



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 01883-23

AGENCY DKT. NO. 2023-35350

A.E. AND K.E. ON BEHALF OF R.E.,

Petitioners,

v.

SAYREVILLE BOROUGH

BOARD OF EDUCATION,

Respondent.

Alyssa Drazin, Esq., for petitioner (Barger & Gaines, attorneys)

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, P.C., attorneys)

Record Closed: January 11, 2024

Decided: February 16, 2024

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioners' son R.E. is in seventh grade. R.E. was deemed eligible for special education under the Specific Learning Disabilities classification category since he was in second grade. Petitioners assert that the individualized education programs (IEPs) provided by respondent Sayreville Borough Board of Education (Board or District) for sixth and seventh grade failed to provide a free, appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act (IDEA). They argue that based upon the information available to the District at the time it prepared the sixth- and seventh-grade IEPs, they were not reasonably calculated to provide their son with significant learning and a meaningful educational benefit. Rather, the District continued the same or essentially the same program that had already failed to meet his educational needs. They also assert that the IEPs proposed by the District for sixth and seventh grade violated Section 504 of the Rehabilitation Act of 1973. They seek an order placing R.E. in an out-of-district school "for so long as remains appropriate," reimbursement of the costs of their experts, and compensatory education. The District asserts that the IEPs provided R.E. a FAPE in sixth and seventh grade and that it offered a revised IEP that added additional benefits for his education. The District contends that R.E. achieved significant learning outcomes.

PROCEDURAL HISTORY

Petitioners filed a due-process petition on January 9, 2023. The matter was transmitted by the Department of Education, Office of Special Education (OSE), to the Office of Administrative Law (OAL), where it was filed on March 3, 2023, as a contested case. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. A prehearing conference was held on March 22, 2023, during which the hearing was scheduled to be conducted on June 7, 2023, June 8, 2023, and June 28, 2023. These hearing dates were adjourned in response to petitioners' request, which was occasioned by the unavailability of their expert witness. The hearing was rescheduled to September 18, 2023, September 20, 2023, and October 17, 2023. These dates were adjourned in response to respondent's request, due to a change in counsel. The hearing was conducted on October 6, 2023, October 16, 2023, October 23, 2023, and January 11, 2024. The record closed on January 11, 2024.

FACTUAL DISCUSSION AND FINDINGS

Most of the pertinent facts, taken from testimony and exhibits offered during the hearing, are undisputed.¹

R.E. is a thirteen-year-old boy who is currently in seventh grade. He was diagnosed with attention deficit hyperactivity disorder (ADHD) at age five or six and more recently with autism spectrum disorder (ASD). His mother, **K.E.**, credibly testified that, in first grade, she and R.E.'s father, A.E., requested a review by the school's child study team (CST) because R.E. refused or was reluctant to do schoolwork and had social and attention issues. Their doctor at Children's Specialized Hospital recommended a 504 Plan for the ADHD diagnosis, which the District implemented. The District did not refer R.E. to the CST. It had him repeat first grade, in particular because his reading skills were lacking. R.E. had the same problems while he repeated first grade and in second grade.

R.E.'s parents again requested a CST review while he was in second grade (2018–2019). In February 2019, the District conducted an Initial Learning Evaluation of R.E., during which his second-grade teacher was interviewed. The teacher reported he was “emotional, insecure, unmotivated and distractible” and that he was more distractible and required more one-on-one attention than other students. P-7 at 3. He had “incidents of physical and verbal aggression with peers” in multiple settings. Id. at 2. His performance in listening comprehension, oral expression, reading comprehension, mathematics reasoning, written expression, spelling, and editing was “limited.” Id. at 3. His “greatest weaknesses” were in reading comprehension and writing. Ibid. His Developmental Reading Assessment (DRA) level corresponded to the end of first grade and had not improved since September 2018. He could not progress further because he could not “get past the comprehension piece.” Id. at 2. The score report in the evaluation indicated that he had limited proficiency in broad reading, reading fluency, math calculation skills,

¹ The transcripts of the October 6, 2023, October 16, 2023, and October 23, 2023, hearing dates are referred to herein as “T1,” “T2,” and “T3,” followed by the referenced page and line numbers.

written expression, academic fluency, math facts fluency, and sentence-writing fluency. P-7.²

The District determined R.E. was eligible for special education under the specific learning disability (SLD) classification category. His disability was “characterized by a severe discrepancy between [his] current achievement and intellectual ability in” listening comprehension, mathematical computation, written expression, and reading fluency. P-10 at 4–5. His first IEP, dated April 11, 2019, reported his relative weaknesses in sentence-writing fluency, broad reading, reading comprehension, and broad mathematics and that he would likely require “intensive instructional support and targeted interventions in reading/language arts and math calculation.” P-10 at 5. Because he was diagnosed with ADHD³, the IEP noted that he “may have difficulty following and attending when information is presented.” Ibid.

The April 22, 2019, IEP had two reading goals, one writing goal, and two mathematics goals. It placed R.E. in an in-class resource program (ICR) for reading/language arts, math, science, and social studies. ICR is a general education classroom with general and special education students and one general and one special education teacher who provides in-class support. The general education curriculum is utilized. All of his IEPs through February 2022 provided for an ICR placement for these subjects.

K.E. noted that R.E. struggled with homework, attention, and social skills and that he had difficulty with bathroom issues. She believed he had anxiety because he was slow to adjust to new people or situations and would become fearful. Also, he was easily overwhelmed and frustrated.

² The Weschler Intelligence Scale for Children, Fifth Ed. (WISC-V) reported a full-scale IQ of 115 (84 percentile rank (PR)). The Woodcock Johnson Tests of Achievement-IV (WJ-IV) reported basic reading skills (96 standard score (SS), 39 PR); math calculations (88 SS, 21 PR); math problem solving (97 SS, 42 PR); reading comprehension (94 SS, 35 PR); reading fluency (90 SS, 25 PR); and written expression (88 SS, 22 PR). The Woodcock Johnson-4 Test of Oral Language (WJ-4) reported listening comprehension (89 SS, 22 PR) and oral expression (99 SS, 47 PR). P-15 at 4.

³ He had not yet been diagnosed with ASD.

R.E.'s second-grade progress report indicated that, at the end of the year, he had progressed satisfactorily and was expected to achieve his reading goals. He had progressed gradually⁴ with respect to three of his writing goals; he progressed satisfactorily with respect to the other writing goals. P-13.

In third grade, he made less than expected progress or progressed gradually with respect to his writing goals. P-14. K.E. reported that he continued to struggle in third grade and that getting him to read was like "pulling teeth." T2 229:10–11.

The March 13, 2020, IEP (which applied to the end of third grade and fourth grade) identified reading, writing, math, and social/emotional/behavioral skills as areas of need. P-15; R-5. The IEP reported that he "struggle[d] to understand how his actions can affect others[;] need[ed] help to cope with frustration at times[;] and struggle[d] to maintain a positive relationship with his peers." Ibid. Two social/emotional/behavioral goals were added. Id. at 8. R.E.'s report card for the end of third grade indicated he needed support with reading grade-level text with accuracy, fluency, and comprehension. P-16 at 1. This means that he was not grasping key concepts, processes, and essential skills. Id. at 2.

A December 14, 2020, IEP (fourth grade) identified the same needs as the prior IEP. P-17 at 6. The December 2020 progress report documented that R.E. was progressing gradually, and thus making less than anticipated progress with respect to his sole writing goal. P-18. He was progressing gradually or inconsistently with respect to his social, emotional, and behavioral goals. Ibid. The IEP did not incorporate new goals for counseling or reading and writing. P-17.

The March 11, 2021, IEP (for the end of fourth grade and fifth grade) included one reading goal, two writing goals, two math goals, and no goals to address social/emotional/behavioral needs. P-19 at 9. Modifications were included to address his self-esteem ("provide consistent praise to elevate self-esteem" and "discuss behavioral issues with the student privately"). Id. at 10. It reported that R.E. read at a "level 0" in the Fountas and Pinnell Reading Program. Id. at 6. This meant he did not

⁴ Indicating that he made less than anticipated progress but could have possibly achieved the goal.

meet expectations and required intensive intervention. P-69. Each of his teachers reported that he benefited from teacher prompting and modeling. P-19 at 6.

R.E.'s fourth grade report card indicated that he needed support with language arts. Throughout the school year he needed support with reading grade-level text with accuracy, fluency, and comprehension. P-22 at 1. During the last term, he needed support with using details to make connections and inferences, asking and answering questions using textual evidence, drawing evidence from text to support analysis, reflection and research, and understanding and applying the conventions of writing. Ibid. He was found to need support in four mathematics sub-categories. Ibid. He was graded as meeting standards, approaching standards ("beginning to grasp and apply key concepts, processes and skills"), or not assessed in the other sub-categories during various terms. Ibid.

K.E. testified that in fifth grade, homework was a "battle," and he could not do it on his own. T2 235:22. He continued to have behavioral and social issues; it was extremely difficult to get him to read anything; he struggled with reading comprehension and spelling; he did not complete assignments; his teacher reported that he often avoided completing homework; he required frequent redirection and performed better when working one-on-one; he was easily upset; and when he was frustrated he pulled his hair and clenched his fists. R.E. never spoke about friends and was not invited to play dates or birthday parties. Rather, if he said anything it was "when somebody was giving him trouble and even then [K.E.] had to drag it out of him." T2 247:16–18. R.E.'s poor speech language assessment, on which his score was seven for everyday communication and social interactions, was consistent with what K.E. observed.

The "Start Strong" mathematics assessment was administered at the start of fifth grade (fall 2021). R.E.'s score of eight fell within the lowest category and indicated that he needed strong support for mathematics. P-21.

At the time of a February 10, 2022, re-evaluation meeting, his reading level did not meet expectations such that he required intensive intervention. The District proposed education, psychological, social history, speech/language, and neurological evaluations.

It cited to his mother's report that he had been exhibiting maladaptive behaviors that may have been indicative of ASD as well as bathroom difficulties and "overall behavior dysregulation." R-11. Also, because petitioners retained Dr. Priscilla Morrison, Psy.D., the District wanted to review Dr. Morrison's findings and recommendations. Ibid.

The February 11, 2022, IEP (end of fifth grade and sixth grade) identified the same areas of concern, reading, math, and writing, and had one goal for each subject. P-23 at 7–9. It did not include social/emotional/behavioral goals. It continued ICR placement for all classes.

The New Jersey State Learning Assessment (NJSLA)⁵ was administered in spring 2022. R.E. scored 691 on math, which indicated he did not yet meet expectations. P-27 at 1. He scored 703 on language arts, with a score of 36 on reading and 10 on writing; 10 was the lowest possible score. The overall score of 703 indicated he partially met expectations. Id. at 2.

Progress reports for March and June of the 2021–2022 school year (fifth grade) indicated that R.E. progressed gradually and then satisfactorily in his reading goal and its objectives/benchmarks. P-25 at 1. It also reported that he progressed gradually in his writing and math goals. Id. at 2. R.E.'s report card for the end of fifth grade reported that he met standards for "reading at grade level with sufficient accuracy and fluency to support comprehension." P-30 at 1. His teacher reported that he met standards in six other language arts sub-categories and that he approached or met standards in math. Ibid.

Dr. Morrison observed R.E. at school on March 8, 2022, and administered the Kaufman Test of Educational Achievement (KTEA) on April 6, 2022, April 11, 2022, April 28, 2022, and May 18, 2022. She met with R.E. and his parents; conducted a neuropsychological evaluation of R.E.; reviewed records, including background information about R.E. and information from his teachers; conducted a clinical interview and in-school observation; and administered tests to assess brain function.

⁵ A standardized test that measures a student's progress. T1 205:8–9.

Dr. Morrison agreed that R.E. had ADHD. His IQ indicated that he should be able to learn and perform at grade level. However, he had specific learning disabilities in reading, writing, and mathematics. A specific learning disability means that there is a divergence between a student's educational performance and cognitive abilities. With respect to reading, he had "significant challenges with aspects of phonological awareness"⁶ and "difficulties with reading fluency and comprehension." T3 77:15–17. He scored at the 5th percentile for blending words, which was well below expectations for a fifth-grade student. He scored at the 9th percentile for blending non-words.⁷ His ability to recall words was below age-level expectations (16th percentile), and he became easily confused by multiple-choice options. P-24 at 13. He scored below age-level expectations on most measures of his reading skills, with the exceptions of repeating nonwords (37th percentile), manipulation of sounds (50th percentile) and decoding (47th percentile). P-24 at 11.

Word recognition (19th percentile) and word recognition fluency (23rd percentile) were in the low average range. Reading accuracy with short texts (16th percentile) and reading rate, when not permitted to review text (9th percentile), were below age-level expectations (16th percentile). When presented with longer texts, his reading rate (5th percentile) and fluency (4th–9th percentile) were well below age-level expectations. Other areas were in the low average or average range. P-24 at 11.

Testing of R.E.'s written expression skills indicated below-age-level performance in spelling (10th percentile); writing fluency was within the extremely low range (0.4th percentile); and written expression was within the very low range (7th percentile). Id. at 11–12. This indicated he could not identify sounds and sequence appropriately. He also had difficulty remembering instructions and had difficulty with capitalization and punctuation, which he should know in fifth grade.

⁶ The ability to identify and sequence sounds; to put individual sounds "together in order to read a word" and to spell words. T3 77:20–25.

⁷ "Non-words are made up nonsensical words that one could read using basic phonics." T3 78:16–17.

Because R.E.'s prior educational evaluations used different measures, their results could not be directly compared to Dr. Morrison's evaluations. However, comparisons of similar tasks indicated significant decline in reading fluency of sentences, writing fluency, and written expression since February 2019. Id. at 11–12.

In math, R.E.'s basic arithmetic skills (9th) and math fluency (9th) were below age-level expectations. His performance appeared to be "fairly similar" to that in 2019, although the prior measurements were different than Dr. Morrison's. Id. at 2.

Dr. Morrison administered the Behavior Assessment System for Children (BASC), which indicated problems with functional communication. This is the "ability to use language effectively in their day to day life." T3 85:5–6. Word retrieval, his ability to "rapidly retrieve verbal information," which is related to reading, was "weak." T3 85:10–13; P-24 at 12.

With respect to executive functioning,⁸ he could "perform adequately on brief formal measures" but he "reported having significant challenges in his day to day life which was consistent with what [his] parents and teachers reported[.]" T3 87:4–7. R.E.'s self-report, and that of his teachers and parents, "revealed clinically significant concerns regarding self-monitoring, shifting, emotional control, task completion, working memory, planning/organization, initiation, task-monitoring and organization of materials." R-24 at 19. R.E. demonstrated, and his parents also reported, repetitive behavior, restricted interests, and difficulty with flexibility and adapting to change. R.E. reported a "negative attitude toward school," poor self-esteem and feelings of inadequacy, a sense that "people are out to get him," a feeling that he does not have control, and difficulty doing and figuring out things on his own. T3 94:6–24. His parents expressed concerns about withdrawal, social skills, adaptability, activities of daily living, and verbal aggression or arguing. His teachers reported that he exhibited anxiety, somatization, and symptoms of depression.

⁸ A "variety of different higher order more complex tasks or abilities" including "attention, working memory, processing speed, self-control, cognitive flexibility, inhibition, planning and organization[.]" T3 86:17–22.

Dr. Morrison observed R.E. in his language arts class and during lunch. He had “some trouble” paying attention and engaged in some behaviors that could be indicative of autism. During lunch, he “primarily sat in silence” although he occasionally spoke with his peers. T3 76:6.

Based upon her review of records, Dr. Morrison highlighted that R.E. experienced bathroom accidents continuing through fifth grade; he had difficulties with peers since early elementary school; and he had problems with reading, writing, and math and with completing assignments throughout his schooling. Teacher reports indicated work avoidance, a need for frequent redirection, and that he worked better when one-on-one with a teacher. Teacher reports also indicated difficulty with emotional regulation and interactions with people. This indicated “significant social challenges” because it was atypical of children at this age. T3 74:13.

Dr. Morrison observed or noted in records that R.E. had an “intense restricted interest” in a few things. T3 74:20. This is seen in people with autism. That he became overwhelmed by seemingly small matters suggested possible anxiety in addition to behavior regulation problems.

An autism assessment could not be administered in the required manner due to COVID-19 pandemic restrictions. However, its results, when considered in conjunction with the Brief Observation of Symptoms of Autism (BOSA) assessment and R.E.’s developmental history, indicated he met the two major criteria clusters for autism spectrum disorder. The first is persistent deficits in social communication and interaction, including social and emotional reciprocity, non-verbal communication, and deficits in initiating, maintaining, and understanding relationships. R.E. has “a long history of difficulties with social communication and social-emotional reciprocity.” P-24 at 19. He reported never having a best friend, and he has difficulty engaging in daily interactions with peers and adults. The second criteria cluster concerns restrictive, repetitive behaviors, activities, and interests. R.E. has a “history of repetitive behavior which has varied somewhat over time. Verbally, he has been observed to be echolalic and exhibited scripting as a young child.” Ibid. He also demonstrated repetitive motor movements; has restricted/intense interests; has “significant difficulties with change and can be rather

rigid[;] . . . and has a history of sensory sensitivities.” Ibid. He, thus, “requires support for deficits in social communication and restricted, repetitive behaviors.” Ibid.

