State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 07849-21

AGENCY DKT. NO. 2022-33283

R.A. ON BEHALF OF H.A.,

Petitioner,

v.

MIDDLETOWN TOWNSHIP

BOARD OF EDUCATION,

Respondent,

and

B.A.,

Intervenor.

Michael Flom, Parent Advocate, for petitioner R.A. on behalf of H.A., pursuant to N.J.A.C. 1:1-5.4(a)(7)

Eric L. Harrison, Esq., for respondent Middletown Township Board of Education (Methfessel and Werbel, P.A., attorneys)

B.A., intervenor, pro se

Record Closed: September 6, 2022 Decided: September 28, 2022

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

R.A. and B.A. are divorced and both parents have joint legal custody over H.A. The father, B.A., has primary physical custody (i.e., parent of primary residence). In May 2021, H.A. was first classified as Other Health Impaired and began receiving special education and related services. Then on June 28, 2021, H.A. was declassified with the sole consent of the father, B.A.

R.A. (parent/petitioner), on behalf of her daughter H.A. (daughter/student), filed a due process petition against respondent, Middletown Board of Education (Middletown/District), contending that the District should not declassify H.A. from its previous determination of eligibility for special education and that H.A. was eligible for special education and related services under the category of Other Health Impaired (OHI). Petitioner seeks Independent Education Evaluations (IEE) and compensatory education. Again, B.A. consented to the declassification on June 28, 2021.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., requires a public school district to provide its students with a free appropriate public education (FAPE). At issue was whether H.A. should continue to be classified as disabled, and, if so, is an IEE needed.

PROCEDURAL HISTORY

On or about August 12, 2021, R.A. filed a petition for due process and the District responded. The New Jersey Department of Education, Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL), where it was filed as a contested case on September 20, 2021, under OAL Dkt. No. EDS 07849-21 and assigned to Judge Buck. B.A. joined as an intervener. On December 8, 2021, petitioner submitted a writing where she phrased her argument as a motion for emergent relief; requesting an order for stay put (reclassify H.A.) and ordering an IEE. Though not in the proper form of a motion, it was considered as such. On December 21, 2021, the district filed a due process petition seeking an order denying the request for an IEE under OAL Dkt. No. EDS 00052-22.

On January 3, 2022, the Due Process hearing began but was not concluded. On January 12, 2022, R.A. filed a motion for emergent relief to reclassify H.A. On, February 3, 2022, with consent of parties, final arguments were heard on the emergent relief motion and Judge Buck issued a decision from the bench denying both requests for relief (stay put/reclassify H.A. and order IEEs). On February 3, 2022, R.A.'s prior attorney (services terminated on February 7, 2022) filed a motion for summary decision, in reference to the District's Due Process petition (EDS 00052-22) then on February 14, 2022, the District filed a cross-motion for summary decision (again specifically in reference to its own petition, EDS 00052-22). In late February 2022, R.A. filed a complaint in federal court against Judge Buck and the attorney for the District alleging constitutional violations. Judge Buck recused himself from this case.

These cases were assigned to the undersigned on February 23, 2022. A telephone conference was conducted on March 23, 2022, to determine the issue of consolidation and issues at trial. The undersigned entered an Order of Consolidation on March 24, 2022, in accordance with the parties' agreement that the matters should be consolidated. Also on March 23, 2022, the representative of R.A., requested another ruling on the Motion for IEEs. It should be noted that issue was already ruled on by Judge Buck.

On March 25, 2022, R.A. filed a series of documents requesting a Protective Order that Eric Harrison, attorney for the District, be restricted and "[p]rohibit any sharing, directly or indirectly with B.A. by the District, directly or indirectly, any information about: A. the identity (including name, affiliation, contact information) of and, B. the dates and times of any observation by R.A.'s experts or independent experts ordered by the Court, even if the information is entered into the H.A. student file, until the expert begins testimony at a hearing." Petitioner's writing again was phrased in the form a motion. Although neither were filed in the proper form, I considered both as Motions, one for IEEs and one for a Protective Order. After consideration of the documents, an Order denying both requests but granting the District's Motion was provided on March 30, 2022. So, the only issue to be decided was the appropriateness of the declassification.

The undersigned realized that after the order on the motions was issued, the order did not properly reflect the outcome of the cases and they needed to be severed. After consideration of the documents, an Order denying both requests was provided. However, the District's request for Summary Decision was granted and an Order was sent out. The hearing reconvened on April 1, 2022. After consideration of the procedural aspect of granting the District's motion, I realize that an Initial Decision was the proper form for EDS 00052-22 and had to be drafted to that end.

The hearing reconvened on May 26, 2022, June 9, 2022, and June 29, 2022. The record was supposed to close on August 29, 2022, at the request of the parties with the submission of post-hearing written closing summations. Respondent and B.A. submitted their closings on time, however, petitioner through her advocate proposed a date that was convenient for the advocate to submit her closing summation. Petitioner submitted her closing summation on September 6, 2022, with the suggestion that I permit a speech and language evaluation of H.A. to be considered as evidence and suggested filing a motion to hold the record open. Nothing was filed. Similar inappropriate gamesmanship was attempted by the advocate during the hearing and not tolerated. The record closed on September 6, 2022.

