



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

**FINAL DECISION**

OAL DKT. NO. EDS 03275-20

AGENCY DKT. NO. 2020-31235

**J.C. ON BEHALF OF C.C. and**

**J.C. ON BEHALF OF C.C.,**

Petitioners,

OAL DKT. NO. HLT 03276-20

AGENCY DKT. NO. 2020-31234

(consolidated)

v.

**LAWNSIDE BOROUGH BOARD**

**OF EDUCATION,**

Respondent.

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**Cheryl Turk**, Staff Attorney, for the petitioner (Child and Family Advocacy Clinic, Rutgers Law School, attorneys)

**Darryl C. Rhone**, Esq., for respondent (CGO Law, P.C., attorneys)

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

**STATEMENT OF THE CASE**

In this matter, petitioner J.C.<sup>1</sup> filed two expediated due-process petitions to prevent respondent Lawnside Borough Board of Education (Board) from placing her grandsons, Cl. and Cn., on homebound instruction for disciplinary reasons. J.C. maintained that the Board's suspensions of her grandsons and placement on home instruction violated the

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<sup>1</sup> J.C. is the grandmother and guardian of her twin grandsons, who both have the initials C.C. To distinguish the twins, the student in EDS 03275-20 will be referred to as Cl. and the student in EDS 03276-20 will be referred to as Cn.

Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §1415 et seq. Petitioner further maintained that the Board failed to provide each student with a free appropriate public education (FAPE) by failing to timely perform a Functional Behavioral Assessment (FBA) and failing to revisit the appropriateness of their Individual Educational Programs (IEP). The Board maintained that the twin's aggressive and violent behaviors were not a manifestation of their disability because their IEPs classified them as "Communications Impaired." Due to their violent and disruptive behaviors, the Board voted to place Cl. and Cn. on homebound instruction until an appropriate out of district placement was found.

### **PROCEDURAL HISTORY**

The contested cases were transmitted to the Office of Administrative Law (OAL) and filed on March 6, 2020, for expediated hearings. I was assigned the matter on March 9, 2020, and had a telephone conference with the parties on March 10, 2020, to discuss an expediated hearing. At the March 10, 2020 conference, J.C. advised that she wanted to retain an attorney. The hearing was scheduled for March 18, 2020. On March 16, 2020, I received an email from the Board's attorney advising of the school's closure due to COVID 19, necessitating the adjournment of the hearing. J.C. retained counsel and the parties agreed to participate in settlement negotiations.

On May 27, 2020, the parties participated in a settlement conference conducted via zoom with an impartial administrative law judge. Although the matter did not settle, the parties continued to negotiate and successfully resolved the placement issue with an out-of-district placement at Brookfield Academy. The matter was returned to me for a hearing on whether Cl. and Cn. are entitled to compensatory education for the missed school time due to suspensions for disciplinary reasons and the Board's alleged failure to provide FAPE during the 2019-2020 school year.

I conducted the hearing via zoom due to the on-going COVID-19 pandemic on August 11, 2020. The parties agreed that the matter should be decided as a consolidated case with one decision. On August 14, 2020, I entered an Order of Consolidation. The parties submitted closing briefs and I closed the record on September 2, 2020.

## **STATEMENT OF FACTS**

The following information was submitted as joint exhibits and was uncontroverted:

The students enrolled in the Lawnside School District (Lawnside) prior to the start of the 2019-2020 school year. Each student had an IEP from their previous school which listed their special education classification as Communications Impaired. (J-a for Cl. and J-b for Cn.)

On August 22, 2019, Lawnside held an IEP meeting and proposed an IEP for Cl. (J-c at 1-17.) The following information was provided in the IEP:

**Include other educational needs that result from the student's disability [N.J.A.C. 6A:14-3.7(e)3ii]:**

Cl. has recently transitioned to the home of his paternal grandmother J.C. Mrs. C. reports that Cl. is receiving therapy in the home through a contractor with Perform Care. Sessions are one time per week for an hour. The services are being provided at the recommendation of DCPD for PTSD and ODD due to the trauma he experienced in the home with his biological mother. There is a possibility that Cl. may exhibit some behaviors in school due to the trauma he has experienced. In the event Cl. needs to be disciplined as a result of inappropriate behaviors a consultation should occur with the School Social Worker, LDT-C, or School Psychologist. The CST should be made aware immediately of any disciplinary actions and Mrs. C. should be contacted as well to be made aware of the situation.