Given that R.E. has been in the same program for a number of years, his progress would necessarily continue to be limited without a change in his program. The state standardized testing conducted in spring 2022 confirmed Dr. Morrison’s findings. “Continuing to provide in-class support or even pulling [R.E.] out for a specified amount of time will likely result in limited progress given the extent and nature of his academic challenges.” R-24 at 20. In making this recommendation, Dr. Morrison noted that teacher reports indicated R.E. performed better when in a one-on-one setting.

R.E. requires specialized instruction that is integrated in all classes and throughout his school day. The instruction must include an evidence-based multisensory program to address language-based learning deficits. This is a program that research has demonstrated is appropriate for students with language-based learning deficits. The multisensory component enables students to use their senses to learn how to identify sounds and sequence, blend, and read words. This was important for R.E. given Dr. Morrison’s observations of the “level of difficulty” he experienced. T3 100:10–11. She did not observe that a program of this type was being used in R.E.’s language arts class or find references to it in his records. R.E. also required intensive intervention for math deficits, but there was no evidence in his records that this was being provided. It must be provided in a small group or individual setting.

These instructional elements need to be integrated fully in all of R.E.’s classes. Language is used to teach and learn math, as well as social studies and science. Similarly, math skills are required in science class. R.E.’s records did not demonstrate that this was happening in his classes.

Dr. Morrison’s recommendations included:

Evidence-based, multi-sensory intervention for language-based learning deficits and intensive intervention for math deficits. This should include systematic and targeted individual and/or small group instruction.

Specific instruction to address difficulties with executive functioning and reinforcement integrated throughout the day across all subjects and school activities.

Explicit instruction in social skills and support for learning implementation of these skills throughout the school day during all classes.

Individualized behavioral interventions to facilitate increased engagement in academic work.

[P-24 at 21–22.]

On July 1, 2022, petitioners requested a meeting to discuss their request for an out-of-district placement. R.E. was not moved to an out-of-district school.

R.E.'s August 17, 2022, IEP (sixth and seventh grade) was issued after the CST reviewed Dr. Morrison's report. P-32. It identified needs in the areas of reading, writing, and math but not social skills or executive functioning. It reported that R.E.'s reading level at the end of fifth grade, as measured by Fountas and Pinnell, was level S, which meant that he was meeting expectations for fourth grade. P-32 at 6; P-69. It stated that behavioral interventions were not needed. P-32 at 8–9. It did not include goals for reading fluency, spelling, executive functioning, emotional/behavioral issues, or social skills. The IEP team proposed the following changes to R.E.'s sixth-grade program in response to petitioners' concerns and Dr. Morrison's report:

- Pull-out replacement (POR) classroom for language arts and math.
- 1:1 supplemental instruction for language arts and math, one hour per week for each, from October 1, 2022, through June 15, 2023.
- Literacy and math academy, two days per week for each, forty-five minutes per session, before or after school. The academies provided small group instruction for students with IEPs.
- Additional supports in the classroom and state testing accommodations in accord with Dr. Morrison's recommendations.

- Referral to Effective School Solutions (ESS) “for intake to assess social/emotional and executive functioning needs and treatment planning, if appropriate.”

[P-32 at 17.]

The ICR placement would continue for social studies and science.

Samantha B. Barone, Ed.S., NCSP, became R.E.’s case manager during his sixth-grade year (2022–2023) and conducted his social skills group. Barone is a certified school psychologist and has been a school psychologist and case manager for the District since July 2015, received her Ed.S. in school psychology in May 2015, and holds a graduate certificate in applied behavioral analysis. R-61. As a District school psychologist, she manages the caseloads of approximately seventy-five in-district and out-of-district students; conducts psychological evaluations; participates in the preparation of IEPs; provides individual and group counseling; and works with school staff concerning students’ academic or behavioral issues. Ibid. She was admitted as an expert on behalf of the District in the fields of school psychology and special education.

Barone testified that R.E. is an intelligent and nice boy who is artistic and enjoys video games; he is quiet and needs time to warm up to others. She saw him at least twice per week and sometimes several times per week to check in on him and during social skills group. Five or six boys, selected based upon their need, participated in social skills group. They addressed communication skills and verbal and non-verbal conversation; engaged in scenarios; and used games to build rapport and skills. The goal was to generalize R.E.’s social skills. She reported that he always participated and did well. She observed him interact with a peer group, with whom he consistently sat, at lunch.

Barone also met with R.E. when a teacher reported that he was behind on his work. He “doesn’t complete homework” and he missed many assignments, and he also did not complete work during class. This “snowballed,” and she would spend time with him to ensure that he completed his work. T1 49:5–11. R.E.’s teachers told her that he is intelligent and he does his work; participates in class; and was making progress. They

also said that he is social in class and has friends in his class. However, the “major concern” was that “nothing would really ever come back with regards to homework.” T1 49:24–25.

Barone believed the supplemental instruction provided by the August 17, 2022, IEP was appropriate. The District used evidence-based interventions in R.E.’s language and math classes. Project Read is such a program, as is Moby Max and the other math programs that were utilized. R.E. did not require evidence-based instruction for social studies and science because he did not historically have difficulty in those areas. He received in-class support in those classes and performed well. Barone believed R.E. needed less assistance in these classes because he was interested in them. Also, she believed he did not need more in the way of social skills instruction because he participated regularly and made progress in her social skills group.

The IEP proposed evaluations and assessments, which would be “discussed at a subsequent re-evaluation eligibility determination meeting, at which point [R.E.’s] IEP will be updated as needed to reflect the additional evaluation data and any accompanying recommendations.” Id. at 17. The IEP stated that these proposals were made in response to petitioners’ concerns and the “diagnostic impressions and recommendations” in Dr. Morrison’s first report. Ibid. The evaluations and findings follow:

- An August 29, 2022, educational evaluation; report issued on September 1, 2022. P-38. R.E. scored in the low average or average range in eight of thirty-two clusters or subtests. He scored in the low range for reading fluency, broad math, math calculation, and written expression. He scored in the very low range for academic fluency, sentence-reading fluency, math facts fluency, and sentence-writing fluency. He scored in the low average range for broad achievement, academic fluency, broad written language, written language, spelling, passage comprehension, calculation, oral reading and reading recall. Ibid.

- September 19, 2022, pediatric neurologic-neurodevelopmental examination by Dorothy Pietrucha, M.D. Dr. Pietrucha diagnosed autism spectrum disorder, high-functioning, ADHD, and anxiety. P-40.
- A September 14, 2022, occupational therapy evaluation. P-39.
- A September 15, 2022, and September 21, 2022, speech-language evaluation. P-41. R.E. scored in the 7th percentile rank on the test of pragmatic language, which was below average. Id. at 2.
- Functional Behavior Assessment (FBA), conducted September 28, 2022. This was the first FBA conducted for R.E. It concluded that he did not “engage in interfering behavior in the school setting. Motor stereotypy did not occur at rates, or with duration or intensity to have a significant effect on [his] academic or social progress. Off task behavior occurred more frequently. In addition, [his] teachers noted that his inattention and disengagement can be a concern. . . . [O]ff task behavior occurs more often when [R.E.] is disinterested and/or challenged by the subject matter. However, data showed that [he] is rarely off task for periods longer than one minute, and often independently resumes work.” P-43 at 5. Strategies to “improve [his] attention, time-management and preparedness in school” were recommended. Ibid.

Dr. Morrison advised petitioners that the August 17, 2022, IEP was inappropriate. While it offered “some support in certain areas[,]” it “did not provide the appropriate amount or level of intervention” R.E. required, as detailed in her prior report. P-33 at 1. She cited the following inadequacies:

- The IEP did not reference an evidence-based intervention that would be integrated throughout the school day in all classes. R.E.’s program continued to be “piece-meal.” Id. at 1.
- Continuation of supplemental academic sessions before and/or after school was inappropriate due to R.E.’s strong “negative attitude toward school.” Ibid. Dr. Morrison anticipated that he would “likely not appreciate” longer school days and that this would not foster a “love for learning,” which R.E.

had not yet developed. Ibid. Rather, R.E. “may perceive these sessions as punishment or consequence of his learning deficits[.]” Ibid. His supports should be “integrated as a core part of his program rather than added as supplemental components.” Ibid.

- The IEP lacked adequate support for R.E.’s “symptoms of inattention” and “executive functioning challenges.” Ibid. This must be explicitly taught and integrated and reinforced throughout the day. Also, while the IEP stated that tasks would be broken down, it did not specifically explain how this would be done. Skills must be taught explicitly, and implementation must be monitored throughout the day, with prompts/reminders and positive reinforcement to increase his use of the strategies. R.E. must graduate to performing the skills himself, which is “important for academic and daily functioning[.]” Ibid.
- The IEP lacked “a comprehensive and integrated approach for addressing social skills deficits.” R.E. required more than the mere provision of opportunities for peer interactions. Rather, he required “explicit instruction for social skill challenges and integration of these skills throughout the course of the school day” in “real-world situations.” Id. at 2. One-on-one or small group settings, while “somewhat helpful,” do not facilitate ongoing implementation of these skills. An “integrated approach is required rather than a piece-meal attempt to only address deficits during a specified amount of time per week.” Ibid.

Dr. Morrison concluded an out-of-district placement was required because, based upon the above, “the district is unable to provide an appropriate program.” Ibid. On October 14, 2022, petitioners requested an out-of-district placement. The District did not consent to the placement.

The October 17, 2022, IEP (for sixth and seventh grade) included one study skills goal, six reading goals, five writing goals, four math goals, one social/emotional/behavioral goal, and one speech goal. P-43 at 17–20. It continued the POR placements for language arts and math and ICR for science and social studies. It

provided speech language therapy one time per week for twenty-five minutes, eight social skills group sessions per year, and one individual counseling session per week with ESS for thirty minutes.⁹ It also proposed one hour of supplemental language arts and one hour of supplemental math instruction per week, literacy academy twice per week, and math academy twice per week. The academies were available from November 28, 2022, through March 16, 2023, and were offered before or after school. P-43 at 1–2.

In the IEP, R.E.’s sixth-grade language arts and math teachers reported his Present Levels of Academic Achievement and Functional Performance (PLAAFP). The language arts teacher reported that he was assessed using the Project Read Spelling and Phonics Inventory. She listed his strengths, which included that “he knew all his consonants, short vowels, digraphs, diphthongs, and blend sounds in words” and that he “easily pronounces and reads words with long vowels and other vowel pairs[.] . . . Decoding seems to be a strength.” P-43 at 12. She reported that he was weak in writing as he is “inconsistent with staying on topic, organizing his thoughts, using complete sentences, and using correct capitalization/punctuation.” Ibid. He “needs refocusing at times and can be easily distracted. He works well independently as well as in small groups/partners. He volunteers to answer lesson questions or to share personal experiences to add to lessons.” Ibid.

The math teacher reported that R.E. followed the sixth-grade math curriculum “with modifications geared toward pacing and content exposure.” Ibid. The Moby Max program was used to identify and “fix learning gaps with adaptive, differentiated, and individual learning. R.E. received a 3.5 [on the Moby Max placement test] which means that the program started to notice mathematical gaps during the 3rd grade level.” Ibid. The program provides “targeted learning tutorials to help with closing mathematical gaps.” Ibid. R.E. was able to access the program at home and at school, and his teacher encouraged him to use it as often as possible. The math teacher also reported that, while R.E. follows class rules and is polite toward the teacher and his classmates, he “can become distracted and tuned out.” Ibid. With redirection, he focuses on the lesson and

⁹ The IEP reported that R.E.’s “overall involvement with ESS has been positive” and his parents participated in monthly family therapy sessions and attended monthly parent support group when able. Ibid.

the work. He advocates for himself when he needs help and accepts assistance. He sometimes needs material to be read to him, help decoding text and identifying key words, and “skills broken down into smaller parts” to help him “problem solve.” Ibid. The teacher wrote that he uses a multiplication chart and he “should work toward mastering all four operations [sic] act fluency” as well as review work daily, which will “continue to help improve his math skills.” Ibid.

The ESS counselor wrote that R.E. participated in individual sessions and “display[ed] good insight.” P-43 at 14. He was “open to new interventions as they are offered” and his parents participated in monthly therapy sessions and monthly parental support group when they are able. Ibid. The counselor listed two goals.¹⁰ First, R.E. would work toward expressing his feelings through controlled, respectful verbalization and healthy physical outlets. She reported R.E.’s progress with this goal by noting that he attended all individual sessions and was receptive to feedback. He interacted appropriately, showed respect, and was able to “identify a variety of ways to express and process his emotions.” Ibid. The second goal was that he would improve his social skills, social judgment with peers, and accept change. She reported his progress by noting that he was actively engaged and participated in all individual sessions. He “has been able to recognize situations in which he can improve his social judgement” and “displayed insight and is increasing awareness of his ability to make positive changes on his own.” Ibid.

On November 10, 2022, K.E. advised Barone that R.E. was resisting attending his regular classes. He was angry about the addition of ESS, tutoring sessions, and pre- and post-school classes. He yelled at his mother about “everything being too much for him.” P-47. He screamed when his parents encouraged him to attend school and the supplemental programs; refused to get out of bed or dressed in the morning; and kicked holes in the walls. He “constantly” asked to stay home and not go to school. T2 258:7. She ultimately needed to drive him to school, and he did attend school most days.

¹⁰ The goals were listed in the PLAAFP section of the IEP. The “Annual Measurable Academic and/or Functional Goals” section of the IEP listed one goal.

R.E. tried two different medications to treat ADHD. He took the lowest dose of both medications, the first for one month. R.E. resisted taking them such that K.E. chased him around the house in an effort to get him to take the medicine. After R.E. told his pediatrician that he did not feel like himself while taking the medicine, the doctor discontinued it and discouraged trying other medications. R.E. acknowledged that Dr. Morrison recommended ADHD medication.

On December 5, 2022, K.E. advised Barone he would not attend the academy that day because attending the academies and the individual tutoring was “too much.” P-49 at 2. He was willing to participate in individual tutoring. He was removed from the academy roster, as he could not be forced to attend.

Dr. Morrison observed R.E. in his language arts and math classes on January 30, 2023. Barone was present during the observation. Dr. Morrison noted that the language arts lesson was presented at a slower pace. However, R.E. required “significant support” with “foundational [language arts] academic skills.” P-50 at 1. He exhibited “poor phonological awareness and struggle[d] with reading accuracy, fluency and comprehension, as well as spelling.” Ibid. Math computation and fluency were also “significant areas of weakness.” Ibid. While the supplemental language arts and math instruction may have been “somewhat helpful,” R.E. required more than one hour per week per subject. Ibid. Also, if the supplemental instruction were perceived by R.E. as additional work, he would be less likely to be receptive to it. Dr. Morrison also highlighted the absence of executive functioning support. R.E. required “explicit instruction” in this area; however, she did not observe that skill acquisition was being addressed in class or elsewhere. Ibid. She cited specific examples of how these skills could have been addressed and reinforced in class but were not. She also noted that there were missed opportunities to address social skills in his classes. While the social skills group addressed important issues, she did not see that this was incorporated throughout the school day. She thus recommended an out-of-district placement.

R.E.’s final score for language arts, which was based upon his classroom performance, was seventy-five (“C”). His final score for math was eighty-three (“B”). R-

48. His progress report for June of his sixth-grade year indicated that he progressed satisfactorily or fully achieved his reading goals and objectives. R-49.

Petitioners retained Dr. Tina Snider to assess R.E.'s academic achievement while Dr. Morrison was on maternity leave. She met with R.E. and his parents and issued a report on May 12, 2023. P-53. She met with R.E. during a single session and noted that he "presented as very anxious and timid." Id. at 11. After he "settled into the environment[.]" he spontaneously responded but did not engage in conversation. Id. at 12. He said he was nervous; that school and tests made him nervous; and he often felt anxious. He also said that he tried his best on every task and that he worked better in a one-on-one setting. Dr. Snider noted that he "appeared to be thoughtful about his answers and responses[.]" Ibid.

Dr. Snider administered the Woodcock Johnson IV Tests of Achievement Form A to assess his progress since the 2019 assessments. R.E.'s Woodcock Johnson IV scores declined from 2019 to 2022 in "every single subtest score, and almost every cluster score" other than reading.¹¹ Id. at 18. Reading increased by two points, which is "not even outside of a confidence interval and thus the scores are considered equivalent[.]" Ibid. Math fluency scores "were severely delayed," with a relative proficiency index (RPI)¹² of "0/90." Id. at 14. This means that, while other students his age are 90 percent proficient, R.E. was 0 percent proficient.