FACTUAL DISCUSSION

Background

The following **FACTS** are not stipulated between the parties but derived from the relevant documentation and as such **I FIND** as **FACT**:

H.A. is twelve years old and the marital child of R.A. and B.A. R.A. and B.A. are divorced, and it remains contentious. Following a custody order issued by the Superior Court, Chancery Division on August 28, 2014, both R.A. and B.A. were awarded joint legal custody of H.A., with B.A. designated as the parent of primary residence. An additional civil order issued on March 12, 2021, by the same presiding judge, denied R.A.'s request that she be authorized to take any and all actions necessary to

immediately commence services for H.A. The order affirmed that R.A. and B.A. continue to share joint legal custody over H.A., that neither parent is to obtain medical services for H.A. without the other's consent (outside a true emergency), and that neither is to enroll their child with a therapist, counselor, or doctor without the other's agreement. The order also stated that B.A., as a parent with joint legal custody of H.A. has an absolute right to obtain records pertaining to any treatment or evaluations of H.A.

The District in conducting the required triannual reevaluation of H.A. in June 2021, determined that H.A. was still a student with a qualifying disability, but was not in need of special education and related services as his disability did not adversely affect his educational performance. During the subsequent CST meeting to review the results of the evaluations the District recommended that H.A. be declassified. H.A. was then voluntarily declassified by his father, B.A., on July 28, 2021. Since that date, H.A. continues to remain declassified and ineligible for special education and related services under the IDEA. On or about September 17, 2021, R.A. retained three professionals to conduct partial evaluations of H.A. On September 20, 2021, R.A., through her parent advocate, forwarded to the District copies of the reports by her retained professionals. The District forwarded the reports to B.A. and included R.A.'s advocate on the email advising the parties that in the event either parent shared expert reports concerning H.A. with the District, it would share the copies with the other parent. On or about September 20, 2021, after discovering the evaluations occurred, B.A. sent letters to two of the retained professionals stating that pursuant to the standing court order, H.A. was not to be examined by a doctor, therapist, or counselor without B.A.'s consent. He told the professionals they were not to see H.A. again and warned he would press charges to enforce the court order if they saw H.A. again without B.A.'s approval. B.A. has not contacted these professionals since. Nor has he contacted any of the other experts R.A. proposed she may call to testify in her original five-day disclosures, which were received on December 27, 2021. On January 3, 2022, in response to a request by petitioner, both B.A. and the District affirmed that they would not interfere with any expert retained by R.A. to observe H.A. while in the educational setting. The District affirmed it would treat any observer retained by R.A. the same as any other observer who came to its schools.

R.A.'s petition stems from the District recommending the declassification of H.A. after its triannual reevaluation of H.A. indicated that while H.A. was still a student with disabilities, those disabilities do not adversely affect his educational performance and he is not in need of special education and related services or speech-language only services. Both parents were presented with the District's recommendation to declassify, but on July 28, 2021, only B.A. signed his consent to the proposed declassification.

R.A. filed a petition for due process on August 8, 2021, requesting—among other things—the reclassification of H.A., a series of IEEs, a series of services with additional services to be included based on the results of the requested IEEs, and compensatory education. Respondent filed its answer on August 19, 2021, arguing that H.A. demonstrated he was not in need of special education and related services and the evaluations properly conducted by its Child Study Team (CST) likewise indicated that H.A. was not in need of such services. The reevaluation indicated that H.A. may still need some occupational therapy (OT) services. Consequently, on September 15, 2021, a 504 Accommodation Plan was established providing H.A. with thirty-minute monthly sessions to assist him in improving his writing speed and handwriting skills.

During the December 17, 2021, 504 Plan progress review meeting R.A., through her parent advocate, requested the District fund an OT independent evaluation of H.A. Within four calendar days the District filed its own due process petition denying the request for an IEE, arguing that as H.A. was voluntarily declassified by B.A. and thus was not eligible for special education and related services under the IDEA, and so not entitled to publicly funded IEEs.

During the January 3, 2022, hearing petitioner declined to cross-examine the District's witness and indicated she would not present her own witnesses due to allegations of harassment and threats by the District and B.A against her potential expert witnesses. After a discussion on the record between all parties involved, B.A. and the District affirmed that they would continue to not interfere with any observations conducted by R.A.'s independent experts of H.A. in his educational setting so long as those experts abided by the District's policy for all such observers and visitors. B.A.

also affirmed that he would not contact any of R.A.'s retained experts outside of direct or cross-examination during a hearing. R.A., through her parent advocate, indicated that after observations of H.A. were conducted she would be prepared to cross-examine the District's witness and introduce her own witnesses to present their expert testimony.