[Id. at 3.]

On August 22, 2019, Lawnside held an IEP meeting and proposed an IEP for Cn. (J-d at 1-15.) Cn.'s IEP contained the exact same language referenced above. Id. at 4.

The Child Study Team (CST) identified suspected areas of disabilities, to include, social/emotional, behavioral, communications, and academic difficulties, for each student. To address all areas of suspected disabilities, Lawnside recommended the following reevaluations: Educational Evaluation; Psychological Evaluation; Functional

Behavior Assessment; Psychiatric Evaluation; Speech/Language Evaluation; Social History Assessment; and an Audiological Evaluation. On August 22, 2019, J.C. consented to all the proposed evaluations for her grandsons. (J-c at 51-59.)

On August 28, 2019, Jessyca Harper, MSW, conducted a social work evaluation on each student, individually, and wrote two reports. (J-c at 37-42 for Cl. and J-d at 26-31 for Cn.) The background and family history were provided by J.C. As part of their family history, J.C. reported that her grandsons were removed from their mother's custody on April 3, 2019, by the Department of Child Protection and Permanency (DCP&P). At DCP&P's recommendation, the twins receive in-home therapy. The therapist identified that both boys were suffering from Post-Traumatic Stress Disorder (PTSD) and that Cl. exhibited signs of Oppositional Defiant Disorder (ODD). J.C. reported that her grandsons needed to work on controlling their anger.

On September 3, 2019, Sollie Pinkston (Pinkston) LDT-C conducted an educational assessment on Cl. (J-c at 43-50.) Pinkston administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III). Cl.'s scores were as follows: Written Express - average; Oral Language, Mathematics, and Math Fluency – below average; and basic Reading – low. In her summary, Pinkston noted that Cl. appeared motivated to succeed and he persevered through challenging tasks. (Id. at 50.)

On September 3, 2019, Pinkston conducted an educational assessment on Cn and administered the WIAT-III. (J-d at 17-25.) Cn.'s scores were as follows: Oral Language - average; Written Express, Mathematics, and Math Fluency – below average; and Basic Reading – low. In her summary for Cn., Pinkston also noted that Cn. appeared motivated to succeed and that his attention and concentration were consistent as he persevered to complete challenging tasks. (J-d at 17-25.)

On September 19, 2019, Lawnside suspended Cl. for two days for simple assault. (J-e.)

On October 9, 2019, Rebecca Welde, (Welde), MS, SLP prepared a speech-language evaluation on Cl. from multiple assessment sessions over five school days. (J-

c at 32-36.) During the testing sessions, Welde noted that Cl. was “very fidgety and had difficulty sitting in his chair for longer subtests.” Id. at 32. She noted that Cl. responded well to positive reinforcement and praise. Id. At one point, Welde brought Cl.’s older brother into the room to give Cl. a pep talk to help him focus on completing the test. Welde administered the Clinical Evaluation of Language Fundamentals (CELF-5), a standardized test to assess Cl.’s receptive and expressive language abilities. His scores indicated overall language skills in the below average range. Further testing of Cl.’s auditory processing skills also indicated a below average range. However, Cl.’s spoken grammatical language skills were age appropriate. In her summary, Welde opined that Cl.’s weaknesses would “likely inhibit Cl.’s ability to correctly identify and use linguistic concepts, use the correct words within sentences, use provided words within a sentence with correct grammatical structure, follow a variety of classroom directions, and recall details from verbally presented materials.” Id. at 36.

On October 9, 2019, Welde prepared a speech-language evaluation on Cn., from multiple assessment sessions over three school days. (J-d at 48-52.) During one of the sessions, Cn. was having a hard time and refused to do the work. He stood in the corner and ignored all directions from Welde about finishing the work or coming back later to finish. Welde solicited help from Coach Norm, who had a good rapport with Cn., to defuse the situation. Id. at 48. In the CELF-5, Cn.’s scores were in the below average range. In the test of his auditory processing skills, Cn.’s scores were also below average. However, his spoken grammatical language skills were age appropriate. In her summary, Welde opined that Cn.’s weaknesses would “likely inhibit Cn.’s ability to match spoken sentences with visual pictures, correctly identify and use linguistic concepts, identify and explain how words are related, use the correct words within sentences, use provided words within a sentence with correct grammatical structure, follow a variety of classroom directions, and recall details from verbally presented materials.” Id. at 52.