Dr. Snider grouped individual subtest scores into clusters and identified where the grade equivalent of his performance was behind his then-current grade (sixth grade, eighth month):

- Reading 1 year behind
- Broad reading 1.9 years behind
- Basic reading skills 1 year behind

¹¹ -5 in broad reading, -1 in basic reading skills, -5 in reading fluency, -12 in mathematics, -25 in broad mathematics, -29 in math calculation skills, -20 in written language, -17 in broad written language, -20 in written expression, -8 in academic skills, -22 in academic fluency, -13 in academic applications, and -3 in brief achievement. Id. at 17–18.

¹² RPI measures a student's proficiency compared to that of other students his age. Id. at 14.

- Reading fluency 2.4 years behind
- Mathematics 2.5 years behind
- Broad mathematics 3.8 years behind
- Calculation skills 4.5 years behind
- Written language 4.4 years behind
- Broad written language 3.5 years behind
- Written expression 4.4 years behind
- Academic skills 2.1 years behind

[Id. at 16–17.]

Dr. Snider concluded that R.E. “cannot be in a mainstream educational setting. He requires a highly specialized, special education setting that can not only manage his academic issues but his emotional regulation as well.” Ibid. She found his “academic trajectory is significantly declining” and he “exhibits issues with . . . anxiety and social stress (and, as a byproduct, his executive functioning skills are worsening in step.)” Id. at 20. She specifically recommended:

1. Small group and/or 1:1 instruction with regular, consistent, and thorough executive functioning scaffolding all throughout his day—not just in core academic subjects.” Ibid.
2. Because some of his RPI scores were “exceedingly low[,]” R.E. cannot “manage the demands of a general education or even inclusion setting considering those scores and the entirety of his clinical profile.” Ibid.
3. Daily structured literacy instruction by a certified instructor and progression to other levels of the program only after he demonstrates mastery of the skills. The literacy instruction must be “carried through, and supported, in all classes.” Ibid.
4. “Explicit” reading comprehension instruction. Ibid.
5. Writing instruction “designed for students with learning disabilities (using a structured, empirically based writing program.)” Ibid.
6. Special education science and social studies classes.
7. With respect to R.E.’s emotional needs, “[w]hile he is receiving the outpatient care that he requires, the District must immediately set in place an action plan for his

care that can manage his complete social, emotional, and academic needs.” Id. at 21. Supports “must be built into the curriculum,” and the trained teachers must monitor and manage his symptoms. Ibid. While ESS is “a good program,” it does not offer “motivational, social-emotional responsiveness inside” the classroom. Ibid.

8. Accommodations and modifications.¹³

Snider concluded, “If the district cannot accommodate all of these . . . requirements and needs, an out of district placement must be secured.” Id. at 22.

Kimberly Grossman, the District’s director of Curriculum and Instruction, testified as an expert in instruction, curriculum, and administration, and in the application and interpretation of educational testing data. She is not an expert in special education; does not hold a special education certification; neither knows nor evaluated R.E.; and did not speak with his parents.

At the end of fifth grade, R.E.’s reading level, as measured by Fountas and Pinnell was level S, which meant that he was meeting expectations for fourth grade. P-32 at 6, P-69. Grossman acknowledged, however, that R.E. was not meeting expectations and required intensive intervention such as an alternate reading program.

LinkIt New Jersey Student Learning Standards (NJSLs)¹⁴ testing was administered at the start of sixth grade. It employs objective “benchmarking assessments” that are used to monitor progress against the NJSLs. T1 205:12. The State establishes “outcomes” that “students should be able to do or be able to understand by the end of their grade level.” T1 205:5–7. Students’ performances are measured by a percentage that represents how “likely” they are “going to be able to meet standards at

¹³ Including but not limited to chunking and minimization of homework; division of long-range assignments into smaller assignments, homework assignment pad and structured organizational system, direct, explicit and friendly instructions, extra testing time, shorter learning periods, longer breaks, and/or behavior medication program.

¹⁴ LinkIt is an online platform connected to the student’s goals and the work done in the classroom. It is used throughout the year. R.E. had access to an online glossary and the option to listen to the material using headphones.

the end of the academic year.” T1 206:16–19. The LinkIt test results showed that R.E. was 17 percent likely to meet math standards. A few months later, the assessment indicated he was 23 percent able to meet the established standards. Near the end of the year, he was at 57 percent. R-69 at 844. Grossman described this as a “large increase.” T1 207:10.

LinkIt scores for language arts showed that R.E. was 11 percent likely to meet NJSL standards at the start of sixth grade. At the end of sixth grade, he was 31 percent likely to meet standards. Each score was labeled as “partially meeting” expectations. R-69 at 845.

Project Read¹⁵ data showed that R.E. scored 83 out of 300 points when he took the test at the start of sixth grade. At the end of the year, he scored 244 points. R-69 at 844.

Achieve 3000 is a standardized test that “focuses on informational text”¹⁶ and is used for all students in grades three through eight. T1 211:19. The test was administered early and later during R.E.’s sixth-grade year. His score improved 80 points from the first (score 375) to the second test (455). R-69 at 845. Grossman testified that this equates to a “grade and a half growth working with that type of text.” T1 212:16–17. It did not measure whether R.E. was meeting grade-level standards. However, a score of 455 equated to the second-grade level.

From June 2022 to June 2023, R.E. improved from level one (score of 691) on NJSLA standardized math testing to level three (score of 729). P-27; R-47. His scores on the NJSLA language arts tests improved by fifteen points but remained at the same level. Ibid. The 729 score indicated he was approaching expectations and may have

¹⁵ An “interventional reading program used to identify students who need support.” T1 210:9–10. It is a “multi-sensory approach to learning how to read and . . . work on foundational skills relating to early literacy” for students who need help. T1 211:11–14. A 300-point test is administered at the start and end of the school year to gauge students’ progress with respect to “a variety of skills related to phonemic awareness, related to other foundational reading strategies[.]” T1 201:12–14. Students assigned to POR classes that use Project Read would also use Project Read in the language arts academy.

¹⁶ Informational text is non-fiction, such as scientific documents.

needed additional support to meet expectations at the next grade level. R-47 at 543. With respect to “major content,” he “performed about the same as students who did not yet meet or partially met expectations. Students meet expectations by solving problems using ratios, rates, percentages, an understanding of negative numbers, graphing points and simple linear functions, linear expressions, and linear equations.” Id. at 544. With respect to “expressing mathematical reasoning,” he approached expectations. “Students meet expectations by creating and justifying logical mathematical solutions and analyzing and correcting the reasoning of others.” Ibid. He met or exceeded expectations in the area of solving problems involving area, volume, and statistics. Ibid. With respect to “modeling and application,” he did not meet or partially met expectations. This involved “solving real-world problems, reasoning quantitatively, and strategically using appropriate tools.” Ibid.

R.E. scored 718 on language arts, which indicated he may need additional support to meet expectations at the next grade level. He scored 41 on reading; a minimum of 50 was needed to “meet expectations.” Id. at 546. He approached expectations with respect to literary text (showing that he “can read and analyze fiction, drama and poetry”). Ibid. With respect to informational text, he did not meet or partially met expectations. This involved reading and analyzing nonfiction, history, science, and the arts. Ibid. He met or exceeded expectations in the area of vocabulary, that is, using context to determine what words and phrases mean. Ibid.

R.E.’s score of 10 on writing was at the bottom of the scale, where the minimum score to meet expectations was 35. He did not meet or partially met expectations with respect to written expression (showing that he can “compose well-developed writing, using details from what [he has] read”) and knowledge of language and conventions (showing that he can “compose writing using rules of standard English”). Ibid.

Dr. Morrison reviewed Dr. Snider’s report, and on September 8, 2023, she wrote that she was concerned about R.E.’s lack of progress and his academic decline since 2019. His performance in math and written language skills, reading comprehension, spelling, and fluency in math, writing, and reading, was “significantly below age-level expectations,” and he declined in math fluency. P-56 at 1. There was no “notable

progress.” While Dr. Morrison acknowledged that she used different “measures,” Dr. Snider “administered the same measure” that was used in 2019 and 2022, which allowed for a “direct comparison of [R.E.’s] performance over time” and showed a lack of progress across many academic areas and significant decline in a number of areas. P-56 at 1. Dr. Morrison was also concerned about the lack of support R.E. received for social development and executive functioning. She concluded that the support he received was “insufficient and inappropriate” and recommended an out-of-district placement that would address his “learning challenges” and “provide support for social communication, attentional, and executive functioning difficulties associated with autism and [ADHD].” Ibid. She reiterated the need for the supports she detailed in her initial report.

On September 12, 2023, R.E.’s father advised District personnel that R.E. felt that the supplemental instruction was a punishment and that this adversely impacted him emotionally and colored his view of school. P-57

A draft IEP was prepared in advance of an October 5, 2023, annual IEP review meeting. It proposed that all subjects would be taught in POR classes. It also proposed supplemental instruction during the school day, two times per week for forty minutes, not before or after school. It also offered the academy classes before or after school. P-59.

Dr. Snider acknowledged the move to POR classed but opined that the October 5, 2023, IEP was nonetheless inappropriate.¹⁷ It did not provide regular, consistent, and thorough executive functioning scaffolding in his POR classes. P-60 at 2. This was required for R.E. to “better access, and benefit from, his education.” Ibid. The IEP also did not include “structured literacy instruction” throughout his school day. Rather, it “appears” that he will receive only “pockets of intervention” with respect to literacy instruction. Id. at 3. Further, while the IEP provides “pockets of counseling support and social skills,” it is not implemented throughout his school day. Ibid. Dr. Snider added that programming outside of school is unnecessary and inappropriate for R.E.’s mental health and stamina.

¹⁷ Dr. Snider was given a draft of the IEP prior to October 5, 2023.

Dr. Snider reiterated her May 2023 recommendations and summarized:

[T]here has been a downward trend using recorded data since 2019. After several years of no intervention, and then fractured pieces of intervention, it is not practical to think that [R.E.] will be able to benefit from an educational program that is not cohesively build with fidelity to a structured literacy program, infused with executive functioning support, and with management of his overall social and emotional picture. Perhaps if this intervention was established in 2019 we would have been more in the territory of that being able to be appropriate; however, too much time has elapsed and too much decline has occurred.

[Id. at 2–3.]

Lillian Nunes is a special education teacher and was admitted as an expert on behalf of respondent in the field of special education. She was R.E.'s teacher for sixth-grade homeroom and POR math for the first and second periods of the day. Eight students were in the class. The same sixth-grade math curriculum was used for POR and ICR classes; it was modified for POR depending upon the students' needs. R.E. was taught the sixth-grade curriculum even though Nunes reported that he performed at the third-grade level on the Moby Max placement test. P-43 at 12.

Nunes testified credibly about her observations of R.E. He was a good math student who was in the upper half of the students in the class. He scored well on exams and his final grade was eighty-three. R-48 at 2. However, he did not know all the mathematics operations (addition, subtraction, multiplication, and division) and used a multiplication chart. He could add or subtract but needed time to think about it. He was not fluent in these areas. This was consistent with Dr. Morrison's finding that he was in the 9th percentile for math fluency and the District's evaluation that found he was in the low range for math fluency. P-24; P-38.

R.E. struggled with homework and "did not really do" it. T1 237:22–23. He sometimes earned homework "passes" but could not catch up with it, even though there were tools, such as charts and incentives, to try to help him. T1 237:25. His grade for homework was very low. It did not adversely affect his report card grade because it

accounted for only 5 percent of his grade. Had he done his homework, his math skills may have been reinforced.

By April 2023, R.E. had progressed satisfactorily or gradually with respect to his IEP goals and objectives. R-49 at 10–12. Nunes surmised that he achieved adding and subtracting decimals because he was very good with decimals. She also surmised that he achieved substitution of assigned variables. He “probably” achieved another goal. T1 240:14.

Nunes did not observe that R.E. had difficulty with social interaction. He had some friends in the class, and he liked working in pairs. Nunes observed him speaking with other students prior to class and, on a few occasions, sitting and socializing with students during lunch. He worked with other students and in groups; took good notes; helped at the blackboard; and helped other students. He sometimes needed assistance such as someone reading material to him, help with decoding text and identifying key words, and breaking down skills into smaller parts to help him solve problems. R.E. was, at times, distracted and “tuned out.” P-43 at 12. She or the paraprofessional in the classroom would redirect him.

He was often late to school (twice per week) and this became progressively worse during the school year. He would miss the fifteen-minute homeroom period and arrive at the start of the first math period, when they reviewed the work from the prior day.

Nunes gave the instructor of R.E.’s supplemental math class the materials that they were working on in the POR class. The supplemental math instructor helped R.E. with his homework. She did not know about the supplemental instruction he received.

R.E.’s grades would have been higher if he did not miss instruction time due to arriving late and if he completed his homework. However, he made meaningful progress, as demonstrated by his LinkIt scores, which increased during the year. P-69 at 13.

Merritt Hoadley is certified as a teacher of the handicapped and has taught ICR and POR classes for eighteen years. She was admitted as an expert on behalf of

respondent in the field of special education. She was R.E.'s sixth-grade POR English language arts (ELA) teacher. She was the only teacher in the class, which had nine students.

Hoadley credibly testified about her observations of R.E. in the classroom. He had significant reading and writing deficits at the start of sixth grade. P-24, P-32, P-38. During sixth grade, the following was utilized to help him with reading: extra time to answer questions; extended time for timed tests; prompting and cueing to help him resume tasks; teacher modeling; guided practice; positive corrective feedback; paraphrasing and repetition of directions; checks for comprehension; and use of graphic organizers, note-taking supports, and other visuals. P-43 at 12.

Writing was a "weaker area" as he was "inconsistent with staying on topic, organizing his thoughts, using complete sentences, and using correct capitalization/punctuations." Ibid. Graphic organizers; simple and complicated sentence models; paragraph models; and self-monitoring checklists for sentence and paragraph writing construction were used to help him. Ibid.

Hoadley also identified grammar as an area of need. In the IEP, she noted that he needed to work on the correct use of grammar in writing, reading fluency, sticking to the topic, and organization of his thoughts. She also highlighted that he needed to complete and turn in assignments in a timely manner. Id. at 15.

To help R.E. engage with class, Hoadley started with work that was easier, which he could do well, and they progressed to slightly more difficult work. This system worked well for R.E. He asked for assistance from Hoadley or another student if he had a question or did not understand something.

An evidence-based multisensory intervention language program was used in his class. "[M]any different programs" were used to "fit" R.E.'s needs. T284:10–11. The

Project Read program¹⁸ was the primary component of his instruction. It is a structured literacy program that was “infused into the lessons every day” and was also “taught in isolation . . . two to three days for” forty-five minutes. T2 84:22:25. Project Read and Achieve 3000¹⁹ assessments, administered at the start of the year, were used to determine his needs and how to approach work with him. His Project Read scores showed significant progress (83 on the pre-test; 244 on the post-test). Similarly, his Achieve 3000 Lexile levels increased by eighty points from the pre- to the post-test. His LinkIt NJSLS score improved twenty percentage points, which also indicated meaningful progress. Writer’s Workshop was also used to address organizing writing. Hoadley did not know if it was intended to be used for students with disabilities. While Project Read was the primary component, the overall literacy program was composed of “bits and pieces of many different programs to fit the needs of the child.” T2 84:10–11.

Although his grades decreased during the year (eighty-five in the first quarter, seventy-four in the second quarter, seventy-four in the third quarter, and sixty-seven in the fourth quarter²⁰) and his final grade was a C (seventy-five), Hoadley opined this was “phenomenal” for a student with special needs in a POR class. R-48; T2 17:25. She acknowledged that the Lexile score showed that R.E. read at the second-grade level at the end of sixth grade. Notwithstanding the scores on objective testing, he made meaningful progress despite his deficits, which may prevent him from ever achieving grade-level scores. He grew “leaps and bounds” academically and emotionally during sixth grade. T2 95:20–22.

Hoadley wrote in R.E.’s 2023–2024 progress report that he improved from gradual to satisfactory progress or from satisfactory progress to achievement of his goals. R-49. Her assessment of his progress was based upon his assignments, class participation and homework, and her observations. He was a “bright boy,” and overall, he performed better than half of the class. T1 26:5.

¹⁸ She explained that Project Read offers “date-driven intervention strategies throughout the day.” T2 42:15–16. It is a multi-sensory program in that it incorporates movement, audio, visual and written components.

¹⁹ She described Achieve 3000 as an online reading and comprehension program.

²⁰ He scored eighty on the fourth-quarter exam, which tested all skills taught during that marking period. R-48.

In her PLAAFP statement, she wrote that he is weaker in writing. He is creative, a “phenomenal” storyteller, and wants to put his thoughts into writing. However, he has trouble staying on topic, organizing and narrowing the focus of his stories, and difficulty with spelling and grammar. T2 33:24. He was also easily distracted and required refocusing.

