



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

**FINAL DECISION**

**C.F. ON BEHALF OF G.F.,**

Petitioner,

v.

**EAST WINDSOR BOARD OF EDUCATION,**

**MERCER COUNTY,**

Respondent.

OAL DOCKET NO. EDS 05541-19

AGENCY REF. NO. 2019-29596

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**Ryan J. Clark**, Esq., for petitioner (Clark, Clark & Noonan, LLC, attorneys)

**Brett E.J. Gorman** and **William C. Morlock**, Esqs., for respondent (Parker McCay P.A., attorneys)

Record Closed: March 31, 2020

Decided: April 27, 2020

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

**STATEMENT OF THE CASE**

This case arises under the Individuals with Disabilities Act, 20 U.S.C. 1400 to 1482 (IDEA). Petitioner C.F., on behalf of minor child G.F., seeks a finding that the special education and related services for G.F. in the individual education programs (IEPs) proposed by the District of East Windsor (District) for the 2018-2019 and 2019-2020 school years are inappropriate, not geared toward providing G.F. any educational benefit, do not represent the least restrictive environment (LRE), fail to confer a free, appropriate public education (FAPE), and do not comply with the requirements of the IDEA. Further, C.F. seeks a finding that the Newgrange School (Newgrange) is an appropriate educational program and placement to meet G.F.'s needs, is the LRE for G.F.

and the unilateral placement of G.F. at Newgrange in the 2018-2019 school year and for the 2019-2020 school year was proper and reasonable. C.F. seeks an order directing the District to provide G.F. with an IEP which places him at Newgrange for the remainder of the 2019-2020 school year, for the 2020-2021 school year and for so long as it remains appropriate; compensatory education for G.F. for the period of deprivation; and reimbursement for all costs associated with private services provided to G.F. due to the failure of the District to provide FAPE.<sup>1</sup>

### **PROCEDURAL HISTORY**

On March 24, 2019, petitioner filed a request for due process with the Department of Education, Office of Special Education Programs, which was transmitted to the Office of Administrative Law (OAL) and filed as a contested matter on April 25, 2019.

On May 9, 2019, the parties appeared before the Honorable Joseph A. Ascione, ALJ, for a settlement conference. The parties were unable to settle, the case was reassigned to the undersigned immediately and on May 9, 2019, hearings were scheduled for October 2, October 15, October 16, October 21, October 23, November 12, and November 13, 2019. Despite disputes between the parties over discovery, and the need for two intervening telephone conferences, the hearings began as scheduled. Following the first four days of testimony, the parties requested that November 15, 2019, be added to the hearing schedule.

Respondent rested its case on November 12, 2019, and petitioner then moved for summary decision on the grounds that even when considering the facts in the light most favorable to respondent, all objective evidence introduced showed that G.F. made no academic progress while attending District schools and respondent did not show that the failure of G.F. to make academic gains was due to action or inaction of his father, C.F. Respondent countered that summary decision was not appropriate as G.F. did make progress while attending District schools, a conclusion supported by objective tests, his written work, and the testimony of District personnel

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<sup>1</sup> The relief sought by petitioner is described differently here than in his original due process petition as it was modified during the course of this proceeding. See, Petitioner's Summation Br. (March 18, 2019), at 35-36; Petitioner's Rebuttal Summation (March 30, 2020), at 6-7.

who had worked with G.F. Petitioner's motion for summary decision was denied as the testimony and documentary evidence presented by respondent revealed disputes as to material facts.

With respondent's consent, I granted petitioner's request that the hearing of November 13, 2019, be adjourned for medical reasons and rescheduled for December 4, 2019. The testimonial part of the hearing resumed on November 15, 2019, and concluded on December 4, 2019; the record remained open for the parties to submit post-hearing briefs and a final hearing date was scheduled to review exhibits. Briefs and responses were filed on March 18 and 31, 2020, respectively, and on March 31, 2020, the record closed.

## **FACTUAL DISCUSSION AND FINDINGS**

### **Issues Presented/Positions of the Parties**

The parties jointly submitted forty-nine exhibits, including the April 2017 stipulation of settlement which resolved an earlier dispute between the parties over the IEP proposed by respondent Board for G.F. in March 2017. C.F. on behalf of G.F. v. East Windsor Reg. Bd. of Educ., OAL Docket No. EDS 5344-17, Final Decision (April 28, 2017). By the terms of settlement, approved by the Honorable Edward J. Delanoy, ALJ, the IEP for G.F. remained in place without changes in program or placement through December 31, 2017. (J-31.)

Accordingly, the dispute in this matter is whether the Board offered G.F. special education and related services designed and reasonably calculated, based upon his intellectual potential, to confer meaningful educational benefit upon him in the LRE in the 2018-2019 and 2019-2020 school years,<sup>2</sup> as described in the March 22, 2018 IEP (J-38) and the draft March 12, 2019 IEP. (J-48.)

Respondent contends that resolution of this case depends on the answers to two questions: whether a New Jersey public school is able to provide a FAPE to a child whose intelligence quotient (IQ) is in the lowest percentile; and whether a parent who has failed to

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<sup>2</sup> G.F. did not attend school in the District during the 2019-2020 school year.

follow the recommendations of the child study team (CST), as memorialized in an IEP for his child, can unilaterally place that child in an out-of-district school at the District's expense.

Petitioner contends that the District did not provide G.F. with a FAPE. Further, C.F.'s unilateral placement of G.F. at Newgrange was necessary because G.F.'s failure to make academic progress was caused by the failure of the Board to educate him in a manner which was appropriate for him.

### **Testimony**

Respondent called four witnesses; petitioner called three witnesses. The following is not a verbatim account of the testimony but a summary of the testimony and documentary evidence I found relevant to resolving the above-described issue. Note that the testimony offered by several witnesses (and particularly, that of respondent's first two witnesses) includes matters occurring prior to December 2017, and therefore, is useful only as background.

Based upon 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 **FACTS**:

### **Respondent's Witnesses**

**Jessica Erdberg** (Erdberg) is employed by respondent as a Social Worker and Case Manager, positions she has held for ten years. She identified her resume, which describes her education and work experience. (R-8.) She earned a bachelor's degree in psychology and master's degree in social work at Rutgers University. Generally, Erdberg's current duties include working with special education (SE) students at the Walter C. Black Elementary School (WCB School) and the Grace Norton Rogers Elementary School (GNR School). As the social worker, Erdberg conducts social assessments of children with suspected disabilities and counsels students in need of emotional and social support. (R-8.) She described a "social assessment" as a background study conducted with parent input to obtain a "whole full picture of the child's

functioning” socially, emotionally and academically, including early development milestones, social concerns, and self-help skills. Tr. (October 2, 2019) (T-1), at 38-39.

In her case management role, Erdberg is responsible for approximately thirty to forty students each year, scheduling and facilitating IEP meetings, maintaining contact with parents, and collaborating with other professionals on the CST.<sup>3</sup> For each student, she works with the CST to determine the student’s needs and drafts an IEP based on the recommendations of the professionals on the CST, written reports of specialists, and assessments of the student (such as the STAR Assessment, which is used in the District). Erdberg works most closely with the learning disability teacher consultant (LDTC) and school psychologist to ensure that the school is meeting the student’s needs as described in the IEP. The LDTC evaluates and reports on the student’s academic progress; the psychologist evaluates and reports on the student’s intellectual ability and potential. Erdberg was qualified as an expert in social work and case management.

### **Background and Eligibility**

G.F. was born in Bulgaria in 2005; he was adopted by C.F. and brought to London, United Kingdom, in 2013, at the age of eight. (J-1; J-4.) He began school in London in an “independent mainstream provision” with in-class support provided by C.F. (J-4.) After a “statutory assessment” in July 2014, G.F. was moved to the Abingdon House School, a private school for children with language-based learning disabilities. Ibid.

In June 2015, C.F. retained an independent clinical psychologist to “clarify [G.F.’s] current level of learning needs.” (J-4 at J48.) G.F. was assessed using the Weschler Intelligence Scale for Children, Fourth Edition (WISC-IV), which measures verbal ability, non-verbal problem solving, short-term memory, cognitive processing efficiency, and Full-Scale IQ (FSIQ). Id. at J51. This test showed G.F.’s FSIQ as 53, in the first percentile, with “no significant difference between verbal and non-verbal reasoning scores.” Id. at J51-52.

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<sup>3</sup> Professionals who may be included in a given CST include an LDTC, a psychologist, speech and language therapist (SLT), occupational therapist (OT), physical therapist (PT), and general education (GE) and SE teachers.

This threshold issue of G.F.'s intellectual disability and/or "cognitive impairment" would be debated throughout the hearing, with petitioner's witnesses asserting that G.F.'s limitations were a function of his background and limited exposure to education before age eight, not his FSIQ. In any event, based on the June 2015 Clinical Psychology Report, Erdberg stated that G.F.'s FSIQ indicated "cognitive functioning in the 'Extremely Low' range," less than the first percentile, and he would require specialized instruction. This does not mean he is uneducable; Erdberg never said as much and never heard it said regarding G.F. T-1 at 50-51.

Erdberg identified all the documents provided by Abingdon House regarding G.F., including an Education Report, the Clinical Psychology Report, the IEP developed and implemented for G.F. at Abingdon House, and his progress reports. (J-3 through J-9.) In the IEP, G.F.'s diagnosis was "specific language impairment; developmental delay."<sup>4</sup> (J-5.) At Abingdon House, G.F. was placed in a small class with modifications and accommodations, similar to what the District calls a "self-contained classroom." T-1 at 52. The last progress report showed partial achievement of the goals and objectives of the 2015-2016 IEP. (J-9.)

On March 23, 2016, the District CST met to discuss G.F.'s first District IEP (the Transfer IEP) (J-10); C.F. and G.F.'s Abingdon House teacher participated in this meeting by telephone. Erdberg reviewed all the documents from Abingdon House prior to drafting the Transfer IEP for G.F., which maintained the goals and objectives of the Abingdon House 2015-2016 IEP, placed G.F. in a self-contained learning and language disability (LLD) classroom, and included many of the same environmental and curriculum adaptations. (J-10 at J127; J-7 at J84, J92-93.)

Erdberg explained that in a self-contained classroom, there will be one SE teacher with an assistant and eight to ten students. The students all have learning and/or language disabilities, some with multiple disabilities, and all need intense instruction at a slower pace than is found in GE classrooms. The District has two types of self-contained classrooms: LLD and multiply disabled (MD). T-1 at 56-57.

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<sup>4</sup> Erdberg stated that "specific language impairment" means difficulty in understanding language and difficulty using words to express himself. "Developmental delay" means a cognitive delay.

G.F.'s first day at WCB School was April 13, 2016. He was placed in Laura Lentine's classroom. Erdberg described G.F. as "the mayor of the school," a happy and social child. T-1 at 46.

On June 15, 2016, the CST met with C.F. to develop G.F.'s IEP for the next school year, 2016-2017 (June 15, 2016 IEP). (J-12.) Erdberg described the June 15, 2016 IEP; G.F. was placed in a self-contained LLD classroom for academic subjects (reading, writing, math, science, and social studies), was provided related services in small group settings or individually,<sup>5</sup> joined GE students for fine arts, lunch, and recess, and included participation in the extended school year (ESY) program. (J-12 at J172-73.)

### **2016 Evaluations**

Erdberg identified the re-evaluation planning proposal dated September 30, 2016: C.F. consented to educational, psychological, SLT, OT, and PT evaluations and a social history update. (J-13.) The school psychologist administered the WISC-V to G.F.; his FSIQ score was forty-eight, in the first percentile, consistent with the results of the IQ test administered in London. J-15 at J190; T-1 at 71-72. The psychologist also assessed G.F.'s adaptive behavior in communication, daily living skills and socialization using the Vineland Adaptive Behavior Scales, Teacher Rating Form 2<sup>nd</sup> Edition (Vineland II). His overall Adaptive Behavior Composite was "within the 'Moderately Low' range and at the [third percentile] as compared to his same age peers." (J-15 at J193-94.) The report of G.F.'s educational evaluation included a summary of his scores on the Woodcock-Johnson (WJ) IV Tests of Achievement, Form A, which showed him functioning at a very low range across all academic areas. J-16 at 203-204; T-1 at 7. Erdberg stated that G.F.'s academic performance was consistent with his FSIQ. These reports were used in the development of both the IEPs at issue in this proceeding. See, J-38 at J442-43; J-47 at J534-3733.

In November 2016, C.F. retained an independent neuropsychologist to "determine the nature and extent of [G.F.'s] cognitive difficulties and to receive recommendations to ensure his learning needs are met." (J-26 at J287.) Based on a review of the tests most recently

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<sup>5</sup> The related services were SLT, OT, and PT; social skills; small group counseling; and individual counseling. (J-12 at J173.)

administered by the District and results of additional testing of G.F., the neuropsychologist concluded that the “[c]omprehensive neuropsychological evaluation reveals intellectual functioning in the extremely low range” and G.F. showed “developmental delays that exist across all domains of cognitive functioning and functional impairments at home and at school.” Id. at J306, 307. This report was used in the development of the both the IEPs at issue in this proceeding. See, J-38 at J439; J-47 at J533.

### **April 2017 Due Process Petition and Settlement**

Erdberg described G.F.’s academic progress while at the WCB School, the evaluations conducted, and the IEPs implemented prior to April 28, 2017, when the parties reached settlement in a matter brought by petitioner to challenge the IEP proposed by the District for G.F. for the 2017-2018 school year (the November 28, 2016 IEP), which placed G.F. in the middle school. (J-23.) By the terms of the settlement, G.F. remained in the WCB fifth grade classroom for the 2017-2018 school year and petitioner acknowledged that the District had recommended that G.F. instead transition to middle school (sixth grade). (J-31.)

On May 2, 2017, the CST met with C.F. to develop the IEP for the 2017-2018 school year (the May 2, 2017 IEP). (J-34.) G.F. was placed in the self-contained LLD classroom; the May 2, 2017 IEP was substantially similar to that for the prior year except that G.F. no longer needed PT. Ibid. The IEP programmed for ESY, but G.F. did not attend. Erdberg identified G.F.’s progress reports for the 2017-2018 school year, his second year in fifth grade. (J-36 at J-48.) She stated that he did not show as much progress as he had the previous school year.

