

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00417-19

AGENCY DKT. NO. 2019-29065

G.B. AND L.B. ON BEHALF OF B.B.,

Petitioners,

v.

**HUNTERDON/VOORHEES REGIONAL
HIGH BOARD OF EDUCATION,**

Respondent.

Staci J. Greenwald, Esq., for petitioners (Sussan, Greenwald and Wesler,
attorneys)

Teresa L. Moore, Esq., for respondent (Riker, Danzig, Scherer, Hyland, Perretti,
LLP, attorneys)

Record Closed: October 7, 2019

Decided: October 31, 2019

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1401-1484(a). B.B. is a sixteen-year-old student who is eligible for special education and related services under the IDEA. Petitioners, G.B. and L.B. filed a petition for due process alleging that the IEP proposed by respondent Hunterdon/Voorhees Regional High Board of Education (Board or District) failed to

provide B.B. with a free appropriate public education (FAPE). Petitioners seek reimbursement for the costs of their unilateral placement at Winston Preparatory School (Winston). B.B. and his family reside in Tewksbury Township, which has a K-8 school only. Tewksbury students attend Hunterdon/Voorhees Regional High School. B.B. was placed in Winston, a special education school pursuant to an agreement with Tewksbury in 2015. The K-8 students officially become students of respondent District on July 1st.

On September 11, 2018, the petitioners advised the District of their intention to make a unilateral placement of B.B. at Winston. School had already commenced in the district and at Winston, and no IEP had been proposed or agreed upon. Tewksbury had not completed an IEP on B.B. for three years. In early September the case manager from the District observed B.B. at Winston. B.B.'s IEP was completed and provided to the parents on September 17, 2018. The IEP proposed an in-district placement at one of the regional high schools. The parents did not accept the proposed IEP and commenced the within due process proceeding. After unsuccessful mediation, the case was transmitted to the Office of Administrative Law (OAL) where it was filed on January 19, 2019. Hearings were conducted on April 15, 2019, June 17, 2019 and June 21, 2019. Briefs were filed by the parties on September 18, 2019, and September 24, 2019, and the record closed after submission of a joint exhibit list on October 7, 2019.

TESTIMONY AND FINDINGS OF FACT

Respondent's witnesses:

Dr. Zulejka Baharev, Ph.D. is the Director of Special Services for the district. She was accepted as an expert in education, special education and learning disabilities (LD). She discussed the process of transitioning special education students from middle school to high school. B.B. had been at Winston, a private school providing special education services pursuant to an agreement with the K-8 district. Dr. Baharev was not employed by the district at the time of the transition of B.B. from eighth grade to

the district. B.B. did not have an IEP when he became the responsibility of the district on July 1, 2018. The parents provided consent to Tewksbury to conduct all the recommended evaluations in April of 2018. The evaluations were all completed except the OT and PT. A letter was sent to the parents in July 2018, requesting consent for two additional evaluations. The initial meeting with the parents was scheduled for August 30, 2018. She was not present at the August 30, 2018, meeting of the child study team. The child study team determined that B.B. was eligible for special education services under the classification of "Other Health Impaired" (OHI), and recommend his placement in one of the regional high schools.

As part of the IEP process, the case manager needed to observe B.B. at Winston. He observed him in an English class and had a conversation with the principal. Dr. Baharev also had a conversation with the principal at Winston and observed B.B. in the classroom. Based on her general observation, she thought that B.B. was higher functioning than the other students. The new case manager was invited to the IEP meeting, as the prior case manager had gone out on maternity leave. The new case manager was familiar with the LLD program at the high school which was proposed for B.B. She was not present at the IEP meeting that took place on September 17, 2018. They proposed an in-district placement at one of the regional high schools.

The IEP proposed a self-contained classroom at one of the regional high schools. She felt this structure was appropriate for B.B. as it is on the small side and they could modify the curriculum to fit his needs. The electives such as art, music and foreign language were not in the self-contained classrooms. The school psychologist came in two times a month for individual or group counseling. The sports program was specifically for students with disabilities, as they are not your typical athletes. They use peers to work with the special education students and they are there to assist the special education students. The LLD students have their classes in a specific part of the building and the general education classes for the electives would be in the other part of the school. They use peers to escort the special education students to their electives in the other part of the building.

