



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00019-21

AGENCY DKT. NO. 2021 32324

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

Petitioners,

v.

**RIDGEWOOD VILLAGE BOARD OF
EDUCATION,**

Respondent.

Beth Callahan, Esq. for petitioners (Callahan and Fusco, attorneys)

David Rubin, Esq., for respondent

Record Closed: September 27, 2021

Decided: October 15, 2021

BEFORE **ELLEN S. BASS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arose with the November 30, 2020, filing of a due process petition under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C.A. §1415 et seq., by T.S. and M.S. on behalf of their son, T.S. Petitioners assert that the Ridgewood Village Board of Education (“the Board”) denied a Free and Appropriate Public Education (“FAPE”) to T.S. and that, as a result, they were compelled to unilaterally place him out-of-district at the Craig

School on November 11, 2020. They seek reimbursement for their expenses there, together with prospective placement at Craig.¹

PROCEDURAL HISTORY

The contested case was transmitted to the Office of Administrative Law (“OAL”) on December 30, 2020. Hearings were conducted on April 7, May 11, May 12, and June 7, 2021, via Zoom technology due to the COVID-19 Pandemic. Written summations were submitted in lieu of a final day of hearing on September 27, 2021, at which time the record closed.²

FINDINGS OF FACT

Background and Educational History

T.S. is a nine-year-old student who is currently classified as eligible for Special Education Services under the eligibility category “Specific Learning Disability” (“SLD”). At the time the hearing took place, he was in the third grade. T.S. was born prematurely and spent the first two weeks of his life in the Neonatal Intensive Care Unit. At fourteen months, his pediatrician recommended an Early Intervention Screening, as T.S. was not reaching developmental milestones, to include fine motor and speech development. The family resided in New York; T.S. was accepted into an Early Intervention program and received Occupational and Physical Therapies (“OT/PT”), as well as speech therapy. At three years of age, he transitioned to a school-based preschool program under an Individualized Education Program (“IEP”). In August 2016, the family relocated to Ridgewood, New Jersey.

When his parents registered T.S., his mother was informed that his IEP “did not transfer.” They enrolled their son in the Ridgewood preschool disabled program, the Red Program, at their own expense while the Child Study Team (“CST”) evaluated T.S. The CST

¹ While the petition sought compensatory education, petitioners’ post-hearing summation confirms that “the parents are [no longer] seeking compensatory education because [T.S.’s] needs are being met at the Craig School.”

² Earlier final hearing dates were adjourned at the mutual request of counsel.

agreed that he should be classified under the eligibility category “Preschool Disabled,” and formalized his placement at the Red Program. In September 2017, T.S. transitioned to a mainstream kindergarten program, and was reclassified as “Communication Impaired.” The Present Levels of Academic Achievement portion of the IEP for the kindergarten year, drafted in June 2017, cites a speech-language evaluation finding that “[T.S.] presented with multiple misarticulations representing poor development of phonological process rules...” The educational evaluation noted that “[T.S.] may find phonemic awareness tasks challenging,” and pointed out that “[p]honemic awareness is the manipulation of sounds and the foundation to reading.”³ I **FIND** that as early as kindergarten, school personnel had noted deficits that could impact T.S.’s ability to learn to read.

An IEP agreed upon on May 29, 2018, recaps T.S.’s progress during the kindergarten year. He had begun to receive supplemental reading support and was having some successes. T.S. was able to recognize his letters and their sounds but continued to struggle with segmenting words into individual phenomes. The IEP for first grade provided for resource replacement reading for 300 minutes a week; and writing for 225 minutes a week. The parties met again in October 2018; I **FIND** that an Amended IEP dated October 23, 2018, confirmed that the parents had begun to express concerns about their son’s reading level.⁴

During the 2019-2020 second grade year, T.S. continued to be classified under the eligibility category “Communication Impaired” and received his educational program pursuant to a May 2019 IEP that provided for pull-out replacement reading and writing instruction five times weekly, and occupational and speech therapies in a small group setting. The IEP noted that T.S. presented with poor development of phonological process rules and found phonemic awareness tasks challenging. It expressly again confirmed that phonemic awareness “is the foundation to reading.” The family consented to this IEP, but M.S. was becoming increasingly concerned about her son’s failure to acquire reading skills. She saw concerning changes in T.S.; he could not keep up with his peers, and it was negatively impacting his self-esteem. His mother saw T.S. as an eager learner who was transitioning

³ That IEP was later amended to add speech, language, and math goals.

⁴ District witnesses urged that M.S. never formalized her concerns about T.S.’s progress in reading, notwithstanding the fact that she was a frequent emailer. M.S. asserted that she did so; the IEP certainly confirms that this was the case.

into an anxious defeated child. I **FIND** that the May 14, 2019, IEP again indicated that “[M.S.] noted a concern for [T.S.’s] reading level.”

