State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 02367-16

AGENCY DKT. NO. 2016-24033

M.B. on behalf of L.B.,

Petitioners,

v.

CINNAMINSON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

_____

Hillary D. Freeman, Esq., for petitioner (Freeman Law Offices, LLC)

Jared S. Schure, Esq., for respondent (Methfessel & Werbel, P.C.)

Record Closed: December 7, 2016 Decided: December 28, 2016

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

M.B., mother of L.B., challenges the determination by the respondent, the Cinnaminson Township Board of Education ("Cinnaminson" or "the District"), that L.B. should be declassified. The District has conceded that L.B. has been diagnosed on the autism spectrum, with related disabilities, one being a central auditory processing disorder; however, it argues that the disorders are not impeding the child's learning so as to render her eligible for specialized services under the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400 to 1482. Her mother argues that

L.B. has been diagnosed with not only autism and the auditory central processing disorder, but frontal lobe and executive function deficit, pragmatic language impairment, sensory disorder, Fourth Cranial Nerve Palsy, and anxiety, which together cause her to need a high level of specialized support in order to succeed. She also contends that the District did not provide a Free and Appropriate Public Education (FAPE) at any time between 2011 and the 2015-2016 school year (second grade). Therefore, she asserts that the District must provide compensatory education to her daughter. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 18, 2016. It was heard on September 14, 16, 19, 21, 28, and November 16, 2016. The record closed on December 7, 2016, following receipt of the parties' closing summations.

FACTUAL DISCUSSION AND FINDINGS

History in the school district

L.B., age nine, who is currently in third grade, is in the resource room for reading, mathematics and language arts, and in a general education classroom for science and social studies.

In April 2012, at age four, L.B. was found eligible for special education and related services under the category of "Autistic." (J-23, Tr. September 14, 2016, at 25, 26.) The eligibility report said that testing showed below average scores in Listening Comprehension, Reading and Spoken Language. Expressive vocabulary fell in the below-average range, and cognitively her overall abilities fell in the lower limits of the average range with visual processing falling in the below-average range. The disabilities were determined to be affecting education performance in "attention and expressive vocabulary weaknesses. Her visual processing (was) also a significant weakness which could affect pre-reading activities." (J-23.) The IEP for the approximately three months remaining in the year placed her in a self-contained special education preschool room for four-year-olds. She also received physical therapy and occupational therapy consultation three times in the remainder of the school year. (J-

24.) Although the IEP had goals in the areas of language arts, cognition, and mathematics, which included such things as recalling words in a rhyme or song with 80 percent accuracy, verbally sequencing events with 80 percent accuracy, recalling items removed from a group with 80 percent accuracy, solving simple problems with 80 percent accuracy, and identifying objects from verbal clues with 80 percent accuracy, petitioner asserts that it left out critical goals in listening comprehension, reading, writing, and communication skills.

The 2012-2013 IEP placed L.B. in a developmental kindergarten class, which is a general education setting. However, the curriculum was taught at a slower pace, and the class had fewer students than a regular classroom. (J-26, Tr. September 14, 2016, at 34.) L.B. also received physical therapy one day a week for thirty minutes and consultative occupational therapy three times per year. The IEP repeated the pre-kindergarten goals verbatim, with a notation she was already advanced or proficient at all of them, except writing her name with 80 percent accuracy. Jennifer Alexander, school psychologist, testified that the reason the IEP had no specific academic goals, modifications, or accommodations, was that the class existed "solely to work on kindergarten readiness skills and whatever those students may be weak in." (Tr. September 14, 2016, at 35.)

The 2013-2014 IEP placed L.B. in transitional first grade, where the goal is generally to spend about half a year reviewing kindergarten skills and the second half jumping into first grade skills, so the children have a leg up entering first grade. (Tr. September 16, 2016, at 8, 9.) During this time, she received physical therapy one time per week for thirty minutes and consultative occupational therapy three times a year. Alexander explained that transitional first grade is a general education class with fewer students than usual. Although it uses the first grade curriculum, "they're still taking it at a slower pace so that any weaknesses can really be worked on, and there's time to do that before they go on to first grade." (Tr. September 14, 2016, at 48.) The goals repeated the pre-kindergarten goals in language arts and cognition, goals which included working with no more than two prompts, completing tasks three times out of five, accepting correction positively three times out of six, and expressing emotions and

needs appropriately half the time. (J-42.) Alexander said the teachers were not reporting significant social problems in the classroom and felt that L.B. was making appropriate progress in the goals from the prior year. (Id. at 50.)