### **March 22, 2018 IEP**

On March 22, 2018, the CST met with C.F. to develop the IEP for G.F.’s transition to middle school (the March 22, 2018 IEP). (J-38.) In developing the March 22, 2018 IEP, the following evaluations and/or assessments of G.F. were considered, and are quoted below in pertinent part (J-38 at J439-43):

- November 23, 2016 Neuropsychological Evaluation, described above, which revealed “intellectual functioning in the extremely low range. Results are predominantly consistent with the prior examination performed [in London in June 2015]. In achievement, [G.F.] performs in at the 1<sup>st</sup> grade level across reading, calculation, math facts fluency, number matrices, and written language. He performs at the Kindergarten level for math, math problem solving, and academic knowledge. His achievement performance is consistent with his performance at the time of his [London] evaluation.”
- November 18, 2016 Speech/Language Evaluation, which found “[G.F.] demonstrated overall expressive and language skills below age expected levels. . . . [SLT] should focus on helping [G.F.] expand the ability to express himself to meet his needs and related [sic] his thought and feelings to participate in community and home to provide a higher quality of life and maximize his functioning with his family and peers.”
- November 17, 2016 Occupational Therapy Evaluation, which “determined that [G.F.] is typically performing in a Below Average range across all performance areas and there are also areas of concern with regard to his sensory processing.”
- November 15, 2016 Central Auditory Processing Evaluation, which concluded that due to “absence of formal education until the age of 8 years[,] a specific diagnosis of auditory processing deficit cannot be reliably and formally made.” Re-evaluation in one year recommended.
- November 1, 2016 Occupational Therapy Evaluation, which described specific issues with handwriting and typing skills.
- November 1, 2016 Social History, which summarized G.F.’s background, home life, and the concerns expressed by C.F. regarding his son’s emotional and social behaviors.

- October 31, 2016 Speech/Language Evaluation, finds that G.F. “presents with a significant language disorder[,] characterized by deficits in receptive and expressive language, vocabulary in addition to weaknesses with auditory reasoning and processing [which impact] his ability to understand new concepts, follow along with classroom instruction, and hinders his ability to participate in classroom discussions.”
- October 19, 2016 Educational Evaluation, described above, which found G.F.’s “[p]erformance scores fall within the ‘very low’ range of scores” on all academic areas tested using the WJ IV, Tests of Achievement.
- October 18, 2016 Physical Therapy Evaluation, which recommended G.F. continue with once/week PT through the remainder of the 2016-2017 school year “to work on higher level gross motor skills,” after which he will no longer receive PT.
- October 13, 2016 Psychological Evaluation, described above, which found G.F.’s “overall cognitive ability as measured by the WISC-V is assessed to be within the Extremely Low range with a [FSIQ] of 48[,] generally consistent” with the evaluation conducted in London in June 2015, and his adaptive behavior composite “within the Moderately Low range and at the 3<sup>rd</sup> % as compared to his same aged peers.”

The description of G.F.’s “present levels of academic achievement and functional performance” include the following:

#### Social/Emotional/Behavioral

[G.F.] likes to know the classroom schedule and routine [and he] benefits from being given advanced [sic] notice when our daily schedule or routine is going to change.

[G.F.] utilizes a speaker system that goes directly in his ear [which] has kept [G.F.] on task and more focused.

#### Reading

[G.F.] has shown improvement in his independent reading stamina. He enjoys choosing independent reading books that are on his reading level, but will often choose ones that are far below his reading level.

When given enough “wait time,” [G.F.] can often utilize his strategies to decode an unfamiliar word. Allowing [G.F.] to take picture walks, make predictions, and discuss characters is beneficial to his comprehension.

[G.F.] benefits from prepping for important information, visuals, and hands on activities, to keep his attention.

He is introduced to 10 words bi-weekly. He requires multiple modalities and consistent exposure and practice of these words to help him gain a deeper understanding of their meaning and use.

### Writing

Writing is a difficult task for [G.F.]

Often, we will make writing a game to keep his interest.

[He] benefits from utilizing writing planners to help him organize and map out his writing.

### Mathematics

In math, [G.F.] requires repetitive, structured support to find success. [He] uses manipulatives, math organizers, visuals, and “multiples songs” to help him complete his math assignments.

It is helpful to him to make a movie in his mind of the story problem, or draw a picture of what is happening in the story problem, to give him a better understanding of which operation he needs to choose and why.

He has recently begun to understand the concept of fractions and finding equivalent fractions by using pictures and manipulatives.

### Science

Through modified work [G.F.] is able to find success [and he] benefits from hands on experiments, visuals, timelines, and learning through songs to help him gain a deeper understanding.

[(J-38 at J444-46.)]

In the IEP, the following needs and special considerations for G.F. were included:

### Speech/Language

[G.F.] requires information explained in various ways, repeated and reinforced on a consistent basis. Scaffolding information in order to enable him to comprehend information is critical.

Reading

[G.F.] requires structured and repetitive support. The delivery of instruction and content learned is modified to meet [G.F.'s] specific needs. [He] requires reminders of background knowledge before a new skill is introduced. He requires consistent support and reinforcement of skills, checking for understanding, and vocabulary instruction.

Mathematics

Manipulatives, real world experiences, and visual aids are imperative for his success.

Science

[G.F.] benefits from hands on experiences and visuals to aid in his success.

Social Studies

[G.F.] benefits from videos, pictures and other visuals to aid in his success.

[(J-38 at J447-48.)]

The following classroom modifications, among others, were made for G.F.:

Alert student to teacher directions by setting the stage.

Be conscious of your rate of speech. Talk at a slower rate if student indicates an inability to stay with you.

Check for understanding at various points by asking student to repeat or paraphrase directions.

Keep oral directions short and simple.

Provide manipulatives.

Directions repeated, clarified or reworded.

[(J-38 at J453.)]

Starting in September 2018, G.F. was placed at Melvin H. Kreps Middle School (Kreps), in the self-contained MD classroom for academic subjects, with SLT, OT, and counseling. G.F. participated in fine arts, lunch and recess with his same-grade GE peers. He participated in extracurricular activities with GE students. The March 12, 2018 IEP programmed for ESY. (J-38.)

G.F.'s strengths and weaknesses, as identified both by professionals who conducted formal evaluations of him and by his classroom teachers, are addressed in the March 22, 2018 IEP. Erdberg (and respondent's witnesses who followed her) testified that the goals and objectives of the IEP were appropriate. The IEP contained annual measurable academic and functional goals in all of the academic areas in which G.F. was in need of SE and related services (reading, writing, mathematics, speech/language, social/emotional/behavioral, motor skills, and daily living skills), together with their benchmarks or short-term objectives, the criteria for measurement, and the procedure to evaluate or measure each and every benchmark or short-term objective. (J-48 at J449-51.) C.F. raised no objections to the March 22, 2018 IEP.

### **2019 Re-Evaluations**

On January 16, 2019, the CST met with C.F. to discuss triennial reevaluations of G.F., the last having been conducted in the fall of 2016. (J-39.) C.F. consented to educational, psychological, and speech/language evaluations. (J-39 at J466.) At C.F.'s request and with his consent, on February 7, 2019, the District proposed to conduct two additional evaluations: assistive technology and Test of Non-verbal Intelligence (TONI). (J-40.)

The educational evaluation was conducted by LDTC Vanessa Mendoker (Mendoker), who administered the WJ IV Tests of Achievement, Form A and Extended; and WJ Tests of Oral Language. In almost all academic areas, G.F. tested in the very low range but, in comparison to the same test from 2016, G.F. had made "moderate academic gains" in broad written language and math. (J-41 at J481-82.) Mendoker noted that while most of G.F.'s scores showed little change, this still "indicates growth because as a child grows in chronological age the academic demands also increase." *Id.* at J482.

Erdberg stated that the results of the District's psychological evaluation confirmed earlier evaluations and the programming recommended by the District. The school psychologist administered the WISC-V, which showed G.F.'s FSIQ as 54, below the first percentile and in the same range as he had scored in previous IQ tests. The psychologist also administered the UNIT2™: Universal Nonverbal Intelligence Test, Second Edition™, to assess G.F.'s cognitive abilities non-verbally; his non-verbal FSIQ was a 69, in the second percentile. (J-42 at J486,

J489.) The psychologist assessed G.F.'s adaptive behavior using the Vineland Third Edition (Vineland III), a measure of "what [G.F.] actually does in daily life" in communication, daily living skills and socialization. Id. at J491 (emphasis in original). Based on the evaluation performed by Baseden, the psychologist concluded that G.F. functions in the moderately low range in all adaptive behaviors, "significantly below grade level." Id. at J492.

Erdberg identified the IEP proposed by the District for G.F. for the 2019-2020 school year (the draft March 12, 2019 IEP). (J-47.) All the above-described evaluations were used in the development of the March 12, 2019 IEP. The District recommended that G.F. move from the MD classroom to the LLD classroom as the LLD classroom was the least restrictive environment (LRE) appropriate for G.F. (Testifying later, Katherine A. Baseden stated that she proposed this change for discussion at the planning meeting, but a decision was not made before C.F. placed G.F. at Newgrange.) G.F. would also receive SLT and counseling. The draft IEP also programmed for ESY including SLT. This IEP was not completed or implemented because in April 2019, C.F. moved G.F. to Newgrange.

### **Independent Evaluation**

On March 4, 2019, C.F. had a diagnostic learning evaluation of G.F. conducted by Susan E. Miller, an independent specialist. (J-45.) Erdberg stated that she reviewed the report of this evaluation and recognized that some of the recommendations were already being implemented by the District (J-45 at J521), but Erdberg stated that the Wilson Reading Program (Wilson) was not used with G.F. because his IQ was not high enough. The issue of the appropriateness of the Wilson program for G.F. continued throughout the hearing and is discussed more fully below.

It is Erdberg's opinion that the results of all evaluations of G.F. (other than that conducted by Susan E. Miller) confirmed the recommendations for program and placement in each IEP proposed by the District for G.F., he was making progress, and respondent provided G.F. with a FAPE. G.F.'s failure to attend ESY had a significant negative impact on his educational progress; he had to re-learn skills when he came back to the classroom each September.

In reviewing the progress reports issued for G.F. by his classroom teachers, (J-25; J-32; J-36; J-48), Erdberg agreed that G.F. did not fully achieve the academic goals of his IEPs but did achieve goals in reading, writing, motor skills, OT, and social skills. Erdberg stated that these reports are only one method of measuring his progress in any given year. The STAR Assessments, which show progress in reading and math by grade level, are another tool. The IEPs, which may show that a student's goals have become more challenging, may be another sign of progress.

Erdberg stated that this was the first time she testified in any proceeding and her inexperience was evident. She appeared trustworthy and diligent, so much so that she had to be reminded several times that she should not answer questions without personal knowledge. Yet, overall, Erdberg was a credible and reliable witness.

**Lauren Lentine** (Lentine) has been a SE teacher in the District for eight years; she currently teaches SE students in third grade through fifth grade self-contained classroom at the GNR School. Lentine identified her resume, which summarizes her education and work experience. (R-12.) Lentine earned her bachelor's degree in early childhood and elementary education (double major), and her master's degree in SE, at Frostburg State, Maryland. She holds certifications from the State of New Jersey as a Standard Elementary School Teacher (K-6), as a highly qualified teacher of students with disabilities, and as a Wilson Instructor, Level One. To obtain Wilson certification, Lentine took classes and spent sixty hours teaching Wilson reading to students under observation of a Wilson instructor (a practicum).

Over her career, Lentine has worked with more than 100 SE students with different IQs, abilities and disabilities. She instructs and assesses students; develops SE programs; and recommends SE programs and placements for all her SE students. Lentine participates in the IEP process as part of the CST, providing input regarding the student's current academic, social and behavioral levels. She is responsible for writing the goals and objectives of the IEP before it is presented to the parent(s) and making necessary revisions based on parent meetings. Lentine stated that of all the members of any CST, the classroom teacher has the greatest contact with the student.

### **Background/2016-2017**

Lentine met G.F. in April 2016, when he first joined her classroom at WCB. There were seven to eight other students in the room each year, all of whom read at different levels, some lower and some higher than G.F. Lentine smiled as she described G.F., calling him “a pleasure, sweet, hard-working and friendly.” G.F. came to her classroom with significant challenges beginning with that he “came into a school setting not really knowing how to be in a school setting,” not knowing how to walk down the hallways, how to rotate through various classroom learning centers, or to ask in order to use the restroom. Tr. (October 16, 2019) (T-3), at 29-31. G.F. was happy to learn but had difficulty staying on course. Academically, he was an “inconsistent learner,” required constant repetition, and Lentine and her assistant spent a great deal of time sitting with him.

In Lentine’s classroom, G.F.’s day began with science or social studies (academic subjects were always introduced at the beginning of the day). He stayed in the self-contained classroom for all academic subjects and joined GE students for Fine Arts, lunch and recess. Lentine typically instructed students in small groups as her students were on such different levels of instruction, but also taught to the larger group and then reinforced the large-group skills with individual students based on their academic level. The District uses the Journeys reading curriculum and Go Math; with both curriculums, Lentine used components of Wilson instruction. She described G.F.’s program as academic, not functional. T-3 at 43, 214-15.

As first discussed by Erdberg, Orton-Gillingham (O-G) is a method of instruction; Wilson is a multi-sensory instructional reading and language program in which teachers use O-G strategies. Though Erdberg stated that all teachers in the District’s first and second grade GE classrooms use the O-G method, she is not trained in it herself. Lentine, who holds Wilson Level One certification, explained that one-on-one Wilson instruction was not appropriate for G.F. because he did not have the ability to move through the program and did not have the minimum IQ of eighty, as required by the program. Lentine stated that Wilson requires a great deal of memorization; the program has twelve books and substeps within each book, each with rules to be memorized. G.F. had trouble memorizing and was an inconsistent learner, quickly forgetting what he was taught.

