



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

**FINAL DECISION**

**S.M. ON BEHALF OF L.T.,**

Petitioner,

v.

**MAHWAH TOWNSHIP BOARD OF  
EDUCATION,**

Respondent.

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OAL DKT. NO. EDS 11066-22

AGENCY DKT. NO. 2023-35134

**S.M. on behalf of L.T.**, petitioner, appearing, pro se

**Nathanya G. Simon**, Esq., for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: September 12, 2023

Decided: October 4, 2023

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

**STATEMENT OF THE CASE**

Petitioner, S.M. on behalf of L.T., filed a Due Process petition on November 9, 2022, with the Office of Special Education Policy and Procedure (“OSEP”), under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§1400 to 1482, alleging that the Mahwah Township Board of Education (“Respondent” or “District”) deprived L.T. of a free and appropriate public education (“FAPE”), during the 2022-2023 school year based on her program and placement, related services provided, and demand for an FBA to be conducted. On November 29, 2022, the Board filed an Answer with Affirmative Defenses to the Petition.

## **PROCEDURAL HISTORY**

The matter was transferred to the Office of Administrative Law (“OAL”) on December 12, 2022.<sup>1</sup> It is important to note that a Prehearing Order was entered by the undersigned on January 24, 2023, which set forth issues to be resolved at hearing. It was subsequently modified on March 21, 2023, during a prehearing conference. The issues were limited to the following:<sup>2</sup>

1. Whether the District provided FAPE through the implementation of the October 2022 Individualized Education Program (“IEP”), pertaining solely to L.T.’s current placement in the district as of September 2022, including the behavioral plan implemented.
2. Whether L.T. should be receiving counseling, which petitioner alleges was unilaterally removed from L.T.’s October 2022 IEP.
3. Whether L.T.’s therapy should be modified to change the time administered and whether L.T. should be provided with the time for stretching exercises during school hours; and
4. Current transportation issues and the services provided.

Thus, the issues were limited to the October 2022 IEP addressing only the 2022-2023 school year.

It should be noted that all other claims which S.M. attempted to include in her due process petition bearing docket number EDS 11066-22 have either been decided or are to be decided under previously filed due process petitions before the Honorable Thomas Betancourt, ALJ, the Hon. Ernest M. Bongiovanni, ALJ, the Hon. Margaret Monaco, ALJ, and a subsequent filing before the Hon. Matthew Miller, ALJ and thus were not made part

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<sup>1</sup> On December 21, 2022, the Board filed its own Petition for Due Process to Deny the Request for Evaluations. This matter was transferred to the OAL on January 11, 2023, bearing Docket No. EDS 00426-23. On January 19, 2023, Docket No. EDS11066-22 and EDS 00426-23 were consolidated and on May 2, 2023, the Board withdrew its Petition for Due Process bearing Docket No. EDS 00426-23.

<sup>2</sup> The issues were limited because it was unclear what the petitioner’s Due Process Petition was seeking to be addressed. The issues were narrowed with the participation of the petitioner and counsel for the respondent. A Copy is attached to this Final Decision for reference. Further, the issues were set forth on the record at the commencement of the May 2, 2023, hearing date.

of the current due process petition before the undersigned, bearing docket number EDS11066-22.

Hearings were conducted on May 2, 2023, May 9, 2023, June 9, 2023, and June 26, 2023. Post-hearing summation briefs were submitted by the parties and the record was closed based on the last submission date of September 12, 2023.

### **ARGUMENTS**

It is undisputed that this matter is only one matter in a long history of litigation between the parties. Student L.T. is eligible for Special Education and Related Services under the classification of “Specific Learning Disability.” For many years, L.T. attended an out of district school, Inclusive Learning Academy (“ILA”), pursuant to her IEP from the District. However, ILA unexpectedly closed in August 2022, at which point the district worked expeditiously to develop a new program and placement for L.T. Petitioner refused to consent to other out of district placements, thus, the district developed an in-district program for L.T. that provided her with what the district believed to be the necessary academic, behavior, and therapeutic supports for L.T. to access and benefit from her education.

It is the position of the district that throughout the 2022-2023 school year, L.T. received individualized instruction, appropriate supports, and necessary related services to make progress towards her IEP goals and objectives in light of her unique circumstances and thus was offered FAPE in her LRE. It is the position of the petitioner that L.T. was denied a FAPE in her LRE. The petitioner argues that L.T. is entitled to more related services, more accommodations to her transportation, and more behavior interventions. The district argues that L.T. successfully transitioned to the in-district program, and the district staff appropriately responded to L.T.’s unique needs. The district further argues that it is not required to accede to all parent requests, but rather, the legal standard is to provide the appropriate amount of services to confer a meaningful educational benefit. Thus, the District, at all times relevant, provided an IEP for L.T., which proposed and provided a FAPE in her LRE and was reasonably calculated to allow L.T. the opportunity to make meaningful progress towards her goals and objectives.

## **STATEMENT OF FACTS**

Based upon the testimonial and documentary evidence presented at the hearing, the following **FACTS** are undisputed and therefore, I **FIND**:

Following ILA's closure in August 2022, the parties met on August 26, 2022, to discuss a new appropriate placement and program for L.T., both in the district and out of district. (R-4 and R-5). While the District was in communication with out of district placements, the petitioner did not want to consider any out of district placement, and instead wanted L.T. to return to the self-contained program within the district. Petitioner made this decision with the understanding that the IEP would be significantly revised. It is undisputed that petitioner was aware that while the district would revise the IEP to be as comparable as possible to the previous IEP at ILA, ILA was a therapeutic out of district program that was able to provide services the district could not. Petitioner consented to have L.T. returned to the district as the program was presented, with the understanding that the Parties would meet again in October for a transfer IEP meeting. (R-5 and R-6).