When asked about Woodcock-Johnson test scores that were low and decreased over time, Hoadley opined that this does not indicate that he failed to make meaningful progress. The “best he did on that test was his best.” T2 47:12–13.

Hoadley taught the one-on-one after school supplemental program toward the end of the school year. R.E. attended fewer than five times. He did not attend the extended school year (ESY) during the summer break, which Hoadley also taught. During the summer, she teaches Project Read on a one-on-one basis or with two students. She did not recall that the literacy academy instructor contacted her to discuss R.E.’s instruction.

The supplemental programs could have helped R.E. complete assignments and review assignments or lessons he missed or did not understand. ESY would have similarly been beneficial, as it aids retention of skills learned during the school year; presents opportunities for building upon those skills; and offers opportunities for preteaching material that would be taught during the following school year. The language arts academy would have helped him, especially with writing.

Although a behavioral plan was not in place for R.E., he was given a “self-check form” by his case manager or ESS. T2 85:9. Hoadley was asked to notify the CST if there were behavioral issues that she could not address in the classroom. She did not recall “significant emotional needs” in the classroom. T2 85:19. He did not have difficulty with social communication and social-emotional reciprocity. Although he was shy at the start of the school year, over time he flourished, and the other students liked him. He was “always well-mannered, respectful, kind, giving, [and] an active participant in lessons. He would share. He would add onto lessons.” T2 43:23–25. She observed him during recess, where he laughed and had a “great time.” T2 44:19. Socially, he engaged

appropriately with his friends, with whom he talked and did artwork. He had a “common bond” with the other artistic children in the class. T2 45:1. He did not require prompting to engage with his peers. However, things changed for R.E. during the last marking period. He did not want to complete assignments in school or at home and did not complete them on time. She did not recall him being anxious; however, he expressed that his “home life wasn’t as stable or secure as he would like and this would cause some anxiety.” T2 51:7–9.

Jennifer Baum is the program coordinator for ESS, which provides mental-health services within the Sayreville school district. She is a licensed clinical social worker and a certified school social worker. She was admitted as an expert on behalf of petitioners in the field of social work.

ESS did not counsel R.E. prior to his sixth-grade year. During sixth grade, he reported that he had difficulty concentrating, lack of motivation, paranoia, academic challenges, excessive worry, aggressive behaviors, low mood, and family conflict. R-27 at 274. He also reported suicidal thoughts, although the ESS notes indicate he was at “low risk.” Id. at 277. The clinician recommended R.E. for Tier 2 services at his school. Tier 2 services involve weekly individual counseling, monthly family counseling, and ongoing collaboration with the school district. The clinician was to monitor R.E. for high-risk behaviors and recommend clinical services as needed. Id. at 284. A self-monitoring checklist was used to help R.E. address his moods, complete work, and follow an agenda. T3 50:3–10; T3 58:21–25. The clinician coordinated with teachers, the case manager, and parents to address R.E.’s issues and needs. While petitioners participated on some occasions, they did not participate consistently.

Weekly case notes were maintained by the clinician who worked with R.E. They indicate that, throughout the year, R.E. reported difficulty with friends and with processing his emotions; his affect was depressed, he appeared withdrawn, and he was irritable; he expressed negative feelings and nervousness about additional classes after school; and he resisted getting up in the morning and going to school. He resisted going to school since kindergarten. R-50 at 569–651. On February 15, 2023, petitioners reported

concern about his lack of independence and personal hygiene. Id. at 654. Because this was new information, it indicated that R.E. was getting worse.

Additional notes indicated that R.E. was depressed and withdrawn; he felt his after-school classes were a punishment; he did not make progress on schoolwork; he completed some assignments in the ESS office; and he discussed difficulties at home and school that caused him distress. Id. at 656–668. R.E. and the clinician worked on “coping skills related to emotional distress.” Id. at 664.

A self-monitoring checklist was used to help R.E. address his moods, complete work, and follow an agenda. This was an executive functioning task. Baum believed that a February 21, 2023, note about R.E. not completing assignments indicated a “beginning of a decline,” as it was not previously recorded in the clinical notes. T3 37:4–5. While R.E. did not report that his negative mood was caused by his home life, his mother reported an incident at home that caused R.E. anxiety. Baum understood the statement to be a report of the adverse impact of R.E.’s home life on his condition.

By March 20, 2023, R.E. was still failing to complete and turn in schoolwork. The clinician reported that he “appears to be trusting and comfortable in” their sessions and they continued to address his motivation to do schoolwork. Id. at 672. On March 21, 2023, the clinician reported that, overall, he was struggling and angry and his problems had worsened. The clinician did not believe there was a “major crisis.” Id. at 680. By June 21, 2023, his problems were gauged as the same. He was managing his symptoms and easily identified coping skills but seemed to use them inconsistently. Id. at 728. R.E.’s mood continued to be reported as “depressed” through the end of the year. (3T 37:12–14)

In seventh grade, R.E.’s reports indicated he was “stressed, angry or in a negative mood.” T3 54:9. He reported “passive homicidal ideation” when he had interactions that caused him to feel angry or frustrated. T3 54:19–21.

In September 2023, (seventh grade) a draft IEP was prepared in anticipation of R.E.’s October 5, 2023, annual review. It proposed that all his subjects would be taught

in pull out replacement resource classes. Barone explained that the IEP was offered based upon “how things went last year,” petitioners’ concerns, and R.E.’s difficulty completing his assignments. “Homework was really the biggest issue last year.” T1 76:23–25. The pull out replacement resource class would involve less homework and provide individualized attention. The teacher would “make sure that all of his assignments are getting completed on a consistent basis.” T1 77:5–6. These changes were informed by Dr. Snider’s determination that he required more “intensive programming.” T1 165:12–14.

On September 12, 2023, K.E. and A.E. objected to supplemental instruction outside regular school hours. This was due to R.E.’s negative response to it during the prior year. It had “negative effects on [R.E.] emotionally to the point that it was very difficult to get him to want to go to school at all. Every morning was a fight. This caused a lot of stress within the home. R.E. felt like he was being punished, and his negative feelings about school continued to his first day going back. This year my wife and I are objecting to the supplemental instruction being conducted either before or after school. Please make time during the school day (resource rooms, etc.) for the supplemental instruction.” R-56 at 748.

In response to R.E.’s concerns, the District offered one-on-one supplemental instruction in language arts and math, twice per week, during R.E.’s physical education class. It also continued to offer the literacy and math academies, with the recognition that it could not force R.E. to attend. As of the date of Barone’s testimony, petitioners had not responded to the District’s offer concerning the one-to-one instruction, and R.E. remained in ICR classes for social studies and science.

On September 28, 2023, Dr. Morrison wrote that the October 5, 2023, proposed IEP was inappropriate because the supplemental instruction periods were too short to “address significant learning challenges[.]” P-74 at 1. Also, the academy classes were not offered during school hours, and thus, R.E. would likely not benefit from them. “An appropriate academic program will integrate evidence-based intervention throughout all of [his] courses, five days per week, rather than solely or primarily being provided during supplemental instruction. This includes his pull out resource replacement courses for

science and social studies as well.” Ibid. She recommended “more intensive academic support, especially considering the results from his most recent evaluation in May 2023 and the lack of progress that has been demonstrated since 2019.” Ibid.

Dr. Morrison also criticized the use of ESS therapy sessions for executive functioning and social emotional challenges because they were offered infrequently. [R.E.] required “significant support for executive functioning weaknesses, difficulties that have persisted over time and continued to impact his learning. Specific time should be set aside to focus solely on supporting executive functioning [and he] . . . requires support to integrate these skills throughout the day.” Ibid. She did not see “evidence of a system in place to ensure newly taught skills are then practiced, assessed, monitored, and reinforced across his multiple classes with various teachers and school staff. It is not helpful to teach [him] how to create a study plan but then watch him fail to implement those strategies because there is no reinforcement to increase use of those skills.” Ibid.

Dr. Morrison had similar concerns regarding generalization of social skills. While R.E. may have appeared “comfortable and friendly during his small, social skills group sessions[,]” he may “continue to struggle with appropriately initiating social interactions and reciprocal communication throughout the rest of the school day.” The IEP did not include “evidence of monitoring and reinforcement of these skills throughout the school day.” Id. at 1–2. She concluded that since the District has “repeatedly attempted to provide an appropriate program without success, an out of district placement is necessary.” Id. at 2.

After the changes to R.E.’s IEP, in response to Dr. Morrison’s recommendations, District Director of Special Services **David Knaster** asked Dr. Michael Steinhardt to review R.E.’s record and conduct a complete evaluation. Dr. Knaster, who holds principal, supervisor, and school psychologist certifications, was admitted as an expert on behalf of respondent in the fields of school psychology and special education. Neither Knaster nor the District had a prior relationship with Dr. Steinhardt.

Knaster noted that the recently proposed October 5, 2023, IEP, which offers POR classes for social studies and science, does not constitute an admission that the prior

placements were inappropriate. While he was “not so sure” that more restrictive programming was necessary, he recognized that other experts opined that it was appropriate and that petitioners wanted it. The IEP team “reluctantly” made the change. T2 202:25–203:6. In response to questioning about R.E.’s below-grade-level performance in several areas, Knaster stated that research has shown that children make better progress when their program is closest to a mainstream setting. By “mov[ing] him further down on the special education pipeline he’s going to be further away from grade level and that’s based on a variety of factors.” T2 204:21–24.

Expert Testimony

For Respondent:

Dr. Michael Steinhardt is a neuropsychologist whose private practice focuses on “learning-based issues” for children with disabilities including ADHD, high-functioning autism, and language disorders. 2T 107:4–11. Fewer than 10 percent of his patients are referred by school districts; the remainder are referred by pediatric neurologists or psychiatrists and are paid for by the parents. He makes recommendations concerning educational programming for nearly all the students he evaluates. He was admitted as an expert in neuropsychology and special education.

Dr. Steinhardt does not recommend educational programming based merely upon a diagnosis “label.” T2 125:18. Rather, he considers the child “as a whole” and evaluates “whether they’re best off being placed in a special education setting away from neurotypical children.” T2 125:18–22. Based upon his experience, if students with high-functioning autism can be “accommodate[d] in a mainstream setting with pull-out special education support as needed or [in-class support] as needed[,] that would be the best interest of the child in the long term.” T2 126:4–7.

Generally, students are “best off” if they are educated in “a mainstream setting if at all possible with accommodations” that are altered over time. T2 108:15–16. Long-term goals must be considered. If a student is “overburdened . . . with services that are not necessary for them,” their “ability to adjust and adapt to life later on” is “inhibit[ed].” T2

108:20–22. A learning disability is a neurodevelopmental condition that a child is born with, and it “sticks with them throughout their life.” T2 110:7–8. While it would be ideal if they could achieve at the same level as other children their age, most students with learning disabilities progress but remain “below the normative . . . sample over time.” T2 109:17–19.

Dr. Steinhardt reviewed Dr. Morrison and Dr. Snider’s reports and the records provided to him by the District; observed R.E. in school; and prepared a report. R-38. As there was “an abundance of evaluations,” Dr. Steinhardt believed there was “sufficient information” such that he did not need to conduct his own evaluation of R.E. T2 113:12–14. He did not want R.E. to go through another evaluation unnecessarily. He, thus, reviewed Dr. Morrison and Dr. Snider’s reports and relied upon the data they provided. He accepted the results of their objective testing but did not accept all their conclusions and recommendations that were based upon the data. Dr. Steinhardt did not question the determination that R.E. required social skills training and support, as this is not unusual for children with ADHD. He prepared a second report after he reviewed Dr. Snider’s report following her April and May 2023 evaluations, Dr. Morrison’s September 8, 2023, and September 27, 2023, letters, the October 2023 draft IEP, a clinical assessment by ESS, and ESS weekly case notes for 2022–2023. R-70.

Dr. Steinhardt did not speak with R.E., his parents, or his ESS counselor; did not observe R.E.’s math class; did not ask him to write, read, or do math problems; and did not administer achievement testing, measurements of attention, executive functioning, or social/emotional skills, or an autism assessment. He did not carefully review the ESS records. His references to R.E.’s home life were based solely upon the information provided in the reports he reviewed.

The 2022 evaluations found that R.E.’s Woodcock-Johnson IV academic cluster standard scores for reading, basic reading skills, math problem-solving, and brief achievement were in the average range while his scores for broad reading, reading comprehension, mathematics, written language, broad written language, academic applications, and broad achievement were within the low average range. He was within

the low range for reading fluency, broad mathematics, math calculation, and written expression. He was in the very low range for the academic fluency cluster. R-38 at 3.

A speech-language evaluation indicated his pragmatic language skills were below average. He lacked one or more of the core skills to enable his responses to be marked as correct. Ibid.

An evaluation by pediatric neurologist Dr. Dorothy Pietrucha resulted in findings that R.E. had high-functioning autism spectrum disorder and ADHD “with comorbid anxiety.” Ibid.

The FBA found that any motor stereotypy behavior²¹ occurred without a “degree of frequency, intensity or duration that would have a significant effect on [R.E.’s] academic or social progress[.]” R-38 at 3–4. His “off-task (ADHD) behavior occurred with greater frequency. However, . . . [it] rarely lasted for longer than one minute, and . . . [he] often independently resumed his work.” Id. at 4. Thus, “autistic-like behavior” was not “visible in a regular classroom setting,” and R.E.’s ADHD was “more in the mild area[.]” T2 117:25–118:6. A behavior that “occurs very infrequently is not a behavior that is amendable to behavioral change with behavioral reinforcement.” T2 117:18–21.

Dr. Steinhardt observed R.E. at his school on March 20, 2023, for approximately two hours. He observed R.E. in his POR language arts class for approximately forty minutes. His teacher engaged R.E. in the lesson, and “his level of participation appeared to be on-par with the [seven] other students in the classroom.” R-38 at 4. Using the Student Observation System (SOS) or the BASC, third edition, he conducted a “quantitative assessment of both adaptive and maladaptive behaviors” in the classroom. Ibid. R.E. “engaged in adaptive, on-task classroom behaviors²² approximately seventy percent” of the time during a fifteen-minute period. Ibid. Maladaptive behaviors²³ were

²¹ “[A]typical . . . motor behaviors” like “hand flapping” that are “very common in children on the autistic spectrum[.]” T2 118:11–14.

²² Such as “working on school subjects (57%) and appropriately interacting with the classroom teacher (13%).” Ibid.

²³ These “were limited to inattention (23%) and inappropriate movement (7%) with no other disruptive or other maladaptive behaviors present.” Ibid.

observed 30 percent of the time. “Overall, [R.E.] “presented as a cooperative and interactive student with mild ADHD.” Ibid.

R.E. was observed for approximately thirty minutes during lunch. He sat with and appropriately interacted with two other students. He reacted appropriately during a presentation that occurred during lunch. Id. at 4–5.

R.E. was observed for approximately forty minutes during his ICR science class. The twenty students were divided into “pods” of four where the students engaged in group activities. Id. at 5. R.E. actively participated; contributed to the group’s work; and “at times appear[ed] to lead his peers during portions of that activity.” Ibid. His level of classroom participation was “appropriate and on-par with his classmates. There were no episodes of disruptive or maladaptive behavior observed during this class.” Ibid.

Dr. Steinhardt did not observe the social deficits reported by Dr. Morrison, who opined that R.E. required instruction for specific skills, promoting, and further reinforcement. R.E. was “a typically behaving child in social interaction throughout [his] observation.” T2 139:5–7. He did not see objective or subjective data supporting Dr. Morrison’s conclusion in this regard.

Dr. Steinhardt questioned the autism diagnosis because the Diagnostic and Statistical Manual of Medical Disorders, fifth edition (DSM-5) requires “persistent (not intermittent) deficits in social communication and social interaction across multiple contexts, as well as restricted, repetitive patterns of behavior, interests, or activities that result in clinically significant impairment in social, occupational, or other important areas (i.e., education) of day-to-day functioning.” R-38 at 5. Often, children “have bits and pieces of autism spectrum disorder but don’t quite meet the full diagnosis” such that it is not sufficiently “pervasive and very significantly interfering with day-to-day functioning.” T2 124:4–9.²⁴

²⁴ Dr. Steinhardt also questioned Dr. Morrison and Dr. Pietrucha’s evaluations, which led to their diagnoses of autism, because they were conducted remotely and masks were used. The evaluations were not intended to be conducted in this manner.

Dr. Steinhardt also noted that R.E.'s anxiety "does not rise to the level of an anxiety disorder . . . requiring specialized educational placement." R-70 at 3. His finding was based on R.E.'s self-report and his mother's report for the BASC, as relayed by Drs. Morrison and Snider. Anxiety must significantly impact day-to-day functioning to support an anxiety disorder diagnosis.