All of petitioner's witnesses disagreed with Lentine, stating that Wilson can be used with students of low IQ. Amanda Hope Colannino, who testified for petitioner regarding her independent evaluation of G.F., and who was qualified as an expert in the Wilson program, explained that to obtain certification in Wilson, a teacher must complete at least four books (or levels) with a single student in a nine-month period, and students with low IQs are not able to master the concepts that quickly. Overall, the misunderstanding at the District of the requirements of Wilson makes little difference in this case. The District uses O-G and/or Wilson with all GE students; both of G.F.'s SE teachers in the District used components of Wilson with G.F. as it is a multi-sensory program and G.F.'s IEPs all called for the use of multi-sensory instruction. Even if there was no dispute over whether Wilson is the best method of multi-sensory instruction, there might still be an issue regarding the apparent dearth of teachers with practical experience using Wilson with low-IQ students prior to certification. In any event, the law is clear, as explained in greater detail below, that the choice of instructional methods is not to be made by the courts or parents, but by the CST.

Lentine identified the IEP developed for G.F. for May 2017 through December 2017, the May 2, 2017 IEP. (J-34.) The program was identical to the program for the previous year; at C.F.'s request, G.F. stayed in Lentine's self-contained LLD classroom. (J-34 at J403.)

Lentine identified the IEP developed for G.F. for October 18, 2017 through June 19, 2018. (R-19, the October 17, 2017 IEP.) The CST asked for this meeting to begin G.F.'s transition to middle school; the CST hoped to reach some agreement with C.F., but he refused to discuss middle school, threatening to leave the meeting. The October 17, 2017 IEP was adopted without major changes. (R-19.)

Overall, Lentine stated that G.F. made huge strides both academically and socially in the two years and three months he spent in her classroom. To illustrate this progress, Lentine identified classroom work done by G.F. that showed improvement in his writing ability, storytelling, reading and comprehension, and even his handwriting. (R-16.)

## **ESY**

Both parties' witnesses gave the same response regarding the purpose of ESY—that it is recommended for SE students to prevent academic regression over the summer. T-1 at 104; T-3 at 63-64; T-7 at 201-02.

G.F. participated in ESY once while in the District schools. Without C.F.'s testimony, the story was not entirely clear, but it appears that G.F. attended ESY 2016 and his father claimed that at this program, G.F. was the victim of bullying by a GE student. Tr. (October 15, 2019) (T-2), at 121. As a result of this alleged incident or because he was generally dissatisfied with the ESY program, C.F. elected not to enroll G.F. in ESY 2017 or ESY 2018, though each IEP adopted for G.F. while he was in the District programmed for ESY. See, T-2 at 139-40; T-3 at 64-67. For her part, Lentine never saw the alleged incident nor did she observe any bullying involving this particular GE student.<sup>6</sup>

## **March 22, 2018 IEP**

Lentine identified the final IEP that she wrote for G.F., the March 22, 2018 IEP, but did not speak to the specifics of the IEP as that had already been covered by Erdberg. (J-38.) The goals and objectives for G.F. were, generally, to progress in all academic areas as G.F. was weak in all areas. Because the March 22, 2018 IEP would follow G.F. to the middle school, Lentine visited the middle school, watching lessons in each program area with G.F. in mind. She knew that C.F. also visited the middle school. Lentine recommended a program similar to the classroom at WCB, which she described as an academic program with a functional component, noting that often the best way to learn an academic subject (such as money) is through life skills (such as using play money to make purchases). G.F. did not belong in a life skills-only program and Lentine stated that she did not recommend one for him. (David Roe, the Board's last witness, stated that Kreps does not offer a life skills-only program.)

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<sup>6</sup> A second "bullying" incident occurred in May 2017, involving a GE student. Lentine recalled email correspondence with C.F. regarding this incident and that G.F. stuck up for his peers. (R-13 at R395-97.) (C.F. does not state that G.F. was the victim.) Lentine said she referred the incident to the appropriate persons and did not know whether a formal bullying referral was made. T-3 at 160-62.

Lentine is familiar with the independent evaluation of Miller. (J-45.) She explained that most of the recommendations for instructional methods and/or curriculum found in this report were used in her classroom, including using a “systemic explicit multisensory approach to learning” and a “hands-on systematic curriculum,” and that G.F. “requires an instructor that is certified in the [O-G] methodology such as Wilson.” (Lentine is Wilson-certified.) See, T-3 at 128-39; J-45 at J127. As petitioner noted in cross-examination, the materials and methods used by Lentine were not in all respects the same as that recommended by Miller. T-3 at 273-75. Overall, however, Miller’s report takes little away from Lentine’s testimony as Miller did not observe Lentine’s classroom, and the documents Miller reviewed in the course of her evaluation did not include any of the those authored by Lentine. See, J-45 at J514.

Lentine was a credible witness and her fondness for G.F. appeared genuine. In his brief, petitioner notes that as a fact witness, the opinions of Lentine “cannot be given the weight of an expert[.]” particularly with respect to whether the District offered G.F. a FAPE. Petitioner’s Summation Br. (March 18, 2020), at 4. Consistent with the rules, Lentine’s opinions were given due consideration to the extent they were “rationally based” on her first-hand experiences in the classroom with G.F. and assisted the undersigned in determining the facts at issue in this matter. N.J.R.E. 701. I found Lentine’s testimony most helpful when she described G.F.’s behavior in the classroom, which was obviously based on her first-hand experience. Even so, Lentine’s testimony did not add much to respondent’s case as G.F. was not in her classroom during the time period at issue.

**Katherine A. Baseden** (Baseden) has been a SE teacher for fifteen years, the last three of which have been in the MD classroom at Kreps. She identified her resume which summarizes her education and work experience through 2016, when she was first hired by the District. (R-11.) Baseden began her career in a Queens, New York public school where she taught SE students in fifth and first grade inclusion classrooms (mixed GE and SE students). From there, she went to the International School of Brussels, Belgium, where she taught SE in a self-contained middle school classroom of about ten students. After seven years, Baseden returned to New Jersey and worked as an early intervention coordinator, private therapist and tutor and substitute teacher at a school for autistic children before taking the job in the District. Baseden estimated that she has taught more than 100 SE students in her career.

Baseden earned her bachelor's degree in elementary and special education at Providence College, Providence, Rhode Island. She received a graduate degree in literacy education at Hunter College, New York City. She has been certified by the State of New Jersey in SE. She described multi-sensory techniques as the core of her training in SE. She has been trained in the Wilson Program and taught first grade students using the Wilson Foundations program.

Besides classroom teaching, Baseden's current job duties include working with the CST for each of her students; she drafts the portions of the IEPs on the students' present level of performance and goals and objectives. At Kreps, she has written approximately thirty IEPs. In her position in Brussels, Baseden used a similar process to prepare her students' IEPs, except that she did not have the support of a CST and therefore, wrote the entirety of approximately fifty IEPs.

Baseden stated that an IEP is necessary for a SE student because he or she is an individualized learner with unique needs and cannot access the GE curriculum. In drafting an IEP, Baseden stated that her main goal is to understand the whole student and support him or her with goals that he or she can attain. Of all the members of the CST, it is the classroom teacher who spends the greatest amount of time with the student.

Baseden had heard of G.F. two years before he came to her classroom, in the spring of 2017, as she was told he would be enrolling in her class the next fall. She met with C.F and Lentine; they discussed the appropriateness of G.F.'s move to the middle school and Baseden knew C.F. wanted G.F. held back. In the spring of 2018, Baseden met again with C.F., G.F.'s CST and the middle school principal to discuss G.F.'s transition to middle school. The CST and C.F. agreed that the proper placement for G.F. was the MD class. Based on discussions with C.F., Baseden learned that G.F. has an unusual background; she learned what schooling he had had, the different programs he had used, and his social and family background.

Baseden gave the following description of G.F.:

G.F. is a great kid. I really enjoy having him in my class. He's got a lot of spunk. He's full of energy always. He loves chatting with students and adults. . . . mostly adults. He loves having conversations, asking lots of questions, getting to know you. He came into our classroom in September [of 2018] with a lot of energy and quickly adapted to our class. There were only seven kids in the class, where I can have up to 12. So it was actually a really nice small group. . . . The [six ] boys meshed very well together and . . . he really enjoyed working with some of them as well as having some friendships outside of the classroom.

[H]e also had a lot of stuff that we needed to work on. He was quite impulsive. We had to work on sitting down, knowing when his turn was . . . He . . . posed some difficulties in all subject areas, as well as social skills. And so we . . . created a program for him. I worked a lot of one-on-one with him, because his learning style was a bit different than the other students.

Tr. (October 21, 2019) (T-4), at 15-17.

As Lentine and Erdberg did, Baseden described G.F. as an “inconsistent learner,” that he had difficulty retaining concepts he had previously learned. For example, G.F. may have mastered a concept but would have difficulty recalling it two weeks later without consistent practice. He required concepts to be taught over and over to maintain knowledge.

In September 2018, G.F. was very social, he loved making friends, talking in the hall, going to his locker and meeting other students. Baseden said G.F. had some trouble understanding the levels of friendship (e.g., immediately characterizing a new acquaintance as a “best friend”), reading social cues, understanding how to speak to adults, and learning how to join conversations (instead of interrupting).<sup>7</sup>

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<sup>7</sup> These were common issues among students in Baseden's class; the SLT also worked with the students on these skills. T-4 at 32. Newgrange appears to define the therapy used to refine these skills as OT, not SLT. See, summary of testimony of Kathleen Bostock, below.

Baseden identified the March 22, 2018 IEP, which she reviewed before the 2018-2019 school year began and used with G.F. (J-38.) Baseden also reviewed the 2017-2018 progress report, as learning how G.F. performed on his goals for the prior year helped her decide what skills she would need to work on with him. (J-36.) In September 2018, G.F. needed to work on multiplication and math skills, such as money, time, measurements and problem solving. In reading, G.F. was good at decoding words, and had good sight word knowledge but struggled with unknown words, comprehension and accuracy. G.F. could write complete sentences of two to three sentences on a single topic but needed work on punctuation and longer sentences.

### **MD Classroom/Curriculum**

In the summer of 2018, just before G.F. joined her classroom, Baseden developed the SE curriculum used at Kreps. She explained that because of the vast differences between learners in a SE classroom, it is difficult to find a single curriculum which suits all of them. This curriculum is a framework for the entire class in which the only constant is that all the students are developmentally below their age level. (For example, in the 2018-2019 school year, Baseden had seven students; all could read but at various levels. G.F. was in the middle with respect to reading ability.) Baseden described the curriculum as “functional academics,” teaching academics that are necessary to function in the real world. T-4 at 35. The students will need these skills when they leave high school in order to live independently and obtain jobs, but it takes so long for these students to learn these skills, it is important to begin teaching them in the sixth grade.<sup>8</sup> This curriculum was linked to the New Jersey State Standards, called Essential Elements, for SE. T-4 at 155.

Baseden taught math using the Touchmath program, a multi-sensory approach. With G.F., Baseden used manipulatives, songs, videos, and visual aids. G.F. told Baseden that he knew his multiplication tables at the beginning of the school year but Baseden saw that he had regressed. Using various tools, especially songs, G.F. learned to multiply one and two-digit numbers. At the beginning of the year, he struggled with time and money, unable to remember coins and values. Money, said Baseden, is an academic subject as it involves adding, subtracting, problem-solving, and estimating.

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<sup>8</sup> Baseden stated that “life skills” is not a separate subject; it is a technique which crosses academic subjects with practical applications. T-4 at 161.

Baseden used a multi-faceted language arts curriculum with G.F., working with him one-on-one using multi-sensory techniques. Since G.F. had some prior Wilson training, Baseden used this tool along with visuals, read-aloud, Reading Ally, and connecting books to videos. G.F. would choose “just right level” books and would work on decoding and other word attack strategies. In GR, G.F. chose texts at his instructional level; one-on-one, Baseden would pre-teach the theme of the text, they would read it together and G.F. would then read it independently. Using Reading Ally, G.F. would read along with the highlighted text, thereby being able to access grade-level content that he could not otherwise read independently. The Unique Learning curriculum was used in science and social studies. This curriculum worked well with personalization; the students were able to learn specific topics of interest within a general topic area.

Baseden stated that practical settings were used to support academics; her students applied classroom learning and social skills training outside the classroom. The “coffee cart” is an exercise in which the students sell coffee, water, and tea to teachers each Friday. The students prepare the cart on Thursday using an excel spreadsheet of orders. To do this, they read the chart, transcribe the information onto order forms, and prepare the individual orders. As they make deliveries, they speak with the teachers and collect money. The students return to the classroom to make change and count the money, they then go to the main office and count the money again with the school treasurer.

Mail delivery is the most coveted job among Baseden’s students, likely because of the social aspect. The students take mail from the main office and deliver it to the assistant principals. It involves reading and following directions (from a checklist) as well as socializing. Baseden explained that the opportunities to practice different skills were important for G.F. as he is developmentally behind his age group. She wanted to build him up socially and set him up for success, now and in the future. T-4 at 63. These tasks cross over to academics, showing students they are able to work on academics independently without the teacher sitting next to them, and support academics as a practical use of academic skills.

## **2019 Reevaluations**

Baseden identified the January 16, 2019 reevaluation planning notice prepared for a meeting with C.F., the purpose of which was to discuss triennial reevaluations of G.F. by the District, conducted pursuant to N.J.A.C. 6A:14-3.8. (J-39.) C.F. consented to three evaluations of G.F.: educational, psychological, and speech/language. Id. at J466. Baseden identified C.F.'s request for additional evaluations, submitted on February 7, 2019, those being assistive technology and C-TONI evaluations. (J-40.) Baseden identified the reports of the educational, psychological, and speech/language evaluations conducted by the District (each of which is covered in detail in the summary of Erdberg's testimony, above). (J-41 through 43.) She could recall nothing specific or surprising about any of these reports. In his brief, petitioner was particularly critical of Baseden for her inability to remember,<sup>9</sup> but that she recalled nothing surprising may simply be evidence of the consistency over time of the results of the evaluations of G.F. See, Petitioner Summation Br., at 7-8. Significantly, Baseden stated that nothing in these reports flagged the need for her to modify G.F.'s instruction. T-4 at 68.