The parties then met again on October 2, 2022, to prepare, collaborate and agree upon a full thirty (30) day transfer IEP for the 2022-2023 school year. Under this IEP and subsequent IEPs developed during the 2022-2023 school year, L.T. attended Ramapo Ridge Middle School, within the district. She transitioned into the program, and her IEP placed her in a self-contained class for Math, English, Reading, History, Science and Life Skills, general education for PE/Health, lunch, and recess. She receives physical therapy, occupational therapy, speech therapy and has a 1:1 aide, daily nursing services and a behaviorist. (R- 8, 9, 10, 11 and 16). Her transportation is provided with a nurse. (R-7 and R-32). She was found eligible for the extended school year ("ESY").<sup>3</sup>

## **TESTIMONY**

### **KIERSTYN LIDDY**

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<sup>3</sup> The ESY for the summer of 2023 was/is being decided by the Hon. Matthew Miller, ALJ under a separate Due Process Petition.

Liddy is L.T.'s Case Manager and a school psychologist who was qualified as an expert and testified on behalf of the respondent. Liddy testified that she believed that ILA met all of L.T.'s academic, social, emotional, and behavioral needs, making ILA an appropriate placement for L.T. When ILA unexpectedly closed, Liddy and Lisa Rizzo, the Director of Special Services, worked right away to find an appropriate placement for L.T. prior to the school year commencing. Liddy contacted approximately eighteen out of district programs to see if they had any availability to even review L.T.'s records. The programs were full. Moreover, L.T.'s parents did not sign a consent form to release her records to any out of district programs. Therefore, Liddy pivoted to creating a program in the District for L.T. so she could start the school year in September, which is what the petitioner wanted.

Liddy testified that while the district could not emulate everything ILA provided to L.T., information that was shared with petitioner, the district implemented L.T.'s then IEP to the fullest extent possible. Liddy explained that the district provided L.T. with a 1:1 behaviorist for the first six weeks of school to help L.T.'s transition to the district and provide accommodations and modifications as the behaviorist saw fit. Regarding L.T.'s behavior, Liddy stated that the District CST rejected petitioner's request for an FBA in August of 2022 because ILA was a therapeutic program with a full-time BCBA on staff who did not believe an FBA was necessary to service L.T. in their program. When L.T. transitioned to the district, neither Liddy nor L.T.'s teachers observed any problematic behavior. Liddy went on to state that most of L.T.'s behavior and emotional concerns are related to outside of school.

Additionally, Liddy testified that she does not believe that L.T. requires school-based counseling. Liddy opined that L.T. requires immediate responses to her emotional and behavioral needs, which school-based counseling would not provide. Rather, school-based counseling would require L.T. to internalize the negative emotions until the scheduled counseling session. Liddy added that when L.T. is asked about behavior or emotions after the fact, this often retriggers the behavior.

Liddy also explained that she had been adding a new accommodation every month for L.T. regarding her transportation, whereas for most students, Liddy only modifies a

special education transportation request at the end of the academic year for the ESY programming and school programming for the next year. Liddy stated that L.T. receives a pickup window each day from 7:30-7:45 a.m., where the bus arrives at L.T.'s home at 7:30 a.m. and remains there until 7:45 a.m. L.T. has an entire fifteen-minute window to board the bus. This window was provided so that if there were behavior or opposition to get on the bus, staff had an opportunity to work with L.T. to get her onto the vehicle. Liddy stated that the petitioner regularly has L.T. out the door at 7:45 a.m., which defeats the purpose of the window. (R-7 and R-32).

Further, Liddy explained that it is necessary for L.T. to board the bus prior to the bus's scheduled departure of 7:45 a.m. If she does not, there are two primary concerns. First, the school day begins at 8:00 a.m. so Liddy believes it is necessary for L.T. to arrive on time in order to be on time, so she does not miss the arrival procedures or life skills programming at the beginning of the day. Liddy also explained that L.T. thrives on routine and structure and when she is out of routine and structure, L.T. exhibits behavior concerns. Second, the transportation company has a route immediately after L.T.'s that they need to be on time for. Therefore, the District is unable to extend the pickup window for L.T.

Liddy testified that when school returned from winter break in January, L.T.'s teachers, therapists, and aides observed an uptick in some behaviors that were different than they had seen before. L.T. started to strike staff members, throw classroom materials around the room, and damage property, which was a big safety concern. On or about February 2, 2023, Liddy determined that a FBA was necessary at that time. The district arranged for Katherine Wiedemann to conduct a FBA of L.T., who provided recommendations and created a comprehensive behavior plan for L.T. (R-18 and R-19). Prior to this time there was not a concern by staff which warranted that a FBA to be conducted.