Dr. Baharev testified that the proposed IEP provided for modifications based upon his strengths and weaknesses. B.B. was also given extra time, voice over and other appropriate accommodations. Dr. Baharev went to Winston in January to observe B.B. She met with the principal to discuss their program, the school and the population of students in the school. She observed one lesson, which was a one-on-one. Other than this short observation, she had never meet B.B. or talked to any of his teachers. She never spoke to anyone at Tewksbury about B.B. However, she did review his records. The proposed IEP placed B.B. in a self-contained English, science, and math class. She was not certain how the schedule works. She felt it would be better for B.B. to be in a classroom with others like him. She did not provide any testimony regarding the others in the classroom in the proposed IEP and why she thought they were "like him."

Dr. Baharev felt that B.B. would be better in-district and felt that the program they had for him was appropriate and would be the least restrictive environment. She is not aware if any of the classes are college prep classes and likewise, did not ask this question at Winston. She testified that whenever it is a new student, it takes some time to come up with the best program, which is why they do a thirty-day review after a new student comes into the district to make sure the IEP is working and the student is happy. They have peers with them when they are going to lunch or into the general education classes. She defended the goals and objectives as being general, as opposed to specific so they could be modified at a later date.

Dr. Baharev was questioned about why the proposed IEP did not address basic phonics/decoding. She was not certain why they did not include any specific goals and objectives with respect to phonics. However, she did reiterate that the IEP could be modified at a later date after they got to know the student better. When they met on August 30, 2019, the IEP was not yet developed and they wanted to observe the child in his school setting first. She testified that she attends some of the meetings, but she is not part of the IEP team, and did not attend the IEP meeting. She conceded that there was no behavior intervention component in the plan, and no OT and PT

evaluations had been completed. The Child Mind Institute report that the parents had recently completed was accepted. The goals and objectives from Winston were not included in the IEP, and there were no specific goals for reading comprehension and fluency. The other factor which the IEP did not address was the emotional issues with sending B.B. to a new, significantly larger school. She was questioned about why the extra-curricular activities, which was such an important part of his overall success at Winston, were not addressed at all. There was no plan as to how to integrate him, except that he would be able to participate with the other special needs' students, which had a very wide range of functioning.

Elaine Nestel is the Director of special education services for the District and was qualified as an expert in special education and learning disabilities. She was responsible for evaluating B.B. during the summer for his reading, math and phonics levels. Her testing determined that he was reading at an eighth-grade level, which was sufficient for his grade level. He struggled more in the phonics and decoding areas as well. She administered a math test from the Woodcock Johnson. She explained the subparts of the test and the results. Overall, his scores were low.

Ms. Nestel was on the evaluation team, but she was not part of the IEP development and was not at the IEP meeting. She went to Winston to observe B.B. at Winston, after the mediators recommended that the District observe B.B. in his school setting. She indicated that there were large rooms with a lot of activities. She testified that the LLD classroom at North Hunterdon was an appropriate placement for B.B. However, she did not elaborate as to why, or exactly what information she relied upon in reaching this conclusion. She was not familiar with the range of disabilities in this proposed classroom and how B.B. compared to the other students in terms of functioning. She emphasized that they would re-evaluate B.B. after they got to know the student. She did not talk to the teachers at Winston about B.B. and she did not review any of the records from Tewksbury.

Petitioners' witnesses:

Megan Brown, Ph.D. testified for the petitioners. She was familiar with B.B. as she had done an evaluation for Tewksbury in 2015, and recommended his placement out of district at that time. Her practice specializes in ADHD children. She has worked as a school psychologist, she has a Ph.D. in Psychology and a master's in counseling. She was accepted as an expert in psychology and development of IEPs in ADHD children and children with learning disabilities. She was initially contacted by the District to do an independent evaluation some years ago. She did some testing and reviewed his scores. His strength in verbal comprehension, was somewhat skewed as he was not on his medication at the time of the testing and thus, an underestimate of his ability.

B.B. has problems with working memory and processing speed. This can be remediated with every day practice, fluency drills, practice with visual and working memory. She would expect goals and objectives to address these issues in his IEP. She did the Wechsler test, and he scored in the average range – at or better than thirty-seven percent of the kids. The next area that she tested was oral expression, which is your ability to verbally communicate. This function relies on working memory and processing skills which B.B. was low in. Reading comprehension is also a major weakness for him. He made significant progress at Winston in this area, as Winston focused on goals and objectives in this area and had specific goals for written expression. The proposed IEP did not have any specific goals and objectives to address these issues.