## **March 12, 2019, Draft IEP**

On March 12, 2019, the CST met with C.F. to develop the IEP which would have been implemented during the end of the 2018-2019 school year through March of the 2019-2020 school year. (J-47.) C.F. attended the meeting with Andrew Morgan (Morgan), his outside advocate. Id. at J551.

In the draft IEP, starting in September 2019, Baseden included moving G.F. move into the LLD classroom for academic subjects, with SLT and counseling, but she stated that C.F. and Morgan were not open to this discussion. Id. at J529; T-4 at 86, 159. The IEP programmed for ESY with SLT. In developing the March 12, 2019 IEP, the following evaluations and/or assessments of G.F. were considered, and are quoted below in pertinent part (J-47 at J531-36):

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<sup>9</sup> It is worth noting that at the time of the hearing, Baseden was on maternity leave, making more understandable her inability to recall specifics about test results for a student whom she had not seen for close to a year.

- February 28, 2019 Speech/Language Evaluation, which found that G.F.'s voice, fluency and hearing were all within normal range, but his receptive and expressive language skills were in the very low range.
- February 22, 2019 Psychological Evaluation, described above, concluded that results of G.F.'s WISC-V test (FSIQ=54) and UNIT2™ test (non-verbal FSIQ=69) “reveal that [G.F.] presents with global cognitive deficits. Compared to other children his age, [G.F.'s] abstract reasoning abilities (verbal and nonverbal) are significantly below average[.] . . . These results are fairly consistent with previous psychological evaluation results (October 2016), in which [G.F.'s] overall cognitive abilities were found to be in the Extremely Low range (FSIQ=48).” The results of the Vineland III assessment “indicated that [G.F.'s] overall adaptive functioning is Moderately Low (4<sup>th</sup> percentile)” as compared to other children his age, “consistent with the previous psychological evaluation (October 2016).”
- February 15, 2019 Educational Evaluation, described above, which found that in almost all academic areas, G.F. tested in the very low range but, in comparison to the same test from 2016, G.F. had made “moderate academic gains” in broad written language and math. Recommended a “systematic, direct, multisensory approach to learning.”
- November 23, 2016 Neuropsychological Evaluation, which revealed “intellectual functioning in the extremely low range. Results are predominantly consistent with the prior examination performed [in London in June 2015]. In achievement, [G.F.] performs in at the 1<sup>st</sup> grade level across reading, calculation, math facts fluency, number matrices, and written language. He performs at the Kindergarten [sic] level for math, math problem solving, and academic knowledge. His achievement performance is consistent with his performance at the time of his [London] evaluation.”
- November 18, 2016 Speech/Language Evaluation, which found “[G.F.] demonstrated overall expressive and language skills below age expected levels. . . . [SLT] should focus on helping [G.F.] expand the ability to express himself to meet his needs and related [sic] his thought and feelings to participate in community and home to provide a higher quality of life and maximize his functioning with his family and peers.”

- November 17, 2016 Occupational Therapy Evaluation, which “determined that [G.F.] is typically performing in a Below Average range across all performance areas and there are also areas of concern with regard to his sensory processing.”
- November 15, 2016 Central Auditory Processing Evaluation, which concluded that due to “absence of formal education until the age of 8 years[,] a specific diagnosis of auditory processing deficit cannot be reliably and formally made.” Re-evaluation in one year recommended.
- November 1, 2016 Occupational Therapy Evaluation, which described specific issues with handwriting and typing skills.
- November 1, 2016 Social History, which summarized G.F.’s background, home life, and the concerns expressed by C.F. regarding his son’s emotional and social behaviors.
- October 31, 2016 Speech/Language Evaluation, finds that G.F. “presents with a significant language disorder[,] characterized by deficits in receptive and expressive language, vocabulary in addition to weaknesses with auditory reasoning and processing [which impact] his ability to understand new concepts, follow along with classroom instruction, and hinders his ability to participate in classroom discussions.”
- October 19, 2016 Educational Evaluation, which found G.F.’s “[p]erformance scores fall within the ‘very low’ range of scores” on all academic areas tested using the WJ IV, Tests of Achievement.
- October 18, 2016 Physical Therapy Evaluation, which recommended G.F. continue with once/week PT through the remainder of the 2016-2017 school year “to work on higher level gross motor skills,” after which he will no longer receive PT.
- October 13, 2016 Psychological Evaluation, which found G.F.’s “overall cognitive ability as measured by the WISC-V is assessed to be within the Extremely Low range with a [FSIQ] of 48[,] generally consistent” with the evaluation conducted in London in June

2015, and his adaptive behavior composite “within the Moderately Low range and at the 3<sup>rd</sup> % as compared to his same aged peers.”

The description of G.F.’s “present levels of academic achievement and functional performance” include the following:

#### Speech/Language

[G.F.] receives speech and language services twice weekly.

He often has difficulty getting to the point and requires prompting to stop and think about what he is saying. [G.F.] tends to interrupt others so he can share his thoughts and requires reminders to use appropriate conversational skills.

#### Social/Emotional/Behavioral

[G.F.] is seen for counseling once per week in a group setting.

[G.F.] can be easily influenced by his peers as well as easily upset when he gets into a disagreement with his friends. [G.F.] is learning to understand the levels of friendship . . . and how to socialize at these different levels. [G.F.] has a difficult time waiting his turn and knowing the appropriate time to enter a conversation or share information. He is learning to ‘read the room,’ knowing when it is/is not appropriate time to talk to adults and peers as well as reading the reactions of others to his stories.

#### Language Arts

[G.F.’s] reading program focuses on the development of his decoding, fluency and comprehension skills. The program includes guided reading in a 1:1 setting, along with additional reading support using the reading a-z program.

He has made excellent progress in his reading skills this year, increasing from a 1.4 grade equivalent to a 3.1 equivalent according to STAR reading tests.

[G.F.] is usually able to answer basis comprehension questions about the text read [but] struggles to express the main idea of the story and discuss the book in greater detail. Therefore, he is learning to use strategies such as stopping to think about what is happening after each page read, rereading each chapter, using context clues and asking questions. We have been working on reading a story together[.]

[G.F.] has worked on writing weekly narrative texts about his weekends.

When [he] shares his weekend stories verbally, he shares with great detail including feelings and dialogue. However, his written stories usually range from 3-5 sentences in length with few details.

His handwriting and spelling are also very inconsistent in effort and quality.

#### Mathematics

[G.F.] has made very good progress this year. With 80% accuracy, [he] is able to add and subtract multi-digit numbers with regrouping, tell time to the minute, solve elapsed time problems involving plus hours and 5 minute intervals, add a combination of coins, multiply and divide one digit numbers and multiply two-by-two digit numbers.

[G.F.] requires repetition and practice of concepts to retain his skills in these areas. [G.F.] has a good memory for concrete skills but has difficulty applying these skills to real-world situations. He would also benefit from practicing these basis skills, especially using money, out in the community. [G.F.] benefits from the use of manipulatives, pneumatic devices and visual aids.

#### Study Skills

[G.F.] has a difficult time with organization skills [including] keeping track of his belongings. [He] has been provided with many tools to support his organization [but] has not yet mastered using these tools independently.

[(J-47 at J537-39.)]

In the IEP, the following special considerations for G.F. were included:

#### Speech/Language

[G.F.] will continue with speech and language services to maintain his skills in the areas of receptive and expressive language skills, and pragmatic skills.

#### Reading

[G.F.] requires structured and repetitive support.

He requires repetition and clarification. The delivery of instruction and content learned is modified to meet [G.F.'s] specific needs.

Mathematics

[G.F.] requires structured and repetitive support. He benefits from consistent practice and repetition of skills to ensure understanding. Manipulatives, real world experiences, and visual aids are imperative for his success. The delivery of instruction and content learned is modified to meet [G.F.'s] specific needs.

[(J-47 at J539-40.)]

The following classroom modifications, among others, were recommended for G.F.:

Alert student to teacher directions by setting the stage.

Be conscious of your rate of speech. Talk at a slower rate if student indicates an inability to stay with you.

Check for understanding at various points by asking student to repeat or paraphrase directions.

Encourage student to request help when he/she does not understand directions or has missed part of the instructions.

Introduce new vocabulary in context before a reading assignment. Give student ample opportunity to discuss new words and to use them in original sentences.

Keep oral directions short and simple.

Provide manipulatives.

Directions repeated, clarified or reworded.

[(J-47 at J545.)]

Baseden stated that the goals and objectives of the draft March 12, 2019 IEP were appropriate for G.F. The IEP contained annual measurable academic and functional goals in all of the academic areas in which G.F. was in need of SE and related services (study skills, reading, writing, mathematics, speech/language, social/emotional /behavioral, and daily living skills), together with their benchmarks or short-term objectives, the criteria for measurement, and the procedure to evaluate or measure each and every benchmark or short-term objective. (J-47 at J540-44.) The draft March 12, 2019 IEP was modified from the IEP of the prior year to address G.F.'s educational needs as evidenced by the results of the triennial reevaluation.

C.F. did not accept the draft March 12, 2019 IEP; Baseden recalled that he was having outside evaluations of G.F. conducted, but could not recall if these evaluations had been completed

as of the date of the meeting or if such evaluations were the reason C.F. would not accept the March 12, 2019 IEP. During the meeting, Morgan said that C.F. did not want to accept the IEP because he did not believe there was a program in place for G.F. in the District. Specifically, Morgan stated that G.F.'s IQ was very low and therefore he needs "community-based instruction," which generally means having the students apply what they have learned in practical settings.

While Baseden's students do get out into the community once or twice a year, SE students in the District do not participate in community-based instruction until they are in high school. She explained that the District focuses on academics in sixth grade so SE students can learn as much as possible. It may be that a SE student can advance enough academically to move into the LLD class, ICS, and/or remedial classes. Baseden recalled at least two, maybe three of her students have made sufficient progress in the MD class that they were able to move up a level. Further, G.F. had made sufficient progress in the MD class that, as stated above, Baseden wanted to discuss changing his placement to the LLD class for the 2019-2020 school year but this discussion with C.F. did not take place. T-4 at 157-58; J-47 at J529.

Morgan's statement gives weight to respondent's argument that petitioner had decided to place G.F. at Newgrange even though the methods of instruction there (other than the use of O-G) are not much different than that which G.F. was receiving in the District. In April 2019, C.F. unilaterally placed G.F. at Newgrange and the draft March 12, 2019 IEP was never completed.

Baseden reviewed G.F.'s progress in her classroom, as shown in his progress report, the Star Assessments, his daily classroom work, and her own observations. She believes he showed great growth, academically and socially. Baseden identified G.F.'s scores on the Star Assessments, an evaluation conducted three times each year showing that in reading he had reached a grade equivalency of 2.6 by the end of fifth grade (May 2018), began sixth grade with a grade equivalency of 1.4 (after missing ESY), and by January 2019, had reached a grade equivalency of 3.1. (R-1 at R2.) Similarly, in math, G.F. was at a grade equivalency of 1.8 in September 2018, and by January 2019, had improved to a grade equivalency of 3.0. Ibid.

## **Independent Evaluation**

On March 27, 2019, Susan E. Miller of the Ann Robinowitz Education Center came to Baseden's class to observe G.F. during English/language arts, math and lunch. She attended two class periods for approximately two hours on one day. Baseden identified Miller's observation report (J-44) and her diagnostic learning evaluation. (J-45.) Baseden responded to specific and implicit criticisms of her teaching methods made by Miller and pointed out errors in Miller's two reports. For example, Miller described the program in the classroom as "Life Skills-based" (see, J-44 at J507), but Baseden stated that the program is functional academics, in which "students take what they're learning academically and use it in a practical setting." T-4 at 125-26. Miller stated that each day the students spent time in the kitchen or handling outside jobs; Baseden said such tasks are performed one day a week, not every day. Miller stated that Baseden begins each day with GR, but Baseden said she teaches reading and writing every day but does not use GR every day.

Overall, like Lentine, Baseden stated that she was teaching G.F. with the strategies recommended by Miller, a "systematic, explicit, multi-sensory approach." T-4 at 78. She noted that while the District does not use the specific curriculums Miller recommended, they were still teaching the same concepts and often using similar strategies. As recommended by Miller, Baseden kept verbal instruction to a minimum; almost all teaching was done in small groups or one-on-one; the bulk of G.F.'s learning was active and engaged; he required overlearning, so she continuously revisited and retaught skills; she used chunking strategies.<sup>10</sup>

As with Erdberg and Lentine, Baseden had never testified in a contested proceeding. Evidence of her lack of experience was her willingness to go on with her answers, often with information well beyond the question posed to her. She was a willing participant, was quite pleasant and confident and seems to love both her work generally and working with G.F. specifically. In particular, her credibility was enhanced by her stated enthusiasm to receive reports of independent evaluators, such as Susan E. Miller. She described such evaluations as a check

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<sup>10</sup> While Baseden uses O-G methodologies in her classroom, she agreed with her colleagues that a strict O-G curriculum is not appropriate for low-IQ students. After much discussion on cross-examination about this restriction on the use of Wilson, Baseden recalled that Patty Toggins, a District employee and Wilson Level I-Certified trainer, told her not to use Wilson with low-IQ students.

on what she is doing in the classroom and when new programs are recommended, she does follow-up research and may ask her supervisor for approval to use such with her students. “And that’s how we got Touch Math.” T-4 at 82-83. As with Lentine, although Baseden was not qualified as an expert, her testimony was given due consideration to the extent it was rationally based on her first-hand experience with G.F. and assisted the undersigned in determining the facts at issue.

### **Petitioner’s Witnesses**

**Susan E. Miller** (Miller) is the assistant director of the Ann Robinowitz Education Center,<sup>11</sup> Princeton, New Jersey. Miller identified her resume, which summarizes her educational and work experience. (P-20.) Although respondent objected to Miller’s expertise in SE and O-G instruction, she was qualified as an expert in SE, specifically teaching students with reading disorders and language-based learning disabilities; O-G curriculums; and as an LDTC experienced in testing and developing IEPs.