On or about January 12, 2022, R.A. filed a motion for emergent relief seeking to have H.A. reclassified for special education services pursuant to the IDEA's stay-put provision. Following oral arguments, on February 3, 2022, a decision was issued by Carl V. Buck, III, ALJ, denying R.A.'s request for emergent relief. Also on February 3, 2022, R.A. filed a motion for summary decision on the District's due process petition. On February 16, 2022, the District filed its cross-motion for summary decision on its own petition. Petitioner filed suit in federal court against the district's lawyer and Judge Buck. Judge Buck recused himself from the case.

The undersigned was assigned the case in early March 2022, and on March 24, 2022, following a status conference regarding the parties' motions for summary decision, R.A. filed a motion seeking two protective orders. The first was to prohibit the District from sharing with B.A. any information about the experts retained by R.A. to observe H.A. until after said experts began presenting their testimony at a hearing. This request included restricting the District's ability to disclose any information about such expert observations contained in H.A.'s student records. The second was to order the District to not impose any restrictions on the independent experts' observations of H.A. it would not impose on its own staff.[1] On March 25, 2022, B.A. filed a letter response with exhibits, arguing that a protective order against him was improper as it would violate his rights as a custodial parent of H.A. and was not necessary as he had previously consented to observations of H.A. in his educational setting as long as such observations did not interfere with H.A.'s instruction. The District declined to respond to these motions by R.A.

[1] R.A., through her advocate had been requesting protective orders since the party's settlement conference with Mary Ann Bogan, ALJ. R.A. was advised by ALJ Buck during the January 3, 2022, hearing that the OAL does not have the jurisdiction to order protective orders of the type sought by R.A.

With regard to the motions for summary decision, I ordered that R.A.'s motion for summary decision and both protective Orders be denied. However, the District's motion for summary decision was granted. An order and final decision reflecting the same was sent out so, the only issue to be decided in the case was the appropriateness of the declassification.

Testimony

Respondent

Marian Enny (LDTC; former case manager), (Enny) testified on behalf of the District as an expert in the field of special education generally and in the particular field of a learning disabilities teacher consultant (LDTC). Enny has masters' degrees in both education and administration and is certified by the State both as a teacher of the handicapped and as a LDTC. Enny testified that she normally writes around sixty IEPs each year.

Enny explained that as an LDTC her certification includes being a classroom teacher with a special education certification. This means that for CST evaluations she does all the educational evaluations and works with teachers to develop programs within their classrooms (i.e., accommodations and modifications). When drafting IEPs she will rely on the expertise of other CST members, but still has sufficient knowledge of the areas evaluated and frequently contributing to an IEP in order to develop the IEP and analyze the results of evaluations.

Enny testified that a student with a disability listed in the IDEA and New Jersey Administrative Code is not alone enough for a student to be classified and eligible for special education and related services. Rather, the CST must first determine whether the student's disability affects the student's access to their education (i.e., the educational impact). And second, whether their disability necessitates special education and related services for the student to learn.

While H.A. had been diagnosed with autism and ADHD, Enny testified that after H.A. moved to the District and the school became familiar with H.A., the CST suspected he did not need to continue having special education in order to access his education. In other words, H.A.'s disabilities did not cause an educational impact.

H.A. first moved to the district from Long Branch in the summer of 2020. Enny testified that although she was not the case manager for the transfer of his IEP, H.A. began school in the fall, she took on that role. She testified that normally she familiarizes herself with the kids she manages as part of her role on the CST, and although it was more difficult due to the COVID restrictions she testified that she became familiar with H.A. through his transfer IEP, classroom observations, and speaking with his teachers and related services' providers.

The transfer IEP only provided for language arts in-class special education support, and related services for speech and occupational therapy (OT). Enny explained that in-class support means a special education teacher would work alongside a general education teacher within the general education classroom. Both teachers would teach the student, but the special education teacher may provide modifications, accommodations, and focus on working toward goals and objectives in the student's IEP.

When H.A. moved to the District, its CST implemented the transferred IEP. Stating that as the CST did not know H.A. and his needs yet, they followed the prior district's recommendations and monitored H.A.'s progress over the academic year.

For the 2020-21 school year, pursuant to existing COVID restrictions, H.A. began the school year on a hybrid schedule. He was grouped with a cohort of other students based on name, and this group would come in-person two days a week, and would work remote two days a week, with all students remote on the last day. Around a month into the school term, all special education students were given the option to come in-person all five days, or to remain with their cohort. The school left this decision up to the student and their parents on which choice was best based on the student's needs.

Enny testified that she believed H.A. primarily remained with his cohort but may have chosen to remain remote for additional days as well.

Prior to the reevaluation assessments Enny testified that H.A.'s classroom teachers reported that he was doing well, and they were pleased with his progress. The teachers reported that H.A. occasionally needed some reminders to refocus but this was not an issue of significant concern among H.A.'s teachers.

H.A.'s annual review meeting was scheduled for May 2021. Since his triannual reevaluation was due later in August the CST decided that it would be more convenient for the parties involved if H.A.'s reevaluation planning meeting happened during the regular annual review meeting. The purpose of the reevaluation planning meeting was to determine what evaluations would be appropriate.

Enny testified that the District issued an IEP for H.A. in May 2021, as at that time the evaluations had not been completed and although there were positive reports from the teachers the CST determined that it would be appropriate to do a complete reevaluation to substantiate the teachers' reports.