Additionally, Liddy explained that the district considered and ultimately rejected petitioner's request to have PT occur outside of the school day. She stated that for a child to require related services, the need for related services must have an educational impact on their day-to-day functioning in the classroom and accessing their education. L.T. has significant gross and fine motor concerns that impede her access to the educational

environment. Thus, L.T.'s related services need to be provided in the school environment to reduce these barriers. These services include increasing her mobility in navigating the building, reducing her fatigue, manipulating the classroom environment, typing, and writing, and throwing and catching a ball, all of which Liddy stated needed to occur in the school environment to ensure that L.T. is able to safely access her school environment. Moreover, when related services occur within the school, the related service providers are able to consult, collaborate with, and receive feedback from L.T.'s teachers, which ensures the implementation of related service strategies in the classroom and allows L.T. to functionally use these skills in her day-to-day learning.

Finally, Liddy opined that L.T. received a FAPE throughout the 2022-2023 school year. Liddy based this conclusion on how L.T. was functioning in the classroom, as well as the academic support and related services provided to L.T. Liddy believes that the accommodations and modifications, including behavior-related ones, the district has in place allow L.T. to succeed in the district, and provide her with FAPE in the LRE. L.T.'s report cards support her making progress. (R-20).

### **REGINA BUSSINELLI**

Regina Bussinelli ("Bussinelli") is a District Behaviorist who has worked with L.T. for many years. Bussinelli was admitted as an expert behaviorist, and she testified regarding L.T.'s transition from ILA to the District. She explained that during the District CST's conversations with petitioner, it was made evident that the district's program would not fully replicate ILA. However, Bussinelli added that the petitioner expressed concerns regarding L.T.'s experience at ILA. Specifically, the petitioner expressed concern that L.T. was in a very small class, sometimes the only student in class at ILA, and petitioner did not approve of ILA's utilization of edible reinforcements. In describing L.T.'s current in-District program, Bussinelli stated that there is a high teacher to student ratio, and students in the self-contained class are given mainstream opportunities to socialize with her general education peers. L.T. and her classmates attend lunch, recess, and when appropriate, specials with the general education population.

Bussinelli further opined that it is necessary for L.T. to receive related services at Ramapo Ridge. Bussinelli stated that certain aspects of the school environment cannot be replicated at home. For example, at a recent PT session, Bussinelli observed L.T. climb the stairs on the school stage. Not only will this help L.T. walk the stage at her graduation or participate in theater, but the stairs on the stage are different than the carpeted stairs at the petitioner's home. Thus, in order to safely access her school environment, L.T. needs to practice these skills in school, and not at home.

Bussinelli explained that throughout most of the 2022-2023 school year, the behavior intervention plans in the classroom addressed L.T.'s behavior. However, L.T. began to struggle behaviorally and demonstrated aggressive behavior following her return from winter break. In response, Bussinelli stated that the staff increased reinforcement systems, provided different activity schedules, and modeled expectations for behavior. Additionally, Bussinelli observed that L.T. was becoming fatigued walking to the other side of the school for history, so the district changed the schedules of the history teachers to allow the history teacher to push into L.T.'s classroom. When the behaviors continued through the end of February 2023, Bussinelli believed that it was appropriate for "someone from the outside" to conduct an FBA of L.T. (Emphasis added). The suggested revisions to L.T.'s behavior Intervention Plan were not significant. (R-27).

### **ELENORE VANWYK**

Elenore Vanwyk ("Vanwyk") is L.T.'s one-to-one nurse. She explained that L.T. has both good and bad days, and her difficult behavior arises when L.T. is required to follow rules that she does not want to follow. These include not being able to have her phone or toys. Vanwyk explained that while this makes L.T. upset, her behavior is improving and complying with rules is part of developmental expectations for someone L.T.'s age. Vanwyk further stated that L.T. was easily re-directed once on the bus.

### **DEBI WOLFE**



Debi Wolfe (“Wolfe”) is L.T.’s Occupational Therapist. Wolfe testified that while receiving OT, L.T. does not get distracted by other students. Additionally, Wolfe stated that L.T.’s behavior does not interfere with receiving OT. When L.T. stops complying with directions or demonstrates problematic behavior, Wolfe reminds L.T. of what she is working towards, at which point, L.T. pauses and continues with the demanded OT task.

Wolfe also explained that L.T.’s IEP goals related to OT are “Ongoing.” (Emphasis added). While Ongoing does not mean L.T. achieved her OT IEP goals, Wolfe explained that L.T. made significant progress during O.T., particularly with her writing. Moreover, if L.T., or any other student, does not meet any IEP goal in a given year, this does not constitute a failure. Rather, success is measured by progress towards the goal, and many of L.T.’s OT goals are meant to be continuing and cannot be given a certain time to be completed. Wolfe did not believe that L.T. required an increase in OT because she is currently receiving OT twice a week for forty-five minutes, which Wolfe believed is a significant amount of therapy.

### **MARY SHUBERT**

Mary Schubert (“Shubert”) is L.T.’s Special Education teacher, who has nineteen years of Special Education experience. Schubert testified that when L.T. first arrived at the District, Schubert administered numerous benchmark assessments to determine L.T.’s current levels in the academic domains and tailored individualized IEP goals and objectives for L.T. throughout the school year, Schubert noticed a decrease in both the frequency and duration of L.T.’s behavior. Previously, L.T.’s behavior incidents lasted an hour, whereas now, L.T.’s behavior issue lasts three to twenty-five minutes.