On October 21, 2019, Joseph C. Hewitt, D.O. (Dr. Hewitt) performed a Psychiatric Evaluation of Cl. (J-c at 18-21.) Dr. Hewitt reviewed some of Cl.’s past tests and noted that he “had significant difficulties with communication and language and that this was accompanied by high activity levels, impulsivity, limited frustration tolerance, and behavioral issues.” Id. at 18. In Cl.’s IEP for the 2018-2019 school year from his previous

school, Dr. Hewitt noted that Cl.'s "behavior frequently impacted participation and learning." Id. at 19. Dr. Hewitt's interview with Cl. was challenging because Cl. tried to control the interview and refused to cooperate. Dr. Hewitt was forced to engage Cl.'s grandmother to help with the process. Cl. remained aloof, inattentive, and avoidant. Id. at 2. J.C. advised Dr. Hewitt about aggressive behavior that occurred during the last school year and she questioned why an FBA was never done. J.C. stated that Cl. is high energy, but she manages his behavior at home. After interviewing Cl. and J.C., and reviewing documents, Dr. Hewitt's made the following diagnoses: 1) severe communications disorder; 2) adjustment disorder with mixed disturbance of emotions and conduct; 3) disruptive behavior disorder; and 4) longstanding behavior issues. In his recommendations, he opined that Cl. met the criteria for Communications Impaired but also felt that Cl. met the criteria for Other Health Impaired or Emotionally Disturbed. Id. at 3. He advised that a behavioral plan should be considered. Id. at 4.

On the same day, October 21, 2019, Dr. Hewitt performed a Psychiatric Evaluation of Cn. (J-d- at 32-35.) Dr. Hewitt found Cn. to be more communicative than his brother but he was also aloof, wary, and difficult to engage. Dr. Hewitt gained more information from speaking to J.C. about the trauma the boys experienced. He opined that Cn. continues to meet the criteria for severe communications disorder. He also diagnosed an adjustment disorder with mixed disturbance of emotion and conduct and disruptive behaviors. Dr. Hewitt supported the continued classification of Communications Impaired, as being the area of greatest difficulty, but felt that more data was needed.

On November 1, 2019, Lawnside suspended Cn. for three days for leaving school grounds without permission and for open defiance of authority. (J-f.)

Cl. received his second suspension on December 5, 2019, for five days for fighting. (J-e at 2.) On January 5, 2020, Lawnside sent J.C. a Level III notice, inviting J.C. to attend a Disciplinary Hearing scheduled for February 13, 2020. Id. at 3. As per the Student Code of Conduct, "When a student reaches, in a school year, three (3) suspensions, or ten (10) days of suspension, he or she may be referred to the Board of Education for other appropriate actions." At the time of the Level III notice, Cl. had two suspensions totaling seven days. A week later, on January 13, 2020, Cl. received his

third suspension, two days for hitting and striking. Id. at 4. Cl.'s fourth suspension came on January 22, 2020, when Lawnside issued a three-day suspension for fighting. Id. at 5. On February 3, 2020, Lawnside suspended Cl. for eight days for physical aggravated assault upon another person, continual willful disobedience, and open defiance of authority. Id. at 6.

On January 5, 2020, Lawnside issued a Level III notice for Cn., inviting J.C. to attend a Disciplinary Hearing on February 13, 2020. (J-f at 3.) At that time, Cn. had only received one three-day suspension. Cn. received his second suspension, on January 21, 2020, for one-day for willful disobedience. Id. at 2. On January 29, 2020, Cn. received a twenty-one day suspension for assault upon a teacher, administrator, or other employee. Id. at 4.

During this time of escalating aggressive behaviors and increased suspensions, David J. Houck, Jr., (Houck), MS., conducted a Psychological Evaluation of Cl. over three school days, January 16, 2020, January 21, 2020, and January 28, 2020. (J-c at 22-30.) In his background information, Houck wrote that the evaluation was due to "academic, behavioral, and communication concerns." Id. at 22. Houck administered the Wechsler Intelligence Scale for Children (WISC-V), and computed Cl.'s overall cognitive functioning within the very low range. Id. at 24. Significantly, Houck expressed concern that Cl.'s "extreme distractibility, impulsivity, and his low frustration tolerance during the evaluation may have influenced the scores." Id.