Even if R.E. met the DSM criteria for autism, a mainstream setting is most appropriate for him because he has "high average intelligence." T2 133:8. His "level of functioning is such that he would best be served educationally and socially in a mainstream educational setting with appropriate support. This will provide him with the greatest opportunity for further developing his social skills with mainstream, neurotypical peers and best prepare him for the future" in the least restrictive environment. R-38 at 5. A mainstream placement is "especially appropriate for [R.E.] given his above average intellectual ability²⁵ and his faintly visible socialization difficulties. Placement in an out-of-district school dedicated to students eligible for special education "often fails to provide students with adequate experiences and opportunities with typical peers[,] who can serve as models for "appropriate behaviors" and thus enable the student to "function in a 'real-life' environment." Ibid.

While Dr. Morrison reported deficits in functional communication, R.E.'s score on the BASC showed, based upon teacher and parents' reports²⁶, that R.E.'s functional communication was within normal limits. 2T 134:22–135:9. Additionally, R.E.'s focus and attention scores, as reported by the Connors Continuous Performance test (CPT), were within the average range. T2 135:8–15 (referencing R-18 at 29). While his "reaction time" score was "a little slow," it was on the low end of the average range. T2 136:16-20. Dr. Steinhardt noted that a "child with ADHD can perform normally . . . on the CPT, but not if [the ADHD] is moderate or severe. . . . [T]his would just provide evidence that his ADHD would be mild." T2 136:22–25.

²⁵ R.E. has a 115 IQ. T2 146:23.

²⁶ Dr. Morrison reported that the T-score on the parent rating scale was forty and the T-score on the teacher rating scale was forty-four. These scores are within normal limits. T2 135:2–7.

With respect to Dr. Morrison’s determination that R.E. made “limited” progress, Dr. Steinhardt commented that he does not “know how to measure limited versus standard versus advanced.” T2 137:4–14. While R.E. “remains below age and grade-level expectations, . . . he clearly has made progress.” T2 137:15–18. Dr. Steinhardt compared his performances on the Woodcock-Johnson assessment and found that “he has clearly made meaningful progress[.]” T2 138:5–6. Although there were “fluency measurers” where R.E. declined, he did not “believe that those are real . . . declining performances.” T2 138:7–11. R.E.’s improvement in scores on assessments such as Achieve 3000 indicated meaningful progress. T2 147:1–7.

Dr. Morrison and Dr. Snider’s findings that R.E. declined academically from 2019 to 2022 were based on “a common error in data interpretation.” R-70 at 3. They relied upon the standard scores reported by Woodcock-Johnson IV tests. Reliance upon these scores is inappropriate because:

Standard scores, by definition, indicate where an individual’s performance is situated in relation to the normative sample’s mean, indicating how far above or below the individual performed based upon normative expectations. In other words, it is used when comparing an individual’s performance to that of others within their normative group. While this type of analysis can provide good information regarding how that particular individual [sic] performances compare to the normative sample, it could not and should not be used to indicate whether an individual’s performance is progressing or declining over time. To perform that type of analysis, an individual’s performance must be compared to their own performance over time. . . . The data that is required to perform this type of analysis is an individual’s raw scores. Raw scores on the WJ-IV are determined by the number of correct responses in [sic] individual provides on a specific test. The WJ-IV expresses these scores as “W” scores[.]

[R-70 at 3–4.]

Dr. Steinhardt’s analysis of R.E.’s W scores shows “an overall positive trend” from 2019 to May 2023. Id. at 4. He improved in all tested areas and “demonstrated continued progress from his 2019 assessment through his most recent assessment of May 2023 on the WJ-IV subtests of Passage Comprehension, Oral Reading, Sentence Reading

Fluency, and Sentence Writing Fluency.” Ibid. While the W scores showed a decline in math facts fluency and writing samples from 2022 to 2023, a “more accurate interpretation of this data is that his variability in performance is attributable to ADHD and/or lowered levels of motivation/drive on timed tasks.” Id. at 5. Also, the writing samples subtest “is very subjective and prone to interrater reliability problems.” Ibid. Dr. Steinhardt cited a published journal article that found “these scoring criteria are complex and require the use of examiner judgement” and he noted that the test publishers described the scoring process as “subjective[.]” Ibid. He wrote that the test publishers recommended that writing sample subtest scores should be “confirmed by two raters” and acknowledged that “it is not always possible to know if a specific item is scored correctly.” Ibid. Dr. Steinhardt thus posited that R.E.’s decline “should be attributed to subjective scoring differences and problems with interrater reliability” and that R.E.’s “serial test performance indicates that academic progress is being achieved, albeit he remains below grade-level expectations.” Ibid. He also noted that R.E.’s home life “has been turbulent in recent years” and that this was documented by ESS after a September 9, 2022, clinical assessment. Ibid. It is “well-established in the literature that environmental factors, such as a student’s home environment[,] significantly contribute to underperformance in school-related learning activities. To attribute [R.E.’s] academic underperformance solely to school-based factors would be unreasonable and unrealistic.” Ibid.

To the extent R.E.’s W scores declined from 2022 to 2023, Dr. Steinhardt explained that this would occur as a result of “other factors other than math knowledge such as his performance, motivation, drive, emotional status, inattention, careless errors in work which are routinely . . . performed by children with ADHD.” T2 179:111–15. He did not address R.E.’s presentation or cooperation when he was tested in May 2023 with Dr. Snider or other evaluators. However, he firmly asserted that it is “illogical for [R.E.] . . . in the absence of a neurological condition to . . . not be able to do single-digit addition or subtraction problems as well as . . . in the previous two evaluations.” T2 182:6–12. Scores alone are an insufficient indicator; the “entire clinical picture[,]” including R.E.’s motivation and cooperation, must be considered. T2 183:7–8.

Dr. Steinhardt thus concluded that R.E.’s current IEP, with “minor modifications,” “adequately provides him with the educational and social opportunities he requires to

achieve his goals in these areas.” Ibid. POR and ICR classes for his core academic subjects, with testing and educational modifications, will help him achieve his educational objectives and goals. His pragmatic language will be further developed by social skills groups and group speech-language therapy. Social and emotional development will be further assisted by individual counseling. ESS will provide “professional assistance to develop his study/organizational/executive functioning skills,” and specific IEP goals focus on completion of homework and class work. Ibid. Dr. Steinhardt noted that there should be an “emphasis on teaching him self-monitoring skills, as well as the use of checklists, self-checking for careless errors, and learning to preview material being presented in class or prior to a reading assignment.” Id. 5–6.

Based upon his review of R.E.’s progress, as reported in August 2022, October 2022, and September 2023 IEPs, he determined that R.E. made meaningful progress.²⁷

Dr. Steinhardt made the following additional recommendations:

- Re-enrollment in the social skills group after each cycle ends if he demonstrates that he is benefiting from it.
- “[A]ccess to an identified in-school counselor (with a ‘back-up’ staff member) on an as-needed basis to serve as a ‘safe address.’”
- Case manager should serve as a “point-person to provide ongoing communication with [R.E.’s] parents and any relevant private clinicians, as needed.”
- “Dr. Morrison’s recommendation that [R.E.’s] parents consult with a pediatric specialist for medication to treat his ADH[D] should be seriously considered.”²⁸

[Id. at 6.]

²⁷ While Dr. Steinhardt testified that he reviewed these IEPs, he did not specifically reference them in his report. The report is undated but is based upon a March 20, 2023, observation of R.E., which predated the September 2023 IEP. R-38.

²⁸ Dr. Steinhardt noted that all or nearly all of the evaluators diagnosed ADHD and there is “no runner-up to effective treatment for ADHD that comes close to medication,” including talk therapy. T2 129:6–8. To the extent R.E. did not like how he felt while taking Adderall for ADHD, there are multiple other medication options.

He also opined that the IEP offered for the seventh-grade year is arguably more restrictive than necessary because it offers self-contained classes for all academics. Nonetheless, it still provides R.E. FAPE. T2 147:148:25. His current IEP is also appropriate.

Dr. Steinhardt strongly disagrees with the petitioners' demand that R.E. be sent to a special education school, notwithstanding that he is up to four grade levels behind. Isolating him and losing access to neurotypical peers would "arrest[] his growth." T2 150:6. Performance below grade level does not mean that he has been deprived of a free, appropriate public education. Rather, he has a learning disability and will be aided by the emotional mental health support provided by ESS.

Although he did not carefully review the ESS weekly case notes, Dr. Steinhardt acknowledged that an ESS clinical assessment reported that, at the start of sixth grade, R.E. experienced difficulties concentrating, lack of motivation, paranoia, excessive worry, aggressive behaviors, and low mood, and that, within the prior month, he wished he were dead or that he could go to sleep and not wake up. R-27 at 274, 277. This is "concerning" and "of clinical significance that should be addressed." T2 174:12–13. He did not carefully review the ESS weekly case notes (R-50) in which the counselor recorded "negative mood," "low mood," and "depression." T2 172:25–173:7. He noted that these notes do not necessarily mean that R.E. was clinically depressed. However, ESS then began "appropriate" one-on-one therapy with R.E. and family therapy was offered. T2 188:19.

He was directed to a reference in an ESS assessment to R.E.'s parents' separation a few months before the start of sixth grade and testimony that R.E.'s reduced engagement was related in part to his concern about being moved to an out-of-district school. He indicated that these circumstances might explain R.E.'s lower "W" scores in 2023 and opined that it was "likely" that R.E.'s academic performance would have improved had he availed himself of the supplemental instruction offered by the District during and outside the regular school day.

For Petitioners:

Dr. Priscilla Morrison was admitted as an expert in neuropsychology. She described herself as R.E.'s "advocate." T3 188:11. She noted that state testing that was administered in spring 2022 was consistent with her findings, as was the testing conducted during the District's August 2022 educational evaluation. P-27; P-38. The District's neurodevelopmental evaluation agreed that R.E. had autism in addition to ADHD and anxiety, and its speech and language evaluation corroborated her findings about his social language. P-40; P-41. Its functional behavioral analysis corroborated her findings of off-task behavior and stereotypy. P-42.

R.E. required "really specialized support in order to really be able to focus and be engaged . . . given his symptoms." T3 104:14–18. The District's program was neither comprehensive nor fully integrated throughout the school day. Rather, the District cobbled together discrete elements of programs. The one-to-one instruction and academy classes offered by the District were infrequent and not offered during the regular school day. By merely providing in-class support or pulling R.E. out of class, the District provided a "piece meal approach" and did not provide necessary intensive comprehensive integrated support that would permit consistent support throughout all his classes. T3 102:12–16.

R.E. also required explicit instruction throughout the day to address inattention and poor executive functioning because R.E. does not implement or utilize these skills in his daily life. He requires these skills to be taught in various contexts, and he must have opportunities to practice across settings with appropriate reinforcement. Similarly, "explicit support for social skill development" should be "integrated throughout all classes and school-based activities. . . . [R]einforcing use of these skills is critical for [R.E.] to be successful. Simply providing him opportunities to interact with peers is not sufficient." P-24 at 21. The District did not provide explicit instruction in executive function skills or social communication education that was integrated throughout the school day.

The August 16, 2022, IEP was thus inappropriate because it did not include goals for executive functioning and expressly stated that behavioral interventions were not

required even though his behavior impeded his learning. R.E.'s executive function deficits are significant, and this impairs his "ability to learn in the classroom, to complete work and practice skills that are taught[.]" T3 113:25–114:2. There were no goals for self-monitoring, emotional control, task completion, working memory, planning and organization, or work completion. Further, the IEP did not include goals for social skills, communication, reciprocity, or attention. R.E. required more than mere interaction with his peers. A social skills program needed to involve explicit instruction incorporated into every class, every day, as well as in one-on-one or small group settings.

Further, the IEP did not integrate math and literacy instruction throughout the day, nor did it reference multisensory, intensive interventions. Supplemental programs were outside of regular school hours, while intensive interventions should be offered throughout the school day in all courses. The IEP did not include goals concerning: blending words and non-words, even though R.E. performed at the 9th percentile in this area; reading rate (5th percentile); reading fluency (4th–9th percentile); spelling (10th percentile); writing fluency (0.4th percentile); or capitalization and punctuation. Its math goals were similarly inappropriate given the scope of R.E.'s needs.

The October 14, 2022, IEP was also inappropriate because it continued R.E. in general education science and social studies; offered supplemental instruction before and after school; did not provide for specialized literacy instruction; did not properly address executive function skills; did not provide goals for phonological awareness, reading rate, and reading fluency; and offered insufficient study skills goals. While there was a reading comprehension goal, this alone was insufficient.

Referring to Dr. Snider's May 12, 2023, report, Dr. Morrison noted that, from March 2019 through May 2023, R.E.'s subscores decreased in all categories other than reading. The increase in reading was nominal. R-53 at 17–18. Compared to the District's 2019 testing, he regressed. Thus, R.E. did not make meaningful progress. She acknowledged, though, that Dr. Snider's tests were conducted in one day even though it is better to spread out testing over longer periods of time for children with ADHD and autism.

Referring to Dr. Steinhardt's opinion that standard scores should not be used to assess progress, she explained that "using standard scores is standard practice in our field. We are able to look at performance across a variety of different measures and determine if there are significant differences." T3 133:17–20. Regardless, relying upon W scores, as Dr. Steinhardt recommended, does not produce a "meaningful difference." T3 133:23.

Referring to the District's educational evaluation, R.E.'s broad achievement score decreased from average in second grade to low average in sixth grade. P-7; P-38. Dr. Snider's testing produced a broad achievement score in the low category at the end of sixth grade. P-56 at 16. This underscores R.E.'s lack of meaningful progress and the inappropriateness of his program. Thus, an out-of-district placement is required, as it would provide evidence-based intensive remediation integrated throughout the school day to address academic deficits as well as executive function and social skills deficits.

Dr. Morrison also acknowledged that she observed R.E. in his language arts class for only fifteen minutes and during lunch for only fifteen minutes and that she had not yet met R.E. at that time. Also, she could have conducted additional observations at other times but did not. Further, she did not address the teachers' PLAAFP statements and was "not very familiar" with Math LinkIt. She has "heard of" the NJSLs that are incorporated into Math LinkIt. T3 181:25–182:3. Her familiarity with it was limited such that she was unable to ascertain the significance of a reported degree of progress. Thus, she would defer to an interpretation of progress made by a special education expert.

Dr. Morrison acknowledged that she never implemented Project Read and did not discuss it with District staff. Although she is not able to determine the statistical significance of Project Read pre- and post-test scores and would defer to a special education expert, she opined that it is not as "rigorous as some other programs." T3 171:14–15. Based upon her training, work, and discussions with others, she concluded that there was not "extensive research and evidence to demonstrate its appropriateness for students with language based learning deficits." T3 172:13–16. When asked, she did not cite a specific case in which she determined that Project Read was inappropriate for a student. She did not recommend a specific alternative program for R.E.

Dr. Morrison was “somewhat familiar” with the Achieve 3000 test. T3 183:11–13. However, she was unable to say whether an eighty-point increase was statistically significant. Again, she would defer to a special education expert’s interpretation. She asserted that she considered R.E.’s scores on the test although she did not address them in her report. Notwithstanding R.E.’s scores on Project Read, Achieve 3000, and LinkIt, she found that his overall progress was limited in various academic areas.

Dr. Morrison did not observe R.E.’s supplemental or academy instruction or speak with the instructors, perhaps because the District may still have been scheduling the sessions. Nonetheless, she believed they were not integrated programs. She acknowledged that this belief was based upon her assumption that the District used multiple different programs, although she did not recall where she heard that Project Read was not used throughout R.E.’s program in the same manner it was used in his classroom. She made the same assumption about his math instruction. Regardless, the sixth-grade IEP and proposed seventh-grade IEP did not have goals for the literacy deficits that Dr. Morrison identified.

Dr. Morrison did not speak with the ESS clinicians who worked with R.E., and in her report, she did not fully incorporate a written report about R.E.’s social interactions in class. She did not receive the clinicians’ notes until one week before the hearing, and neither R.E.’s case manager nor his teachers told her about ESS’ concerns.

She was invited to attend the IEP meeting during which the IEP team was to review her evaluation and recommendations. However, she declined to attend because petitioners told her it was unnecessary.

Based upon her observation of R.E. in his sixth-grade language arts and math classes, she concluded that opportunities to address the executive functioning were not seized. For example, when R.E. could have been prompted to use a skill to remember an instruction, or the instruction could have been paired with other information, this did not occur. Other times, instruction was not given to explain how students were to plan an

essay or write notes. Essential steps were not emphasized; step-by-step instruction could have been provided but was not.

Social skills were not adequately addressed in his classes. Dr. Morrison observed times when structured group activity could have been incorporated but was not. Neither her observations nor the IEP indicated that R.E. was learning to generalize the skills he learned in the group sessions. She did not observe his social skills sessions in 2022–2023. While the topics of the social skills sessions were appropriate, and were “likely somewhat helpful,” it was problematic that social skills instruction was not offered at other times during the school day. T3 189:16.