The neuropsychiatric evaluation revealed B.B.'s attention deficit and his deficits with auditory processing and reading comprehension. These deficits can affect a child socially and make it difficult to make and keep friends. At Winston they recognized this and focused on social skills. Based on the results of the testing that she completed, she recommended that B.B. be placed in a specialized school with a small teacher to student ratio. Moreover, he had specific goals and objectives relating to the problems with decoding, executive function deficiency, as well as memory speech and language issues at Winston. The full recommendation was contained in her report. She also opined that Winston addressed the social issues and she felt strongly that any proposed IEP should include specific goals and objectives with respect to the social

skills and integration. She was contacted by the parents in 2018, about the proposed placement in the regional high school. She did not retest him, as he had been recently tested, and she reviewed all the test results. In addition, she observed the programs at Winston as well as the District, and reviewed the records from Winston.

The District proposed an IEP for B.B. that had no specific goals and objectives in several critical areas. Significantly, the social and emotional pieces were not addressed at all. Although they recognized the attention issues, there needed to be specific goals and objectives to address the natural effect of this on his social and emotional development and relationships with others. The proposed IEP did not address these issues, and had no specific goals and objectives related to these areas. B.B. is a little awkward and has a hard time socially, which was addressed at Winston but there was nothing in the proposed IEP to address this and no goals and objectives in this area. This is a crucial area, especially in high school. Dr. Brown felt that B.B.'s placement in a very large regional high school, without a plan to address the social issues was wrong for B.B. and had no chance of providing any meaningful educational benefit.

Dr. Brown observed the learning-disabled English and math class, which were proposed for B.B. In the English class, there was no teaching, and the students were in groups and were working on different programs, and the chrome books were not working. They had a peer leaders' program, to help integrate the special education students with the others. However, this program was another way of singling him out as different and would further isolate him. There was a very short time period in between classes and the hallways were very hectic. This would have been overwhelming for B.B. She also observed that the teacher had a hard time commanding the attention of the students in the classroom, due to the wide range of disabilities of the children in the classroom. At Winston, B.B. is grouped with children with similar disabilities and cognitive abilities. There was a lot of activities and kids getting up and the lesson itself was difficult to follow. Such a setting is very difficult for an ADHD child. Neither the English or the math programs that she observed were appropriate for B.B. In addition to the absence of specific goals and objectives, the children in the program were not cognitively at the same level of B.B. B.B. does not do well in a large setting such as

this, and the proposed IEP was all wrong for him. She concluded that in her expert opinion, B.B. would not make any meaningful educational progress under the District's proposed IEP.

She observed B.B. at Winston in October 2018. Winston had specific goals and objectives to address all of these issues. Specially, when she observed him at Winston, they were set up in cubicles and there was one-on-one. She observed B.B. and he performed well in this one-on-one atmosphere with no distractions. The English class was a small class as well. They reviewed the reading and strategy lesson and they all had a binder or notebook with them. She noted the incredible progress B.B. had made at Winston. B.B. had become more independent and his confidence was improved. He was carrying himself in such a way that he was engaged, happy and much more successful. She strongly recommended that he not be removed from Winston, as this was a much more appropriate placement for him. Moreover, the IEP proposed by the District, lacked specific goals and objectives and was all wrong for B.B. It had no provisions for the social and emotional aspects of B.B.'s disability, which is so integral to any academic success for him.

The IEP had no plans for his transition to such a large and unfamiliar setting, no plans to incorporate him into the sports and other extracurricular activities that he was thriving in at Winston. He would have been placed in a classroom with children with a wide range of disabilities and cognitive levels. Finally, the one-on-one aid and/or the peer program would make B.B. feel intimidated and awkward in a brand-new setting. Dr. Brown strongly recommended that B.B. remain in his current educational program so that he could continue to meet his goals and objectives and achieve continued success in his academic program. She concluded in her expert opinion that the proposed IEP was not reasonably calculated to confer any educational benefit on B.B. and would thus, result in a denial of FAPE.