Regarding the disagreement between R.A. and B.A. in approving H.A.'s declassification, Enny testified that from her perspective as H.A.'s case manager and as an expert in special education, she understood the custody order gave R.A. and B.A. joint custody over H.A. and named B.A. as the primary custodian. She testified that she believed the document meant both had educational decision-making authority regarding H.A., and that only one parent needed to consent to educational decisions for the school to have the required parental consent and to implement the plan.

Enny utilized the Woodcock-Johnson test for H.A.'s educational evaluation, specifically the oral language and test of achievement. Enny testified that an educational evaluation assesses the student's actual academic achievement while a psychological evaluation looks at the student's ability to achieve (i.e., their cognitive ability). Both portions are important to determine if the student is achieving up to their ability.

In H.A.'s case Enny testified that he scored in the high average range overall (a broad achievement score of 117), and his I.Q. score was 119, and so determined that he was achieving up to his ability. When comparing the results of H.A.'s evaluation to other students at his age level H.A. scored average, high average, and in one case, superior. The broad achievement score is determined by comparing the clusters and the clusters' sub-tests. Enny testified that to compare a student's achievement and ability, the evaluator looks at the difference from the broad achievement score to the I.Q. score, not between any of the individual subtests or cluster tests to the I.Q. score. She stated that for example, since H.A. has ADHD, the tests which evaluated his listening ability would be lower as H.A. occasionally needed redirection or for instructions to be repeated or clarified. This would automatically lower the score in the subtests even though H.A. was able to complete the test itself once he was given the repeated or clarified instructions. Enny testified that in her professional opinion, based on the Woodcock-Johnson evaluation there was not a significant discrepancy between H.A.'s educational achievement or performance and his ability to achieve.

She also testified that there was nothing in the standard scores which indicated there might be an area of disability that was not being adequately investigated through the evaluations.

As Enny evaluated H.A. she thought he was doing so well he might not need special education, but she did not make a predetermination and remained objective during the evaluation process.

For the three other evaluations (speech-language, OT, and psychology) Enny's testimony was that H.A. scored generally average to above average, and that she relied in part on the evaluations and discussions with the evaluators in making her determination. She testified that she is able to opine as to the educational significance of the other evaluation results due to her expertise in the field and experience in drafting IEPs and performing IEP evaluations and reevaluations. Finally, Enny testified that the evaluations did not indicate that H.A. was not being sufficiently tested in an area of suspected disability and that the evaluation results did not indicate that H.A. needed

special education or related services in order to access his education or succeed academically.

At the conclusion of H.A.'s re-evaluation OT support was recommended because H.A.'s handwriting weakness was an area of concern. But as H.A.'s final gross motor skills were not impeding his access to education, Enny testified that the CST determined, in consultation with the occupational therapist, that a 504 Plan could provide some continued services to assist H.A. with improving in this area without requiring H.A. to remain improperly classified.

Enny wrote the final re-evaluation eligibility determination after the evaluations were completed and she met with each of the evaluators. The determination included H.A.'s report card grades, a summary of the evaluations, and reports by H.A.'s teachers on his ability to perform in class. Enny testified that report card grades are included as they are indictive of how a student is performing daily in the different subject areas, as compared to how a student does on an evaluation test. Since how a student performs during an evaluation can vary slightly depending on a number of factors including how the student is feeling that day. She also stated that H.A.'s teachers reported he was not given modified work nor a modified grade, nor did his IEP state that modified work was needed in order for H.A. to access what the rest of his class was working on.

Regarding H.A.'s 504 Plan, Enny worked with Ms. Newman in developing the Plan which was implemented before the start of the 2021-22 school year. The plan was based on the occupational therapist's recommendations and provided H.A. with individual services once a month for thirty-minute sessions.

In Enny's professional opinion—which was based on the evaluation results, teacher reports, H.A.'s report card grades, and H.A.'s standardized test scores—H.A. does not need special education and related services and his disabilities are not impeding his ability to access his education and learn.

H.A. participated in the school's gifted and talented program from the middle of the first marking period through the end of the 2020-21 school year. And at the end of

H.A.'s sixth grade year was recommended for honors math and honors language arts classes, which he is currently attending. Enny testified that he is currently receiving straight A's in his classes and is on the high honor roll.

On cross-examination, R.A. attempted to establish that the District and B.A. purposefully excluded her from the IEP meeting by not accommodating her needs for a time change. But in the video (R-9) it is purported that R.A. could not attend but wanted the meeting to proceed without her. "If she said no, I would not have proceeded without her." Although R.A. was not present for the meeting, "she was permitted to participate by telephone but chose not to log-in." Also, "confident that sent the recording to both parents." As the email states, it was sent under a separate email to R.A. Nevertheless, R.A. claimed that she never received the email. (P-14.)

Despite the fact that the proposed IEP and reevaluation plan was tentative for fifteen (15) days, here, it was approved by B.A. approximately fourteen (14) minutes later, so it became effective at that time. B.A. consented as the joint parent with physical custody that is why it became effective. R.A. was given the opportunity to participate in the meeting but did not.