M.S. asked for a dyslexia screening and asked to move up the triennial evaluation. The Child Study Team consented to an earlier reevaluation, and in November 2019, it was agreed that educational, psychological, speech and language, and occupational therapy evaluations would be conducted. An evaluation plan document noted that T.S. “struggles with reading and writing.” As for the dyslexia screening, M.S. related that she was told that if any concerns were seen in the evaluations, a screening could be done. T.S.’s Case Manager, Jane Gerald, disagreed that a request for a dyslexia screening was made by the parent.

Gerald was a credible witness, whose testimony was presented in a consistent and professional manner. But T.S.’s mother likewise credibly testified that his reading problems had become her focus, so it is believable that she would have raised the possibility of a dyslexia screening when the parties met. The meeting in question took place some time ago, and memories certainly could have faltered. And I am cognizant that while school personnel address the concerns of many children, to the parent, the child being discussed is very much her singular focus. I thus **FIND** that M.S.’s memory of the interaction was the more accurate one and that she did request a dyslexia screening.⁵

An eligibility meeting took place in January 2020. In light of T.S.’s deficits in reading fluency and comprehension, his classification category was changed to “Specific Learning Disability” (“SLD”), thus confirming that the CST agreed that reading needed to be a focal point in T.S.’s educational programming. It was noted in T.S.’s educational evaluation as follows:

[W]hile decoding was a relative strength ... [T.S.] is not able to apply these skills quickly and efficiently within a story. There was a significant discrepancy noted between [T.S.’s] oral comprehension and reading comprehension. [T.S.] would continue to benefit from

⁵ M.S. shared that she had previously asked for a dyslexia screening but was advised that T.S. was too young; that some of the reading deficits that concerned her were developmental. District personnel did not recall such a request, but I again deemed M.S.’s testimony reliable. M.S. urged a dyslexia screening has not been done to date. I **FIND** that I was presented with no evidence to the contrary.

continued direct instruction utilizing multisensory reading techniques...

The Speech and Language Assessment revealed that T.S. continued to struggle to “use his skills to meet grade level curriculum expectations...” The report summary noted that “[T.S.] was found to have difficulty following oral directions and producing complete and fluid sentences when expressing his thoughts.” Notwithstanding these struggles, psychological testing revealed scores in the very high, high average, and average range, and a full-scale I.Q. of 112.

An IEP was presented to the parents that confirmed the change in classification and added pull-out supplemental multi-sensory reading instruction four times weekly for 25 minutes per session to the services offered in T.S.’s prior IEP. The IEP continued to offer speech and language therapies in a small group setting. M.S. additionally requested an Extended School Year (“ESY”) program; that request was denied. The parents were represented by an educational advocate, and while they did not sign the IEP, it went unchallenged and into effect fifteen days later.

In March 2020, instruction in Ridgewood, and throughout New Jersey, changed with the onset of the COVID-19 pandemic. Instruction went remote and Gerald admitted candidly that all students, T.S. included, did not receive the same amount of traditional instruction offered pre-pandemic. On-line instruction was offered during a truncated day and was supplemented with email assignments. T.S.’s multi-sensory reading instruction was also provided on-line, but in the same truncated fashion. Per his mother, T.S. struggled mightily. On-line instruction included written instructions that he could not read; this deficit impeded his ability to perform in English and language arts, but also in mathematics, where he required assistance to read problems. Via email dated May 28, 2020, T.S.’s mother again inquired about ESY services for T.S. The parties met in June 2020 to discuss ESY and it was again determined that he did not qualify for these services. While his parents were not pleased, no formal challenge was filed.

In September 2020, T.S. entered the third grade, and Ridgewood and the world continued to battle COVID. School reopened on a hybrid basis with students divided into two

cohorts. All students attended a shortened school day, from 8:45-12:45, on a rotational schedule that brought them physically into school alternatively two or three days per week. On days when students were not present in school, they would receive instruction virtually. Multi-sensory reading instruction continued to be provided to T.S. in accordance with this model; both in-person and virtually.

After consultation with her attorney, M.S. had begun to explore Craig as an option for T.S. and his parents formally applied for admission in September 2020. On September 18, 2020, the District received correspondence from counsel for the family, in which she shared her clients' dissatisfaction with the program being delivered to T.S. She requested an IEP meeting, which took place on October 9, 2020, via an online platform; attorneys for both the parents and the District were present. The parents formally asked that Craig, a non-approved private school, be considered as a placement for T.S. The CST choose not to explore the Craig option, instead via an email dated October 27, 2020, counsel for the Board forwarded a proposed revised IEP to the family. Jessica Maneri is a School Psychologist, was T.S.'s Case Manager from September through mid-November 2020, and she described the changes made in response to the parents' concerns.

In addition to the services already in place, the CST proposed the addition of twice monthly multi-sensory reading consultation to be delivered by Christie DeAraujo, a Certified Orton-Gillingham Instructor and Dyslexia Specialist. DeAraujo would collaborate with T.S.'s instructors to assess his progress and recommend strategies to improve his instructional outcomes. Additional goals were added to the IEP. In the area of writing, the IEP now provided that T.S. would use multisensory strategies to revise and edit his writing. The goals for multi-sensory reading were expanded and amplified, as were his general reading goals.