L.B. is B.B.'s mother. B.B. was diagnosed with a disability at three years old. He started Kindergarten at six years old and was originally classified as "other health impaired." It was initially just ADHD, but he also had an auditory processing disorder

and some executive function issues. He was later diagnosed with math and nonverbal learning disabilities. He was getting by in early years of grade school, but the gap was widening as he got older. He was pulled out of the resource room and received supplement services and did okay until fifth grade. He became very frustrated because he could not do the work and the disabilities were preventing him from having friends and he was not involved in clubs or sports. He was becoming isolated. The other kids made fun of him and the homework battles were terrible. Eventually he was refusing to go to school. He needed constant oversight to stay on task and he needed a behavior plan. What happened in the resource room did not carry over to the classroom. Every teacher had a different strategy and things were not working. Everything and everyone were too advanced for him, and he was failing. After they had evaluations done, someone recommended Winston. In 2015, they entered into an agreement with the Tewksbury District to send him to Winston.

L.B. testified that Winston has been a great fit for B.B. He feels like he is part of the community as opposed to an outsider. He has friends and he is involved in activities and sports at school. The teachers all understand him and kids with learning differences. He has developed the skills necessary to do the work. Before everything about school was a constant battle, and now he does it on his own with the skills that he has learned at Winston. However, he is still far behind his grade level and does not have the social skills necessary for a large High School, where he does not know anyone, and would not be able to be involved in any activities or sports.

The first time she had any contact with the District was in July 2018, before ninth grade. The Child Mind, who petitioners had used for some testing, recommended a speech and language evaluation, and Hunterdon wanted to do a reading screening. They did additional testing in July and August, but the last IEP he had was three years old. She met with the school and they said B.B. was eligible for special education services, but there was no IEP. They could not decide about a new school without an IEP and they did not meet with the child study team until August 30, 2018. They were very concerned with the program that the District had ultimately proposed on September 17, 2018. The program seemed to lack appropriate goals for B.B. and she

was very concerned about the social and peer aspect of it. It was a school that was not their home school and it was very large. The only approach they had to address the size of the school and integrating was to use peers, which would make B.B. feel even more isolated. The only sports and extracurricular programs available for B.B. were the ones for children with disabilities, which were much more severe than B.B. However, he was not capable of participating in regular activities without a one-on-one aid, which was impossible at this level, and not even considered by the District. It is difficult for B.B. to participate in sports without an aid, but the aids are embarrassing for him when others don't have it. It is different at Winston as they all need a little direction, and they get it without feeling embarrassed about it. He would be totally isolated at the school as opposed to being integrated into a school with like children. It is very difficult to separate the emotional from the educational components of school, but they are so related. If B.B. is not happy, he is not going to learn. This was a big part of the problem before he went to Winston. In addition, there was no transitional component to the IEP. He was to go from three or four years at Winston to a regional high school overnight. He is thriving at Winston and you are not going to meet a happier kid.

She never observed the LLD class at North Hunterdon, and never saw the program in action. She did view summer school at Voorhees, but they were not the LLD students and the summer program is different. She went to look at it as she was trying to gather as much information as possible on the program that was being offered to B.B. However, she did not want him to start in the middle of the year, the transition was going to be difficult enough for him. And after she saw the program, she was concerned that it was not the right program for him. He receives school-based counseling at Winston and the social skills that they teach which are so crucial to B.B.'s overall educational success is worked into the classes at Winston. He is not pulled out and made to feel different and thus, this component of the proposed IEP would further isolate B.B.

FINDINGS OF FACT

The resolution of the petitioners' claims in this matter requires that I make a credibility determination regarding the critical facts, as well as the expert testimony. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view, and I **FIND** that Dr. Baharev's testimony was not credible. Moreover, her testimony was not corroborated by the documentary evidence. She did not demonstrate that the proposed IEP would provide a meaningful educational benefit to B.B. and it did not have specific goals and objectives for B.B. The testimony that she provided was not supported by the facts and the documentary evidence. I **FIND** that Ms. Nestel's testimony provided no assistance in the determination of FAPE, as she was not a part of the IEP development process and provided no testimony on this critical issue. However, I **FIND** the testimony of Dr. Brown to be credible and was corroborated by the documentary evidence as well as the testimony of B.B.'s mother, whom I also found to be credible. I therefore **FIND** the following as **FACT**:

1. B.B. was diagnosed with disabilities at the age of three. He was classified as OHI in kindergarten.

2. B.B. was later diagnosed with other learning disabilities.
3. B.B. was placed in Winston, a special education school in 2015, pursuant to an agreement with the K-8 District.
4. B.B. became the responsibility of the Hunterdon/Voorhees District on July 1, 2018.
5. An IEP had not been completed on B.B. for several years.
6. An initial meeting of the child study team was conducted on August 30, 2018.
7. B.B.'s parents provided notice of a unilateral placement at Winston on September 11, 2018.
8. The District provided the parents with a proposed IEP on September 17, 2019.
9. The District's IEP proposed placement of B.B. in one the regional high schools.
10. The proposed IEP failed to provide specific goals and objectives in several critical areas.
11. The proposed IEP failed to provide any plan to integrate B.B. into the District.
12. The proposed IEP had no plan for the social and emotional aspects of B.B.'s educational plan.
13. The District's proposed IEP was not reasonably calculated to confer any meaningful educational benefit on B.B.

14. The proposed IEP would have resulted in a detail of FAPE.
15. Winston teachers had plans with specific goals and objectives for B.B.
16. Winston had sports and extracurricular activities for B.B.
17. Winston had social and emotional programs built into their curriculum which are essential for B.B.
18. The placement at Winston provided a meaningful educational benefit for B.B.

LEGAL DISCUSSION AND ANALYSIS

The Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §§ 1400-1482, provides the framework for special education in New Jersey. It is designed “to ensure that all children with disabilities have available to them free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. § 1400(d)(1)(A); see generally id. § 1400(c), (d) (describing need for, and purposes of, the IDEA). A state may qualify for federal funds under the IDEA by adopting “policies and procedures to ensure that it meets” several enumerated conditions.

This Act requires that boards of education provide students between the ages of three and twenty-one who suffer from a disability with a free appropriate public education, or FAPE. In fulfilling its FAPE obligation, the Board must develop an IEP for the student, and the IEP must be reasonably calculated to confer some educational benefit. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 192, 73 L.Ed. 2d 690, 703, 102 S.Ct. 3034 (1982) (Rowley). The Third Circuit Court of Appeals has clarified the meaning of this “educational benefit.” It must be “more than trivial and

must be significant" and "meaningful." Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989) (Polk); Ridgewood Board of Education v. N.E., 172 F.3d 238, 247-48 (3rd Cir. 1999) (Ridgewood). In evaluating whether a free, appropriate public education was furnished, an individual inquiry into the student's potential and educational needs must be made. Ridgewood, supra, 172 F.3d at 247. In providing a student with a FAPE, a school district must provide such related services and supports as are necessary to enable the disabled child to benefit from the education. Rowley, 458 U.S. at 188-89. If an administrative law judge finds that a district has not made FAPE available to a student who previously received special education in a timely manner prior to his enrollment in a nonpublic school, the judge may require the district to reimburse the parents for the cost of that enrollment if the private placement is appropriate. N.J.A.C. 6A:14-2.10.

The Supreme Court also held that two factual findings must be made before awarding reimbursement for the costs of a unilateral placement: (1) the school district failed to provide a FAPE to the student, and (2) the placement selected by the parents was proper. School Comm'n of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369-70 (1985). Since the Burlington decision, its holding has been adopted by both Congress and the United States Department of Education. 20 U.S.C. §1412(a)(10)(C); 34 C.F.R. 300.403(c) (2005). It is also set forth at N.J.A.C. 6A:14-2.10(b) in that an ALJ may require the district to reimburse the parents for the cost of enrollment if the ALJ finds that the district had not made FAPE available to that student in a timely manner prior to that enrollment and that the private placement is appropriate. A placement may be found to be appropriate by an ALJ according to N.J.A.C. 6A:14-6.5 for placements in unapproved schools, even if it does not meet the standards that apply to the education provided by the district board of education.

Parents who are dissatisfied with an IEP may seek an administrative due-process hearing. 20 U.S.C.A. § 1415(f). The burden of proof is placed on the school district. N.J.S.A. 18A:46-1.1. The Board will satisfy the requirement that a child with disabilities receive FAPE by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson

Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). To meet its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. (2017); 137 S.Ct. 988; 197 LEd 2d 335. In Endrew, the District Court for the District of Colorado initially upheld the school denial of a reimbursement for an out of district placement. However, the Supreme Court reversed finding that an IEP should be appropriately ambitious in light of the child's circumstances, and "tailored to the unique needs of a particular child."

In Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, 1001 (2017), the United States Supreme Court construed the FAPE mandate to require school districts to provide "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Court's holding in Endrew F. largely mirrored the Third Circuit's long-established FAPE standard, which requires that school districts provide an educational program that is "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities." Dunn v. Downingtown Area Sch. Dist. (In re K.D.), 904 F.3d 248, 254 (3rd Cir. 2018) (quoting Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3rd Cir. 2012)). In addressing the quantum of educational benefit, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the IEP provides for "significant learning" and confers "meaningful benefit" to the child. Endrew E., 137 S. Ct. at 1000–01; T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 247 (3d Cir. 1999), superseded by statute on other grounds as recognized by P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988). Hence, an appropriate educational program will likely "produce progress, not regression or trivial educational advancement." Dunn, 904 F.3d at 254 (quoting Ridley, 680 F.3d at 269).

Thus, the first issue is whether the District's proposed IEP provided FAPE. The testimony of petitioners' expert, whom I found credible, as well as B.B.'s mother demonstrates petitioners' argument that the significant needs of B.B. were not addressed in the proposed IEP and would not have been met in the proposed placement. B.B. had significant issues in the Tewksbury District, which led to his placement at Winston. In addition to academic troubles, B.B. had trouble relating to other students in the class, trouble focusing and was easily distracted. He was picked on, was unable to engage in extracurricular activities and sports due to his disability. The IEP failed to provide specific goals and objectives on a social, emotional and academic level which would provide a significant and meaningful educational benefit to B.B. Moreover, the IEP did not provide any meaningful way to acclimate B.B. to the entirely new school environment, nor did it provide a way to incorporate him into any of the extracurricular activities in any meaningful way.

Although the IEP should set forth a statement of the present levels of academic achievement and functional performance, including how the student's disability affects involvement and progress in the general curriculum (20 U.S.C. §1414(d)(1)(A)(i)(I); N.J.A.C. 6A:14-3.7(e)(1)), there was no such clear statement in the proposed IEP. Although there should be a statement of measurable annual academic and functional goals with short-term objectives or benchmarks and the IEP should describe a program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives (20 U.S.C. §1414(d)(1)(A)(i)(II)-(IV); N.J.A.C. 6A:14-3.7(e)(2)-(4)), those were not clear in the proposed IEP. Although the IEP should establish the rationale for the pupil's educational placement, the proposed IEP recommended B.B.'s placement in a school that was very large, with no meaningful way to acclimate him. The majority of the children in the proposed class were not functioning on the level of B.B. and thus, from a social aspect integration would be difficult if not impossible. Accordingly, I conclude that the proposed IEP would provide no meaningful educational benefit and a denial of FAPE.

If a reviewing court finds as I have, that an educational agency failed to provide a student with a FAPE, it is broadly empowered to fashion relief that is appropriate in light

of the purpose of the IDEA. School Comm'n of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985). The right of parents to make unilateral private placements when they disagree with the educational programs provided to their disabled children is well established. In the Burlington case, the United States Supreme Court held that the IDEA empowers courts to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement is proper under the IDEA. Ibid. This was considered to be a valid exercise of courts' broad powers to ensure that the purposes of the statute are carried out, i.e., to ensure that all disabled children have access to a FAPE. Ibid. The Court concluded that this would not unduly burden school districts. Rather, it merely requires a school district to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Id. at 359.

Based on the evaluations and reports and based upon the past history of B.B., I **CONCLUDE** that the District's proposed IEP, did not provide B.B. with FAPE. I further **CONCLUDE** that the IEP was not consistent with the observations of the petitioners' expert, the reports from the Winston teachers, the parents' concerns and the recommendations of petitioners' experts. Further, I **CONCLUDE** that the IEP was not reasonably calculated to deliver a measure of progress deemed reasonable and beneficial given the special needs and specific requirements of B.B. Therefore, I **CONCLUDE** that the petitioners met the standard in showing that the District's proposed IEP failed to provide FAPE.

Reimbursement is still dependent upon the parents establishing that the unilateral placement provides the pupil with an appropriate education. Burlington, 471 U.S. at 359; Florence County School District Four v. Carter, 510 U.S. 7, 15 (1993). Regarding the appropriateness of Winston, petitioners' provided documentary evidence of B.B.'s progress at Winston, and provided expert testimony that Winston indeed demonstrated the significant academic and social progress B.B. had made at Winston, and specific goals and objectives for his continued progress.