Miller is aware of G.F.’s background; she has experience working with students adopted from Eastern Europe and Central America who, like G.F., have language-based learning disabilities. Miller stated that G.F. is not “severely cognitively impaired”; she made this finding based on her experiences with other children who have “suppressed IQs” due to a lack of stimulation as an infant. Tr. (October 23, 2019) (T-5), at 58-59. Though she recommended G.F. be given the non-verbal IQ test to “get another picture” of his ability, she does not believe the IQ test is a reliable predictor of G.F.’s intelligence due to his absence of formal schooling prior to age eight. Miller classified G.F. as MD, with ADHD, auditory processing disorder and LLD.

Though at hearing Miller stated that G.F. should have been getting “multi-sensory reading instruction,” (T-5 at 62), in her observations report, Miller states that O-G is the preferred method to teach reading (for all students, but especially SE students). (J-44.) She stated that the only curriculum appropriate for G.F. is one which uses an O-G approach as it will “remediate his phonological awareness deficits . . . and improve his retention and language.” T-5 at 64-65. She

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<sup>11</sup> The Newgrange School of Princeton, Inc., a 501(c)(3) tax-exempt organization, is the parent corporation of the Newgrange School and the Ann Robinowitz Education Center. All three entities share the same Board of Trustees.

described GR as a method, or tool, in which a student reads with a guide and, should the student make mistakes, the guide corrects him or her in real time.<sup>12</sup>

Miller identified the January 5, 2017 IEP developed by the District for G.F. (J-28.) It includes the statement that G.F. would be taught GR once/day for twenty minutes. (J-28 at J337.) Instead, G.F. should have received multi-sensory reading instruction. He had difficulty learning to read because he did not have phonological awareness (inability to process sounds) and was an inconsistent learner (inability to retrieve subjects he had been taught). Miller stated that O-G curriculums should have been used to remediate the phonological deficit, to address his memory issues with repetition, and to monitor his progress on a weekly basis through testing. Miller believes the District erred in not using Wilson with G.F.; the Journeys 4 curriculum was not appropriate for him and mixing O-G methods with Journeys was also not appropriate because such instruction would not follow the correct scope and sequence or measure progress. Miller identified the March 22, 2018 IEP for G.F., the IEP in use at the time she met G.F. (J-38.) She stated that the curriculums used for instruction in language arts were not appropriate and/or were not O-G. (There are no O-G-approved math curriculums.)

On March 27, 2019, Miller went to Kreps to observe G.F. in the classroom; she identified her observation report. (J-44.) Miller arrived on time for the first period, at 8:30 a.m. Instead, she was asked to return for the second period, beginning at 9:27 a.m. Miller could not explain the delay; she stated that she was surprised, and no reason was given to her as to why she would not be allowed to observe period one. Respondent, however, showed Miller a series of emails from David Roe (Roe) to Morgan (as described in the summary of Roe's testimony, below), the first sent one month prior to the observation date, in which Roe tells Morgan that the observation would begin at 9:27 a.m., not at 8:30 a.m., as Miller was advised by petitioner's team.

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<sup>12</sup> Miller stated that decades of research with GE students show that this approach is not working; students do not have "word attack skills" by the time they reach sixth grade. She provided petitioner's team with a report of a study of the use of GR with first and second-grade GE Tier II students. (P-21.) This report was of minimal value in this case as (1) G.F. is a SE Tier III student; and (2) there was no agreement as to the definition of GR, much less as to the use of GR in Baseden's classroom.

In the second email, Roe responds to an email from Morgan in which Morgan complains that Miller was turned away at 8:30 a.m. Miller stated that she had never seen these emails.<sup>13</sup>

During her classroom observation, Miller “didn’t see instruction” in reading, she only saw the students working independently on computers as Baseden went around and gave the students individualized instruction. T-5 at 105-06. Miller did not see the use of scope and sequence, daily instruction explicitly teaching and reviewing skills that the students had not mastered. In particular, Miller was critical of how Baseden helped G.F. use an apostrophe, giving him a mini-lesson as opposed to explicit instruction of a new concept. According to Miller, Baseden spotted that G.F. did not know how to use the apostrophe randomly, not in context of other skills G.F. did not have. Baseden should have looked at G.F.’s writing to determine his reading skills, compared this to a checklist of what he had mastered and then designed classroom instruction accordingly. Miller did not explain how she concluded that Baseden never gave formal instruction on reading skills and/or that the background work Miller recommends is not done for G.F., or for any other student. Miller’s report was based on a single hour of observation; it seems unlikely that Baseden could have accomplished the design of appropriate instruction on apostrophes during that hour.

Miller was very critical of Baseden’s teaching methods and her classroom:

Given the fact that [G.F.’s] phonological awareness, decoding/encoding skills are in the poor to low ranges on recent evaluations, [I] was expecting to observe direct, explicit instruction to improve his phonological awareness and word attack skills during English/literacy block that occurs each day during periods 1 and 2. Rather, [I] was told that the [GR] approach was utilized in the class on a daily basis.

[(J-44 at J509.)]

Miller was particularly critical of what she characterized as a “life skills” curriculum, the mail delivery and coffee cart exercises and spending time in the kitchen. In short, she sees it as a waste

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<sup>13</sup> Whether Morgan is unorganized or disingenuous, it appears unfair both to Miller and G.F. to set Miller up to begin her observation day suspicious of the District. On re-direct, after being advised of the above-described email chain, Miller again said that an administrator from the District told her she “was not allowed to observe period one,” which was only technically correct. T-5 at 242.

of time, time could be better spent on addressing G.F.'s academic deficits. Miller said that when Baseden described this curriculum, Miller "thought, oh, I've heard that curriculums like that are used with kids that are autistic and severely cognitively impaired [and have] Downs' Syndrome[,]" and such is not appropriate for G.F. because he's "capable of learning how to read and write." T-5 at 113. Later, however, Miller agreed that G.F. struggles socially and acknowledged that he receives social skills instruction at Newgrange, though she is not familiar with the means of this instruction. (As was heard from petitioner's other experts, Newgrange provides G.F. the exact type of instruction Miller found so objectionable at Kreps, raising the question of whether Miller's criticism of any District curriculum was a foregone conclusion.)

When told that Baseden had given testimony refuting statements in her observation report, Miller stated that even if she were incorrect, it would not change her ultimate conclusion that the District's program was not appropriate for G.F. Miller stated that G.F. requires daily SLT and O-G instruction throughout the day, neither of which was being implemented by the District. Though a number of Miller's recommendations were found in G.F.'s IEPs, Miller stated that based on her review of the IEPs, G.F.'s class work (R-17, which was not organized by the teacher), and her observation of Baseden's classroom, she saw no evidence that the District was providing G.F. with multi-sensory instruction. T-5 at 179.

Miller identified the report of the Diagnostic Learning Evaluation she conducted at C.F.'s request. (J-45.) The latter report was based on her meeting with G.F., tests she conducted, her observations, and G.F.'s educational file (as provided to her by C.F.). Miller stated that results of the tests she administered to G.F. placed him in the lowest percentiles, "pretty similar" to the results of tests given during the District's February 2019 educational evaluation. T-5 at 202-03. Miller identified a summary chart of G.F.'s scores on the W-J test. (P-22.) The standard score is comparison of a student to his peers with the norm being 100. She concluded that from October 2016 to February 2019, G.F. did not make significant progress (though there are areas where he did make progress). G.F.'s scores show that while his peers are getting stronger, the gap between G.F. and his same-age peers is getting larger. Had he been instructed with O-G, Miller believes this gap would not be there.

Miller's argument that G.F. was not given appropriate instruction at Kreps suffered in that she failed to offer more than anecdotal evidence of her most substantial claim: that children like G.F. who were not exposed to language and/or formal schooling from an early age will not test well but make academic progress if educated using O-G methods with fidelity. Miller said that she documented this experience for her practicum. T-5 at 149. Although she did not elaborate, given the testimony (by all of petitioner's witnesses) that a teacher cannot complete his or her practicum with low-IQ students, Miller appears to be admitting that none of the students of similar backgrounds with whom she trained had an IQ below eighty. In other words, Miller's experiences do not support her conclusions with respect to G.F. Further, it is worth noting that Miller's expertise is teaching children with language-based learning disabilities, not those who are classified as intellectually disabled. Newgrange, with which Miller is associated, specializes in educating the language-based learning disabled. T-5 at 218-19.

**Amanda Hope Colannino** (Colannino) was a LDTC in private practice at the time she met and evaluated G.F., but just before she appeared at hearing, she had been offered a full-time position with Christian Brothers Academy (CBA), a private Catholic high school for boys, located in Middletown, New Jersey. Colannino identified her resume which summarizes her education, work experience, and credentials. (P-18.) Petitioner offered Colannino, and she was qualified, as an expert in (1) SE, specifically in teaching students with reading disorders and language-based learning disabilities; (2) the Wilson Reading Program; and (3) as an LDTC in SE testing and creating IEPs for SE students.

Colannino described education as a science and seemed to say that some but not all educational programs and curriculums are "tested through peer reviews" and are supported by "brain research." Tr. (November 12, 2019) (T-6), at 51. She is an enthusiastic proponent of the O-G program of reading instruction for all students, GE and SE. She described O-G as systematic and explicit, never assuming that a child has any skills prior to receiving instruction and requiring proof of mastering each benchmark before moving to the next skill. Based on his low reading test scores, Colannino concluded that G.F. needs systematic, structured instruction in phonics and O-G is "the gold standard."

As an LDTC at Holmdel, Colannino trained in the use of GR.<sup>14</sup> She agreed that there are a variety of descriptions used for GR and based her answers on the Fountas & Pinnell Benchmark Assessment Systems of GR. Students are classified by instructional and independent reading levels and are grouped for instruction at the instructional level. In small groups, students receive instruction for fifteen to twenty-minute periods. Different techniques may be used, such as choral read, whisper read, and word-study. Colannino was quite critical of GR as she claims it is without scope and sequence, offers no direct instruction in phonics and/or word decoding. Students merely recognize words by sight. She does not believe this form of instruction was appropriate for G.F., but conceded she has no direct personal knowledge of the use of GR in the District or with G.F. (as she relied on Miller's report and the District IEPs). Based on Miller's report and the IEPs, Colannino stated that it "appeared that [G.F. was not receiving multi-sensory instruction] in fidelity[.]" T-6 at 143.

Colannino met G.F. on September 12, 2019, by which time he had attended Newgrange just short of three months, plus ESY. (P-18.) She spoke with both G.F. and C.F., reviewed G.F.'s educational files and the results of independent testing, and conducted additional testing to obtain a full picture of G.F. and to compare his scores to those obtained in February 2019. Colannino concluded that G.F. is below average in all academic areas, math, reading and writing. She classified him as MD, ADHD and communication impaired. Over respondent's objections that Colannino is not a psychologist and, therefore, not qualified to opine on the results of psychological examinations, Colannino stated that G.F. is not severely cognitively impaired.<sup>15</sup> T-6 at 114. She explained that a learning disability is characterized by a relatively high IQ when compared to adaptive skills (which was consistent with the later testimony of respondent's witness David Roe). T-6 at 113-14, 115. She concluded that G.F. has a learning disability even though the results of all objective testing performed to date showed G.F. has both a low IQ and low adaptive skills. To reach this conclusion, Colannino relied on her unqualified opinion that G.F.'s low IQ is not a true measure of his ability.

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<sup>14</sup> Colannino stated that the refusal of Holmdel to adopt O-G over GR (apparently for financial reasons) led to her decision to leave her position there. She later clarified that she left Holmdel when the opportunity at CBA became available, but she would not have sought such opportunities had Holmdel adopted O-G.

<sup>15</sup> When asked to define "severe cognitive impairment," Colannino said it is characterized by an IQ of less than sixty, functionally nonverbal, difficulty learning and/or carrying on conversations, and may include gross motor disability. T-6 at 107-08. Colannino was the only one of petitioner's witnesses to refer to the New Jersey Administrative Code as the source of classification. See, T-6 at 115.

Colannino did not know that in 2015, while in London, G.F. had a FSIQ test and/or that the results of that test showed a FSIQ of fifty-three. She said that given that G.F. had no schooling prior to age eight, she was not surprised by that number, and that result would not change her opinion regarding his placement. Further, she “would be astounded” if his IQ [in September 2019] was fifty-three. T-6 at 150. She conceded that in 2019, after four years of school, G.F. recorded a FSIQ of fifty-four, placing him in the first percentile (and a non-verbal IQ in the second percentile). T-6 at 152-54. As noted by respondent, Colannino is not a psychologist and, therefore, her conclusions regarding the validity of tests of G.F.’s IQ must be disregarded as must her opinion on whether G.F. is intellectually disabled.

Colannino identified a chart prepared by counsel summarizing G.F.’s scores on the W-J IV test over the past eighteen months. (P-22.) She stated that G.F. made minimum to no progress while in the District but saw progress during his time at Newgrange. When his scores (such as in basic reading, word attack skills, sight words, and nonsense words) showed no progress at Newgrange, Colannino explained that he had to “take a step backward to shore up the skills he was missing at the bottom.” T-6 at 124. He had been moved up prematurely while in the District and because of his memory problems, he had forgotten higher level skills that he had already been taught. G.F. made the largest improvement in his math scores; Colannino believes this is because he wasn’t exposed to this particular curriculum prior to enrolling at Newgrange (which is not an O-G curriculum). Even if Colannino had not conducted her own tests of GF in September 2019, she would come to the same conclusion regarding the appropriate placement as he had not made any progress at Kreps. In sum, Colannino concluded that because G.F. had not made progress, the problem was with the techniques used, not with G.F. Once he got to Newgrange, any lack of progress was also due to the failure of the District to lay the proper foundation or the greater difficulty of the tests, but again not due to G.F.’s intellectual disability.