Houck evaluated Cl.'s behaviors using the Behavioral Assessment System for Children-Third Edition (BASC-3). Id. at 25. Using the BASC-3 Teacher Rating Scales, Houck had Cl.'s special education teacher, Ms. T. Harvey, and his general education teacher, Ms. S. Harvey, complete scales to provide information about Cl.'s functioning in the classroom. Ms. T. Harvey indicated "behavioral/emotional concerns in the areas of hyperactivity, aggression, conduct, attention, learning, atypicality, adaptability, social skills, leadership, and study skills. Id. at 30. Ms. S. Harvey indicated the same concerns and added functional communication. Id.

Houck performed a Psychological Evaluation on Cn., with observations on January

15, 2020, January 16, 2020, and January 23, 2020. (J-d at 36-45.) On the first day of the examination, Cn. left the testing room without permission and ignored the examiner's request for him to return. On the second day of testing, Cn. complained that the material was "boring," grabbed the examiner's book, and left the office without permission. Id. at 37. On the third day, he again dismissed the material as boring, grabbed the examiner's books, and had to be escorted back to the room after leaving without permission. Id.

Cn.'s scores on the BASC-3 Teacher Rating Scales were similar to Cl.'s scores but more troubling. Cn.'s general education teacher, Ms. Coleman, expressed deep concerns about Cn.'s behavior and his emotional needs. She reported that Cn. was "very angry" and she was "afraid he will either harm himself or someone else." Id. at 44.

Like his brother, Cn. scored within the very low range on the WISC-V, with Houck cautioning that Cn.'s disruptive behaviors may have influenced the scores. Id. at 45.

On January 23, 2020, J.C. attended a Manifestation Determination meeting for Cl. (J-h at 1-2.) The Manifestation Determination report (J-h at 3-4) indicated that Cl. was involved in numerous incidents of fighting. The information considered did not include any of the current assessments. In response to the question, "[d]id the conduct in question have a direct and substantial relationship to the child's disability" the IEP Team responded "Yes." Id. at 3. Despite the "Yes" answer, the IEP Team determined that the student's behavior was not a manifestation of his disability. Id. at 4.

On February 4, 2020, J.C. attended a Manifestation Determination meeting for Cn. (J-i at 3-4.) The Manifestation Determination report (J-h at 3-4) indicated:

On 1/29/2020, Cn. was having a discussion with his teacher, Ms. S. Harvey. Mrs. Williams came to get him for class, but he wanted to play with the laptop and refused to go with her. Cn. subsequently began going around the classroom throwing the students' journals on the floor. Cn. went over and took a yardstick from the back of the classroom. Ms. S. Harvey attempted to take the yardstick away from him. Cn. went over and hit a student in the face with the yardstick. The student said, "Ouch." Cn. told the student that he was going to hit the student until he bled. Mrs. Williams then came back in the



room to get Cn. for class and Cn. ran out. He ran over to Ms. Coleman's classroom. There was a substitute in the classroom. Cn. went to the back of the classroom and grabbed yardsticks. Ms. S. Harvey went into the room and removed the yardsticks from Cn. He returned to Ms. S. Harvey's classroom and attempted to get the yardsticks from her. He crawled under the desk then attempted to open the teacher's desk drawers to obtain additional items to throw at Ms. Harvey. Ms. Harvey attempted to lock the drawer and Cn. pushed the drawers open so they could not be locked. Ms. Harvey attempted to talk to Cn. to have him come out from under the desk. She attempted to take his hand and Cn. bit Ms. S. Harvey twice.

In reaching its determination, the IEP Team did not consider any of the current assessments. J.C. reminded the IEP Team of Cn.'s ODD and PTSD diagnoses. She also stressed that the FBA was promised before the start of the school year, but never done. Although the IEP Team affirmed that the conduct in question had a direct and substantial relationship to the child's disability, it still determined that Cn.'s behavior was not a manifestation of his disability. Id. at 12.

At the Board meeting on February 13, 2020, the Board voted to place Cl. and Cn. on homebound instruction pending placement in an appropriate Out-of-District setting.

I **FIND** the above as **FACTS**.

### **TESTIMONY**

The following is not a verbatim recitation of the testimony. Rather, it is a summary of the testimony and evidence that I found helpful to resolve the issues presented in this matter.

**Niphon Kirk** (Kirk) is an eighteen-year employee, who is currently the assistant vice principal at Lawnside. She held that position for approximately five years. As part of her duties, Kirk is responsible for imposing discipline on students who violate Lawnside's Code of Conduct.