Regarding the legal argument that Winston is unapproved and unaccredited, said argument does not go to the appropriateness of the school, but rather, a judge's ability to order such a school as a placement. In R.S. and M.S. obo D.S. v. Somerville Bd. of Ed., Civil Action 10-4215 (MLC), 2011 WL 32521, the U.S. District Judge held that despite a school being unapproved by the NJDOE, the placement was considered the "stay put" placement under the Court's "equitable authority" at least initially while not ruling on whether such a placement could be ordered on a prospective basis. In L.M. v. Evesham Bd. of Ed., 256 F.Supp. 2d 290 (2003), the court ruled that standards applied to the educational decisions of the local school district are not to be applied to unilateral parental placements and that prospective placements could be effectuated, "most likely after a due process challenge." In short, the cases are consistent that the failure of a school to be state-approved is no justification for denying a student's access to needed educational services that the district failed to provide, and the parents unilaterally sought. See Nancy Conners v. Richard Mills, Comm. of Ed., 34 F.Supp. 2d 795, 805 (N.D.N.Y. 1998). Further, the regulations make allowances for unapproved schools by authorizing an administrative law judge to place a child in such a school. N.J.A.C. 6A:14-2.10(b) (citing N.J.A.C. 6A:14-6.5).

In New Jersey, such reimbursement is also dependent on compliance with N.J.A.C. 6A:14-2.10 entitled, Reimbursement for Unilateral Placement by Parents. The regulation provides in pertinent part:

(a) Except as provided in N.J.A.C. 6A:14-6.1(a), the district board of education shall not be required to pay for the cost of education, including special education and related services, of a student with a disability if the district made available a free, appropriate public education and the parents elected to enroll the student in a nonpublic school, an early childhood program, or an approved private school for students with disabilities.

(b) If the parents of a student with a disability, who previously received special education and related services from the district of residence, enroll the student in a nonpublic school, an early childhood program, or approved private school for students with disabilities without the consent of or referral by the district board of education, an

administrative law judge may require the district to reimburse the parents for the cost of that enrollment if the administrative law judge finds that the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a court of competent jurisdiction or an administrative law judge according to N.J.A.C. 6A:14-6.5 for placements in unapproved schools, even if it does not meet the standards that apply to the education provided by the district board of education.

(c) The parents must provide notice to the district board of education of their concerns and their intent to enroll their child in a nonpublic school at public expense. The cost of reimbursement described in (b) above may be reduced or denied:

1. If at the most recent IEP meeting that the parents attended prior to the removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the IEP proposed by the district;

2. At least 10 business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the district board of education of their concerns or intent to enroll their child in a nonpublic school;

....

4. Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

The District was given proper notice of the unilateral placement. Moreover, the District was aware that B.B. was at Winston, and failed to propose an IEP until well after the school year had commenced, and finally the proposed IEP failed to provide a plan with any meaningful educational benefit and thus, the proposed IEP denied B.B. FAPE. I **CONCLUDE** that the unilateral placement by the parents at Winston was reasonable.

I therefore **FIND** as set forth above that due to (1) the failure of the District to provide FAPE, (2) the appropriateness of Winston for B.B., and (3) the parents' notice to the District of their placement and the rejection of the proposed IEP, that reimbursement must be granted. N.J.A.C. 6A:14-2.10. Applying the notice requirements of N.J.A.C. 6A:14-2.10(c), reimbursement is appropriate from September 2018, and as long as that placement remains appropriate. The District shall develop an IEP consistent with B.B.'s placement at Winston.

DECISION AND ORDER

For the reasons set forth above, the reimbursement for the unilateral placement and continued placement at Winston is **GRANTED**. Petitioners' request for compensatory education is **DENIED**.

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

October 31, 2019 _____

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency

Date Mailed to Parties:

SGC/cb

APPENDIX

WITNESSES

For petitioners:

Meghan Brown, Ph.D.

L.B.

For respondent:

Zulejka Baharev, Ph.D.