While Colannino generally agreed with Miller’s criticism of the coffee cart exercise used at Kreps, she was not aware of whether G.F. receives any life skills instruction at Newgrange. In her report, Colannino stated that Kreps fails to provide G.F. with a “true middle school experience and he should not be in a self-contained classroom” (P-18 at 321), even though G.F.’s IEPs state that he was with GE students for fine arts, lunch and recess, and describe his participation in extracurricular activities with GE peers. G.F.’s Newgrange IEP places him “Full Time [in a] Self-

contained SE” classroom daily, from “8:15-3:00 with no mainstreaming.” (P-8 at 071, 053.) Colannino conceded at hearing that Newgrange has only SE students, so it too fails to offer a “traditional middle school experience.” T-6 at 244.

During their September 12, 2019, meeting, G.F. told Colannino that he did not want to return to the District, saying that during his last few weeks at Kreps, he did not want to go to school for the first time (presumably, since he began school in London).<sup>16</sup> G.F. said he had been bullied at Kreps, “lose learning,” and complained that he was being taught life skills (though he did not use that term) rather than academic subjects. Had Colannino a better understanding of the Newgrange program, she might have been skeptical of G.F.’s complaining about non-academic activities during the school day, as he appears to participate in “life skills” as much at Newgrange as he did at Kreps. See, T-6 at 183.

When asked whether G.F. should return to the District, Colannino was so emphatic that G.F. cannot be educated in a place he does not want to go that she made the following statements which she later had to admit were outside her area of expertise as she is not a psychologist:

I would fear for him should he go back to Kreps. . . . I don’t think it’s a close question at all that he needs to stay at Newgrange. He would take such a backslide not only academically, but emotionally and socially as well. He felt like he was being bullied. He was being bullied. I think it would just be terrible if he were to be sent back.<sup>17</sup>

[T-6 at 137-38, 168.]

Colannino was assured and self-confident but I found her to be unreliable as she based her strong opinions on statements that did not hold up. She is extremely enthusiastic about O-G, to the point of becoming emotional, and clearly sees Newgrange as a better opportunity for G.F. Colannino gave weak support for her conclusion that he belongs at Newgrange and will be

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<sup>16</sup> Note that in February 2019, school psychologist Michelle Navarro included in her psychological evaluation of G.F. that he “expressed positive feelings toward school.” (J-42 at J497.)

<sup>17</sup> Without question, no parent willingly sends his child to a school where he or she was subject to bullying. But this case is not about bullying, as to which petitioner presented no credible evidence. G.F.’s fifth grade classroom teacher discussed two alleged incidents, neither of which she observed. Colannino’s argument that the District should place G.F. in a private school because G.F. wants to go there is curious and detracts from her testimony.

harmful if returned to the District and appears to misunderstand that the standard as to which the District is held is not better or best but “appropriate.”

**Kathleen Ann Bostock** (Bostock) is the Assistant Director of Education at Newgrange. She identified her resume which summarizes her education and work experience. (P-17.) In 2007, Bostock earned her masters’ degree in Learning Disabilities from Farleigh Dickinson University in 2007, but did not obtain LDTC certification. She stated that she is not a teacher and does not hold a teaching certificate. Rather, she is a teacher’s teacher and her “focus has always been to spread the word to teachers to help them develop the knowledge base in order to work with students with language-based learning differences.” Tr. (November 15, 2019) (T-7), at 10. Bostock holds numerous training certifications that allow her “to teach other teachers in the O-G methodology.” Id. at 14.

In her position at Newgrange, Bostock trains public school teachers through the Robinowitz Center, handles scheduling of students in appropriate learning groups; review of test results, conducting sub-testing (of new students) and participating in IEP processes to ensure placement of students with other students of similar educational needs; and curriculum design. She clarified that she does not conduct learning evaluations (as she is not an LDTC) but analyzes the results of this testing.

Bostock was qualified as an expert in SE teacher training; the O-G curriculum; creating and review of IEPs for SE students; and evaluating test results in those topic areas in which she has been trained.

Bostock described O-G as a multi-sensory approach that allows students to actively participate in learning using all their senses. Its effectiveness has been shown through decades of testing—specifically, functional residence imaging tests—of students who were taught using that approach. Results show differences in the neurological structure of the students’ brains before and after O-G training.<sup>18</sup> All O-G curriculums have a “scope and sequence” from most common to least common, simplest concepts to the most complex, with repetition throughout.

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<sup>18</sup> Proof of these studies was not provided.

The teacher links what was previously taught to what is currently being taught. Bostock believes all students can benefit from an O-G approach to learning. T-7 at 40.

Bostock is familiar with G.F.; she sees him daily in the school of just ninety-five students. She read his educational file, did preliminary testing, developed his IEP (P-8), and has observed him in the classroom and lunchroom. Bostock also prepared the May 23, 2019 IEP Report for G.F., a summary of the results of G.F.'s performance on the W-J IV in reading and mathematics. (P-9.) Bostock described G.F. as "a funny kid, a nice boy, eager, good sense of humor." T-7 at 50. He is classified at Newgrange as having language-based learning and processing difficulties.<sup>19</sup> G.F. has expressive language difficulties (trouble finding the correct words), difficulty with pronunciations and uses the same word repetitively, but can convey his needs and wants. He is lacking executive functioning skills, cannot stay on task and sustain attention. For this reason, the teacher cannot give him too much information verbally. G.F. has a working memory deficit; he has instant recall but no long-term memory.

When asked if G.F. suffers from severe cognitive impairment, Bostock gave a long-winded answer that while he appears to be limited, his disabilities may be as much a function of his environment and the lack of stimulation he experienced until age eight as those disabilities are a function of G.F.'s low IQ. See, T-7 at 57-59. When asked if she knew that G.F. has a FSIQ of between forty-eight and fifty-four, Bostock recalled seeing these results but believes they are only a snapshot, not a complete profile of a student, and that the CST should make a decision as to his or her classification (and programming) based on a number of factors, such as daily functioning, problem solving skills, completion of task, communication skills, and social background. Bostock did not, however, adequately explain the decision to disregard consistent snapshots taken over the five-year period during which he has received formal schooling.

Without question, Bostock believes O-G is the best way to teach G.F. and further, that mixing GR with multi-sensory approaches is not appropriate because:

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<sup>19</sup> At hearing, Bostock continually referred to G.F.'s classification as "language-based learning differences" rather than disabilities. T-7 at 53, 69, 181. This same description appears in her resume; she stated that it was a mistake in her resume which her daughter drafted. T-7 at 11. It appears that she uses the terms interchangeably.

[G.F.] needs an evidence-based approach and targeting multi-sensory strategies and instruction. He needs to learn the connections between one concept and another. He needs to be taught in frequency of usage so that he's learning the most information that can be the most beneficial to him and then continue. It's also structured so that you can learn simply things and get a good solid foundation in order to build new and more complex concepts and structures and with a faulty foundation and a continuous linkage from new learning and past learnings, it will make it more difficult, especially for children who have language challenges.

[T-7 at 52.]

This somewhat confusing response was rendered essentially useless with Bostock's later statement that while she had observed the use of GR in GE classes, she has never seen it used in a SE class. Id. at 65. Nor, for that matter, had Bostock observed GR instruction in the District.

Bostock described the education G.F. received in London as evidence-based instruction with OT, PT and ST. Based on her review of the IEPs and progress reports from London, Bostock believed G.F. was "building a hierarchy of skills," as the goals and objectives were sequential. T-7 at 82. Bostock was critical of the goals and objectives found in the District IEPs, saying they were more "general" than those from the London IEPs and that mastery of a concept should be at ninety percent (rather than eighty percent) so that G.F. could "transfer into a less supported environment if that is in [his] future." T-7 at 84. G.F.'s Newgrange IEP, however, has goals of ninety percent proficiency only for reading, goals of eighty-five percent proficiency for all other academic subjects and goals of eighty percent proficiency for use of technology, life skills, expressive and receptive language, and social communication. (P-8.) Later, Bostock stated that only reading proficiency goals are always ninety percent, but proficiency goals for other subject areas may vary. T-7 at 112.

Bostock does not believe that G.F. received FAPE in the District as his classification changed without explanation, the goals in his IEP were lacking, his absence of phonological awareness was not addressed. Bostock did not observe classes in the District (or, for that matter, in London), and based her opinion on the documents in G.F.'s educational file and Miller's evaluation. She conceded that her opinion of the District program for G.F. was not based on first-hand knowledge. T-7 at 167. Overall, Bostock was particularly critical of the

District IEPs (without specificity as to dates) but had trouble recalling her specific issues and contradicted herself on more than one occasion. Two instances in particular stand out.

First, Bostock was very critical of the District regarding the absence of OT in G.F.'s draft March 12, 2019 IEP. According to Bostock, because the District eliminated OT, G.F. is not getting the training at Newgrange that could address his executive functioning deficits (specifically, awareness of surroundings and cues that direct appropriate behavior). T-7 at 149-52. As discussed above, the District did recommend such training for G.F., but under the heading SLT not OT. See, J-36 and J-48 (progress reports showing that G.F. had achieved goals in OT); J-47. Further, Bostock stated that as a general practice, Newgrange does not provide related services, such as OT, to students who did not qualify for such services in their last public school, even when, as with G.F., such student is placed at Newgrange unilaterally. T-7 at 151-52. Here, it is noted that Bostock did not say why Newgrange could not provide any services deemed necessary but, it appears that because someone at Newgrange failed to adequately read G.F.'s educational file, Newgrange is not providing him the related services that the District would have provided.

Second, Bostock stated that she agreed with the statements in Miller's report critical of any "life skills training" as inappropriate for G.F. T-7 at 100. Later, Bostock described instruction G.F. receives at Newgrange that can only be characterized as "life skills training." Further, she stated that G.F. receives this instruction not because it is required by the State of New Jersey, but because it is appropriate for G.F. T-7 at 196-98, 203. This includes training in activities of daily living (e.g., personal hygiene), working at the Trenton Soup Kitchen, the Mall Trip Project (learning how to select and purchase appropriate gifts), and a luncheon for parents (planning, organizing, grocery shopping, cooking and serving). (P-14; T-7 at 210-11.) Later, Bostock tried to explain that "Life and Career Skills" at Newgrange is delivered differently than at Kreps but was not convincing. See, T-7 at 232-33.

Bostock's demeanor belies her chosen occupation, she speaks slowly and carefully as she maintains her gaze at the factfinder. She appears kind and thoughtful and often gave long, expansive answers when a short response would have been sufficient. Her enthusiasm for O-G and for teaching SE is apparent; Bostock believes strongly that O-G is the best approach to teach reading and, for students like G.F., the only approach which is appropriate. T-7 at 164-65.

Overall, though, I found Bostock to be an unreliable and unconvincing witness. The report she wrote and the tests she administered to G.F. were, by her own admission, faulty. T-7 at 176, 177-80. Further, her testimony suffered from ardent belief that the District did not properly service G.F.; she failed to recognize when she was advocating for rather than against District programming. It may simply have been a case of not thoroughly reading G.F.'s educational file and/or Miller's report. But, in any event, Bostock did little to poke holes in the Board's position that G.F. received a FAPE in the District and with her description of Newgrange's "community-based instruction," she gave support to the Board's claim that C.F. did not meaningfully participate in the March 12, 2019 IEP meeting but had already decided to place G.F. at Newgrange, where he would receive what Morgan called "community-based instruction." T-7 at 203-04; see, Summation Br. of Respondent, at 51.

### **Rebuttal**

**David Roe** (Roe) is the District's Director of Student Services. He identified his resume, which summarizes his education and work experience. (R-6.) In his current position, Roe supervises the SE Department and nursing staff and is responsible for the District's homeless students. He does not draft IEPs, but oversees the various CSTs, and provides training "for the CST on the necessary components of IEPs," including goals and objectives and classification categories. Tr. (December 4, 2019) (T-8), at 7. Prior to working in the District, Roe was the school psychologist for six years in the Saddle Brook (New Jersey) Public School District. In this role, he served as SE case manager, met with parents, responded to referrals, conducted evaluations of students, classified students, developed and reviewed IEPs, and conducted triennial reevaluations. Roe was promoted to Supervisor of Special Services and then Director of Special Services at Saddle Brook, the latter position similar to his current job.

Roe has worked in the field of SE for thirteen years, participating in approximately one thousand IEP meetings, almost 800 as case manager. As a school psychologist, Roe was trained in giving and interpreting standardized IQ tests and has conducted approximately 350. Roe was qualified as an expert in school psychology, SE with an emphasis on supervision of IEPs, case management, and conducting and interpreting psychological evaluations.

Roe identified a series of emails between himself and Morgan regarding petitioner's request for Miller to observe G.F. in the classroom. (R-20 at R760; P-23.) The email chain began with Roe asking Morgan on February 26, 2019, what time Miller would arrive for observation. (P-23.) Morgan replied the same day that Miller would arrive at period one and stay through period four; Roe responded that he would confirm after speaking with the building principal. *Ibid.* On February 28, 2019, Roe emailed Morgan, with copies to C.F. and the case manager, with the observation schedule for Miller, starting at the beginning of second period. (R-20.)

Roe stated that he typically gives independent evaluators one and one-half hours to observe a classroom but gave Miller two hours and three minutes so that she could observe a literacy block, free time, and math class. In reaching this decision, to allow Miller to observe three periods rather than the four periods she requested, Roe considered that four periods was well beyond the access typically provided, visitors can be disruptive to the other students, and Miller was granted access to the subjects she asked to observe. Finally, Roe reached the decision in consultation with a building administrator.

No one from petitioner's team objected to Roe's February 28, 2019 email, but on the agreed upon date, Miller arrived at the beginning of first period, as she described at hearing (see above). The office staff could not let a visitor into the classroom outside of the approved time and the case manager had not come to the office (pursuant to the emailed schedule). So, Miller left and returned at the beginning of the second period to begin her observation of G.F.'s classroom.