Schubert believed this decrease in problematic behavior is largely based on the real time services provided to L.T. and her use of the Zones of Regulation. Zones of Regulation is a Social-Emotional Learning Curriculum that teaches children self-regulation and emotional control by having students organize their feelings and energy levels into four colored zones. When L.T. uses the Zones of Regulation, she is able to identify her feelings and implement the tools and strategies to regulate her behavior. In fact, Schubert testified that L.T. has become so adept utilizing the Zones of Regulation that she will actually identify

other students in the class that might be in the blue (fatigued, bored or sad) or yellow (stressed, frustrated, or excited) zones, and give them strategies to regulate their behavior. As a result, Schubert does not believe that L.T. needs counseling services, nor is counseling in L.T.'s best interest, because the classroom supports address L.T.'s emotions instantly, rather than requiring L.T. to hold onto any negative feelings for a counseling session.

### **DORIS MONROE**

Doris Monroe ("Monroe") is an Independent PT Consultant that the district hired through Therapede. While Monroe testified that L.T. demonstrates behavior that affects her PT, Monroe explained that the behaviors do not prevent L.T. from receiving P.T. Rather, Monroe and L.T. begin each PT session by agreeing on at least five activities, and occasionally L.T. will only want to complete two activities. In those situations, Monroe adjusts the activity order or will play a game with L.T. to incentivize L.T.'s continued participation in the PT session. Monroe stated that L.T. has pushed her, but this does not happen often and typically, L.T. and Monroe get along quite well. Further, L.T. has never eloped from PT. In the instances where L.T. demonstrates problematic behavior prior to a scheduled PT session, Monroe will switch L.T.'s session to a later time. Monroe also stated that there has never been an instance when another student's behavior affected L.T.'s therapy sessions.

Monroe was happy with the progress L.T. made during PT. She is running better and walking upstairs for longer durations. Monroe believes that L.T.'s current PT schedule of two forty-five-minute sessions is appropriate for L.T. and added that this is more than any other student gets. Importantly, Monroe expressed concern with increasing the frequency and time of L.T.'s PT sessions because L.T. fatigues easily, which may do more harm than good for L.T.'s development.

### **CATHERINE BUCKLEY SMITH**

Catherine Buckley Smith (“Buckley-Smith”) is L.T.’s one to one paraprofessional. Buckley Smith explained that L.T. has opportunities throughout the school day to socialize with her general education peers. She also explained that L.T. is very active throughout the school day, both in her related services sessions, as well as in the classroom, where her teachers incorporate dancing and movement into instruction. Buckley Smith explained that L.T. improved throughout the school year safely navigating the school environment, particularly in the hallway, where she needs to walk with many fellow students. Finally, Buckley Smith explained that behavior plans have always been in place for L.T., and her teachers and related service providers adjust the behavior plans to properly address L.T.’s behaviors.

### **CATHERINE CARISI**

Catherine Carisi (“Carisi”) is a School Psychologist with twenty-three years of experience. Occasionally, when L.T. is upset and demonstrates behavioral outbursts, L.T.’s teachers call Carisi to the classroom. Carisi explained that the intensity and duration of L.T.’s behaviors have decreased throughout the school year. Additionally, L.T. is better able to self-regulate her behavior and “recover” from the problem behaviors, largely based on her ability to apply the emotional and behavioral regulation strategies taught in her classroom. Therefore, Carisi believes that the current BIP and supports in the classroom are appropriate for L.T. Carisi also does not believe that L.T. needs school-based counseling. She opined that the BIP in place that addresses behavior, coupled with L.T. utilization and generalization of the Zones of Regulation, provides L.T. with the necessary supports to address her behavior and emotions. As such, Carisi did not believe that at this time counseling would provide any other beneficial support to L.T.’s program.

### **KAITLYN DAWSON**

Kaitlyn Dawson (“Dawson”) is L.T.’s Speech Therapist who testified that L.T.’s classroom environment is a safe environment for her to be able to express herself. Throughout the school year, L.T. progressed towards her speech goals and objectives in her IEP. Regarding L.T.’s behavior, Dawson testified that she has never observed L.T. experience any difficulty transitioning to the classroom from another activity or location. Moreover, Dawson testified that her speech sessions with L.T. encompass social and emotional skills that are beneficial for L.T. Dawson stated that she and L.T.’s teachers and therapists are providing her with the necessary tools to self-regulate, and all of the district’s staff are following the same behavior protocols with fidelity to respond to behavior moments. Dawson believes that the recommendation of receiving speech therapy twice a week is appropriate for L.T., she does not believe that L.T. needed speech services outside of school.

### **BEBE CHERIAN**

Bebe Cherian (“Cherian”) is currently a Behaviorist for the District, but previously worked as the Director of ILA for four and a half years, prior to its unexpected closure in August 2022. Cherian is a licensed school social worker who also possesses a supervisor certification. For the first six weeks of the 2022-2023 school year, Cherian provided L.T. with behavioral support. However, she believed that L.T. made such a successful transition to Ramapo Ridge that she gradually reduced her time working with L.T.