She admitted that R.A. was not able to attend the meeting but stated that they should continue anyway. "If she said 'no' then I would not have proceeded." Enny was also confident that she sent both parents the recording of the IEP meeting. Also, H.A. is a very bright child and although there were discrepancies in the scoring, there was no need for anymore special education. The response to R.A.'s objection to declassification was that she filed for Due Process but B.A. consented to the declassification less than an hour after the meeting.

Petitioner

Lauren Cordero has been a teacher for eight years and is qualified in special education as well as having a master's degree in education Literacy. She taught H.A. in seventh grade Language Arts this past school year (2021-2022). H.A. works independently, follows rules and applies that to all his writing and essays which are primarily typed. But his handwriting is legible with low average speed. He needs "minimal assistance" and is always "on task." He needs no accommodations in the form of extra time or help and never complains. Never hands assignments in late. H.A. had an "F" grade on an assignment due to him not setting it up in the correct form. However, that was an anomaly.

In the third marking period class score detail revealed H.A. did well, a B+ (85-89) but he had an A average for the year. She has experience delivering special education and he does not need those services despite his diagnosis of ADHD and Autism.

B.A. is the father of H.A. and was married to R.A. They are divorced. B.A. testified that a TRO (temporary restraining order) that R.A. has on B.A is frivolous. He admitted that H.A. never got ABA therapy because R.A. objected to the names of all of the doctors that he presented. The Orders from the Family Court dictate that ABA is required. So, he wanted to send H.A. to the Proud Moments program but R.A. objected to that as well, so H.A. never went. At no point did B.A. advise anyone at the program that they could not use his medical insurance. BCBA Lisa Spano offered to do observations of H.A. but he did not authorize it.

He recalled that R.A attempted to have H.A. committed and take him to evaluation after evaluation. As a result, B.A. objected because it was not necessary and not helpful for his son. There was no attempt to bribe H.A. or influence him in any way. In fact, he had an objection to Judge Buck's Order for evaluations because "R.A. kept dragging him" and therefore there is an Order prohibiting her from doing so.

B.A. did recall the declassification meeting and that someone said he only needed a signature to declassify him. B.A. agreed with declassification, so he signed

the documents shortly after. B.A. did not know R.A. was opposed to declassification and he was not in "cahoots with the Board of Education." He only has the interest of his son in his mind. Also, Judge Dalton's Order did not allow for evaluations and an LDTC is a medical provider.

Eric L. Harrison, Esq. testified that he is the attorney for the District and saw that R.A. objected to the declassification. However, he indicated that the law in New Jersey is such that even if one parent objects to a declassification, the action is permitted, and the other parent's recourse is to file a Due Process case.

Naema Qureshi, M.D.'s name, qualifications and testimony was withheld by R.A. and her advocate from everyone up through the day of her testimony. However, respondent and B.A. did not object to her testimony and only asked that her C.V. and report be provided to them. I permitted her testimony solely on that basis.

She is a Board-certified Child and Adolescent Psychiatrist and was qualified as an expert in Child and Adolescent Psychiatry. H.A. was evaluated on May 13, 2022, and June 22, 2022, and a report followed. (P-31.) Many of the conclusions from the report including "struggling in school" and "emotional distress secondary to schoolwork" are from R.A. More supports in school would be helpful in dealing with his issues. The school did acknowledge his difficulties but still wanted to end services. This is because she is a mental health professional. It is possible that H.A. is not showing the behaviors that he showed in her exam in the school setting, but not likely.

Dr. Qureshi testified that she only attended two Zoom meetings with H.A. These were all done when H.A. was in the custody and control of R.A. She found a twelve-year-old boy who was previously diagnosed with attention deficit hyperactivity disorder and autism spectrum disorder. H.A. exhibited high levels of frustration and was very rigid and is thinking. He was "focused on preferred areas of interest" and struggled to accept alternative viewpoints or suggestions. It was reported that H.A. related poorly socially and was inappropriate in his interactions as well as being unable to regulate his emotions and self soothe sufficiently. H.A. demonstrated mood disturbance as well as overeating, sleep disturbance, low energy, low self-esteem, poor concentration, and

feelings of hopelessness. "He had voiced suicidal ideation in the past and has required emergent psychiatric assessment."

Dr. Qureshi recommended classroom observation, therapeutic classroom, neuropsychological testing, counseling support through school, individual therapy, occupational therapy, access to resource room, social skills group, social skills lunch group and family therapy. However, the assessment and recommendations were duly challenged by the District.

On cross-examination, she admitted that she was retained by R.A. and the information in her report is based on information provided by R.A. and her advocate, Mr. Flom. Dr. Qureshi agreed that if the information she received was incorrect than her conclusions would likewise be incorrect. Dr. Qureshi claimed that H.A. minimized the difficulties he was having, and that information was coming from his mother. Also, the denial of symptoms was not credible because "his affect was off." Dr. Qureshi continually testified that H.A.'s "affect was off" and it did not match the words he was speaking. Be mindful that both meetings were conducted via Zoom teleconferencing. Also, no information "struck" her that the mother was controlling him. There was an "incongruence" and there can never be a "false positive." Her conclusions included educational recommendations despite the fact that she never consulted with any educators from the District nor B.A. Both BA and the District successfully disapproved many of the facts that Dr. Qureshi relied on to formulate her opinion.