Dr. Morrison acknowledged, though, that on April 12, 2022, R.E.’s language arts teacher wrote that his interactions with his peers increased during the school year and that he developed friendships with two boys. She also reported that he raises his hand; contributes to class discussions; follows class rules; and is respectful to teachers and other adults. He still required redirection, and when frustrated, he pulled his hair, clenched his fists, and flapped his hands. Dr. Morrison acknowledged that, in her report, she referenced only that R.E. had two friends.

Dr. Morrison also acknowledged that the teacher report on the BASC III did not reference a lack of social reciprocity and that she “would have wanted to observe more in school” before reaching a conclusion concerning his social interactions. T3 160:8–10. She noted, however, that R.E.’s language arts teacher told her that he had “some social challenges” such as difficulty when he does not get his way. T3 160:18. He “can get upset easily . . . he always has to be the first in line at school” when they leave class. This can “cause challenges with peers.” T3 160:20–24. She acknowledged that exposure to neurotypical peers would provide opportunities for modeling and interaction and that this is “one way to support students with autism.” T3 170:9–10. She reiterated, however, that “given the variety of . . . [R.E.’s] challenges,” a special school for only students with disabilities was necessary. T3 170:14–15.

Dr. Tina Snider has a Ph.D. in counseling psychology and is licensed in New Jersey as a psychologist. She is in private practice, and 95 percent of her clients are

under age twenty-three. Of the approximately 2,000 to 2,500 psychological evaluations she has conducted, 98 percent involved rendering an opinion about a student's educational needs. She was admitted as an expert in the field of psychology.

Dr. Snider described herself as R.E.'s advocate and explained that she was not charged with conducting a comprehensive assessment. Rather, she was asked to "update the academic piece of R.E.'s profile." T3 263:11–12. Dr. Snider administered the Woodcock Johnson IV test of achievement so she could compare her results with those of the District. It was concerning that there were discrepancies in R.E.'s grade-level performance, notwithstanding that he had special education programming since he was in second grade. The decline in scores from March 2019 to August 2022 to May 2023 indicated he was "falling further and further and further to the back of the line amongst his classmates. . . . Not necessarily losing knowledge but . . . declining significantly amongst his peer group." T3 212:2–7. For example, in broad achievement he declined from average to low average to the "very limited" low range. T3 210:16–17. This indicates that "he has a very difficult time operating in a classroom setting." T3 210:19–20.

The test also assessed fluency, which is the "ability to complete tasks in a timely manner[.]" T3 207:6–7. In R.E.'s areas of strength, he does not perform with fluency. This "limits his ability to function in a classroom setting keeping pace with peers" and is indicative of ADHD, problems with executive functioning, and possibly emotional and behavioral issues. T3 207:11–13. He should not be in a general education setting given how his performance compares to that of same-age peers. Dr. Snider posited that he would "get lost extremely quickly" in a class where everything is moving faster, more intensely, and at a higher instructional level than he is capable of. He needs small group classes or one-on-one instruction for all his subjects, not just the core subjects, because his fluency problems are not limited to math and language arts. They are "part of his neurocognitive infrastructure. He is not benefitting from an[y] type of large group or fast paced environment." T3 224:4–6. The IEP she reviewed did not provide for small group or one-on-one instruction in all his classes.

Structured literacy instruction was also required. Pursuant to the New Jersey Department of Education handbook, it involves "adherence to one particular methodology

of literacy instruction all throughout the day in all classes.” T3 224:18–21. R.E. needs this because his “literacy needs are severely deficient.” T3 224:24. His IEP did not reference this type of instruction, and the use of Project Read, Writer’s Workshop, and Achieve 3000 did not constitute a single methodology. Pursuant to the “literature and research,” the same literacy instruction must be carried through all classes, including social studies, math, and science, to enable students with “severe literacy needs” to “make gains.” T3 226:6–12.

Contrary to Dr. Steinhardt’s opinion, it is appropriate to use standard scores. “The standard score is the language that we speak as people who administer tests. A standard score is the score that helps us understand where our student is relative to their peer group. . . . [I]t allows us to have a universal language of discussing where a student is amongst a normative sample.” T3 213:18–25. Indeed, the Woodcock Johnson IV manual “suggests that the standard score, the RPI are all very valuable scores in being able to understand student data.” T3 214:6–8. W scores, used by Dr. Steinhardt, are weighted scores “based on a ten year old fifth grader.” T3 214:25–215:1. These scores are not the “industry standard for really understanding what this data looks like and what it means.” T3 215:4–6. However, R.E.’s W scores “aren’t compelling” because many show a decline, including writing samples, calculation, and math facts fluency. T3 215:7–8. R.E. did not make progress, particularly given that he has had special education since second grade and repeated first grade. R.E. requires an out-of-district school to address his academic decline and below-grade-level functioning.

R.E.’s emotional, behavioral, and social needs were also relevant. ESS notes document his challenges in these areas, including evidence of an anxiety disorder and depression as well as worsening executive functioning skills. These issues adversely impact his ability to function well in a larger academic setting. He requires “very significant structured support” for his executive functioning and emotional needs to enable him to attend to his education. T3 220:7–8. He should receive assistance with emotional and behavioral regulation while he is in the classroom. He should not be required to “leave his classroom, leave his academics in order to stay regulated, focused and attentive.” T3 220:11–13. To attend ESS counseling, he was required to leave his classroom and miss academic instruction. He also “remained depressed” despite the counseling. T3 221:24–

25. Dr. Snider observed his anxiety and social stress during her meeting with him when he required his father's "assistance to be able to settle in the room," and he reported social disconnection and that school causes him anxiety. T3 222:22. She highlighted that she met with R.E. after a year of ESS counseling. The counseling is insufficient for R.E. "Every time he leaves the classroom he's leaving instructional time and we know from the records that we do not see improvement. Throughout these records we see . . . no change" reported by ESS clinicians "in terms of his progress over time, so it's certainly not enough." T3 223:11–17.

Dr. Steinhardt disregarded data in these areas and determined that R.E. does not have autism, despite not having met R.E. Based upon Dr. Snider's observations, R.E.'s presentation was "very consistent" with that of a child with autism spectrum disorder. T3 201:7. Also, based upon her experience, Dr. Snider disagreed with Dr. Steinhardt's assertion that neurotypical students would not attend an out-of-district school. Importantly, R.E. did not benefit from being in a mainstream school with neurotypical students since kindergarten. He "did not have the skill to engage with neurotypical peers[.]" T3 221:7–8.

Dr. Snider summarized:

We have a youngster who is heading toward high school . . . who has already been retained, whose scores show that he's moving further and further to the back of the class, whose ESS records are showing . . . more significant findings. Socially he's more disconnected[.]

[T3 222:10–17.]

[W]e see too many downward trends and too many different areas. This is not a case that is just about meaningful academic progress. This is a case that is about his ability to regulate. His ability to sustain attention. His executive functioning needs. His social needs. All of that needs to be taken care of in a place where it can be done in house under one roof in real time.

[T3 225:17–24.]

R.E.'s IEP for the start of seventh grade is inappropriate because it provided ICR classes, supplemental instruction after school, social skills offered only eight times during the year, and counseling only thirty minutes per week. Neither executive function scaffolding throughout the day nor structured literacy instruction was included. The recently proposed IEP did not alter his language arts or math instruction. Academy instruction was still offered outside regular school hours and supplemental language arts and math instruction were also to be continued, but during the school day, for shorter periods of time. Three different modes of language arts and math instruction is inappropriate.

Project Read and Achieve 3000 data are not as important as tests like the Woodcock Johnson IV because they are designed for and administered by people who do not "have the ability to administer psychometric tests[.]" T3 240:6. Accommodations are offered to the students that impact their performance. Moreover, "we don't even have a sense of what it is" because the District did not demonstrate the substance of the tests and the specific meaning of the scores. T3 264:23. However, Achieve 3000 found him to be at the second-grade level, which comported with Dr. Snider's test results. She noted that scores she obtained "presented a very similar clinical picture" as those obtained by the District and Dr. Morrison. The proposed IEP is unacceptable, even though it would place R.E. in POR social studies and science classes, because it lacks the elements that the other IEPs lacked.

Dr. Snider acknowledged that she interacted with R.E. for only two and one-half hours in one day and that she asked only R.E.'s mother to report his executive function levels and ability to pay attention using the Brown Scale of Executive Function/Attention. She did not meet with District staff or ask them to complete the Brown Scale even though this information could have been useful. Similarly, she asked R.E.'s mother to complete a BASC III assessment of emotional functioning and behavior but did not ask District or ESS staff to do so. Also, she did not speak with R.E.'s language arts or math teachers or case manager or observe R.E. in school. However, she reviewed materials issued by the District, including progress reports, the IEPs, and PLAAFP statements; she described "some of the data" as "totally incomplete and completely subjective." T3 258:9-10. Progress reports did not provide "good data" that was "put together in a complete way."

T3 265:16–22. Her opinion needed to be based upon “more solid data than” that presented by the District. T3 258:11. She understood that, if the data existed, the District would have provided it.

Neurotypical children are those who do not have autism spectrum disorder and social or emotional deficits. Children who have significant discrepancies between their cognitive ability and functional performance can be considered neurotypical. Such children attend private special education schools. Dr. Snider acknowledged that her interpretation of “neurotypical” and her conclusion that such children attend private special education schools is influenced by her clinician role. An educator, such as a state-certified learning disabilities teacher consultant, may have a different view and approach to educational programming.

ADDITIONAL FACTUAL FINDINGS

Here, the parties’ experts offer divergent opinions concerning R.E.’s performance in school and his educational needs. 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) (citation omitted). Accordingly, the finder of facts must determine the credibility, weight, and probative value of the expert testimony. State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied, 127 N.J. 321 (1990); Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 48 (App. Div. 1990), modified on other grounds and remanded, 125 N.J. 421 (1991). 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).

A factfinder is not “obligated to accept any expert’s opinion, even if the expert was ‘impressive,’ and may accept some of the expert’s testimony and reject the rest, even if that testimony is unrebutted by any other evidence, particularly ‘when, as here, the factfinder is confronted with directly divergent opinions expressed by the experts.’” Prendeville v. Bd. of Trs., 2020 N.J. Super. Unpub. LEXIS 298, *11 (App. Div. February 11, 2020) (quoting State v. Carpenter, 268 N.J. Super. 378, 383 (App. Div. 1993), State v.

M.J.K., 369 N.J. Super. 532, 549 (App. Div. 2004)) (other citations omitted). The weight to be given to expert testimony depends upon the “testimonial and experiential weaknesses of the witness, such as (1) his status as a general practitioner, testifying as to a specialty, or (2) the fact that his conclusions are based largely on the subjective complaints of the patient or on a cursory examination[.]” Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 86 (App. Div. 1961). Other factors to consider include the information upon which the expert has based his conclusions and whether the expert’s opinion finds support in the records from other physicians.²⁹ Ibid.

Dr. Steinhardt, Dr. Morrison and Dr. Snider testified clearly, directly and professionally. I do not question their credentials or capacity to offer an opinion here. A fundamental difference between Dr. Steinhardt’s opinion and that of Drs. Morrison and Snider is the method of scoring R.E.’s achievement or lack of achievement. Dr. Steinhardt asserted that R.E.’s “W” scores must be relied upon rather than those relied upon by Drs. Morrison and Snider. However, he acknowledged that there were several areas in which R.E.’s “W” scores either did not improve or regressed. This included a decline in math facts fluency and writing samples. He sought to diminish this by referring to the subjective nature of the scoring; however, evidence of this is not found in the record. He also suggested that R.E.’s “turbulent home life in recent years” contributed to his underperformance in school. In so arguing, he stated that the connection between the two is “well established in the literature.” The literature and the impact of R.E.’s home life upon his academic performance, versus the impact of his educational program, are not found in the record here. Dr. Steinhardt also surmised that the decline in “W” scores was related to motivation, inattention, careless errors, and other factors commonly associated with ADHD. He reasoned that this must be a relevant factor because it would be “illogical” for R.E. to perform less well on basic math functions. Further, he suggested that it was “likely” that R.E.’s academic performance would have improved had he participated fully in the supplemental instruction programs. These theories, however, are not supported by the evidence in the record and amount to speculation. If accurate, they also beg the question about how R.E.’s performance was adversely impacted by the absence of adequate executive function and behavioral interventions. For all of these reasons, I am

²⁹ These principles apply equally to experts who are not physicians.

unable to rely on the opinions of the District's expert concerning the propriety of testing and scoring methods or the District's program.

Drs. Morrison and Snider clearly explained the basis for their conclusions that R.E. did not progress, and sometimes regressed, citing thoroughly to objective data and other evidence in the record. As reported by Dr. Snider, at the end of sixth grade, his proficiency level was limited or very limited in eight literacy areas. This performance was 1.9 to 4.5 years behind his actual grade level. Moreover, a comparison of the District's 2019 testing (second grade) and Dr. Snider's 2023 testing (end of sixth grade) shows a regression. The only area in which he did not decline was reading; however, the scores were virtually comparable. Although he had an eighty-point increase in his Lexile score in sixth grade, Drs. Morrison and Snider explained that this was not meaningful progress because he was still reading at a second-grade level, notwithstanding the provision of accommodations, as measured by Achieve 3000 and confirmed by his teacher. It is noteworthy that the District reported in fifth grade that he was at the fourth grade reading level, which underscores R.E.'s decline. Moreover, R.E.'s scores on the NJSLA language arts assessment did not improve from spring 2022 to spring 2023. Both times, he partially met expectations and he achieved the lowest possible score on the writing portion of the test.

In math, Dr. Morrison and the District found that R.E. performed very poorly while in the ICR classroom. While in the sixth-grade POR classroom, his math skills were assessed as equivalent to halfway through third grade. His teacher reported that he had not mastered basic math operations (addition, subtraction, multiplication, division) that are ordinarily mastered much earlier. Dr. Snider's testing at the end of sixth grade showed that his proficiency was very limited or extremely limited in five measurement areas. He ranged from 2.5 to 5.3 years behind grade level. A comparison of his second-grade Woodcock Johnson scores with those at the end of sixth grade shows a decrease in every math subtest and cluster score. State testing at the end of sixth grade showed that he did not meet or partially met expectations.

This data, taken together, corroborates Dr. Morrison and Dr. Snider's testimony. While R.E.'s teachers, who demonstrated genuine care for him, reported progress, some

of their reports were anecdotal and subjective. They also acknowledged significant deficits. Importantly, his deficits were documented from first grade through fifth grade. For example, Ms. Grossman acknowledged that in fifth grade, R.E. was not meeting reading expectations and required an intensive intervention such as an alternate reading program. Notwithstanding Dr. Morrison and Dr. Snider's description of themselves as R.E.'s "advocates," I find the data that they cited to be reliable and supported by the evidence in the record. I therefore accept Dr. Morrison and Dr. Snider's testimony about the scores to be used when assessing R.E.'s progress and his program needs.

Having considered the testimony and documentary evidence and the credibility of the witnesses, I **FIND** the following as **FACT**. The District was aware of R.E.'s deficits, as documented by his performance between first and fifth grade. Its witnesses and the expert witnesses, including Dr. Steinhardt, acknowledged R.E.'s deficits and where he declined from 2019 to 2022. It was aware that he either did not make significant progress or regressed, as documented by objective, standardized testing that it and Dr. Morrison conducted. While he was in fifth grade, Dr. Morrison identified the need to address his academic subjects differently and to address autism, anxiety, executive functioning, social skills, and pragmatic language. Notwithstanding scores on report cards or notes on progress reports, the District's evaluators also found that he scored in the low range and very low range in several areas; he had autism and anxiety; scored below average in pragmatic language; and required assistance with attention, time management, and school preparedness. R.E.'s teachers acknowledged when he was well behind grade-level expectations and required intensive support.

Although the District revised R.E.'s sixth-grade IEP in response to its and Dr. Morrison's findings and recommendations, it did not do enough. The sixth-grade program lacked mechanisms recommended by Dr. Morrison, including intensive and consistent programming for language arts, math, executive functioning, and social/emotional/behavioral needs in all classes, including social studies and science. Strengthening and implementation of these skills must be incorporated in all areas and must be reinforced consistently throughout the day. The record does not demonstrate that this occurred. Importantly, the IEP stated that behavioral interventions were not needed, and it did not include goals for reading fluency, spelling, executive functioning,

emotional/behavioral issues, or social skills. Also, it retained R.E. in ICR for social studies and science, which meant the curriculum for those classes was presented in the same manner and at the same pace as for general education students, notwithstanding his documented deficits. There is no evidence in the record that the interventions recommended by Dr. Morrison were incorporated into these classes.

While the District offered supplemental programming to assist R.E., this was limited to a few hours per week. It was also limited to the extent R.E. was willing and able to participate. When he opted to not attend the academies, he was removed from their rosters, and nothing was offered to replace it. Also, whether the supplemental and academy instruction was carefully coordinated with his classroom programs was not established. There is limited to no evidence in the record that the interventions recommended by Dr. Morrison were incorporated into these classes. Further, ESS was not guided by social, emotional, or behavioral IEP goals. It was offered infrequently, and it required R.E. to miss his academic classes.