Cherian explained that a FBA was not needed when the petitioner made her request in August 2022. She stated that the purpose of an FBA is to determine the function of L.T.’s behavior and once functions are assessed, then behavior plans are put into place. However, Cherian explained that the functions of L.T.’s behavior have not changed over time. Instead, Cherian explained that the functions of L.T.’s behavior have been clearly established, and over time, her interventions were modified, updated, and changed to meet her needs. L.T.’s behavior serves two primary functions: social mediated negative reinforcement, which is avoidance, and socially mediated positive reinforcement, which is

attention seeking behavior. Cherian concluded that since the function of L.T.'s behavior has not changed, there was no need for a FBA in August 2022. Based on her experience with L.T. at both ILA and the District, Cherian stated that L.T.'s challenging behavior can happen in any demanding situation, whether that occurs one to one, or small group. As such, Cherian did not believe that L.T. required related services, one on one at home and after the school day.

### **KATHERINE WIEDEMANN**

Wiedemann is a Board-Certified Behavior Analyst ("BCBA"), Special Education Consultant, and owner of Every Child Behavior Solutions who the district retained to perform a FBA of L.T. in March 2023. Wiedemann was admitted as an expert BCBA. Wiedemann explained that she previously completed an FBA of L.T. in December 2021, which was primarily focused on L.T.'s transition to school from the home environments. Wiedemann did not believe that a school based BIP was required because the BIP developed by ILA was effective. However, in February of 2023, L.T. began to exhibit concerning behaviors in the school setting, so the District and Wiedemann determined that a full FBA was needed at that time.

As part of the FBA, Wiedemann observed L.T. in the classroom. During these observations, Wiedemann saw L.T.'s teachers and related service providers utilizing a very comprehensive set of behavioral interventions. In fact, the interventions were so comprehensive that Wiedemann's behavior plan essentially mirrored the behavior interventions already in place, and only included one additional intervention. While L.T. demonstrated problematic behavior, it is Wiedemann's professional and expert opinion that the district was doing an incredible job handling and addressing the behavior as it was coming up: utilizing preventative strategies, utilizing appropriate and compassionate consequence strategies, and making sure L.T.'s dignity was first and foremost.

Regarding counseling, Wiedemann stated that she believed the classroom structure provided substantial emotional support and likely more than L.T. would receive in a pull-out counseling model. Wiedemann noted that L.T.'s teachers utilized significant one-on-one talking and compassionate support strategies that emulated what a school-based

counseling session would look like. However, because these compassionate support strategies are utilized throughout the day and on an individual basis, Wiedemann believed this model was more conducive to meeting L.T.'s emotional needs than school-based counseling.

### **JEANINE GERVASIO**

Jeanine Gervasio ("Gervasio") is L.T.'s private Physical Therapist who provides L.T. PT at home. Gervasio explained the importance of L.T. receiving consistent therapy. While Gervasio believed that L.T. benefits from the PT she provides, Gervasio was unable to offer an opinion regarding L.T.'s in-school PT because she never observed L.T. in school.

### **DISCUSSION**

It is within an Administrative Law Judge's "province to determine the credibility, weight, and probative value of the expert testimony." State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), cert. denied. 127 N.J. 321 (1990). The weight to be given to an expert's testimony depends upon "[sic] candor, intelligence, knowledge, and especially upon the facts and reasoning which are offered as foundation of [their] [sic] opinion." County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). Further, "the 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).

A trier of fact may reject testimony as "inherently incredible," and may also reject testimony when "it is inconsistent with other testimony or with common experience" or it is "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interests, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), cert. denied, 10 N.J. 316 (1952) (citation omitted).

I found all the witnesses to be credible. Therefore, **I FIND** that the district provided L.T. with an FBA in February of 2023 when the district felt it was appropriate for the first time. The new behaviors by L.T. were not exhibited by L.T. until her return to school after the winter break. There was no evidence or testimony presented by the Petitioner which would demonstrate behavior by L.T. from September through the time school broke for winter break that would indicate that such an assessment was warranted prior to February of 2023. Further there was nothing presented by Petitioner that would suggest the services in place were inappropriate to address the alleged behavior of L.T. Even after the FBA was conducted, there were only a few modifications made to the already existing behavior plan in L.T.s October 2022 IEP.

I further **FIND** that the transportation services and modifications requested by Petitioner were provided by the district through multiple modifications of the October 2022 IEP.

I further **FIND** that the school physical therapist did testify that she told the petitioner that L.T.'s forty-five-minute PT sessions could be increased to sixty minutes, however, this was only told to Petitioner to make her happy, not out of necessity. Even though an extra fifteen minutes per session is minimal in the grand scheme of things, I do not **FIND** that the forty-five minutes being afforded is inappropriate or deprives L.T. of FAPE in the LRE.

I further **FIND** that counseling is being provided through the October 2022 IEP. It is incorporated through L.T.'s school day and counseling provided when needed. Petitioner would like counseling separated from L.T.'s school day and classified as a separate session with a specific counselor. However, the testimony and evidence demonstrate that counseling is appropriately administered through the school day during her transportation, classes, and therapies by each of the staff assigned to work with L.T.

### **LEGAL ARGUMENT AND CONCLUSION**

The Individuals with Disabilities Education Act ("IDEA"), 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 free appropriate public education ("FAPE")

consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. 1401(9), 1412(a)(1). The purpose of the IDEA is to:

“Ensure that all children with disabilities have available to them a free and 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. Section 1400(d)(1)(A).]

Under 20 U.S.C. Section 1412(a)(1), any State qualifying for federal assistance under the IDEA must adopt a policy that ensures all children with disabilities the right to a free and appropriate public education. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180-81, (1982). That standard was further clarified in the recent Supreme Court decision in Endrew F. which stated, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999, (2017).