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), requires that when a case has a legal aspect to it, that fact has to be considered and the "responsible thing" would be to check on the patient's state of mind outside of the primary litigant in a case. Here, Dr. Qureshi did not do that because it was "not what she thought". The doctor never checked with the father or even discussed the case with the primary custodial parent. She admitted that it "could be stressful" to travel twice per week back and forth between New Jersey and New York between parents' locations. She never even reached out to the father, nor did she know B.A. was primary custodial parent. She knew the family had a "difficult situation" with the divorce and still did not reach out to the father. There is only one mention in the report that H.A. lives with the

two different parents in two different states but it was actually incorrect. Most all of the information the doctor utilized to form her opinion came solely from R.A., but she admitted that it could be "useful" to speak to the father, B.A. But, she felt that she had "sufficient information to make her recommendations" and never requested to speak with the father. "It's not possible that everything the mother said is false and everything the father said is true."

H.A. would say everything was "good", but his "affect" seemed more serious because there was a visible shift in his examination. There was a change in his demeanor and his "affect." Which is all subjective. Nowhere in the report is a description of the difference in "affect" or other causes of the stress including the obvious conflict between the parents. The common denominator of the conclusions of the professionals solely comes from the information of the mother including the nature of any dysfunction.

Dr. Qureshi waited until mid-June to ask to observe H.A. in class and at no point did the school district refuse to honor the evaluation. Dr. Qureshi was provided the information from Flom and R.A. that the evaluation was not permitted by the District, and she was not aware that the District welcomed an evaluation.

Although she concluded that H.A. needed a "Therapeutic Classroom" and supports, there was more information needed since most of the information came from the mother and two Zoom visits. Dr. Qureshi was not aware H.A. was in the Kings County Psychiatric hospital and deemed not suicidal. Finally, she admitted that it was possible that H.A. acted differently in the two different homes. Despite the fact that most of the information that was provided by the mother was different from the father, it would be important for a proper evaluation to consider both. That was not done here.

FINDINGS OF FACT

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact finder assigns to the testimony of a

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

In determining credibility, I do not believe that District employees want to deprive H.A. of a program that augments his educational opportunities while working within the parameters of the law and regulation. Here, it is declassification. I am also aware that the parents want the best educational opportunity for H.A. Here, one parent believes in declassification and the other does not. It is for me to decide. However, R.A.'s attempt to hide the identity and documents from the District of Dr. Naema Qureshi was disturbing and not appropriate but I allowed her testimony in an attempt at any information that would not favor declassification as appropriate. This was not done by R.A. No witnesses presented by R.A. assisted in that determination. In fact, they bolstered the declassification determination. Dr. Naema Qureshi only spoke with and accepted the opinion of R.A. and her advocate in formulating her opinion. At no time did she attempt to elicit B.A.'s input, which clearly was contrary to R.A.'s, despite having knowledge that there was a contentious divorce. On top of that, much of the information that she relied on was untrue and falsified. Her conclusions that his "affect was off" and no information "struck" her that the mother was controlling him and there was an "incongruence" are all very subjective feelings from a Zoom meeting with information from only one parent. That is not qualified objective data that supports a finding consistent with established science. Interesting is the comment she made when she said that she had "sufficient information to make her recommendations" and that "it's not possible that everything the mother said is false and everything the father said is true." I

take exception to having half of the information when making a medical recommendation here.

In this case, I do not find that there is necessarily an issue of credibility as much as there is an issue of experience and knowledge of the law regarding declassification. As such, I accept the information set forth by the District. **I FIND** as **FACT** that the testimony of all of the witnesses was credible to the extent of considering and implementing declassification. Here, the information provided by the District is clearly the overriding factor and ample proof that FAPE was provided, and all arguments were considered when pursuing declassification. As such **I FIND** them all as **FACT**.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA or the Act), 20 U.S.C. §§ 1400 et seq., requires New Jersey to effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). A purpose of the IDEA is:

> [T]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.
>
> [20 U.S.C. § 1400(d)(1)(A).]

Under 20 U.S.C. § 1412(a)(1), any state qualifying for federal assistance under the IDEA must adopt a policy that assures all children with disabilities the right to a free appropriate public education. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180-81, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 696 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey follows the federal standard requiring such entitlement to be "sufficient to confer some educational benefit," although the State is not required to maximize the potential of handicapped children.

Lascari v. Ramapo Indian Hills Reg. High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). Third Circuit decisions have further refined that standard to clarify that such educational benefit must be "meaningful," "achieve significant learning," and confer "more than merely trivial benefit." T.R. v. Kingwood Tp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-84 (3d Cir. 1988), cert. den. sub. nom., Ctr. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The Third Circuit has re-emphasized the importance of the inquiry into whether the placement proposed by a district will provide the student with a "meaningful educational benefit." S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003). The quantum of educational benefit necessary to satisfy the IDEA varies with the potential of each pupil. N.E., 172 F.3d at 247.