For first grade in 2014-2015, Jannette Oliver, L.B.'s transitional first grade teacher, recommended movement to the general education setting for everything with some accommodations, but eventually the child study team concurred with the parent's[1] request for a split curriculum, with resource room instruction in reading, language arts and math and general education placement for science and social studies. In addition, L.B. was offered the opportunity to participate in a lunch bunch for social skills training. (Id. at 89.) Susan Siegler, school social worker, was L.B.'s case manager during this time period. She explained that the resource room takes children out of general education to a small group, where the curriculum can be modified and different strategies utilized. Students there are taught by a special education teacher. It is more restrictive than general education because "all of the students in the class are special ed students." (Id. at 83, 84.) The IEP (J-48) noted that while L.B. could recognize 66 of 68 sight words in isolation, she was not consistent when they appeared in a story. It also reported some issues in transitioning to a non-preferred activity (making the change but making clear she did not want to change), and daydreaming. It delineated goals for English Language Arts, Mathematics, and Social Skills, which included such things (all at 80 percent accuracy) as being able to retell a story in sequence, predicting outcomes, writing a story with a beginning, middle and end, adding and subtracting, doing math word problems, completing tasks at an appropriate pace, and transitioning appropriately from preferred to non-preferred activities.

The disagreement over mainstreaming repeated itself for second grade in the 2015-2016 school year. In a December 2015 IEP meeting, the District formally recommended declassification, a proposal to which the parent responded with the instant due process petition. The dispute continued through the rest of the year, and L.B. continued in an informal stay-put arrangement. Despite a lengthy process of mediation and an unsuccessful attempt to settle, the case went to hearing, and as a

[1] Although L.B. lives in a family that operates as a two-parent unit, the second caregiver has not taken the steps necessary to become a parent as a matter of law.

result, so far in third grade, L.B. has remained in the pull-out resource room for reading, language arts and math; and in a regular general education classroom for science and social studies.

Declassification

The school district contends that L.B. is performing at average levels in the classroom and scores at average on tests. Therefore, she simply does not meet the legal criteria for a disability requiring an IEP. The District points out that diagnosis alone is insufficient. The disability also must adversely affect the student's educational performance, and the student must be in need of special education and related services. N.J.A.C. 6A:14-3.5. The District contends that there is no proof of adverse effect on performance; therefore, there also are no proofs that special education and related services are required to provide the child with a FAPE. The parent contends that the District has either negligently or deliberately turned a blind eye to L.B.'s problems and the numerous expert reports documenting them.

In the main, the District's witnesses testified to their belief that L.B. can function in a general education classroom without the need for an IEP and specialized services.

Janette Oliver, L.B.'s teacher in transitional first grade, testified that initially, L.B.'s reading skills were at a one, when entering first graders should have at least be a three. So, in Oliver's opinion, L.B. was properly placed in developmental first grade. By January, L.B. had reached three, and by year end, eight, which meant that she ended the year "at a mid-year first grade level." (Tr. September 16, 2016, at 12-13.) Socially, she began the year reserved compared to other children. But, at year end, L.B. was raising her hand without being coaxed. (Id., at 15-16.) L.B. needed "a lot of teacher support" in the first marking periods, but progressed over time to working more independently. (Id. at 23.) Her report cards demonstrated constant progress in decoding, identifying sounds, and comprehension, along with mastery of recognizing color and sight words, number words and numerals. (J-99.) In math, she started with a 12 percent on a standardized test, and ended with an 88 percent on a test of the same

skills, which was average for the class. (Tr. September 16, 2016, at 16, 17.) Oliver said L.B.'s biggest struggle in math was addition and subtraction facts, where she received "I"s, meaning improvement needed. Oliver recalled L.B.'s work as "very inconsistent," as sometimes she was apparently guessing, while on other days she flew through the math worksheets with no problems. (Id. at 25.) L.B. also received "needs improvement" in math problem solving. (J-99.)

Laura Keneally Flail was the resource room teacher for first grade. She explained that while all first graders learn setting, characters, cause and effect, and main idea during the reading portion of their day, in the resource room, the stories are shorter, as are the sentences, making it easier to understand. (Tr. September 16, 2016, at 88.) The resource room class uses more small group instruction, individualized attention and multi-sensory approaches. (Id. at 88, 89.) L.B. started the year at a high level in reading and math compared to the other children in the room. In math, she earned "A"s in every marking period except the last one, which was a B-Plus. (Id. at 91.) As it happened, she also was the only student in the resource room who came from the transitional first grade class; the others from that class had moved on to general education in all subjects. (Id. at 128.) L.B.'s Developmental Reading Assessment scores went from eight in the fall to twelve in winter, ending with an eighteen. (Id. at 92.) Although Flail had graded L.B.'s reading fluency as needing work in all marking periods, Flail said in her view, all first graders need help reading orally with fluency. However, she did not believe L.B.'s lack of skill in the area was hindering L.B.'s comprehension or word decoding skills. (Id. at 104.)

Initially, L.B. did not exhibit confidence or enthusiasm in writing, but she slowly began to write longer stories with more details as the year went on. (Id. at 100.) The teachers did not grade writing at all for the first half of the year because students were new to first grade. (Id. at 125.)