State regulations track this requirement that a local school district must provide a 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”. Lascari v. Ramapo Indian-Hills Reg. High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, supra, 458 U.S. at 200). 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 Twp. Bd. of Educ., 205 F. 3d 572 (3d Cir. 2000).

However, it is well established that IDEA does not require a school district “supply an education to a handicapped child that maximizes the child's potential . . .” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010). As the Sixth Circuit analogized, the IDEA requires “the educational equivalent of a serviceable Chevrolet” rather than a “Cadillac solely for [the student's] use.” Doe v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455, 459-460 (6th Cir. 1993). Accordingly, “though the IEP must provide the student with a ‘basic floor of opportunity,’ it need not necessarily provide ‘the optimal level of services’



that parents might desire for their child." D.S., supra, 602 F.3d at 557 (quoting Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000)) (Emphasis added).

The determination of whether a student receives a FAPE cannot be reduced to a single test or by measuring the student's progress by the progress of his typically developing peers. Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 198-202, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). Rather, the Court noted that IDEA:

requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with non-handicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. [Id. at 202.]

In short, case law has long and uniformly rejected "a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3d Cir. 1999). The Court in Endrew F cautioned that "the absence of a bright-line rule...should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" 137 S.Ct. 988, 999-1000 (quoting Rowley, 458 U.S. at 206). Such difference is based on the school authorities' application of expertise and the exercise of judgment. Id. "Those authorities should be able to offer a reviewing court a cogent and responsive explanation for their decisions..." Id. at 1002.

In evaluating whether a free, appropriate public education was provided, an inquiry into the student's potential and educational needs must be made. Ridgewood, supra, at 247. In providing a student with a FAPE, a school district must provide such related services and supports as are necessary to enable the disabled child to benefit from the education. Rowley, supra, at 458 U.S. 188-189.

In summary, to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Endrew F., supra, 137 S. Ct. 988, 999(2017); 20 U.S.C.A. § 1414(d)(4)(A); N.J.A.C. 6A:14-3.7(i). The appropriateness of an IEP must be determined as of the time it is made, and the reasonableness of the school district's proposed program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Bd. of Educ., 602 F. 3d 553, 564-65 (3d Cir. 2010). When determining the appropriateness of any given IEP, a court's focus should be on the IEP actually offered by the board and not upon an IEP that it could have offered. Lascari, supra, 116 N.J. at 46 –47.

In Rowley, the Supreme Court developed a two-prong test to determine whether school districts have provided a FAPE:

First, has the state complied with the procedures set forth in the act? And, second, is the individualized education program developed through the act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

458 U.S. at 206-207.

When a court must determine whether a district has provided FAPE, the appropriateness of an IEP is not determined by a comparison between a program chosen by parents and the program proposed by the district. See, S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Instead, the pertinent inquiry is whether the IEP proposed by the district offered FAPE with the opportunity for significant learning and meaningful education benefit within the LRE. G.B. & D.B. ex rel J.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., EDS 4075-06, Final Decision (June 13, 2007). If it is found that the district provided FAPE, the appropriateness of another program is irrelevant. See, H.W. & J.W. ex rel A.W. v. Highland Park Bd. of Educ., 108 Fed. Appx. 731, 734 (3d Cir. 2004). In New Jersey, the school district bears the burden of proof by the preponderance of competent and credible evidence that it has provided a FAPE to the child in the least restrictive environment ("LRE"). See, N.J.S.A. 18A:46 -1.

It is the position of the district that at all times relevant in this litigation, the district provided an appropriate IEP for L.T., which met the standard of FAPE in the LRE. The October 2022 and any other IEP's addressing the 2022-2023 school year, provided a highly individualized and reasonably calculated program for L.T. for the 2022-2023 school year. These IEPs placed L.T. in a self-contained class for Math, English, Reading, History, Science and Life Skills, and in general education for PE/Health, Lunch, and Recess. L.T. receives: PT twice a week for forty-five minutes, individually, OT twice a week for forty-five minutes, individually, and speech therapy twice a week for thirty minutes, with one session in a pull-out room and one in the classroom. L.T. was provided a 1:1 aide, daily nursing services, and a behaviorist consult once a week for sixty minutes. Moreover, the District provides transportation to and from school, during which L.T. is accompanied by her nurse. This transportation includes an extended fifteen-minute pickup window to accommodate L.T.'s needs, which is what the petitioner has requested in this Due Process petition.

L.T.'s teachers and related service providers all testified to the progress that L.T. made throughout the school year, both behaviorally and progressing towards her IEP goals and objectives. While L.T. had behavior incidents, the district properly responded to L.T.'s behavioral and emotional needs as they occurred during the school day, including transportation time. This includes behavior accommodations and modifications, implementing a BIP, utilizing Zones of Regulation instruction, and providing L.T. with individualized support throughout the school day. When L.T.'s behavior incidents increased in February 2023, the District determined that they then needed to conduct an FBA to address L.T.'s behavior. As per the testimony of the witnesses, prior to that point, the function of L.T.'s behavior had not changed, and an FBA was not necessary. When Wiedemann completed the FBA and developed a new BIP, Wiedemann's BIP mirrored the behavior modifications, supports, and instruction already occurring in L.T.'s classroom. There were very minimal changes made to what already was in existence. Thus, while petitioner may believe that L.T. required an earlier FBA, it is **CONCLUDED** that the weight of the evidence shows that an earlier FBA was not necessary, and the district, at all times relevant, utilized comprehensive, appropriate, and individualized strategies to respond to L.T.'s behavior.