Only one of the reading consultations took place on November 12, 2020. Notes of that consultation revealed that the staff shared T.S.'s academic challenges, and that DeAraujo offered instructional approaches that might assist. In November 2020, the District entered a new phase in its attempts to adjust to the demands of the COVID-19 school environment. Special Education students were now able to be in school in-person five days a week. The multi-sensory reading instruction offered to T.S. would now take place live, four days per week, per his IEP. His parents took advantage of this instruction for about two to

three weeks. On November 11, 2020, counsel for the family advised via letter to the Board's counsel that T.S. was being unilaterally placed at Craig and that the parents reserved the right to seek reimbursement for their expenses there. This letter came fifteen days after receipt of the October revisions to the IEP. A Craig contract was signed on November 21, 2020, and T.S. began school there on November 23, 2020.

T.S.'s Reading Levels

Testing completed by the District Learning Consultant late in 2019 revealed low scores in several critical areas. On the Woodcock-Johnson Test of Oral Language T.S. scored in the low average range in sound blending, which "involves the ability to put together or synthesize sounds to form words." On the Woodcock-Johnson Test of Achievement, T.S. scored in the second percentile for reading fluency, or the "very low" range. Oral reading and sentence reading fluency scores were also in the low range, as were T.S.'s broad reading scores. Broad reading "provides a comprehensive measure of reading achievement;" T.S. scored in the third percentile. Academic skills "is a measure of reading, decoding, math calculations, and spelling of single word responses, providing an overall measure of basic achievement skills." Here too, T.S. had scores in the "low" and "low average" range. The examiner noted "a significant discrepancy...between T.S.'s oral comprehension and reading comprehension." I **FIND** that by the midpoint of his second-grade year, T.S.'s achievement in reading was below average, and in some areas well below average.

In March 2019, during the first-grade year, T.S. had mastered none of his reading goals, although the report noted that he was "progressing." An October 2020 report revealed mastery of only one goal in the "multi-sensory reading" and "reading" groupings. In the October 2020 IEP, T.S.'s reading teacher, Erica Lisa, recapped his progress and cited improvement overall as of January 2020. She noted that on the TOWRE Sight Word Efficiency Test, T.S. dropped from the twelfth to the fourth percentile, but she explained that a different form of the test was used in each administration. Regardless, neither score is strong. On the PAL II Syllables, T.S. improved from the average to the high average range; on the Pal II Phenomes, he progressed from the borderline range to the very superior range. Lisa indicated that there was growth on the DIBLES Next Oral Word Fluency. But T.S.'s Independent Reading Level on the Fountas and Pinnell Benchmark Assessment was on a

level E. According to Elizabeth Kenny-Foggin, level E is below a first-grade standard. Kenny-Foggin's assertion in that regard went unchallenged by school personnel, and I **FIND** that as of January 2020, halfway through his second-grade year, T.S. was barely reading at a first-grade level.

Craig reported that in February 2021, during the mid-point of the third-grade year, T.S. continued to present with reading deficits. I **FIND** that he tested in the 25th percentile in reading fluency, and in the 33rd percentile on the Scholastic Reading Inventory, a test that "requires the student to read a short passage and then choose a word from a word bank to fill in a blank in a sentence about the passage." Anecdotally, the report shared that T.S. performed below grade level in sight word efficiency, decoding efficiency, and reading rate. He relied on context to aid in fluent reading.

The Expert Testimony

The expert testimony did not easily resolve the question of whether T.S. was enrolled in an appropriate program in Ridgewood. His Case Managers had no expertise in reading the deficit which is the focal point of this due process request. Two witnesses were experts in reading and dyslexia, Elizabeth Kenny-Foggin and Stefanie Spector, but neither had tested T.S. Spector had never observed him, and Kenny-Foggin had observed T.S. in two school settings, but only briefly. Kenny-Foggin based her opinions on a review of only those records supplied to her by the parents and their counsel. Spector relied only on a review of limited records, and on Maneri's observations.

On November 9 and 10, 2020, Kenny-Foggin observed T.S. for a total of ninety minutes in his multi-sensory reading and Resource Center English/Language Arts programs. Kenny-Foggin observed via remote technology; Maneri was simultaneously physically present in the classroom. The multi-sensory reading instruction lasted for 25 minutes, Kenny-Foggin opined that this was not long enough to be effective. And the instruction that she observed did not contain the key components of Orton-Gillingham Instruction, to include decoding, phonological and morphological skill reinforcement, encoding, multi-sensory strategies and sight word instruction. Kenny-Foggin observed round robin reading, which in her view was not a good use of instructional time, as the students who are not reading are

not actively engaged. She stressed that the dyslexic student needs multi-sensory lessons, direct cumulative and sequential instruction, review and reinforcement, and immediate corrective feedback to progress educationally.