Kirk was familiar with both students, Cl. and Cn.

Cl. received his first suspension on September 9, 2019, for two days for simple assault. (J-e at 1.) Kirk could not recall the details of the incident. However, Cl. as a special education student, would have received modified suspensions. Cl. received his second suspension for five days on December 15, 2019, for fighting. (J-e at 2.) Again, Kirk could not recall the details of the incident, but recalled that Cl.'s disruptive behavior required her to visit him in his classroom. She started meeting with Cl. in the morning to set goals for the day and she also ate lunch with him.

Cl. received two more suspensions. Kirk did not impose the suspension addressed in the January 13, 2020 letter, so she had no information about the allegations of hitting and striking. (J-e at 4.) While Kirk did impose the suspensions addressed in the January 22, 2020, and the February 3, 2020 letters, she could not recall the details of the incidents described therein. (J-e at 5-6.)

On cross-examination, Kirk could not recall any specific injuries caused by Cl.'s conduct. She believed that after one fight, both students were sent to the nurse, but she had no recollection of any injuries reported. She did recollect seeing a mark on the face of the student who had been struck by Cl. during a fight.

Ms. Kirk testified that she was not familiar with Cl.'s IEP, but she was aware of some of its requirements. She understood that she was to provide Cl. time to calm down and to offer him choices. She also recalled that Cl.'s morning routine was changed to prevent disruptions. Kirk is not a member of the CST. However, she consulted with the social worker and the school psychologist prior to issuing suspensions.

On re-direct examination, Kirk recalled that the parents of the student whom Cl. choked took their son to the hospital for an evaluation.

Cn. received his first suspension on November 1, 2019, for three days for refusing to go back to the classroom. (J-f at 1.) He received his second suspension on January

21, 2020, for one day. (J-f at 2.) Kirk had no independent recollection about those events but recalled that Lawnside gave Cn. plenty of opportunities to adhere to the school's Code of Conduct. Cn. received his third suspension on January 29, 2020, for twenty-one days for assaulting a teacher. (J-f at 4.) Kirk could not recall all the details but knew it involved Cn. hitting a teacher and other students with a yardstick.

Kirk was aware the Superintendent issued letters to J.C. inviting her to the Disciplinary Hearings for Cl. and Cn. scheduled for February 13, 2020, before the Board.

On cross-examination, Kirk stated she was not familiar with Cn.'s IEP, but she understood that she was required to contact the special services supervisor before imposing discipline. There was no documentation of any such contact.

By letter, dated January 5, 2020, the Board scheduled a Disciplinary Hearing for Cn., after he received one three-day suspension. (J-f at 3.) Kirk had no independent knowledge why this letter was sent but acknowledged that it should not be sent to a student with only one suspension.

**Gina Lewis** (Lewis) was hired on January 16, 2020, as the Supervisor of the Child Study Team for Lawnside. She is also a school psychologist.

Lewis understood that Cl. and Cn. transferred to Lawnside prior to the start of the 2019-2020 school year. Both students had IEPs from their previous schools and were both classified as Communications Impaired. Lawnside convened an IEP meeting in August 2019, and proposed new evaluations.

Although she was not employed by the District at the beginning of the year, she was aware that each student had been suspended prior to her employment. She also knew that suspension days were modified for special education students. She believed that the teachers and the administrators tried to work with the students. The boys were given access to laptops when such access was not generally permitted until third grade. She also understood the CST was trying to get the FBA completed but there was not

enough time. The students were out of school on suspensions and then the school was closed due to COVID-19.

Lewis recalled at Cl.'s manifestation determination meeting, there was a discussion with the student's father about a possible out of district placement at Brookdale. However, she understood the decision of the CST and the Board was that both boys were to be placed on homebound instruction until an appropriate out of district placement could be found. She attempted to set up homebound instruction with First Children, but the boys failed to attend the first two sessions.

On cross-examination, Lewis stated she was aware that the CST proposed evaluations in speech, psychiatric, social, audiological, learning, and FBA, at its August 2019 IEP meeting. The boys' guardian consented to the evaluations on August 22, 2020. According to Lewis, the psychiatric, audiological, and the FBA were not completed by the February 13, 2020 Board meeting. Lewis was aware of the regulation that required evaluations to be performed within sixty days. She knew that the students' IEPs included supportive counseling due to their medical diagnoses of PTSD and ODD. According to Lewis, staff and administration tried many ways to help the boys, from having breakfast with the Vice Principal, to providing accolades whenever possible. She stated there was no Behavior Intervention Plan (BIP) because there was not enough time to perform the FBA.