District staff did not support adding counseling to L.T.'s program or increasing the frequency and duration of L.T.'s current related services. District staff stressed the importance of L.T. receiving related services in the school. The skills can best be taught and generalized in the school setting. Additionally, when L.T.'s related services are provided in the school environment, the related service providers are able to collaborate with and receive feedback from L.T.'s teachers, which not only improves the quality of L.T.'s related services, but also allows for the integration of the skills taught into her educational curriculum. District staff also expressed concern that increasing the amount of services may do more harm than good. L.T.'s therapists added that L.T. is progressing towards her IEP goals and objectives, and while she did not master all of her goals and objectives during the 2022-2023 school year, she is making progress towards them, and this is considered a success and material benefit to L.T. Thus, it is **CONCLUDED** that adding additional time for services and modifications is not warranted by the testimony and evidence presented.

Regarding L.T.'s transportation, the district has gone above and beyond in accommodating L.T.'s unique needs during her transportation to school. The district provides L.T. transportation each day with her 1:1 nurse. Further, no other student can be added to L.T.'s transportation route without consultation with the district, and as no other student has been added to L.T.'s transportation route, she is effectively provided with private transportation. The district implemented a pick-up window for L.T. each morning from 7:30 a.m. to 7:45 a.m., which, if utilized correctly, provides time for the staff to address any behavior or opposition from L.T. to get on the bus. However, the petitioner regularly arranges for L.T. to leave the house at 7:45 a.m., at the end of the window, defeating the purpose of this accommodation. It is important that L.T. arrives at school at 8:00 a.m. It is up to the petitioner to ensure that L.T. leaves the house prior to 7:45 a.m. I **CONCLUDE** that the district has at all times relevant hereto accommodated all of petitioner's transportation requests.

Lastly, the District staff believe that L.T. requires counseling services. Liddy, Bussinelli, Schubert and Wiedemann testified that the emotional education and support embedded in L.T.'s classroom provide the necessary emotional support to L.T. Moreover, it was opined that a pull-out counseling model may actually harm L.T. as she would be required to hold onto emotions to discuss during a counseling session, rather than

responding to them in real time using the emotional supports embedded in L.T.'s daily instruction, such as the Zones of Regulation. I **CONCLUDE** that separate counseling services, in addition to what is already being afforded through L.T.'s IEP is not warranted.

Petitioner may want more or different services for her daughter, but there simply is no basis, neither factual nor legal, for petitioner to claim that the program that the district offered to L.T. for the 2022-2023 school year did not meet IDEA standards for FAPE in LRE. Petitioner has provided insufficient supporting evidence for her positions in the Petition.

I **CONCLUDE** that the district met its burden of proof and clearly demonstrated that at all times relevant in this litigation, it provided an IEP for L.T. which met the standard of FAPE in the LRE. All the credible testimony and evidence admitted into the record demonstrated that L.T. was offered an appropriate program. Accordingly, there is no basis to conclude that petitioner is entitled to compensatory services to make progress towards her IEP goals and objectives. The district provided and continued to offer FAPE to L.T. throughout the 2022-2023 school year, which is the point in time that this Court is reviewing. The petitioner has failed to provide credible evidence that the district program and placement did not meet the standard of offering FAPE in the LRE, and therefore, there is no basis for the relief sought by the petitioner.

### **ORDER**

For the reasons set forth above and the district having met its burden of proof, I **CONCLUDE** that the district demonstrated that at all times relevant in this litigation, it provided an appropriate IEP for L.T. which met the standard of FAPE in L.T.'s LRE, thus it is **ORDERED** that petitioner's petition is **DENIED**.

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

concern should be communicated in writing to the Director, Office of Special Education Programs.

October 4, 2023

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DATE

Date Received at Agency

Date Mailed to Parties:  
sej



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**ELISSA MIZZONE TESTA, ALJ**

October 4, 2023

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October 4, 2024

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## **APPENDIX**

### **WITNESSES**

#### **For Petitioner:**

Jeanine Gervasio  
Elenore Vanwyk  
Debi Wolfe  
Mary Schubert  
Doris Monroe  
Catherine Buckley Smith  
Catherine Carisi  
Kaitlyn Dawson  
Bebe Cherian  
Katherine Wiedemann

#### **For Respondent:**

Kierstyn Liddy  
Regina Bussinelli

## **EXHIBITS IDENTIFIED AND MOVED INTO EVIDENCE**

#### **For Petitioner:**

- P-2 Summer OT and PT email dated April 24, 2023
- P-3 Note January 11, 2022 regarding regression physical therapy email dated, January 11, 2022
- P-4 Counseling session rate email from Home Therapist Mrs. Venderhoff on March 13, 2023
- P-5 Incident Today (March 20, 2023) An hour of refusing to put shoes on during Gym weight room
- P-6 Thursday April 13, 2023 Incident - (She escalated again, began crying and talking about her home life. I re-directed her and continued to follow planned ignoring".
- P-7 Thursday April 13, 2023 incident - Mrs. Simon stating the district does not agree

that counseling is a necessary related service for FAPE.