Although the October 17, 2022, IEP (for sixth and seventh grade) included a study skills goal, a social/emotional/behavioral goal, and a speech goal, and provided for speech language therapy, the evidence in the record does not demonstrate that it addressed Dr. Morrison's other concerns and recommendations. R.E. did not receive explicit executive function support; supplemental instruction was offered infrequently; and teachers reported that he did better when working with someone one-on-one. There was also evidence of worsening behavioral issues, executive functioning deficits, and "snowballing" of his ongoing problem with doing homework during sixth grade. These problems hampered his ability to progress. The sixth-grade math curriculum was used even though his teacher agreed that he was at the 9th percentile for math fluency and Moby Max reported that he performed at the third-grade level. He scored the lowest possible score on the NJSLA for reading in 2022 and 2023.

Although, as documented by standardized testing, R.E. did not progress during sixth grade, and although R.E. demonstrated worsening behavioral and executive function skills, his IEP for seventh grade was not amended to respond to this information.

The only amendment was proposed shortly before this hearing began, when the District offered to change R.E.'s social studies and science classes from ICR to POR.

Simply put, the evidence, taken as a whole, documents that R.E. was saddled with too many struggles and achieved too little progress. The District was aware of R.E.'s deficits and needs when it prepared the sixth- and seventh-grade IEPs. Indeed, the IEPs were responsive, in part, to Dr. Morrison's recommendations. The District suggested that, due to his deficits, R.E.'s progress may necessarily be limited. However, it did not demonstrate the degree of progress and success that he can reasonably be expected to achieve. Without more, the evidence indicates that the sixth- and seventh-grade IEPs were insufficient to enable R.E. to achieve meaningful progress.

CONCLUSIONS OF LAW

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to 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). This "free appropriate public education" is known as FAPE.

A state is eligible for assistance if the state has in effect policies and procedures to ensure that it will meet the requirements of the Act. 20 U.S.C. § 1412(a). In New Jersey, such policies and procedures are set forth in the state statute, Special Schools, Classes and Facilities for handicapped children, N.J.S.A. 18A:46-1 to N.J.S.A. 18A:46-55, and the implementing regulations, N.J.A.C. 6A:14-1.1 to N.J.A.C. 6A:14-10.2. See Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 34 (1989).

The Act defines FAPE as special education and related services provided in conformity with the IEP. 20 U.S.C. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176,

203 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, 458 U.S. at 189.

The Act did not impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, 458 U.S. at 192. In support of this limitation, the Court quoted Pa. Ass'n for Retarded Child. v. Commonwealth of Pa., 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (1972), and Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 876 (D.D.C. 1972). Rowley, 458 U.S. at 192. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, 458 U.S. at 192–93. The Court also wrote that available funds need only be expended “equitably” so that no child is entirely excluded. Rowley, 458 U.S. at 193, n.15. Indeed, the Court commented that “the furnishing of every special service necessary to maximize each handicapped child’s potential is . . . further than Congress intended to go.” Rowley, 458 U.S. at 199. Thus, the inquiry is whether the IEP is “reasonably calculated” to enable the child to receive educational benefits. Rowley, 458 U.S. at 206–07.

The Third Circuit later held that this educational benefit must be more than “trivial.” See Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988). Stated otherwise; it must be “meaningful.” Id. at 184. Relying on the phrase “full educational opportunity” contained in the Act, and the emphasis on “self-sufficiency” contained in its legislative history, the Third Circuit inferred that Congress must have envisioned that “significant learning” would occur. Id. at 181–82. The Third Circuit also relied on the use of the term “meaningful” contained in Rowley, as well as its own interpretation of the benefit the handicapped child was receiving in that case, to reason that the Court in Rowley expected the benefit to be more than “de minimis,” noting that

the benefit the child was receiving from her educational program was “substantial” and meant a great deal more than a “negligible amount.” Id. at 182. Nevertheless, the Third Circuit recognized the difficulty of measuring this benefit and concluded that the question of whether the benefit is de minimis must be answered in relation to the child’s potential. Id. at 185. As such, the Third Circuit has written that the standard set forth in Polk requires “significant learning” and “meaningful benefit”; that the provision of “more than a trivial educational benefit” does not meet that standard; and that an analysis of “the type and amount of learning” of which a student is capable is required. Ridgewood, 172 F.3d at 247–48. In short, such an approach requires a student-by-student analysis that carefully considers the student’s individual abilities. Id. at 248. In other words, the IEP must confer a meaningful educational benefit in light of a student’s individual needs and potential. See T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).

In Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386 (2017), the United States Supreme Court clarified that while it had declined to establish any one test in Rowley for determining the adequacy of the educational benefits conferred upon all children covered by the Act, the statute and the decision point to a general approach: “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.” 580 U.S. at 399. Toward this end, the IEP must be “appropriately ambitious” in light of those circumstances. 580 U.S. at 402.

The Court continued that a student offered an educational program providing merely more than de minimis progress from year to year could hardly be said to have been offered an education at all, and that it would be tantamount to sitting idly until they were old enough to drop out. 580 U.S. at 403. The Act demands more, the Court asserted. “It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Ibid.

Thus, in writing that the IEP must be “appropriately ambitious in light of the child’s circumstances,” the Court sanctioned what has already been the standard in New Jersey: The IEP must be reasonably calculated to provide significant learning and meaningful benefit in light of a student’s individual needs and potential.

An IEP must not only be reasonably calculated to provide significant learning and meaningful benefit in light of a student's needs and potential, but also be provided in the least-restrictive environment. See 20 U.S.C. § 1412(a)(5)(A). To the maximum extent appropriate, children with disabilities are to be educated with children without disabilities. Ibid. Thus, removal of children with disabilities from the regular-education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Ibid. Indeed, this provision evidences a "strong congressional preference" for integrating children with disabilities in regular classrooms. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993).

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

Accordingly, a school must consider, among other things, the whole range of supplemental aids and services, including resource rooms and itinerant instruction, speech and language therapy, special-education training for the regular teacher, or any other aid or service appropriate to the child's needs. Id. at 1216. "If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." Ibid. Indeed, the Act does not permit states to make mere token gestures to accommodate handicapped children, and its requirement for modifying and supplementing regular education is broad. Ibid. The Third Circuit has emphasized that just because a child with disabilities might make

greater academic progress in a segregated special-education classroom does not necessarily warrant excluding that child from a general-education classroom. Id. at 1217.

The “measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995).

In James D. v. Board of Education, 642 F. Supp. 2d 804 (N.D. Ill. 2009), the parties disputed the amount of progress the student made and whether that amount of progress was satisfactory under the IDEA. The student’s parents contended that her failure to master her IEP goals, and the fact that a number of the goals consequently were repeated from year to year, indicated that she did not make sufficient academic progress. The District Court observed that “courts have held that a student’s failure to master IEP goals does not compel the conclusion that the IEP was not reasonably calculated to provide a FAPE, particularly where the student made progress towards achieving those goals.” 642 F. Supp. 2d at 827. The court cited O’Toole By and Through O’Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 707 (10th Cir. 1998), which held that, where the student was “making adequate progress on” IEP goals, “[t]he fact that she had not fully met most of those objectives [did] not indicate she was not getting educational benefit.” The court also noted, “Likewise, the mere fact that a student’s IEP goals are continued does not necessarily mean that the similar IEPs were not reasonably calculated to confer educational benefit.” (citing Schroll v. Bd. of Educ. of Champaign Comm. Unit Sch. Dist. # 4, 2007 U.S. Dist. LEXIS 62478 at *5 (C.D. Ill. Aug. 10, 2007) (“[a]n IEP is not inappropriate simply because it does not change significantly on an annual basis * * * [or] because the student does not meet any of the IEP goals”)). However, “if the student made no progress under a particular IEP in a particular year, . . . the propriety of an identical IEP in the next year may be questionable.” Schroll, 2007 U.S. Dist. LEXIS 62478 at *5 (emphasis added); see also Carlisle, 62 F.3d at 534 (where “a student fail[s] to make any progress under an IEP in one year, we would be hard pressed to understand how the subsequent year’s IEP, if simply a copy of that which failed to produce any gains in a prior year, could be appropriate”) (emphasis added). The James D. court observed, “Therefore, to the extent that [the student’s] IEP goals were not mastered and were

repeated, the proper inquiry is whether she made any progress on those goals such that the District could reasonably have concluded that those goals were ‘likely to produce progress’ the next year.” 642 F. Supp. 2d at 827.

Here, the District has not demonstrated, by a preponderance of the credible evidence, that it crafted a program and provided a placement for sixth and seventh grade that was reasonably calculated to provide R.E. significant learning and meaningful benefit in light of his individual needs and potential. Affording the District the deference it is due, the IEPs for those years were not adequately responsive to the data and other evidence of R.E.’s deficits and needs that were available to the District. The District had ample evidence of the many areas in which R.E. failed to progress or regressed. It also had ample evidence of his struggles with executive function and social skills and his behavioral issues. However, R.E.’s sixth- and seventh-grade programs did not provide him the integrated supports and instruction he required. While the District was responsive to recommendations made on behalf of R.E., it was not sufficiently responsive.

I note that the District seemed to try to shift the blame, at least in part, to R.E., by citing his unwillingness to attend classes before or after school. It also suggested that his parents were responsible for his failures, to some extent, by deferring to him when he refused to attend extra classes. Even if this were accurate, the evidence supports a finding that R.E. required more than the IEPs gave him. Also, as noted, the evidence in the record does not allow for a finding that R.E.’s capacity is limited such that he could not progress beyond a certain level or rate. For the foregoing reasons, I **CONCLUDE** that respondent did not demonstrate by a preponderance of the evidence that it provided R.E. a FAPE in sixth and seventh grade.

With respect to the relief sought by petitioners, an out-of-district placement, the evidence in the record is lacking in two respects. First, while the District did not provide appropriate IEPs for sixth and seventh grade, there has not been a showing that only a private school can provide an appropriate program. Dr. Morrison and Dr. Snider asserted this, without citing facts, data, or other information that would support this proposition. Indeed, Dr. Snider left open the possibility of the District providing R.E.’s future education when she concluded her report by writing that if the District “cannot accommodate all” her

recommendations, “an out of district placement must be secured.” Second, petitioners did not offer testimony or evidence about specific out-of-district schools, their programs, and how those programs would be responsive to R.E.’s needs. Without more, I am unable to conclude that an out-of-district placement is the only appropriate remedy.

Because more must be done for R.E., I **ORDER** that the parties shall reconvene within fourteen days of the date of this decision to discuss a revised program, whether in-district or out-of-district. The District shall be prepared to thoroughly address and respond to petitioners’ experts’ recommendations, recognizing that any new program will likely be more restrictive than R.E.’s current program. If the parties cannot agree to a revised program that aligns with the experts’ recommendations within thirty days of the date of this decision, a third party who the parties agree upon shall be enlisted to facilitate an agreement. The new IEP shall be finalized no later than thirty days after the selection of the third party.

Petitioners seek an award of compensatory education for sixth and seventh grade. The purpose of compensatory education is to remedy past deprivations of a FAPE. Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990). It “serves to ‘replace [] educational services the child should have received in the first place’ and . . . such awards ‘should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.’” Ferren C. v. Sch. Dist. Of Phila., 612 F.3d 712, 717–718 (3d Cir. 2010) (quoting Reid ex rel. Reid v. D.C., 401 F.3d 516, 518 (D.C. Cir. 2008)). The authority of a court to remedy a deprivation of FAPE is “a profound responsibility, with the power to change the trajectory of a child’s life.” Thus, the “courts, in the exercise of their broad discretion, may award [compensatory education] to whatever extent necessary to make up for the child’s lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.” Upper Darby Sch. Dist. v. K.W., 2023 U.S. Dist. LEXIS 129803, *37–38 (E.D. Pa. 2023)³⁰ (quoting G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015)).

³⁰ This decision is not precedential.

“Such a remedy is ‘an appropriate form of equitable relief where a local educational agency (“LEA”) knows, or should know, that a child’s special education program is not appropriate . . . and the LEA fails to take steps to remedy deficiencies in the program.” Id. at *36 (quoting R.B. v. Downingtown Area Sch. Dist., 509 F. Supp. 3d 339, 349 (E.D. Pa. 2020)). “Thus, a compensatory education ‘belatedly allows [a student] to receive the remainder of his free and appropriate public education.” Ibid. (quoting Lester H., 916 F.2d at 873.)

In certain circumstances, “full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted when the overarching impact of a district’s denial of FAPE resulted in a pervasive loss of a student’s educational benefit.” R.B., 509 F. Supp. 3d at 349 (citation omitted).

In Lauren P. v. Wissahickon Sch. Dist., 310 Fed. Appx. 552 (3d Cir. 2009), the Third Circuit affirmed the District Court’s finding that the school district “(1) knew or should have known that [the student’s] behavioral problems were impeding her education, (2) recognized that the IEP was inadequate, and (3) addressed [the student’s] behavior in a piecemeal fashion rather than through a consistent behavior management plan.” 310 Fed. Appx. at **5–6. The District Court affirmed the following findings about the student’s disability:

[I]t is clear that part of Student’s disability is distractibility that manifests itself as not completing assignments, becoming distract[ed] coming from and going to class, losing assignments, not completing assignments, and so forth. Not only are these behaviors part of her disability, they interfere with her learning and require intervention. She needed a behavior management plan that shaped the desired behaviors and used positive reinforcement rather than the negative consequences provided. Moreover, this behavior management plan should have been used consistently across all school settings by all teachers.

Second, Student’s problems worsened and the District should have known that the program it was providing was not effective. Instead, the District blamed Student for behaving like a student with a disability.

[P. v. Wissahickon Sch. Dist., 2007 U.S. Dist. LEXIS 44945,
*18–19.]

The District Court agreed that the school district “knew or should have known [the student] is a child whose behavior impedes her learning when it developed [her] IEP . . . and [the school district] failed to provide an appropriate IEP by not including a management plan to address that behavior.” Id. at *20. Prior to drafting the IEP, the District received a re-evaluation report by the school psychologist who reported “a litany of behavioral concerns, including her routine failure to complete assignments, her feeling of embarrassment and anxiety about the quality of her work, and her resistance to support from her parents and teachers.” Id. at *21. The report also advised the school district that, during the prior school year, “teachers reported a similar pattern, such as losing her assignments, not handing them in, or handing in incomplete work.” Ibid. The court thus found that the school district knew that the program it was providing was not effective at the time the IEP was implemented.³¹

The District Court acknowledged that the school district “expended a great deal of effort and good faith” on the student’s case. Id. at *23. However, “an award of compensatory education does not require a finding of bad faith or egregious circumstances.” Ibid. It thus agreed that the award of compensatory education was appropriate, and the Third Circuit affirmed this decision because the school district did not provide “appropriate instruction in school coping skills and . . . [this] remain[ed] a need.” The following was ordered for the number of school days in the years at issue, except the days the student was absent:

[D]irect and systematic instruction in homework completion, personal organization, study skills, learning strategies, and other such skills as are needed to be successful in school and

³¹ For example, The IEP did not adequately address the student’s “lack of study and organizational skills, [which] pervaded her entire school program[.]” The “failure to address these needs adequately had a negative effect on her entire school day.” Id., 2007 U.S. Dist. LEXIS 44945, *19, n.3. The IEP did not “provide appropriate instruction in school coping skills” and employed an “improvisational” response to the student’s lateness, absence, and failures to complete assignments. Ibid. The District Court noted that the school district “blamed [the] Student for behaving like a student with a disability.” Id. at *19. Noting that the IEP stated that the student “needs to become more responsible with her books and materials,” “needs to apply the strategies taught to her,” and “needs to take her time and concentrate on the task at hand,” the District Court wrote that these “statements demonstrate the District’s failure to respond to deficiencies in previous IEPs and thus meet its responsibility to provide a [FAPE].” Id. at *22.

in academic instruction. . . . This compensatory education shall be provided at Student's and her parents' convenience and may be after school, on weekends, during the summer, or after graduation. Student and her parents may select the specific learning strategies and school skills to be provided.

[Id. at *15, n.2.]

Here, R.E.'s circumstances were much like Lauren P.'s. Prior to the start of sixth grade, Dr. Morrison notified the District that R.E. required intensive support for emotional, social, and behavioral deficits that adversely impacted his capacity to learn and progress. It is well documented that his ability to work on assignments and complete them was poor before sixth grade but became substantially worse during sixth grade. There is no evidence that his capacity in this regard improved in seventh grade. ESS records show that he fared poorly in many ways in sixth grade, and there is little to no evidence of improvement in seventh grade. His difficulty with or inability to attend the learning academies underscores this. Yet, when he did not attend the academies, nothing was offered to replace them. For these reasons, I **CONCLUDE** that petitioners are entitled to compensatory education.