Elaine Nestel

EXHIBITS

For Joint:

- J-1 Psychological Evaluation Report, dated November 3, 2014
- J-2 Educational Evaluation, dated March 18, 2015
- J-3 Authorization for Evaluation, dated July 15, 2015
- J-4 Authorization for Release/Exchange of Information, dated July 20, 2015
- J-5 Neuropsychological Evaluation, dated July 28, 2015
- J-6 North Hunterdon-Voorhees Regional School District Registration Form, dated January 23, 2018
- J-7 Invitation for Initial Identification and Evaluation Planning, dated March 9, 2018
- J-8 Meeting Attendance Sign-in Sheet, dated April 11, 2018
- J-9 Consent for Initial Evaluation, dated May 11, 2018
- J-10 Speech and Language Evaluation Report, dated July 26, 2018
- J-11 Confidential Report of Reading Assessment, dated July 26, 2018
- J-12 Educational Evaluation, dated August 30, 2018
- J-13 Letter from Kathleen Wright (Tewksbury Twp.) Responding to Questions Concerning B.B.'s Transition to High School, dated June 2017

- J-14 Authorization for Release/Exchange of Information – Voorhees High School Child Study Team for the 2017-18 School Year (8 gr.) (signed)
- J-15 Letter from North Hunterdon-Voorhees to Parents of 8th Grade Students re: Evening for Parents of Students Eligible for Special Education Who Will be Entering 9th Grade in 2018, dated October 6, 2017
- J-16 Invitation for Initial Identification and Evaluation Planning (Tewksbury Twp.), dated March 27, 2018
- J-17 Winston Prep School Report Card, Spring 2018
- J-18 Clinical Research Feedback Report (Rebecca Neuhaus, Danielle Kahn of Child Mind Institute), dated March 29, 2018
- J-19 North Hunterdon-Voorhees Request for Additional Assessment (Speech Language and Read 180), dated July 5, 2018
- J-20 Consent for Additional Assessment (signed), dated July 6, 2018
- J-21 Request to Release and/or Obtain Pupil Records/Information (signed), dated July 6, 2018
- J-22 North Hunterdon-Voorhees Student Invitation to a Transition IEP Meeting, dated August 3, 2018
- J-23 North Hunterdon-Voorhees Invitation for Initial Identification and Evaluation Planning, dated August 3, 2018
- J-24 Letter, dated August 21, 2018 from Megan Verderammo to Zulie Baharev re: Clerical Error on B.B.'s Consent for Initial Evaluation, dated May 11, 2018
- J-25 Invitation for Initial Eligibility Determination and IEP Development, dated August 23, 2018
- J-26 Invitation for Initial Eligibility Determination Meeting Confirmation Form (signed), dated August 27, 2018
- J-27 Initial Eligibility Determination with IEP Meeting Attendance Sign-In Sheet, dated August 30, 2018
- J-28 Initial Eligibility Determination – Eligibility Without IEP Development
- J-29 Invitation for Initial Eligibility Determination and IEP Development, dated September 5, 2018

- J-30 Email Correspondence to/from petitioners to Tarah Santaniello re: B.B.'s Placement
- J-31 Invitation for Initial Eligibility Determination Meeting Confirmation Form, dated September 11, 2018
- J-32 Meeting Attendance Sign-In Sheet, dated September 17, 2018
- J-33 Draft IEP, dated September 17, 2018

For petitioners:

- P-1 Winston Preparatory School Fall Report 2015
- P-2 Winston Preparatory School Report Card Fall 2015
- P-3 Winston Preparatory School Winter Report 2016
- P-4 Winston Preparatory School Final Report 2016 & Report Card (originally marked as P-10 id)
- P-5 E-mail Correspondence to/from petitioners and Tewksbury Township Board of Education April 2018-June 2018
- P-6 Dr. Megan A. Brown's Report of School Observations, dated October 2, 2018
- P-7 Winston Preparatory School Fall Report 2016 (originally marked as P-10 id)
- P-8 Winston Preparatory School Winter Report 2017 (originally marked as P-10 id)
- P-9 Winston Preparatory School Spring Report 2017 & Report Card (originally marked as P-10 id)
- P-10 Winston Preparatory School Fall Report 2017 (originally marked as P-10 id)
- P-11 Winston Preparatory School Winter Report 2018 (originally marked as P-10 id)
- P-12 Winston Preparatory School Spring Report 2018 & Report Card (originally marked as P-10 id)
- P-13 – P-26 *Not in Evidence*
- P-27 Curriculum Vitae of Dr. Megan Brown
- P-28 Website Regarding NHV

For respondents:

None