Upon review of the manifestation determination report for Cl., Lewis stated that the current evaluations were not considered because they were not complete and an IEP meeting had not been convened. (J-h at 3.) As a result, Lewis only considered the eligibility classification of Communications Impaired and related that classification to the conduct for which discipline was imposed. The same was true for Cn.

On February 13, 2020, at an executive session of the BOE, the Board recommended that both students be placed on homebound instruction pending placement in an appropriate out of district placement. Lewis confirmed that the BOE conferred with the CST but no IEP meeting was convened. The boys' guardian as a member of the CST was not given any input into the change in placement.

On re-direct examination, Lewis explained that the under the classification of Communications Impaired, CI.'s and Cn.'s exhibited violent behaviors were not a manifestation of the stated disability in their current IEPs. She noted that the students were under reevaluations, but the reevaluations were not completed. For Lewis, the controlling factor in determining that the behaviors were not a manifestation of the students' disability was the classification of Communications Impaired.

### **ADDITIONAL FINDINGS OF FACT**

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see, In re Polk, 90 N.J. 550 (1982). Credibility conclusions "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-22.

The Board presented two witnesses, Kirk and Lewis. Having had an opportunity to observe the appearance and demeanor of the witnesses, it is my view that Kirk and Lewis sincerely believed that Lawnside tried to address the students' behavioral issues and made accommodations, such as providing laptops, using praise and accolades, and giving extra time by having breakfast or lunch with the students. However, such actions

were not enough and did not excuse Lawnside's failure to immediately conduct the FBA. In August 2019, the CST suspected social/emotional and behavior problems, yet, there was no testimony why the FBA was not performed within sixty days of consent. Cl. received his first suspension in September 2019, and the evaluations completed by October 31, 2019, confirmed the CST's suspicions that the students' behaviors were impeding their ability to learn and impacting the learning environment. Lewis' rationale that there was not enough time to complete the FBA was an excuse not a justification for Lawnside's failure. Further, her justification not to consider the very recent evaluations because they were not completed was disingenuous. Cl.'s evaluations, excluding the FBA, were substantially completed by his January 23, 2020 manifestation determination hearing. The Psychological Evaluation needed one final day of observation and it was completed on January 28, 2020. For Cn., excluding the FBA, all his evaluations were completed by his February 3, 2020 manifestation determination hearing. All evaluations, except for the FBAs, were completed by the February 13, 2020 Board meeting.

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witness, I **FIND** the following as additional **FACTS**:

Lawnside knew prior to the start of the 2019-2020 school year that Cl. and Cn. required a FBA. Its failure to timely perform the FBA impacted Cl.'s and Cn.'s academic success, impeded their ability to learn, and created an adverse learning environment. The students' behaviors, coupled with the evaluations, especially Dr. Hewitt's Psychiatric Evaluation, completed on October 21, 2019, triggered the need for IEP meetings to revisit the appropriateness of the current IEPs.

Without a behavioral intervention plan (BIP), Lawnside resorted to discipline by suspensions when Cl. and Cn. violated Lawnside's Code of Conduct. Under the students' IEPs a consultation was required with the "School Social Worker, LDT-C, or School Psychologist" with notice to the CST and J.C. before disciplinary action could be imposed. There is no evidence in the record that Lawnside complied with this provision in the IEPs. However, even if the CST was notified, it failed to convene an IEP meeting to address the escalating behavior issues.

On January 22, 2020, Cl. received a three-day suspension for fighting. With this three-day suspension, Lawnside's total suspensions of Cl. exceeded ten days, and triggered compliance with N.J.A.C. 6A:14-2.8(d) and 20 U.S.C. 1415(k)(1)(E). On January 23, 2020, Lawnside held a manifestation determination meeting, but did not consider any of the evaluations conducted during the 2019-2020 school year. Cl.'s conduct, consisting of numerous incidents of fighting, was considered by the IEP Team to have a "direct and substantial relationship" to his disability. Consequently, Lawnside was required to reach the determination that Cl.'s behavior was a manifestation of his disability. Pursuant to 20 U.S.C. 1415(k)(1)(E) manifestation is required when the "conduct in question was caused by, or had a direct and substantial relationship to, the child's disability." After completion of the Psychological Evaluation on January 28, 2020, Lawnside suspended Cl. for eight more days for physical aggravated assault, willful disobedience, and defiance of authority. These behaviors had been highlighted in the very recent Psychological Evaluation and the earlier evaluations. The Board's decision on February 13, 2020, to change Cl.'s placement was without J.C.'s agreement. The Board lacked authority to unilaterally change Cl.'s placement because the required FBA was not conducted and an IEP meeting was never convened to determine appropriate placement and services. Cl.'s total suspension days, in excess of ten days, were improper.