T.S. seemed unengaged and defeated; he put his head down on the desk and was not reengaged by his teacher. A sight-reading activity that included manually tapping out the word on the child's arm was, in Kenny-Foggin's view, improperly executed. She noted that T.S. did not receive preferential seating. Maneri had a different impression of the lesson. She felt that the round robin method of instruction offered T.S. multiple opportunities to read aloud and that he readily picked up the lesson when it was his turn without prompting or redirection. Maneri did not observe T.S. with his head down.

Kenny-Foggin similarly found T.S. to be less than fully engaged in the Language Arts class. T.S. asked no questions, was slouched in his seat with hands folded, and did not appear to be following along. He appeared frustrated. And the teaching style included no multi-sensory techniques. Here too, Maneri had a differing impression, and she found T.S. engaged and particularly excited about the lesson, which involved a discussion of sharks.

These competing views on T.S.'s engagement during the observed lessons help little in understanding if the school program was appropriate to T.S.'s needs. A brief observation sheds scant light on how a child functions on an ongoing basis. If T.S. was disengaged, Kenny-Foggin may have just caught him on a bad day. And Maneri perceived no disengagement, which could simply suggest that the two observers have different views about the nuances of engagement in a young child. Their conflicting impressions relative to the lesson about sharks emphasize this point. Kenny-Foggin described T.S. as calling out of turn and unable to properly maintain himself in a classroom setting; Maneri saw a child who was thoroughly excited and engaged in the lesson being presented. But again, it is of no moment, as neither observer truly knew how T.S. routinely functions in the classroom.

More critical is whether appropriate instructional techniques were utilized during the observed lessons. Maneri was not qualified to opine regarding the efficaciousness of the instruction for a student like T.S. Stefanie Spector was so qualified and was admitted as an expert in the education of children with dyslexia and the development of educational

programming for dyslexic children. She is employed by Ridgewood as a Multisensory Reading Instructor. Spector reiterated that T.S. was engaged and on task but did so simply by citing Maneri's observations. She disagreed that T.S. only read for a brief time, relying again only on what Maneri reported. Spector indicated that use of round robin reading is an appropriate multisensory technique, noting that it incorporates the use of multiple senses because it requires that the reader look at words on a page while listening to himself and his peers read aloud. She noted that this technique is endorsed by Sally Shaywitz, a noted authority in dyslexia. While Spector urged that repeatedly reading a word aloud can achieve successful fluency training, it is noteworthy that neither Kenny-Foggin nor Maneri indicated that words were being read repeatedly during the round robin.

Relative to the sight word activity, Spector disagreed that the teacher incorrectly executed multisensory techniques. Again, relying exclusively on Maneri's observations, she contended that the technique was correctly used, with T.S. tapping out letters on his arm while it was crossed across his midline, "thus engaging the corpus callosum, the connection between the two cerebral parts of the brain." Regarding the concern that T.S. did not receive preferential seating, Spector noted that each student was seated in equal proximity to the teacher, but that a distance was maintained due to COVID social distancing considerations. As to the observation of T.S.'s English/Language Arts instruction, Spector offered support for the instructional technique used which involved T.S. reading and answering questions, as she urged that this assisted T.S. in organizing his thoughts and ideas. But she did not indicate that any multisensory instruction took place during the lesson.

Kenny-Foggin recommended that T.S. receive, at a minimum, 360 minutes per week of one-to-one multisensory instruction in structured literacy instruction with an Orton-Gillingham Certified Teacher. And she opined that Orton based instruction was required in all content areas where T.S. was expected to read for comprehension and communicate his thoughts and ideas. Spector did not challenge the recommendation that T.S. receive over an hour daily of one-to-one reading instruction. Rather, she countered that teachers in Ridgewood receive training in multi-sensory techniques, and that T.S. would thus receive appropriate instruction throughout his day. Citing the New Jersey Dyslexia Handbook, Kenny-Foggin urged that ninety minutes daily of uninterrupted literacy instruction is

recommended; here too, Spector simply countered that such instruction would be embedded throughout T.S.'s day in Ridgewood.

Spector endorsed the collaboration by teaching staff with DeAraujo to support implementation of multisensory reading instruction and interventions. And she urged that the goals and objectives in his October 2020 IEP properly stress T.S.'s needs for instruction in phonological and morphological awareness, word analysis, vocabulary instruction, reading comprehension instruction, reading fluency, written expression, sentence structure, sentence types and paragraph formats. Spector discredited Kenny-Foggin's opinions and supported the school district's program, but without any real knowledge of T.S. and his individualized needs. Indeed, Spector was unable to answer questions about T.S.'s reading levels on cross-examination. Her report references a document review, but only a very limited one that focused on Kenny-Foggin's report and the last offered IEPs. She did not indicate that she reviewed test results or evaluative data. And Spector based her opinion on information supplied by an observer with no expertise in reading instruction.

Spector's expert opinion was less than persuasive. She is certainly a well-trained and properly credentialed reading expert, and her testimony was presented in a cogent and professional fashion. But an expert's opinion is only as strong as the facts upon which it is based. See N.J.A.C. 1:1-15.9(b)(2); Pomeranz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011). Our courts have held that "[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted). Spector simply did not, or could not, marshal the facts needed to offer a compelling endorsement of the Ridgewood program.