The basic tenant for that education is an education which offers the student an opportunity for meaningful learning, considering the child's potential. Ridgewood, 172 F.3d at 247 wherein the Court found that meaningful education must be more than de minimis. New Jersey has adopted the standards set forth by the United States Supreme Court and the Third Circuit. Lascari, 116 N.J. at 47-48, wherein it was found that the District is not required to provide the best education available. See R.D. and A.D. for C.D. v. Delran Board of Education, 2001 WL 830871 (N.J. Adm. 2001). Therefore, if the District through the applicable IEP is reasonably calculated to provide more than a de minimis benefit, then the school district has met its obligation under the IDEA. CV.J. and D.J. o/b/o B.J. v. Ocean City Board of Education, 2004 WL 763590 (N.J. Adm. 2004).

Thus, the issue is whether the IEP proposed and implemented by the District during the school year was appropriate for H.A. and offered FAPE in the least restrictive environment. Then, thereafter, the question is whether the District appropriately declassified H.A. at the end of that school year.

The witnesses proffered by the respondent, were all qualified and very familiar with the IEP and educational services provided by the District. They all testified

regarding H.A.'s progress. The District in conducting the required reevaluation of H.A. determined that he was still a student with a qualifying disability but was not in need of special education and related services as his disability did not adversely affect his educational performance. During the subsequent CST meeting to review the results of the evaluations the District recommended that H.A. be declassified. Here, the District presented competent evidence from experts in special education and general education – including one who actually taught H.A. for nearly a full school year prior to testifying – that H.A. does not have a disability which adversely affects his educational performance and that H.A. is not in need of special education and related services.

Although the witnesses questioned by the petitioner were direct and clear, they provided no information bolstering her agenda. In fact, they all testified in support of the position taken by the respondent. Also, Dr. Naema Qureshi failed to give a complete picture of the psychiatric nor educational landscape of H.A. The nearly sole basis in support of the claim that the District did not provide FAPE rested on Dr. Naema Qureshi's testimony, which although sincere, was not grounded in complete facts nor sound principles of fact gathered through science. Her testimony was conclusory and lacked foundational background information that is needed to develop an informed opinion. As an example, she never spoke with B.A. regarding H.A. This all the while knowing that B.A. and R.A. were divorced. Dr. Naema Qureshi formulated a diagnosis without all of the information available to her which renders her opinion not credible and suspect.

I CONCLUDE that based on the persuasive testimony presented by the District, and the lack of evidence from R.A., the education provided to H.A. was reasonably calculated to offer him FAPE in the least restrictive environment and was not in any way violative of any law.

As found above, H.A. has a developmental disability which does not "significantly impact" communication and social interaction and in no way adversely affects H.A.'s "educational performance." [Emphasis supplied.] Indeed, concerns about social interaction by the District personnel greatly diminished throughout the school year. His social and behavioral progress made significant progress. There was sufficient credible

proof that none of H.A.'s behaviors were adversely affecting his educational performance. The CST dutifully considered its evaluations as well as the independent ones. None of them suggested that H.A.'s academic performance was other than good.

The other question that needs to be addressed is whether the District determination to declassify H.A. at the end of the school year was proper, of which the District bears the burden of proving the same.

In order to show that H.A. is a student with a disability, a "student with a disability" is defined as a student who has been determined to be eligible for special education and related services. N.J.A.C. 6A:14-1.3.

> A student shall be determined eligible and classified eligible for special education and related services under chapter when it is determined that the student has one or more of the disabilities defined in (c)(1) through (14) below, the disability adversely affects the student's educational performance, and the student is in need of special education and related services. Classification shall be based on all assessments conducted including assessment by child study team members and assessment by other specialists as specified below.
>
> [N.J.A.C. 6A:14-3.5(c)]

Thus, in order to be eligible for special education and related services, the student must 1) have one or more disabilities as defined in N.J.A.C. 6A:14-3.5(c)(1)-(14); 2) the disability must adversely affect the student's educational performance; and 3) the student is in need of special education and related services. That is not the case here.

Here it is undisputed that H.A. has one of the enumerated disabilities; he has received diagnoses of autism and attention deficit hyperactivity disorder (ADHD) and therefore would fit the definition of "Other Health Impaired" and/or "Autistic." However, during the 2020-2021 school year H.A. did not experience an adverse educational impact on account of a disability and he did not require special education services. As such, his declassification was appropriate.

In order to be classified as OHI, N.J.A.C. 6A:14-3.5(c)(9) is applicable. The OHI classification corresponds to children who either:

> 9. "Other health impairment" means a disability characterized by having limited strength, vitality, or alertness, including a heightened alertness with respect to the educational environment, due to chronic or acute health problems, such as attention deficit hyperactivity disorder, a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, or any other medical condition, such as Tourette Syndrome, that adversely affects a student's educational performance. A medical assessment documenting the health problem is required.
>
> [Ibid.]

