 2018, Atlantic Health Summary of Care
- J-9 May 14, 2018, Branchburg IEP Meeting Attendance Sign-in Sheet
- J-10 May 25, 2018, Somerset Hills Learning Institute Progress Report
- J-11 June 18, 2018, Social History Evaluation Branchburg Township
- J-12 June 18, 2018, Occupational Therapy Evaluation Branchburg Township
- J-13 June 19, 2018, Battelle Developmental Inventory
- J-14 June 27, 2018, Speech and Language Evaluation Branchburg Township
- J-15 June 27, 2018, Email exchange from Heather Lilly

- J-16 July 9, 2018, Structured Observation Branchburg Township (EI OT session at home)
- J-17 July 9, 2018, Structured Observation Branchburg Township (2x at SHLI)
- J-18 July 12, 2018, Email exchange from Allison Eby
- J-19 Not introduced or in evidence
- J-20 July 19, 2018, Email exchange from Allison Eby
- J-21 July 19, 2018, Branchburg Township Meeting Attendance Sign-in Sheet
- J-22 July 19, 2018, IEP
- J-23 Not introduced or in evidence.
- J-24 July 26, 2018, Letter from S.M. and T.M. to Heather Lilly
- J-25 August 1, 2018, Email exchange from T.M.
- J-27 September 12, 2018, Email exchange from Heather Lilly
- J-28 Somerset Hills Learning Institute Progress Report
- J-32 December 5, 2018, Letter from Lori Gaines, Esq. to David Rubin, Esq.
- J-34 December 20, 2018, Email from David Rubin, Esq., with Written explanation by the CST and proposed IEP
- J-35 January 7, 2019, Letter from Lori Gaines, Esq. to David Rubin, Esq.
- J-36 January 25, 2019, Somerset Hills Learning Progress Report
- J-38 Visitor's Log Whitton Elementary School relative to Allison Eby
- J-39 May 6, 2019, Email Exchange Allison Eby
- J-40 June 13, 2019, Letter from Lori Gaines, Esq. to Rita Barone, Esq.
- J-41 2018/2019 Scheduled for Proposed In-District Program
- J-44 Not introduced or in evidence
- J-45 Curriculum Vitae Allison Eby
- J-46 Not introduced or in evidence
- J-51 September 2018 – April 2019, Whitton Elementary Visitor Log and School Calendar
- J-53 Curriculum Vitae Heather Lilly
- J-59 January 2, 2019, IEP
- J-60 Not introduced or in evidence
- J-61 Not introduced or in evidence
- J-62 Not introduced or in evidence

J-63 July 19, 2018, Recording of IEP Meeting

J-65 July 9, 2019, IEP

For petitioners:

P-7 March 29, 2018, Consultation Report Hannah Hoch, Ph.D., BCBA-D

P-26 August 1, 2018, Observation of Self-Contained Preschool Child with a Disability Classroom by S.M. and T.M.

P-29 October 4, 2018, Observation of Integrated Preschool Program at Whiton Elementary School by S.M. and T.M.

P-30 Notes by S.M. of Observation of Integrated Preschool Program at Whiton Elementary School on October 4, 2018.

P-31 November 20, 2018, Consultation Report by Hannah Hoch, Ph.D., BCBA-D

P-33 December 17, 2018, Email Exchange from Douglas Haan and caricature of a Dragon

P-42 Curriculum Vitae of Hannah Hoch, Ph.D., BCBA-D

P-43 Curriculum Vitae of Kevin Joseph Brothers, Ph.D., BCBA-D

P-47 Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers

P-48 DSM-5 Diagnostic and Statistical Manual of Mental Disorders – Autism Spectrum Disorder Criteria

P-49 Professional and Ethical Compliance code for Behavior Analysts

P-50 Not introduced or in evidence

P-52 Program Book Somerset Hills Learning Institute

P-64 Somerset Hills Learning Institute Progress Report – July 13, 2019

P-66 May 14, 2019, E-mail from Lori Gaines, Esq. to Rita Barone, Esq.

P-67 July 8, 2019, Job Posting by Branchburg Township School District

P-68 Somerset Hills Learning Institute Camp Data

P-69 Chart

For Respondents:

R-54 June 27, 2019, Report of Allison Eby and Heather Lilly

R-55 Not introduced or in evidence

R-56 Article – Providing Interventions for Young Children with Autism by P. Strain, et al

R-57 Not introduced or in evidence

R-58 Article – Preschool Inclusion by S. Odom