As a representative of the District, Roe attended the entire hearing. He heard several witnesses give testimony regarding the definition of "cognitive impairment" (including at my request). Roe first explained that "cognitive impairment" is not the correct term as the New Jersey Administrative Code uses the term "intellectually disabled" and classifies students from mild to severe.<sup>20</sup> A student with mild intellectual disability is one with an IQ "two standard deviations below the mean, which would correspond to a score between 55 and 70." T-8 at 37. A student with moderate intellectual disability is one with an IQ between forty and fifty-five with some social skills deficit. This classification is made by the school psychologist using the results of a psychological evaluation.

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<sup>20</sup> N.J.A.C. 6A:14-3.5(c).

Roe described how, on an IEP team (or CST), each professional does individual evaluations and makes programming recommendations and/or decisions based on these separate evaluations. The LDTC focuses on a student's performance in reading, writing, and math in relation to his or her grade-level peers. Any recommendations by an LDTC regarding a student's intellectual disability (or cognitive impairment) would not be used by the CST because that information would be provided by a psychologist. Note that Roe had heard all three of petitioner's witnesses, none of whom are psychologists, testify that G.F. was not cognitively impaired and further, state that the results of G.F.'s IQ tests were not dispositive.

Roe identified the results of the four IQ tests given to G.F.<sup>21</sup> In the school psychologist's report on G.F. from London dated June 7, 2015, on the WISC-IV, G.F.'s FSIQ was fifty-three. (J-4 at J57.) G.F. showed moderate intellectual disability; he needed "explicit instruction in areas such as social skills, adaptive skills . . . would respond very slowly to academic instruction, would have difficulty retaining information that is presented to [him] based on the working memory score, difficulty dealing with abstract concepts, difficulty working under timed conditions, difficulty making connections between concepts." T-8 at 44-45.

The results of all the subsequent IQ tests given to G.F. have been consistent with his initial scores from London. In October 2016, and February 2019, his FSIQ scores were forty-eight and fifty-four, both in the first percentile. (J-15; J-42.) In February 2019, G.F. scored a sixty-nine on a non-verbal IQ test, placing him in the second percentile. (J-42 at J0489.) Roe stated that the consistent scores were expected as "IQ tests are considered very reliable over time." T-8 at 45.

As discussed above, the intellectual disability classification relies on two separate scores, first the IQ test, and second, the Vineland Test of adaptive skills, on which G.F. earned a composite score in the moderately low range, the third percentile (in 2016). (J-15 at J194.) Roe stated that despite these low scores, the District hoped that G.F. "would respond favorably to a very enriched environment" and that his IQ would improve. T-8 at 47. The District CST reviewed all the documents provided from London and, in line with the IEP from London, initially classified G.F. as

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<sup>21</sup> In its brief, respondent refers to five separate IQ tests, but the neuropsychological examination of G.F. conducted in November 2016 included a review of the results of the WISC-V test conducted by the District, not a separate IQ test. See, J-26 and Post-Hearing Br. of Respondent (March 17, 20200, at 4.

communication impaired. (J-15 at J47.) This classification is used for students (like G.F.) who score below the tenth percentile on two tests given by a speech language pathologist.

In 2019, G.F.'s third FSIQ test returned a score of fifty-four (J-42 at J486), and the assessment of his adaptive skills again showed G.F. to be in the moderately low range, Roe determined that his IQ was stable in the low range and the District changed his classification to MD, which "encapsulates not just intellectual disability but also the auditory processing issues and a host of other issues." T-8 at 49; J-42 at J486. With this classification, the District offered comprehensive programming to address all G.F.'s challenges.

If a student's IQ is in the fiftieth percentile, but their academic achievement tests show performance in the twenty-fifth percentile, the CST concludes that there is a learning disability. If, however, as with G.F., the IQ and learning assessments are in the same percentile, the student is performing to his ability. Roe concluded that G.F. does not have a learning disability but an intellectual disability:

[G.F.'s] difficulty was acquiring written language, being able to read. It's not a result of a learning disability. It's the result of an intellectual disability and the child's innate ability to grasp the materials.

A language-based learning disability presumes average or maybe slightly below average intellectual disability, and then their learning scores are well below where they're actually performing or well below their potential[.]

If [a student's] IQ falls . . . below the first percentile . . . we can expect [the] student to having difficulty grasping concepts [and] we plan our instruction and the IEP accordingly [as] if they're not going to respond to typical instruction.

[T-8 at 61-63.]

## **Discussion**

After listening to all prior witnesses discuss whether G.F. can be accurately described as "cognitively impaired" or "severely cognitively impaired," Roe clarified that the correct term

to describe a student with a low IQ and low academic performance is “intellectually disabled” and referred to the following regulation:

‘Intellectually disabled’ means a disability that is characterized by significantly below average general cognitive functioning existing concurrently with deficits in adaptive behavior; manifested during the developmental period that adversely affects a student’s educational performance and is characterized by one of the following:

- i. ‘Mild intellectual disability’ means a level of cognitive development and adaptive behavior in home, school, and community settings that are mildly below age expectations with respect to all of the following:
  - (1) The quality and rate of learning;
  - (2) The use of symbols for the interpretation of information and the solution of problems; and
  - (3) Performance on an individually administered test of intelligence that falls within a range of two to three standard deviations below the mean.
- ii. ‘Moderate intellectual disability’ means a level of cognitive development and adaptive behavior that is moderately below age expectations with respect to the following:
  - (1) The ability to use symbols in the solution of problems of low complexity;
  - (2) The ability to function socially without direct and close supervision in home, school and community settings; and
  - (3) Performance on an individually administered test of intelligence that falls three standard deviations or more below the mean.
- iii. ‘Severe intellectual disability’ means a level of functioning severely below age expectations whereby in a consistent basis the student is incapable of giving evidence of understanding and responding in a positive manner to simple directions expressed in the child’s primary mode of communication and cannot in some manner express basic wants and needs.

[N.J.A.C. 6A:14-3.6(a).]

Cognitive skills (or intellectual potential) are measured by a psychologist using a FSIQ test, such as WISC-IV/V. Adaptive skills are measured by a psychologist using the Vineland II/III as administered by the classroom teacher and/or parent. G.F.'s FSIQ was tested in June 2015, while G.F. was in school in London; in October 2016, by the District psychologist; and in February 2019, again by the District psychologist. The results were consistent: G.F. was found to have a FSIQ of fifty-three, forty-eight, and fifty-four, respectively, all in the first percentile, and a non-verbal IQ test (conducted in 2019) showed that G.F. has a non-verbal FSIQ of sixty-nine, in the second percentile. The Vineland tests were administered by the District psychologist (with the assistance of the classroom teachers) in October 2016 and February 2019. The results of these tests too were consistent; G.F. showed composite adaptive skills in the moderately low range.

In November 2016, C.F. took G.F. for testing by an independent neuropsychologist. Although he did not conduct an IQ exam, he reviewed all tests to date and found the "comprehensive neuropsychological evaluation reveals intellectual functioning in the extremely low range." (J-26 at J306.) Further, after administering additional tests, this professional concluded:

Technically, [G.F.] meets criteria for a moderate intellectual disability due to the presence of developmental delays that exist across all domains of cognitive functioning and functional impairments at home and at school. [G.F.] is currently functioning at a 1<sup>st</sup> to 2<sup>nd</sup> grade level on cognitive tests. Despite these scores, it is premature to conclude that these delays are solely due to a biologically based intellectual disability.

[Id. at J307-08.]

While petitioner presented three witnesses who disputed the accuracy of the above findings,<sup>22</sup> and thereby contradicted petitioner's independent neuropsychologists, they were not qualified to do so. Moreover, they could point to no competent objective testing to support their position. The failure of petitioner to introduce testimony of a psychologist to at least attempt to discredit the IQ test results is telling, possibly because such testimony could not be obtained. See, Ltr. Br. of Respondent in Reply (March 30, 2020) at 11-12.

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<sup>22</sup> "As petitioner's experts testified, due to [G.F.'s] late start in a formal education and in English, his IQ results significantly underestimate his true intelligence, making the IQ threshold criteria questionable in this case." Petitioner's Reply Br., at 6.

Petitioner argues that there is no evidence that G.F exhibits “deficits in adaptive behavior moderately below age expectations with respect to the ability to use symbols in the solution of problems of low complexity [and] in the ability to function socially without supervision.” Petitioner’s Reply Br., at 6. This claim ignores the consistent results of all objective testing given to G.F. since 2015 as well as the descriptions of G.F.’s social and executive functioning deficits that have been documented by all his teachers (and by Bostock in her testimony).

I am not persuaded by the expert testimony petitioner provided. While both parties’ witnesses were enthusiastic about SE, on balance, I found petitioner’s witnesses to be less informed and prone to criticize the District’s programming for the sake of proving the programming was lacking, even when confronted with information that contradicted the facts on which they relied. Two Board witnesses stated not just that a multi-sensory approach was appropriate for G.F., but that they used a multi-sensory approach with G.F., and the two IEPs at issue in this matter include descriptions of multi-sensory techniques to be used with G.F. These IEPs were developed consistent with an educational evaluation which specifically recommended a “systematic, direct, multisensory approach to learning.” If we can believe the Board’s witnesses (and I found them credible), they did in fact use a direct, systemic multi-sensory approach, and during each school year, G.F. did make progress. Baseden in particular stated that a multi-sensory approach is “best practice” for SE instruction and she has always used it with SE students. T-4 at 49. G.F.’s failure to catch up to (or close the gap with) his same age GE peers may not be a function of programming as much as it is a function of his ability.

Petitioner based much of its claim that the Board failed to provide a FAPE to G.F. on the fact that the District does not use “with fidelity” O-G curriculums and/or methodology. The parties do not agree as to whether G.F. was exposed to multi-sensory techniques while enrolled in the District and it is, therefore, not possible to predict whether such a concession on the part of petitioner would have been detrimental to his case. I **FIND** no legal obligation on the part of respondent Board to adopt an O-G curriculum and/or to use duly certified O-G instructors in its SE classrooms as neither is a requirement of the State of New Jersey. Although the burden of proof in these matters lies with the Board, I nevertheless observe that there was an absence of any corroborating evidence or empirical data to support the assertion that O-G is the only methodology appropriate for students (as petitioner describes) with G.F.’s background and

resulting language-based learning disability. In fact, while Miller and Bostock both referred to the wealth of such data, neither provided specific citations. The only publication petitioner produced was a criticism of GR based on research with GE Tier II students, making it essentially inapplicable to G.F. (who is a SE Tier III student).

Further, there was also no corroborating evidence or empirical data to support the assertion that O-G is appropriate for students with G.F.'s intellectual disability, whether that be mild or moderate. Again with the understanding that the burden of proof is respondent's, I nevertheless observe at the outset that the O-G methodology is not a State of New Jersey requirement for MD or LLD classrooms. Miller described a "well-documented profile of [children adopted from Eastern Europe and Central America whose] IQs are suppressed due to a lack of stimulation in their environments" who, after intensive intervention show an improvement on IQ tests. T-5 at 59. She did not, however, produce this profile to support her testimony. Further, she did not offer specific examples (presuming, of course, that she would not have been asked to share confidential information) to support her description of students she taught who have backgrounds similar to G.F.; she did not provide more than anecdotal evidence to support her broad conclusions regarding the similarities in academic potential and success between G.F. and these unnamed students. That was not enough to discredit the results of objective testing.

The unwillingness of petitioner's experts to accept the consistent results of IQ tests conducted over a five-year period undermined their credibility but was necessary to prove petitioner's case (or, for that matter, to prevent the Board from proving its case). Petitioner's argument that the Board failed to provide G.F. with a FAPE because the District does not employ an O-G curriculum with fidelity goes to the heart of his case. But, as Miller conceded, the O-G method addresses the challenges of the learning disabled, not the intellectually disabled, and Newgrange is a school for the learning disabled.

### **LEGAL ANALYSIS AND CONCLUSIONS**

As a recipient of Federal funds under the IDEA, the State of New Jersey must have policies and procedures that assure all children with disabilities the right to a free appropriate public education (FAPE). 20 U.S.C. §1412. State regulations track this requirement that a local school

district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. A free, appropriate special education and related services must be provided to all students with disabilities from age three through twenty-one: a.) at public expense, under public supervision and direction, and without charge; b.) to the standards of the State educational agency; c.) include an appropriate preschool, elementary, or secondary school education in the State involved; and d.) in conformity with the individualized education program (IEP) required under 20 U.S.C. §1414(d). 20 U.S.C. §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 for every student eligible for SE and related services. 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 SE 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.

Parents who are dissatisfied with an IEP may seek an administrative due-process hearing. 20 U.S.C. §1415(f). The school district bears “the burden of proving the appropriateness of the [IEP that it has proposed] but the school district is not required to prove the inappropriateness of any alternative IEP that a student’s parents might suggest.” Carlisle Area Sch. v. Scott P. by and Through Bess P., 62 F.3d 520, 533 (3<sup>rd</sup> Cir. 1995); N.J.S.A. 18A:46-1.1.

The IDEA does not require the Board to provide G.F. with the best possible education, S.H. v. State Operated Sch. Dist. of Newark, 336 Fed. 3d 260, 271 (3<sup>rd</sup> Cir. 2003), but must provide personalized instruction with sufficient support services to permit G.F. to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049 (1982). Noting that Rowley involved a student who, though disabled, was fully integrated in a GE classroom, the United States Supreme Court explained that while “a child’s IEP need not aim for grade-level advancement if that is not a reasonable prospect, [the IEP] must be appropriately ambitious in light of his circumstances[.]” Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S.Ct. 988, 992 (2017). The Third Circuit found the directions of the Supreme Court in Endrew to treat “a child’s intellectual abilities and potential as among the most important circumstances to consider” to be consistent with its standard that an “IEP must provide significant learning and confer meaningful benefit.” Dunn v. Dowlingtown Area Sch. Dist., 904 F.3d 248, 254 (3<sup>rd</sup> Cir. 2018). “IEPs must be reasonable, not ideal [and] slow progress does not prove” the deficiency of an IEP. Ibid.