While I would have preferred to have heard from a professional who had tested T.S., or had worked more extensively with him, in the end, I deem persuasive Kenny-Foggin's opinion that the Ridgewood program did not deliver sufficient daily one-to-one instruction in reading. At the time of the hearing T.S. was a third grader who still was reading well below grade level, notwithstanding his better than average cognitive ability. His situation cried out for intensive attention to his reading deficits, rendering Kenny-Foggin's report and testimony

convincing. I thus **FIND** that the program offered by Ridgewood was not appropriate for T.S. nor did it meet his individualized needs.

The Craig School

Kara Loftin was admitted as an expert in Special Education for students with dyslexia and specific learning disabilities and is the Head of School at Craig.⁶ No one from Ridgewood observed the Craig program. Accordingly, Dr. Loftin's description of its offerings was uncontroverted, and I **FIND**:

The cornerstone of the Craig day is ninety minutes of structured literacy instruction, which in Loftin's view is the minimum amount of time needed to focus on vocabulary, phonemic awareness, phonics, and comprehension. Specifically designed to assist students who struggle with fluent word recognition, decoding and spelling, the instruction is uninterrupted. When T.S. enrolled at Craig this instruction was delivered one-to-one. He now is grouped with a maximum of four other students. T.S.'s daily schedule also includes a "booster class" that offers additional expressive language instruction. This is offered four days a week for 25 minutes. Orton-Gillingham techniques are embedded in instruction throughout the day.⁷ Loftin opined that T.S. needs the amount of structured literacy that Craig offers to progress in reading. This is particularly critical because in third grade you are no longer learning to read, but rather reading to learn. For the child who has not mastered reading, the gap in achievement continually widens. As Loftin aptly put is, "the rich get richer. The poor get poorer. So, with your literacy skills you just fall further and further behind your classmates."

Craig also offers an Individualized Behavioral Management System. The intent is to assist T.S. in recognizing when he is getting off track and reengage himself in learning. Loftin described specialized chairs that are in the classroom and available for student use; she

⁶ Although she was the Head of School, it is noted that on occasion Dr. Loftin was unable to explain certain Craig course offerings or processes. For example, when counsel noted that certain documents indicated that T.S. required an FM system, Loftin was asked to explain and clarify, but she expressed an inability to do so.

⁷ It was pointed out on cross-examination that many subject area teachers were not Orton trained but rather received advice and guidance as to how to integrate these techniques into their instruction much like Ridgewood proposed to do via the assistance of DeAraujo.

noted that being able to move their bodies sometimes quiets student minds enough to allow them to focus and concentrate. T.S. works on his executive functioning skills via a school-wide organizational system. Craig creates goals and objectives for each student, and progress is reported both daily and weekly. Formal assessments take place at the start and close of the school year. One hour of homework help is offered after school. Use of this service is encouraged, as it decreases frustration for the family, and allows students to practice strategies for independent learning and metacognition. All of T.S.'s class sizes are small, ranging from five to eight students. Loftin reported that T.S. is thriving at Craig. He is making positive developments socially and academically and is advocating for himself.

Kenny-Foggin also observed T.S. at Craig. She reported that his instruction there included every component of the Orton-Gillingham approach. The reading teacher, in Kenny-Foggin's view, was masterful. The class was interactive, with the use of a white board to keep the students engaged. T.S. seemed eager to learn and was on task. Kenny-Foggin opined that Craig is an appropriate placement for T.S.

M.S. shared that the decision to enroll T.S. in an out-of-district school was not an easy one. She is very involved with the public schools, and she did not want to remove T.S. from his local school setting. But she felt desperate. By November M.S. had made up her mind that T.S. needed to go to Craig. Although it was preferable that he was in school all day, unlike the hybrid COVID schedule offered by the public schools, the real draw at Craig was its reading instruction. M.S. concurred that Craig has been a successful experience for her son. T.S. now reads for pleasure, to include graphic novels and Harry Potter novels. He can read his own assignments. He is well organized at Craig. He is independent. She too highlighted Craig's reward system, noting that it is individualized and private.

The Board urges that M.S. did not give the public schools a chance; that her desire to enroll T.S. at Craig was both predetermined and a reaction to the pandemic. But M.S. was a credible witness, who appeared to speak from the heart. When she stated that her preference would have been to keep her son in public school, I believed her. When she stated that she chose Craig because she was fearful her son would not learn to read, and not in reaction to COVID, again, I believed her.

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 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 via an IEP rests with the local public school district. N.J.A.C. 6A:14-1.1(d).

Where parents have unilaterally placed their child, it is well established that the appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Rather, the pertinent inquiry is whether the school district offered an IEP reasonably calculated to enable the student to make progress appropriate in light of his circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. ____ (2017); 137 S. Ct. 988; 197 L. Ed. 2d 335. I **CONCLUDE** that the Board did not deliver FAPE to T.S.⁸

My analysis starts with the District's obligation to screen T.S. for dyslexia. N.J.S.A. 18A:40-5.3(a) provides that

[a] board of education shall ensure that each student enrolled in the school district who has exhibited one or more potential indicators of dyslexia or other reading disabilities is screened for dyslexia and other reading disabilities using a screening instrument selected pursuant to section 2 [C. 18A:40-5.2] of this act no later than the student's completion of the first semester of the second grade.