The remedy ordered in Lauren P. serves as a guide here. As in that case, the District here appears to have acted in good faith to the extent it made efforts to respond to Dr. Morrison's recommendations and its own assessments. However, more was required. For the reasons stated above, I **CONCLUDE** that the following compensatory education is appropriate: instruction in the skill areas identified by Dr. Morrison and Dr. Snider, including but not limited to executive functioning and social skills, and therapeutic intervention by a professional trained to work with students with R.E.'s diagnoses and needs. Further, because the District was on notice of the linkage between R.E.'s limitations in these areas and his academic difficulties, based upon its receipt of Dr. Morrison's August 2019 report, compensatory education shall also be provided in the form of remedial literacy and math instruction. Petitioners shall consent to the specific learning strategies and skills training that are to be provided. These services may be offered after school, on weekends or during the summer. I recognize that R.E. previously demonstrated reluctance to attend additional educational programs outside the regular

school day. To help facilitate his attendance and participation, all compensatory education shall be provided in accord with R.E. and his parents' schedules.

A question remains about the total number of hours of compensatory services and instruction that must be provided. Petitioners merely sought compensatory education "equal to the period of deprivation wherein an appropriate education was not being rendered." Their witnesses did not quantify the compensatory education they believe is required and this cannot be discerned from the record. I therefore **ORDER** that the parties shall reconvene within fourteen days of the date of this decision to discuss the total amount of compensatory education to be provided. If the parties cannot agree within thirty days of the date of this decision, a third party who the parties agree upon shall be enlisted to facilitate an agreement. The total amount of compensatory education shall then be finalized no later than thirty days from the date the third party was selected.

Petitioner also seeks reimbursement of the costs of their experts, pursuant to Section 504 of the Rehabilitation Act (RA), which prohibits any federally funded program from discriminating against persons with disabilities.

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]

[29 U.S.C. § 794(a).]

To prevail on a violation of either of those statutes, a petitioner must demonstrate that the student (1) has a disability; (2) was otherwise qualified to participate in a school program; and (3) was denied the benefits of the program or was otherwise subject to discrimination because of her disability. Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 189 (3d Cir. 2009).

A "violation of Section 504 is not 'a per se violation' of IDEA, or vice versa." Matthew B. v. Pleasant Valley Sch. Dist., 2019 U.S. Dist. LEXIS 190226, *1, n.1 (November 1, 2019) (citing Andrew M. v. Del. Cnty. Off. of Mental Health & Retardation,

490 F.3d 337, 349 (3d Cir. 2007) (“[E]ven in cases brought under the IDEA . . . a plaintiff must still prove that there was a violation of [Section 504 of] the RA.”)). Thus, petitioner “must still prove the elements under Section 504, though they may rely on the same facts in doing so.” Ibid.

Where a petitioner “seeks compensatory damages as a remedy for violations of the RA and the [Americans with Disabilities Act], it is not enough to demonstrate only that the plaintiff has made out the prima facie case outlined above.” D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260, 269 (3d Cir. 2014) (citation omitted). A petitioner must “also demonstrate that the aforementioned discrimination was intentional. A showing of deliberate indifference satisfies that standard.” Ibid. (citations omitted).

To satisfy the deliberate indifference standard, a plaintiff “must present evidence that shows both: (1) knowledge that a federally protected right is substantially likely to be violated . . . , and (2) failure to act despite that knowledge.” “Deliberate indifference does not require a showing of personal ill will or animosity toward the disabled person.” It does, however, require a “deliberate choice, rather than negligence or bureaucratic inaction.”

[Ibid. (citations omitted).]

Here, it has been found that, for the sixth- and seventh-grade years, the District failed to act in material ways despite its knowledge of R.E.’s needs. It should be underscored that this does not constitute a finding of ill will or animosity toward R.E. or petitioners. To the contrary, the evidence indicates that the District endeavored, albeit in a less than fulsome manner, to provide a program that was appropriate for R.E.

However, the relief sought by petitioners cannot be awarded in this forum. As explained in W.Z. ex rel. G.Z. v. Princeton Reg’l Bd. of Educ., EDS 02563-07, Decision (April 26, 2007), 2007 N.J. AGEN LEXIS 227, *7:

Pursuant to . . . N.J.A.C. 6A:14-2.7(a), ALJs have authority to decide certain issues in Special Education cases. However, the OAL is part of the executive, not the judicial, branch and the OAL is not a “court” within the intent of the above-cited

section of the IDEA. ALJs are executive branch judges. Consequently, ALJs do not have authority to grant claims for attorney's (or expert's) fees in Special Education cases. See N.J.S.A. 52:14F-1, -4.

I therefore **CONCLUDE** that petitioners are not entitled to an award of reimbursement of their experts' fees pursuant to Section 504 of the Rehabilitation Act.

ORDER

For the foregoing reasons, it is **ORDERED** that petitioners' request for relief pursuant to the IDEA is **GRANTED** as follows. The parties shall convene within fourteen days of the date of this decision to discuss a revised program, whether in-district or out-of-district. The District shall be prepared to thoroughly address and respond to petitioners' experts' recommendations, recognizing that any new program will likely be more restrictive than R.E.'s current program. If the parties cannot agree to a revised program that aligns with the experts' recommendations within thirty days of the date of this decision, a third party who the parties agree upon shall be enlisted to facilitate an agreement. The new IEP shall be finalized no later than thirty days after the selection of the third party.

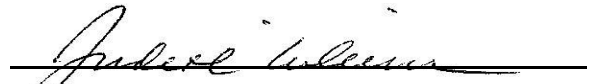
It is also **ORDERED** that petitioner's request for compensatory damages is **GRANTED** in the form of instruction in the skill areas identified by Dr. Morrison and Dr. Snider, including but not limited to executive functioning and social skills, and therapeutic intervention by a professional trained to work with students with R.E.'s diagnoses and needs. Compensatory education shall also be provided in the form of remedial literacy and math instruction. Petitioners shall consent to the specific learning strategies and skills training that are to be provided and the times when these services will be offered. The parties shall convene within fourteen days of the date of this decision to discuss the total amount of compensatory education to be provided. If the parties cannot agree within thirty days of the date of this decision, a third party who the parties agree upon shall be enlisted to facilitate an agreement. The total amount of compensatory education shall then be finalized no later than thirty days from the date the third party is selected.

It is also **ORDERED** that petitioners' request for payment of their experts' fees is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2023) 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 (2023). 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.

February 16, 2024

DATE


JUDITH LIEBERMAN, ALJ

Date Received at Agency:

February 16, 2024

Date Mailed to Parties:

February 16, 2024

JL/sg/mg

APPENDIX

WITNESSES

For petitioners

K.E.
Jennifer Baum
Dr. Priscilla Morrison
Dr. Tina Snider

For respondent

Samantha Barone
Kimberly Grossman
Lillian Nunes
Merritt Hoadley
Dr. Michael Steinhardt
Dr. David Knaster

EXHIBITS

For petitioners

- P-1 A.E. K.E. 2016-2017 Report Card, June 2017
- P-2 A.E. K.E. 504 Accommodation Plan, September 9, 2017
- P-3 A.E. K.E. 2017-2018 Report Card, June 2018
- P-4 A.E. K.E. 504 Accommodation Plan, September 18, 2018
- P-5 A.E. K.E. to Byrne Letter (referral), January 10, 2019
- P-6 A.E. K.E. Initial ID and Eval Plan, January 22, 2019
- P-7 A.E. K.E. Initial District Learning Evaluation (Randy Levy, LDTC), February 22, 2019
- P-8 A.E. K.E. District Psychological Report (Taryn Connor, MA), March 28, 2019
- P-9 A.E. K.E. District Social History Assessment (Kathleen Silberlight), April 2, 2019
- P-10 A.E. K.E. IEP, April 11, 2019

- P-11 A.E. K.E. Grade 2 Math LinkIt Results, June 6, 2019
- P-12 A.E. K.E. 2nd Grade (2018-2019) Report Card, June 2019
- P-13 A.E. K.E. IEP Progress Report, June 2019
- P-14 A.E. K.E. IEP Progress Report, December 2019
- P-15 A.E. K.E. IEP, March 12, 2020
- P-16 A.E. K.E. 3rd Grade Report Card 2019-2020, June 30, 2020
- P-17 A.E. K.E. IEP, December 14, 2020
- P-18 A.E. K.E. IEP Progress Report, December 2021
- P-19 A.E. K.E. IEP, March 10, 2021
- P-20 A.E. K.E. Fall ELA Assessment Report, Fall 2021
- P-21 A.E. K.E. Fall Math Assessment Report, Fall 2021
- P-22 A.E. K.E. 4th Grade Report Card 2020-2021, June 2021
- P-23 A.E. K.E. IEP, February 10, 2022
- P-24 A.E. K.E. Neuropsychological Evaluation Report (Dr. Morrison), May 18, 2022
- P-25 A.E. K.E. IEP Progress Report, June 2022
- P-26 A.E. K.E. Gaines to Board Attorney, July 1, 2022
- P-27 A.E. K.E. NJ State testing Spring 2022, July 13, 2022
- P-28 A.E. K.E. LinkIt Profile (3rd-5th), June 3, 2022
- P-29 A.E. K.E. Score Data Summary (4th-5th) 2021-2022
- P-30 A.E. K.E. Report Card, June 2022
- P-31 A.E. K.E. Re-Evaluation Plan, August 16, 2022
- P-32 A.E. K.E. IEP, August 16, 2022
- P-33 A.E. K.E. - Dr. Morrison Letter, August 24, 2022
- P-34 A.E. K.E. Gaines to Silvestro, August 26, 2022
- P-35 A.E. K.E. Literacy Academy Letter, 2022-2023
- P-36 A.E. K.E. Math (AM) Academy Letter, 2022-2023
- P-37 A.E. K.E. Math (PM) Academy Letter, 2022-2023
- P-38 A.E. K.E. District Educational Evaluation (Oleszkiewicz), September 1, 2022
- P-39 A.E. K.E. District Occupational Therapy Evaluation (Tiberi), September 14, 2022

- P-40 Neurologic-Neurodevelopmental Evaluation (Dr. Pietrucha), September 19, 2022
- P-41 A.E. K.E. District SL Evaluation (Moose), September 21, 2022
- P-42 A.E. K.E. District Functional Behavior Assessment (Kowantz), September 28, 2022
- P-43 A.E. K.E. IEP, October 14, 2022
- P-44 A.E. K.E. Gaines to Bass October 25, 2022
- P-45 Barone to A.E. K.E. Email, November 1, 2022
- P-46 A.E. K.E. Gaines to Bass, November 10, 2022
- P-47 A.E. K.E. to Barone Email, November 10, 2022
- P-48 A.E. K.E. Drazin to Bass, December 13, 2022
- P-49 Barone to Knaster and A.E. K.E. Email, December 16, 2022
- P-50 A.E. K.E. Dr. Morrison report, February 6, 2023
- P-51 A.E. K.E. Drazin to Mucciolo, February 15, 2023
- P-52 A.E. K.E. District Neuropsychological Eval (Dr. Steinhardt), March 20, 2023
- P-53 A.E. K.E. Psychological Eval (Dr. Snider), May 4, 2023
- P-54 A.E. K.E. Drazin to Mucciolo, August 1, 2023
- P-55 A.E. K.E. 2022-2023 Report Card, June 2023
- P-56 A.E. K.E. - Dr. Morrison Letter, September 8, 2023
- P-57 Email to District, September 12, 2023
- P-58 A.E. K.E. Drazin to Harrison, September 14, 2023
- P-59 A.E. K.E. draft IEP, October 5, 2023
- P-60 A.E. K.E. – Dr. Snider Letter, September 27, 2023
- P-61 A.E. K.E. Drazin to Harrison, September 27, 2023
- P-62 A.E. K.E. progress report, 2018-2019
- P-63 A.E. K.E. progress report, 2019-2020
- P-64 A.E. K.E. progress report, 2020-2021
- P-65 A.E. K.E. progress report, 2021-2022
- P-66 A.E. K.E. progress report, 2023-2024
- P-67 International Dyslexia Association: What Is Structured Literacy?, Summer 2016
- P-68 NJ Dyslexia Handbook: Comprehensive Literacy Instruction for All, September 25, 2017

- P-69 Fountas & Pinnell: Instructional Level Expectations for Reading, August 7, 2014
- P-70 Woodcock Johnson IV: Reports, Recommendations, and Strategies
- P-71 Dr. Priscilla Morrison CV
- P-72 Dr. Tina Haydu Snider CV
- P-73 Dr. Michael Steinhardt CV
- P-74 A.E. K.E. - Dr. Morrison Letter, September 28, 2023
- P-75 Achieve 3000 Lexile

For respondent

- R-1 Due Process Petition
- R-2 Answer to Due Process Petition
- R-3 IEP, April 11, 2019
- R-4 LinkIt scores, June 2019
- R-5 IEP, March 12, 2020
- R-6 Progress report, 2019-2020
- R-7 IEP amendment, September 22, 2020
- R-8 IEP, December 14, 2020
- R-9 IEP, March 10, 2021
- R-10 Progress report, 2020-2021
- R-11 Reevaluation Plan, February 11, 2022
- R-12 IEP, February 10, 2022
- R-13 CST Educational Evaluation, September 1, 2022
- R-14 CST Occupational Therapy Evaluation, September 14, 2022
- R-15 CST Speech Evaluation, September 15, 2022
- R-16 Pediatric Neurologic-Neurodevelopmental Examination, September 19, 2022
- R-17 CST Functional Behavioral Assessment, September 28, 2022
- R-18 Private Neuropsychological Evaluation Report, May 5, 2022
- R-19 Progress report, 2021-2022
- R-20 Report card, 2021-2022
- R-21 Assessment scores and source documents, 2020-2021 & 2021-2022

- R-22 LinkIt scores, 2019-2020, 2020-2021, & 2021-2022
- R-23 IEP, August 16, 2022
- R-24 Updated input from private neuropsychologist, August 24, 2022
- R-25 Correspondence from L. Gaines to D. Silvestro requesting out-of-district placement, July 1, 2022
- R-26 Correspondence from L. Gaines to D. Silvestro again requesting out-of-district placement, August 26, 2022
- R-27 ESS clinical assessment, September 9, 2022
- R-28 ESS post-assessment follow-up notes, September 28, 2022
- R-29 IEP, October 14, 2022
- R-30 Email from teacher regarding parent noncompliance with supplemental instruction, October 25, 2022
- R-31 Correspondence from L. Gaines to E. Bass regarding IEP and out-of-district placements, October 25, 2022
- R-32 Email from E. Bass to L. Gaines responding to October 25, 2022 letter, November 1, 2022
- R-33 Correspondence from L. Gaines to E. Bass regarding Morrison observation and out-of-district placements, November 10, 2022
- R-34 Email from E. Bass to L. Gaines responding to 11/10/2022 letter, November 15, 2022
- R-35 Correspondence from A. Drazin to E. Bass regarding Morrison observation and “resistance” to school, 12/13/2022
- R-36 Email from E. Bass to A. Drazin regarding Dr. Morrison observation, December 14, 2022
- R-37 Email from E. Bass to A. Drazin regarding Morrison observation and Couturier-Fagan evaluation, December 21, 2022
- R-38 Report and C.V. of Michael Steinhardt, Psy.D., March 2023
- R-39 Email chain regarding LinkIt form, March 2, 2023
- R-40 Private psychological evaluation, March 12, 2023
- R-41 NJSLA scores, 2022-2023
- R-42 LinkIt data, 2022-2023
- R-43 LinkIt ELA Form A, 2022-2023
- R-44 LinkIt Math Form A, 2022-2023

- R-45 LinkIt ELA Form C, 2022-2023
- R-46 LinkIt Math Form C, 2022-2023
- R-47 New Jersey Math and ELA Assessment Reports, 2022-2023
- R-48 Report card, 2022-2023
- R-49 Progress reports, 2022-2023
- R-50 ESS weekly case notes, 2022-2023
- R-51 ESS post-assessment follow-up note, September 7, 2023
- R-52 Private neuropsychological report, September 8, 2023
- R-53 ESS weekly case notes, 2023-2024, through September 8, 2023
- R-54 Email from case manager regarding IEP meeting, September 11, 2023
- R-55 ESS clinical assessment, September 12, 2023
- R-56 Email chain regarding supplemental instruction, September 12, 2023
- R-57 Project Read data, September 12, 2023
- R-58 Correspondence from A. Drazin to E. Harrison regarding supplemental instruction, September 14, 2023
- R-59 LinkIt publisher description
- R-60 CV – Jennifer Baum, social worker
- R-61 CV - Samantha Barone, school psychologist and case manager
- R-62 CV – Kim Grossman
- R-63 CV – Merritt Hodley
- R-64 CV – David Knaster
- R-65 CV – Lillian Nunes
- R-66 LinkIt Math Form B, 2022-2023
- R-67 LinkIt benchmarks, 2022-2023
- R-68 Lexile changes
- R-69 Draft IEP, October 5, 2023
- R-70 Dr. Michael Steinhardt supplemental report, September 28, 2023