Toward this end, an IEP must contain a detailed statement of annual academic and functional goals related to the Core Curriculum Content Standards of the GE curriculum and be measurable so both parents and educational personnel alike can be apprised of expected levels of achievement attendant to each goal. N.J.A.C. 6A:14-3.7(e)(2). These annual academic and functional goals must also include benchmarks or short-term objectives to help the student both participate and progress in the GE curriculum, as well as meet the student's other educational needs that result from his or her disability. N.J.A.C. 6A:14-3.7(e)(3). “Without an adequately drafted IEP, it would be difficult, if not impossible, to measure a child’s progress, a measurement that is necessary to determine changes to be made in the next IEP.” Lascari v. Bd. of Educ., 116 N.J. 30, 48-49 (1989) (IEP was inappropriate and incapable of review where the goals and objectives were vague, the measure of progress was equally unclear, it lacked objective analysis and remarks were subjectively based).

The IDEA also requires states to educate disabled children in the LRE to the maximum extent appropriate, with children without disabilities. See, 20 U.S.C. §1412(a)(5)(A). Thus, removal of children with disabilities from the GE environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services

cannot be achieved satisfactorily. Ibid. "This provision evidences a 'strong congressional preference' for integrating children with disabilities in regular classrooms." Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993) (citations omitted).

To determine whether a school is in compliance with the Act's mainstreaming requirement, a court must first determine whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. Id. at 1215. If such education cannot be achieved satisfactorily, and placement outside of the regular classroom is necessary, then the court must determine "whether the school has made efforts to include the child in school programs with nondisabled children whenever possible." Ibid. This two-part test is faithful to the Act's directive that children with disabilities be educated with nondisabled children to the maximum extent appropriate. Ibid.

Finally, the United States Supreme Court warned in Rowley that courts must be careful to avoid imposing their own preferred view of educational methods upon the States. Rowley, 458 U.S. at 207. In particular, the Supreme Court noted that the Act left the primary responsibility for formulating the educational program—and for choosing the most suitable educational method—to the CST. Ibid. "In the face of such a clear statutory directive," the Court stated, "it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories[.]" Rowley, 458 U.S. at 207-08. Therefore, once a court determines the requirements of the Act have been met, questions of methodology are for resolution by the states. Rowley, 458 U.S. at 208; see also, W.R. v. Union Beach Bd. of Educ., 414 Fed. Appx. 499, 501 (3d Cir. 2011) (evidence of frequent communication between parents and district satisfied the requirements of the IDEA, notwithstanding that the district employed a methodology in educating the student with which the parents disagreed).

Moreover, a program and placement does not turn on the intensity of the services or the superiority of the program. Scott P., 62 F.3d at 535. Despite a parent's best intentions in attempting to seek the optimal placement of his or her child, the standard is not what is optimal, but what is appropriate. Ibid. A program is appropriate if it confers some educational benefit; it need not be the superior alternative. Ibid. The Act does not require more. Ibid. In short, an IEP must be designed to confer some educational benefit in the least restrictive educational environment. Ibid.

Petitioner claims that the Board presented “no credible or persuasive testimonial or documentary evidence to support the appropriateness of its proposed program.” Summation Br. of Pet’r, at 27. To show that the program was appropriate, petitioner argues that the Board would have to prove that: (1.) the curriculum developed and implemented by Baseden was appropriate; and (2.) moving G.F. from the academic program he had in fifth grade to a “functional life skills program” in sixth grade was appropriate. In making this argument, petitioner presumes the sixth grade program differed significantly in focus from the fifth grade program though Baseden testified credibly that it did not and, in fact, insisted that sixth grade was too early to move from academics to life skills. (Here, Baseden and Bostock are in agreement. See, T-4 at 87-88; T-7 at 100.) Petitioner contends that respondent did not “put forth the proof necessary to justify this program as appropriate” but he is only correct if we accept his claim that Kreps only offered G.F. a non-academic program, and I do not. Not only were there no statements from the Board’s witnesses that G.F. belongs in a life skills-only program, but Roe stated that Kreps does not offer a life skills-only program, and petitioner’s witnesses agreed that life skills training was appropriate for G.F. See, P-8 at 067; P-14 at 085, 089.

In considering the appropriateness of an IEP, case law instructs that actions of the school district cannot be judged exclusively in hindsight. 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. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564–65 (3d Cir. 2010) citing Susan N. v. Wilson Sch. Dist., 70 F. 3d 751, 762 (3<sup>rd</sup> Cir. 1995). An IEP is “based on an evaluation done by a team of experts prior to the student’s placement.” Fuhrmann v East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3rd Cir. 1993) (emphasis in original). Thus, “in striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable [when] 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., 70 F.3d at 762, citing Fuhrmann, 993 F.2d at 1040.

The Third Circuit in Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 247 (3d Cir. 1999) stated that the appropriate standard is whether the IEP offers the opportunity for “significant learning and confers meaningful educational benefit.” The benefit must be meaningful in light of

the student's potential; the student's capabilities as to both "type and amount of learning" must be analyzed. Id. at 248. When analyzing whether an IEP confers a meaningful benefit, "adequate consideration [must be given] to . . . [the] intellectual potential" of the individual student to determine if that child is receiving a FAPE. Ibid. The IDEA requires an IEP based on the student's needs and "so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate." Scott P., 62 F. 3d at 534.

Each FSIQ test given to G.F. produced the same result; he scored in the lowest percentiles. Both Vineland tests given to G.F. produced the same result; his adaptive functioning was in the lowest range. These evaluations and all other professional assessments conducted by the District and/or provided by C.F. were considered in developing his IEPs. G.F.'s strengths and weaknesses, current level of academic and functional performance, and the recommendations for curriculum, teaching methods, and classroom modifications were addressed in his IEPs. G.F.'s placement in the MD class for 2018-2019 was appropriate and the recommendation of Baseden that G.F. had progressed enough to move to the LLD class for the 2019-2020 school year may have been determined by the CST to be appropriate. Related services were provided as recommended by the professionals who had worked with G.F. The March 22, 2018 IEP and the March 12, 2019 draft IEP were reasonably calculated to enable G.F. to make progress appropriate in light of his circumstances. I **CONCLUDE** that the respondent has met its burden of showing by a preponderance of the credible evidence that it offered G.F. IEPs for 2018-2019 and 2019-2020 with appropriate placements in the LRE that were reasonably calculated to enable him to make progress in light of his circumstances. Accordingly, I **CONCLUDE** that the Board provided G.F. with a FAPE.

Having found that the Board offered a FAPE to G.F., it is not necessary to analyze whether placement at Newgrange is appropriate under the IDEA. It is well-established that the appropriateness of an IEP is not determined by a comparison of the private school and the program offered by the District. S.H. v. State Operated Sch. Dist. of Newark, 336 Fed. 3d at 271. Rather, the pertinent inquiry is whether the District's IEP offered FAPE and the opportunity for meaningful educational benefit in the LRE. 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/oa/>. Upon a finding that the district provided FAPE, the appropriateness of the private school

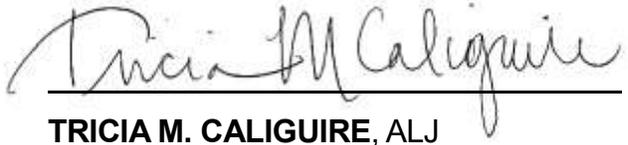
program is irrelevant. Ibid. (citation omitted); Scott P., 62 F. 3d at 533 (District is not required to prove the inappropriateness of the more restrictive placement).

**ORDER**

Given my findings of fact and conclusions of law, I **ORDER** that this case be dismissed in its entirety.

April 27, 2020 \_\_\_\_\_

DATE

  
\_\_\_\_\_

**TRICIA M. CALIGUIRE, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

nd

**APPENDIX**

**WITNESSES**

**For Petitioner:**

Amanda Hope Colannino  
Susan E. Miller  
Kathleen Ann Bostock

**For Respondent:**

Katherine A. Baseden  
Jessica Erdberg  
Lauren Lentine  
David Roe

**EXHIBITS**

**Jointly:**

- J-1 Not Introduced
- J-2 Not Introduced
- J-3 2014-2015 Report Card (United Kingdom), dated June, 2015
- J-4 Clinical Psychology Report, dated June 7, 2015
- J-5 IEP (United Kingdom), 2015-2016
- J-6 Speech Therapy Discharge, St. Peter's Hearing and Speech, dated August 25, 2015
- J-7 Education, Health and Care Plan (United Kingdom), dated September 25, 2015
- J-8 IEP (United Kingdom), dated December 11, 2015
- J-9 Communication and Interaction Targets (United Kingdom), dated June 2016
- J-10 Transfer IEP, dated March 23, 2016
- J-11 Report Card (2015/2016), dated June 2016
- J-12 Annual Review IEP, dated June 15, 2016
- J-13 Re-Evaluation Planning Meeting, dated September 30, 2016
- J-14 Letter from Director enclosing DLM Scores, dated October 28, 2016

- J-15 Psychological Evaluation, Dr. Meredith R. Bergazyn, Psy. D., dated October 13, 2016
- J-16 Educational Evaluation, Roman A. Perez, LDTC, dated October 22, 2016
- J-17 Physical Therapy Evaluation, Pamela Custer-Warshany, PTMS, dated October 24, 2016
- J-18 Speech- Language Evaluation, Tara Katz, M.A. CCC-SLP, dated October 31, 2016
- J-19 Social Agreement Update, Jessica Erdberg, dated November 1, 2016
- J-20 Audiological Evaluation, Robert Wood Johnson, dated November 15, 2016
- J-21 Occupational Therapy Evaluation, Manasi Bhawe, OTR-L, dated November 17, 2016
- J-22 Occupational Therapy, Christopher Walsh, OTR-L, dated November 23, 2016
- J-23 IEP, dated November 28, 2016
- J-24 Letter from C.F. to Case Manager, dated November 28, 2016
- J-25 Progress Report for IEP Goals and Objectives (2016/2017), dated November 30, 2016
- J-26 Neuropsychological Evaluation, dated November 23, 2016
- J-27 Speech-Language Evaluation, dated November 18, 2016
- J-28 IEP, dated January 5, 2017
- J-29 Due Process Petition filed by C.F., dated February 8, 2017
- J-30 Answer to Due Process Petition, dated February 23, 2017
- J-31 Decision Approving Settlement, dated April 28, 2017
- J-32 Progress Report for IEP Goals and Objectives (2016-2017), dated June 12, 2017
- J-33 Report Card (2016/2017), dated June 16, 2017
- J-34 IEP, dated May 2, 2017
- J-35 Audiology Evaluation, Children's Specialized Hospital, received June 15, 2017
- J-36 Progress Report for IEP Goals and Objectives (2017-2018)
- J-37 Report Card (2017/2018)
- J-38 IEP, dated March 22, 2018
- J-39 Re-Evaluation Planning Meeting, dated January 16, 2019
- J-40 District Request for Additional Assessments, dated February 7, 2019
- J-41 Educational Evaluation, Vanessa Mendoker, LDTC, dated February 18, 2019
- J-42 Psychological Evaluation, Michelle Navarro, M.A., NCSP, dated February 22, 2019
- J-43 Speech-Language Evaluation, Michelle Crisci, M.A., CCC-SLP, dated February 2, 2019

- J-44 Observation Report by Susan E. Miller, M.A. LDT/C, dated April 11, 2019
- J-45 Learning Evaluation by Susan E. Miller, M.A. LDTC, dated March 29, 2019
- J-46 Assistive Technology Evaluation, TCNJ, dated March 29, 2019
- J-47 IEP, dated March 12, 2019
- J-48 Progress Report for IEP Goals and Objectives (2018-2019)
- J-49 Report Card (2018/2019)

**For Petitioner:**

- P-1 Not Introduced
- P-2 Not Introduced
- P-3 Not Introduced
- P-4 Not Introduced
- P-5 Not Introduced
- P-6 Not Introduced
- P-7 Not Introduced
- P-8 IEP for 2019-2020 School Year, dated May 23, 2019
- P-9 IEP by Kathleen A. Bostock, MALD, CDS, OG-THT, CDS, WCT, CDT, dated May 23, 2019
- P-10 Final Report Card Newgrange, 2018-2019 School Year
- P-11 Newgrange Attendance Report, April through July 2019
- P-12 I-Ready Test Results and Diagnostic Performance Summary, 2018-2019
- P-13 Newgrange ESY 2019 Report
- P-14 Newgrange 2019-2020 Program Overview
- P-15 Class Schedule Newgrange, 2019-2020
- P-16 2019 Work Samples and Classroom Tests
- P-17 Curriculum vitea of Kathleen A. Bostock, MA OG-THT
- P-18 Curriculum vitea of Amanda Hope Colannino
- P-19 Not Introduced
- P-20 Curriculum vitea of Susan Miller, MA, LDTC

- P-21 Experimental Evaluation of GR and Explicit Interventions for Primary-Grade Students At-Risk for Reading Difficulties, J Res Educ Eff. Author Manuscript; Available in PMC 2016 January 14, Carolyn A. Denton, Jack M. Fletcher, W. Pat Taylor, Amy E. Barth, and Sharon Vaughn
- P-22 Test Score Comparison
- P-23 Email Exchange, dated February 28, 2019

**For Respondent:**

- R-1 Reading Progress Reporting
- R-2 Math Progress Reporting
- R-3 Case Manager Emails, dated March 2, 2016 through April 3, 2019
- R-4 Baseden Emails, dated September 26, 2018 through April 3, 2019
- R-5 Not Introduced
- R-6 Resume, David J. Roe
- R-7 Not Introduced
- R-8 Resume, Jessica Erdberg
- R-9 Not Introduced
- R-10 Not Introduced
- R-11 Resume, Katherine A. Baseden
- R-12 Resume, Lauren Lentine
- R-13 Lentine Emails, dated June 8, 2016 through June 13, 2018
- R-14 Lentine Notes
- R-15 Lentine Star Testing Reports
- R-16 Work Samples
- R-17 Parent Emails, dated April 11, 2019 through August 29, 2019
- R-18 Baseden Work Samples
- R-19 IEP, dated October 17, 2017
- R-20 Scheduled Observation Email