"Potential indicators of dyslexia" are defined to include, but not be limited to, difficulty in acquiring language skills; inability to comprehend oral or written language, difficulty in rhyming words, matching letters to sounds and blending sounds when speaking and reading words. See: N.J.S.A. 18A:40-5.1. These were all deficits noted in T.S.'s profile as early as his kindergarten year. The law provides that if the screening reveals potential indicators of dyslexia, a comprehensive evaluation should take place, and a local board of education

⁸ In light of this conclusion, it is unnecessary to address whether the Board technically failed to give proper notice of its rejection of the request for a change in placement to Craig, per N.J.A.C. 6A:14-2.3. Suffice it to say that its rejection of that option was clear and unequivocal enough that this petition followed.

should provide “appropriate evidence-based intervention strategies to the student, including intense instruction on phonemic awareness, phonics and fluency, vocabulary, and reading comprehension.” N.J.S.A. 18A:40-5.4. This record includes no evidence that a dyslexia screening took place, and I **CONCLUDE** that the district failed to meet its obligations to timely screen T.S. for dyslexia. Its obligation in this regard is consistent with its general obligation to assess students “in all areas of suspected disability.” N.J.A.C. 6A:14-2.5(b)(7).

The Board suggests that the failure to conduct a Dyslexia Screening was a mere procedural violation. Indeed, the statutory scheme requires such a screening as a prelude to classification, and T.S. was classified upon his enrollment in Ridgewood. But this argument is unpersuasive. N.J.A.C. 6A:14-2.7(k) provides that procedural violations deny FAPE only if the violations impeded the child’s right to an appropriate education; impeded the parents’ opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. G.N. and S.N. on behalf of J.N. v. Livingston Bd. of Educ., 2007 U.S. Dist. LEXIS 57081 at *21-22 (D.N.J. 2007); see also Coleman v. Pottstown Sch. Dist., 2014 U.S. App. LEXIS 17685 *16 (3rd Cir. 2014). Here, the failure to conduct the required screening clearly denied FAPE to T.S. because he was misclassified and for years was deprived of an IEP that focused on his overriding educational deficit; his inability to learn to read.

Until the midpoint of his second-grade year, T.S. was classified under the eligibility category “Communication Impairment,” which “means a language disorder in the area of morphology, syntax, semantics, and/or pragmatics/discourse that adversely affects a student’s performance and is not due primarily to an auditory impairment.” N.J.A.C. 6A:14-3.5(c)(4). It was not until his parents pressed their concerns about their son’s reading progress that additional testing took place and T.S. was reclassified under the category “Specific Learning Disability;” which is the appropriate classification category where “a disorder in one or more of the basic psychological processes involved in understanding or using language... may manifest itself in an imperfect ability to...read...including conditions such as perceptual disabilities...[and] dyslexia.” See: N.J.A.C. 6A:14-3.5(c)(12). [Emphasis supplied]. The District urges that the parents never requested a Dyslexia Screening. I found that they did so. But more to the point, parents bring their love, devotion, and practical knowledge about their children to the discussion of educational programming. School

personnel bring educational expertise; they were obliged by law to screen for dyslexia, regardless of parental request.

Kenny-Foggin noted that indicators of a learning disability were present, and that a screening could have and should have been done, early in T.S.'s educational journey. Spector countered that screening too early is inappropriate; that many of the deficits T.S. presented with were developmental. But the New Jersey Dyslexia Handbook, a New Jersey Department of Education guide to instruction and screening for struggling readers, makes it clear that Kenny-Foggin's opinion echoes relevant law.⁹ The purpose of the Handbook is "to provide information to educators, students, families, and community members about dyslexia, early literacy development, and the best practices for identification, instruction, and accommodation of students who have reading difficulties." [New Jersey Dyslexia Handbook at page 1]. While the document stresses that it does not intend to dictate any particular screening tool, it discusses the need for early screening measures, noting that

[r]esearch indicates that kindergarten screening measures are most successful when they include assessment of the following areas: phonological awareness including blending onset-rime and phoneme segmentation, rapid automatic naming including letter naming fluency, sound-letter identification, and phonological memory including nonword repetition.

[New Jersey Dyslexia Handbook, page 10.]

The Handbook goes on to provide that "[s]tudents who are identified by the district's universal reading screening tools as 'at-risk' and not considered 'likely on track' should be promptly placed into structured literacy interventions, progress monitored, and screened for dyslexia." [New Jersey Dyslexia Handbook, at page 12.] This process thus can commence as early as Kindergarten. Here, it should have.