Cn.'s manifestation determination meeting occurred on February 4, 2020, following Cn.'s twenty-one day suspension for assault upon a teacher. Lawnside made the same determination that Cn.'s conduct had a direct and substantial relationship to his disability yet determined, in violation of 20 U.S.C.1415(k)(1)(E), that Cn.'s behavior was not a manifestation of that disability. Cn.'s twenty-one day suspension for assault consisted of biting his teacher and hitting classmates with a yard stick. Such actions were serious and egregious, but there was no evidence that Cn.'s actions constituted an infliction of serious bodily harm under 20 U.S.C. 1415(k)(1)(G). Therefore, the suspension for over ten days was improper. The Board's February 13, 2020, unilateral decision to change Cn.'s placement for disciplinary reasons violated the protections afforded to Cn. under the IDEA. Cn.'s total suspension days, in excess of ten days, were improper.

## LEGAL ANALYSIS AND CONCLUSIONS OF LAW

As a recipient of Federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities will receive a FAPE. 20 U.S.C. §1412. FAPE includes Special Education and Related Services. 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. 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). To meet its obligation to deliver a FAPE, a school district must offer an IEP reasonably calculated to enable a child to make appropriate progress in light of the child's circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. \_\_\_\_ (2017); 137 S. Ct. 988; 197 L. Ed. 2d 335.

As an initial matter, the Board requested that the Petition in this matter be dismissed as moot. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff’d, Comm’r (May 3, 1999) <<http://lawlibrary.rutgers.edu/oal/search.html>>; J.L. and K.D. o/b/o J.L. v. Harrison Twp. Bd. of Educ., EDS 13858-13, Final Decision (January 28, 2014) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

The Board argued that by its agreement to revise the IEPs and place the students out of district at Brookfield, there is no controversy upon which this tribunal can rule. Additionally, the Board maintained that its agreement to send the students to a more supportive educational setting paid for by the District resolved any compensatory education claims for a denial of a FAPE.



In this matter, the collaborative decision between the parties to send the students to Brookfield after the filing of the Due Process Complaint herein, does not render petitioners' claim for compensatory education moot. The issue of whether Cl. and Cn. were denied a FAPE by the Board's failure to conduct a comprehensive FBA and reconvene IEP meetings after the October evaluations and the escalating behaviors remained justiciable issues that are integral to the issue of whether Cl. and Cn. are entitled to compensatory education.

Our courts recognize compensatory education as a remedy under the IDEA, which should be awarded "for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem." M.C. o/b/o J.C. v. Cent. Reg'l Sch. Dist., 81 F. 3d 389, 392 (3d Cir. 1996.) Compensatory education requires school districts to "belatedly pay expenses that [they] should have paid all along." Id. at 395.

A district must ensure that a child is assessed in all areas related to the suspected disability. 34 C.F.R. 300.304(c)(4). In this matter, involving known trauma and emotional/behavioral issues, the FBA was an essential reevaluation. Here, the Board did not establish by a preponderance of the credible evidence that it complied with the procedural requirements of the IDEA and New Jersey State regulations when it failed to perform the required FBAs for Cl. and Cn. This failure was not inconsequential. The Board had reason to know that the FBAs were warranted and necessary. It is difficult to conceive of a situation in which the need for FBAs were so clearly established.

The Board violated N.J.A.C. 6A:14-3.8(e) by failing to complete the FBAs within sixty days of August 22, 2019. Under New Jersey State regulations implementing the IDEA, procedural violations may lead to a finding that a student did not receive a FAPE if the violations (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) caused a deprivation of educational benefits. N.J.A.C. 6A:14-2.7(k). Our courts have observed that "[t]he procedural requirements of the IDEA are

essential to the fulfillment of its purposes.” D.B. and L.B. o/b/o H.B. v. Gloucester Twp. Sch. Dist., 751 F.Supp. 2d 764, 770 (D.N.J. 2010.)