There is no dispute of the fact that the District classified H.A. as OHI. However, since no proofs were founded, he was declassified appropriately by the District with the consent of B.A. R.A. attempted to have him reclassified as “Multiple Disabled” (MD) without any proofs. The question that begs is if H.A. was not classified as OHI than how could he be classified as MD.

> 6. “Multiple disabilities” means the presence of two or more disabling conditions, the combination of which causes such severe educational needs that they cannot be accommodated in a program designed solely to address one of the impairments. Multiple disabilities include intellectual disability-blindness and intellectual disability-orthopedic impairment. The existence of two disabling conditions alone shall not serve as a basis for a classification of multiple disabilities. Eligibility for speech-language services as defined in this section shall not be one of the disabling conditions for classification based on the definition of "multiple disabilities." Multiple disabilities does not include deaf-blindness.
>
> [Ibid.]

Again, there was no evidence at all proffered at any of the hearings to support that claim.

District relied on the concrete evidence, reports, and teacher input to find that H.A. no longer required special education and related services. I found the District's reliance on that information as persuasive. The record is replete with evidence that H.A. was making progress and not in need of any "special education." The entire IEP team reported that H.A. made tremendous progress and thus no longer needed services. Petitioner offered no credible evidence to contradict this evidence. Dr. Naema Qureshi's opinion was conclusory and formulated without a complete understanding of H.A. and his history. Arguably, a net opinion. To the contrary, at the time of the declassification meeting, the IEP team had an in-depth discussion about declassifying H.A. based on all the information available to them. There were objective proofs which confirmed the significant progress made by H.A. which was based on concrete evidence.

The witnesses who worked with H.A. on a regular basis were compelling and they concluded that the child made tremendous progress and no longer needed special education and related services. Aside from the fact that B.A. consented to the declassification and R.A. did not, there was no evidence presented which showed that H.A. needed continued special education in order to be successful.

New Jersey school districts are not required to maintain and operate general education school programs for non-disabled students, unless ordered by the State on an individual basis. The evidence presented supports the proposition that H.A. does not require special education and related services because he is not a classified student. The undersigned commends H.A. on his accomplishments and hopes to hear of his successes in the future.

Accordingly, **I CONCLUDE** that the determination to declassify H.A. was appropriate under the circumstances of this case. **I** also **CONCLUDE** that the declassification of H.A. did not deny him FAPE.

While it is apparent that R.A. is a passionate, loving, engaged mother, and wishes her child to receive as many services as possible, the IDEA simply does not

require maximization under the facts of this case. H.A. was not deprived of any meaningful educational benefit of the educational program and frankly, is doing well.

ORDER

For the reasons set forth above, it is **ORDERED** that the petition of R.A. be **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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.

September 28, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

DJB/cb

APPENDIX

WITNESSES

For petitioners

Lauren Cordero

B.A.

Eric Harrison, Esquire

Dr. Naema Qureshi

For respondent

Marian Enny

EXHIBITS

For petitioner

P-1 Invitation, April 23

P-2 Order for Custody

P-3 Email, May 17

P-4 Email, May 18

P-5 Email, May 18

P-6 Email, May 18

P-7 Email, May 18

P-8 Email, May 21

P-9 Re-evaluation meeting

P-10 Email with proposed IEP and re-eval, May 21

P-11 Email, May 21 at 3:22 p.m.

P-12 Email, June 1

P-13 Email, June 2

P-14 Email, June 1, 2021, at 10:13 a.m.

P-15 Screen picture of Wave and audio recording, May 21

P-16 Signed IEP Consent Form

P-17 R.A. e-mail

P-18 Ms. Enny response to P-17

P-19 IEP 32

P-20 WISC-V computer generated report

P-21 Order from Chancery Court

P-22 Letter from pediatrician

P-23 Judge's ABA order, March 20, 2021

P-24 E-mail with attachments

P-25 B.A. to Ms. Enny e-mail, July 28, 2021

P-26 Language arts score detail

P-26 Language arts class score detail

P-27 B.A. to Dr. Fradkin e-mail 44 45, March 29, 2021

P-28 B.A. to Morales e-mail, September 21, 2021

P-29 B.A. to LDTC e-mail, September 20, 2021

P-30 Order on Motion, March 12

P-31 Dr. Qureshi report

For respondent

R-1 Due Process Petitioner

R-2 Answer

R-3 Order on Custody, August 28, 2014

R-4 Education Evaluation, May 26, 2021

R-5 Psychological Evaluation, June 16, 2021

R-6 Speech-Language Evaluation, June 15, 2021

R-7 Occupational Therapy Assessment, June 14, 2021

R-8 Video recordings of Eligibility Determination Meetings, July 28, 2021

R-9 Reevaluation Eligibility Determination – Declassified, July 28, 2021

R-10 Email to R.A. and B.A. with 504 Accommodation Plan, September 15, 2021

For B.A.

B.A.-1 Email from Enny to B.A. regarding meeting, May 17, 2021