⁹ I may take judicial notice of the Handbook, as it is publicly available on the New Jersey Department of Education website, a governmental website. See: Reinauer Realty v Nucera, 59 N.J. Super. 189, 202 (App. Div., 1960); N.J.R.E. 201. While the Handbook does not have the weight of law or formal regulation, it offers helpful and persuasive information regarding how the New Jersey Department of Education interprets pertinent law.

The Board argues that the adequacy of the IEP was the exclusive issue before me, and that the failure to timely screen for dyslexia is nowhere pled in the petition, nor was it petitioners' theory of their case. But the failure to timely recognize T.S.'s needs relative to his reading skills is inextricably intertwined with the shortcomings in the District's proffered IEP. It served to make that much more urgent the need for intensive remediation in reading. The IEP, which lacked the needed intensity of reading instruction, accordingly offered "too little too late." I **CONCLUDE** that the last IEP offered to T.S., the IEP that the Board urges is the only matter in contention here, failed to offer FAPE. It simply did not include the amount of instruction needed to ensure that T.S. learned to read. The New Jersey Dyslexia Handbook is again instructive. Consistent with Kenny-Foggin's testimony, it provides that "[t]he NJDOE recommends a minimum of 90-minutes of **uninterrupted** literacy instruction daily in grades K-5." [New Jersey Dyslexia Handbook at page 4, emphasis in the original]. The Ridgewood IEP did not offer this amount of instruction, which Kenny-Foggin, and the Handbook, make clear must utilize a structured literacy framework, that is, "explicit, systematic, cumulative and multisensory." The last two IEPs offered to T.S. included an express commitment to provide multi-sensory reading instruction, but not at the level required to properly address his special needs.

This dispute and this decision come at an unprecedented time in public education, when school districts and parents alike struggle to keep our children on track educationally during lockdowns and periods of remote learning. The Board urges that it should not be penalized for adjusting instruction during a public crisis and suggests that the parents only removed T.S. from his public-school setting because it could not offer in-person instruction, while Craig could do so. I wish to emphasize that COVID-19, and any resultant diminution in instructional time, did not factor into my decision. I **CONCLUDE** that the IEP on its face failed to offer FAPE to this child, even if there had been no interruption in services occasioned by the pandemic.

In accordance with N.J.A.C. 6A:14-2.10, parents may receive reimbursement for a unilateral placement as follows:

- (b) If the parents of a student with a disability who previously received special education and related services from the district of residence enroll the student in a nonpublic school, an early childhood

program, or approved private school for students with disabilities without the consent of, or referral by, the district board of education, an administrative law judge may require the district board of education to reimburse the parents for the cost of enrollment if the administrative law judge finds that the district board of education had not made a free, appropriate public education available to the student in a timely manner prior to enrollment and that the private placement is appropriate.

Our regulation mirrors well-established Federal Law. Parents who unilaterally withdraw their child from public school and place him in a private school without consent from the school district “do so at their own financial risk.” School Comm. of Burlington v. Mass. Dep’t. of Educ., 471 U.S. 359, 374, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985). See too: N.J.A.C. 6A:14-2.10(b)(1). They may be entitled to reimbursement for the costs of their unilateral private placement only if a court finds that the proposed IEP was inappropriate, and the private placement was appropriate under the IDEA. 20 U.S.C.A. § 1412(a)(10)(C)(ii). Once a court holds that the public placement violated IDEA, it is authorized to “grant such relief as the court determines is appropriate.” 20 U.S.C.A. § 1415(e)(2).

Parents who are compelled to unilaterally place their child in the face of a denial of FAPE, need not select a school that meets state standards. Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284, 293 (1993); L.M. ex rel H.M. v. Evesham Twp. Bd. of Educ., 256 F.Supp. 2d 290 (D.N.J. 2003). The Third Circuit has held that “parents [are] entitled to reimbursement even [when a] school lack[s] state approval because the [FAPE] state standards requirements . . . [apply] only to placements made by a public entity.” *Id.* at 297 (citing T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 581 (3rd Cir. 2000)); see also Warren G. v. Cumberland Cty. Schl. Dist., 190 F.3d 80, 83 (3d Cir. 1999). Accordingly, our courts recognize that parents who unilaterally place their child by necessity do so without the expertise and input of school professionals that is contemplated by a truly collaborative IEP process. The courts recognize that under these circumstances, parents essentially do the best they can, holding that, “when a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ (IDEA) if the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” Florence, *supra*, 510 U.S. at 11, 114 S. Ct. at 365,

126 L. Ed. 2d at 293 (quoting Rowley, supra, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

Under this standard, I **CONCLUDE** that the Craig placement is appropriate. In so concluding, I note that it is not a school that is approved by the New Jersey Department of Education. Not all of its teachers are Orton-Gillingham certified, and Kenny-Foggin opined that these techniques must be used throughout T.S.'s instructional day. But Craig is appropriate because, per Loftin's uncontroverted testimony, the cornerstone of its day is ninety minutes of uninterrupted structured literacy instruction. And per the testimony of the parents' expert, and the New Jersey Dyslexia Handbook, this is what T.S. needs to receive educational benefit. Notwithstanding his strong cognitive profile, he will make little progress in school, and will lag behind his peers, if he cannot learn to read.