- P-8 Thank you and Gym question dated April 10 2023 (Asking to CC gym teacher for issues relating gym)
- P-9 Case manager response April 12, 2023 that Mr. Cronk will be attending our IEP meeting tomorrow. (In the IEP meeting Mr. Cronk stated that our daughter did not want to participate in gym activities from January till few days before the meeting on April 13, 2023)
- P-10 Urgent time sensitive and important intervention request dated March 14, 2023 to superintendent.
- P-11 Incident today
- P-12 Physical therapy re-evaluation
- P-13 Dr. Gervasio note from August 16, 2022 Pediatric Home Physical Therapy
- P-14 Bus problems on Friday requesting intervention please dated March 20, 23
- P-15 Incident today dated March 16, 2023
- P-16 Incident today March 17, 2023
- P-17 Bus driver warning- immediate action required January 26, 2022
- P-18 Physical therapist email dated Jan 12, 2022 regarding virtual session .
- P-19 Question about reading email dated October 13, 2022.
- P-20 Emails thread Second page dated August 26, 2022 asking for therapy counts and what is due make up to Director of ILA and Mrs. Rizzo, neither responded to this question.
- P-21 Summer program and request for IEP meeting (Not done in thirty-days)
- P-22 IP meeting request in thirty-days or less email thread
- P-23 May 13, 2022
- P-24 October 3, 2022 IEP

For Respondent

- R-1 Notice following an Annual Review IEP Meeting to parents dated December 17, 2021 from Kierstyn Liddy, Case Manager with Letter dated December 1, 2021 from Lisa Rizzo, Director of Special Services
- R-2 Letter dated July15, 2022 to parent from Kierstyn Liddy, Case Manager enclosing IEP dated May 13, 2022 with IEP attached.
- R-3 Inclusive Learning Academy Progress Reports for Grade 6



- R-4 Email from Bebe Cherian, Director, Supervisor of Special Education at ILA dated 8/23/22 to parent, Kierstyn Liddy and Lisa Rizzao advising that ILA will not be reopening in September 2022
- R-5 Notes of meeting held August 26, 2022 regarding change in placement.
- R-6 Email from parent to Board's counsel dated September 12, 2022 regarding change in placement.
- R-7 Special Education transportation requests for L.T. for School Year 2022-2023
- R-8 Responses to parent questions dated September 12, 2022 from Mahwah School staff.
- R-9 Notice following a re-evaluation IEP/thirty-day transfer meeting to parents dated October 3, 2022 with attached eligibility conference report/re-evaluation.
- R-10 IEP re-evaluation dated October 4, 2022.
- R-11 Email from Kierstyn Liddy to parent regarding program in Mahwah.
- R-12 Email from Mahwah Board counsel to parent and Kierstyn Liddy regarding IEP meeting.
- R-13 Email from Kierstyn Liddy to parents regarding date for meetings.
- R-14 Notice following a re-evaluation meeting dated December 5, 2022 to parents from Kierstyn Liddy
- R-15 Email from Kierstyn Liddy regarding resolution conference and IEP meeting dated December 6, 2022 with attached meeting notes with participants, discussion, and outcomes.
- R-16 IEP re-evaluation dated December 6, 2022.
- R-17 Emails by and between Kierstyn Liddy and parents responding to various issues dated January 23, 2023, January 25, 2023 and January 27, 2023.
- R-18 Email from Kierstyn Liddy dated February 2, 2023 attaching evaluation plan with attached letter to parents entitled: Following a Reevaluation Planning Meeting – Assessment Required indicating two assessments: Functional Behavior Assessment (School and Transportation) and Psychiatric Evaluation with signed consent by parents.
- R-19 Parent Informed Consent Form for FBA signed by parent February 10, 2023.
- R-20 Ramapo Ridge Middle School Report Cards for First and Second Marking Period, grade 7.
- R-21 Curriculum Vitae for Katherine DeCotiis Wiedemann, MAT, BCBA.

- R-23 Emails dated January 12, 2023 through March 2, 2023 with handwritten notes; and copy of a letter sent to Judge Monaco regarding a separate due process case dated March 8, 2023.
- R-25 Email dated March 13, 2023 between Petitioner and private therapist Kaitlin Vanderhoff, LCSW
- R-26 Functional Behavior Assessment by Katherine D. Wiedemann, MAT, BCBA dated December 4, 2021.
- R-27 Functional Behavior Assessment by Katherine D. Wiedemann, MAT, BCBA dated April 12, 2023.
- R-28 Eligibility Conference Report- Re-Evaluation signed April 13, 2023 for meeting dated August 2, 2022.
- R-29 Eligibility Conference Report – Re-Evaluation signed April 13, 2023 for meeting dated April 13, 2023.
- R-30 Notice following a RE-Evaluation IEP Meeting dated April 17, 2023 sent to Sherry Maz and Jay Taheri by Kierstyn Liddy
- R-31 Emails by parents following IEP meeting held on April 13, 2023.
- R-32 Special Education Transportation Request updated April 20, 2023.

**It should be noted that Exhibits P-1, R-22 and R-24 were excluded because they pertain to issues that have already been decided under previously filed due process petitions before the Hon. Thomas Betancourt, ALJ, the Hon. Ernest M. Bongiovanni, ALJ, and the Hon. Margaret Monaco, ALJ, or are to be decided under another pending due process petition before The Hon. Matthew Miller, ALJ., and thus are not issues under this due process petition before the undersigned, bearing docket number EDS 11066-22.**