I **CONCLUDE** that the Board’s failure to complete the FBAs by October 23, 2019, and adequately evaluate Cl. and Cn. clearly impeded their right to a FAPE and ability to learn. I further **CONCLUDE** that Cl. and Cn. were denied a FAPE from a reasonable time following the expiration of when the FBAs were to be conducted and an IEP meeting convened until the end of the 2019-2020 school year.

Compensatory education is an equitable remedy, and one that requires a fact sensitive case-by-case analysis. Our courts have recognized that “[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” Parents of Student W. v. Puyallup Sch. Dist. No 3, 31 F. 3d 1489, 1497 (9th Cir. 1994). See also: Neena S. v. Sch. Dist., 2008 U.S. Dist. LEXIS 102841 (E.D. Pa., 2008). Courts have awarded compensatory education in the form of tuition reimbursement or an injunction requiring school districts to pay for private school tuition or other services. Compensatory education relief has also taken other shapes. Awards of compensatory education have included an additional two-and-one-half years of special education where the school district had been lax in its efforts to provide a proper placement, Lester H. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990.)

My task is “to weigh the interests on both sides and determine the equitable outcome. This is not an easy task, [and I must] balance the interests of finality, efficiency, and use of the School District’s resources with the compelling needs [of the student].” Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 577 (E.D. Pa. 2009), *aff’d* 612 F. 3d 712 (3rd Cir. 2010). Some courts award by rote a block of compensatory education equal to time lost by a denial of FAPE, referred to as a “cookie cutter approach.” See: Cent. Sch. Dist. v. K.C., 2013 U.S. Dist. LEXIS 94065, \*32 (E.D. Pa. 2013), citing Reid v. D.C., 401 F. 3d 516, 523 (D.C. Cir. 2005). As the Ninth Circuit held, “[t]here is no obligation to provide a day-for-day compensation for time missed.” *Ibid.* See also: Neena S. v. Sch. Dist., 2008 U.S. Dist. LEXIS 102841 (E.D. Pa., 2008). The award "should aim to place disabled children in the same position they would have occupied but for the school district's violations" by "replacing educational services the child should have

received in the first place." Reid v. D.C., 401 F.3d 516, 518, 365 U.S. App. D.C. 234 (D.C. Cir. 2005) (cited with approval by Ferren C., 612 F.3d at 717-18). Compensatory education is an equitable remedy and requires the court to "consider all relevant factors." Ferren C., 612 F.3d at 718 (quoting Florence Cnty. Sch. Dist. v. Carter, 510 U.S. 7, 16, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993).)

With this analysis in mind, and mindful that the students have now been placed out of district, I must fashion a compensatory education award that covers seven months during the 2019-2020 school year. This award shall be interpreted thoughtfully through the collaborative process within the CST, of which J.C. is a member, so that Cl. and Cn. can receive additional services, as needed, to compensate them for the services they missed during the 2019-2020 school year. By way of illustration, these services can be in the form of tutoring, one on one instruction, therapeutic services, and/or specialized instruction.

I further **CONCLUDE** that the erroneous disciplinary suspensions exceeding ten days are expunged from each student's records.

### **ORDER**

I hereby **ORDER** an award of compensatory education to Cl. and Cn., consistent with the above, for Lawnside's failure to provide a FAPE during seven months of the 2019-2020 school year. I further **ORDER** that Cl.'s and Cn.'s disciplinary records be corrected to reflect ten total suspension days for the 2019-2020 school year.

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



October 5, 2020  
DATE

\_\_\_\_\_  
**KATHLEEN M. CALEMMO, ALJ**

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

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

KMC/tat

**APPENDIX**

**WITNESSES**

**For Petitioner:**

None

**For Respondent:**

Niphon Kirk, Vice Principal

Gina Lewis, Director of Special Education

**EXHIBITS**

**Joint:**

- J-a Cl.'s Pine Hill IEP
- J-b Cn.'s Pine Hill IEP
- J-c Cl.'s Lawnside Evaluation Planning Records
- J-d Cn.'s Lawnside Evaluation Planning Records
- J-e Cl.'s suspension correspondence
- J-f Cn.'s suspension correspondence
- J-g Teacher Incident Reports
- J-h Cl.'s January 23, 2020, Manifestation Determination Report
- J-i Cn.'s February 3, 2020 Manifestation Determination Report
- J-j Board Minutes – February 13, 2020