Pursuant to N.J.A.C. 6A:14-2.10(c)(4), reimbursement for a unilateral placement can be reduced or denied upon a finding "of unreasonableness with respect to the actions taken by the parents." The Board urges that this record reveals "behavior or strategizing inconsistent with the IDEA's collaborative approach." It urges that the parents did not "first [give] the public school a good faith opportunity to meet its obligations." C.H. by Hayes v. Cape Henlopen, 606 F. 3d 59, 72 (3d Cir. 2010). I cannot agree. T.S.'s parents made their concerns about his reading deficits known as early as his first-grade year, and some two years before they unilaterally placed their son. Additional reading help and a change in classification came only after they pressed the CST for an early reevaluation. They stayed in-district once a January 2020 IEP included multi-sensory reading instruction. And they pulled out of the district only after they felt that this amount of instruction remained insufficient. Simply put, these are parents who tried to collaborate with their CST.

In light of my conclusion that Craig is appropriate and that the conduct of the parents here was reasonable under the totality of the circumstances, I **CONCLUDE** that they are entitled to reimbursement for their expenses at Craig.

ORDER

Based on the foregoing, together with the record as whole, the Board is directed to place T.S. at the Craig School, transport him there, and reimburse his parents for their expenses in unilaterally enrolling him at Craig, including transportation, retroactive to the date of his enrollment.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2018). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

October 15, 2021

DATE



ELLEN S. BASS, Acting Director and Chief ALJ

Date Received at Agency

October 15, 2021

Date Mailed to Parties:
sej

October 15, 2021

APPENDIX

WITNESSES

For Petitioners:

Elizabeth Kenny-Foggin
M.S.
Kara Loftin

For Respondent:

Jane Gerald
Jessica Maneri
Stefani Spector

EXHIBITS

Joint:

- J-1 Email
- J-2 IEP dated January 13, 2020
- J-3 Eligibility Conference Report
- J-4 IEP dated May 14, 2019
- J-5 Educational Evaluation
- J-6 Psychological Evaluation
- J-7 Speech-Language Evaluation
- J-8 Goals and Objectives Progress Reporting
- J-9 Report Cards
- J-10 Emails
- J-11 Kenny Foggin Report, dated January 16, 2021
- J-12 Letter dated September 18, 2020
- J-13 Letter dated November 11, 2020
- J-14 A Starting Place observation
- J-15 Pearl River IEP

- J-16 Reevaluation Plan
- J-17 Social History Report
- J-18 Psychological Evaluation
- J-19 Woodcock Johnson Score Report
- J-20 Speech and Language Evaluation
- J-21 Occupational Therapy Evaluation
- J-22 Educational Evaluation
- J-23 Eligibility report
- J-24 IEP dated November 14, 2016
- J-25 Occupational Therapy Progress Report
- J-26 Preschool Progress Report
- J-27 Speech and Language Progress Report
- J-28 Reevaluation Plan
- J-29 Educational Update
- J-30 Speech and Language Update
- J-31 Occupational Therapy Update
- J-32 Eligibility Report
- J-33 IEP dated June 15, 2017
- J-34 IEP Amendment dated June 15, 2017
- J-35 IEP Amendment dated November 27, 2017
- J-36 Speech and Language Progress Report
- J-37 IEP dated May 29, 2018
- J-39 Reevaluation plan
- J-40 Educational Evaluation
- J-41 Occupational Therapy Reevaluation
- J-42 Student Assessment Data
- J-43 MSR Assessments
- J-44 CV of Stefanie Spector
- J-45 Application to Craig
- J-46 Contract form, Craig School

For Petitioners:

- P-1 Reading Assessment
- P-2 Online programs login information
- P-3 Multisensory reading consultation
- P-4 Attendance records
- P-5 Craig School Present Levels, Language Arts
- P-6 Craig School Goals and Objectives, Language Arts
- P-7 Craig School Present Levels, Math
- P-8 Craig School Goals and Objectives, Math
- P-9 Craig School Present Levels, Social Studies
- P-10 Craig School Goals and Objectives, Social Studies
- P-11 Craig School Present Levels, Reading
- P-12 Craig School Goals and Objectives, Reading
- P-13 Craig School Present Levels, Science
- P-14 Craig School Goals and Objectives, Science
- P-15 Craig School Present Levels Occupational Therapy
- P-16 Craig School Present Levels Speech-Language
- P-17 Craig School Schedule
- P-18 CV Kenny Foggin
- P-19 Admitted as J-11
- P-20 Professional Summary, Wallace
- P-21 Professional Summary, Miller
- P-22 Professional Summary, Della Fave
- P-23 Professional Summary, Finn
- P-24 Professional Summary, Furlong
- P-25 Professional Summary, Kaplan
- P-26 Professional Summary, Cozine
- P-27 Kenny-Foggin Supplemental Report
- P-28 Loftin Resume

For Respondent:

- R-1 DeAraujo resume
- R-2 Third Grade Reading Scores
- R-3 Spector Report