With regard to L.B.'s grades in reading and math, Flail did not think that the reason L.B. did so well was because there were so few students, as Flail spent more time with other children because they were struggling more. (Id. at 93.) She also said

the reason she wrote that L.B. was benefitting from the resource room was that "any student would benefit from a small . . . student to teacher ratio and individualized attention." (Id. at 116.)

Flail did acknowledge writing a note on one of the IEP reports saying that L.B. had difficulty controlling her anger. (Id. at 97.) She said it likely related to one of perhaps three incidents in which L.B. came to class clearly upset about something that she would not discuss. She remained upset for ten or fifteen minutes before returning to normal behavior. (Id. at 98, 102.)

Dawn Martin was L.B.'s general education teacher during second grade. She was the primary teacher for science and social studies, along with homeroom. The classes of twenty students each included about twenty percent classified students and eighty percent unclassified children. Brittany Hockenbrock, who was the second grade special education teacher, cooperated closely with her because, based on testing and recommendations from first grade, they anticipated that L.B. could be declassified at any time and would need to be in the same place in the curriculum as the general education students in reading and math. Martin felt that for science and social studies, L.B. performed as an average second grader. (Tr. September 16, 2016, at 157-158.) "She was average with everyone else. She didn't require any extra modifications in her work, or accommodations compared to the rest of my class." (Id. at 158.)

With regard to L.B.'s relationship with the other special education students, Martin testified that L.B. acted as "more of a leader for . . . (that) group . . . doing things like reminding them to bring their planners or lunches." (Id. at 158.) Martin also said L.B. would express reluctance about leaving, saying things like "Can't I just stay here?" or "I could do your work." (Id. at 159.) L.B. was organized and very attentive to the daily schedule, noticing immediately if "Assembly" was on the board, or that "Social Skills" was missing if it happened to be the day she and others attended that group. (Id. at 163.) She also was very competitive, raising her hand often. (Id. at 160.)

Brittany Hockenbrock, who holds teaching certificates in both elementary education (K-5) and special education, taught the second grade resource room for reading, language arts, and mathematics. She said for reading and language arts, there were four students, adding two more for mathematics, making a maximum of six students that she taught along with an aide. Because L.B. was stronger than other students in reading, she was in her own reading group. Since she was working with Martin to ensure that L.B. could transition quickly to general education, Hockenbrock taught L.B. writing at the same pace as in general education, and math was about a week behind. Hockenbrock said that, in all subjects, L.B. worked at a higher level than the other five students. She testified that L.B. started the year in reading with a DRA level of 24, moved to 28 at mid-year and received a 30 for the spring, all of which were second grade level scores. (Tr. September 19, at 18.)

Hockenbrock said that in her experience, L.B. had great decoding skills, which she attributed to the fact that she used a portion of the Orton Gillingham program focused on decoding to teach spelling. (Tr. September 19, at 41.) L.B. did show some reading fluency issues, as L.B. had a tendency to read at a fast pace, skipping small words like “and,” or substituting “a boy” for “the boy.” She did not make the errors when directed to slow down. (Id. at 41-42.) Hockenbrock said that in her room, when the children are writing, they are working virtually the entire forty-minute period. (Id. at 48.) They are never asked to just write an essay—they usually receive ten minutes to gather ideas, then create a draft, and then on another day edit and complete the finished work. (Id. at 48 through 50.) Like other teachers discussing L.B.’s written work, she defended the multiple spelling errors on grounds that L.B. used phonetic spellings, and that her sentences had appropriate punctuation. (Id. at 52.)

Although Hockenbrock did not see problems between L.B. and other students, there was a period in mid-year when L.B. was less cooperative with teachers. She would, for instance, roll her eyes declaring, “This is easy,” or say the work was boring, or ask, “Why do I have to learn this?” (Id. at 68-69.) At one point during the year, Hockenbrock recalled giving an end-of-the-year test to assess spelling of a list of non-phonetic sight words, such as “once.” She warned the students more than a week

ahead about the need to study. But, on the day of the test, when she asked if everyone studied and if anyone still needed help with any words, L.B. said she had not been allowed to study. Hockenbrock did not necessarily believe this, but gave her fifteen minutes to study before taking the test, on which she scored 90 percent. (Id. at 37-39.)

Questioned about whether L.B. ever talked about moving to all-day general education, Hockenbrock said L.B. vocalized that she does, at times want to be in that classroom, but also said she would miss her friends in the other classroom. The child told the teacher that she was not sure how she would do in general education because she had never been there a whole day. She volunteered that she did not think her parent thought she would do very well there. (Tr. September 19, at 27.)

At the beginning of the school year, L.B. had a separate, portable F.M. system on her desk, but later in the year, when another child with hearing issues joined the class, the school installed a full-classroom teacher amplification system.

Hockenbrock said that although L.B. started well on doing homework, it got inconsistent as the year progressed. "Sometimes there would be . . . whole sheets of homework done incorrectly, where in class that day, she would show no signs of struggle." (Tr. September 19, at 30.) At the end of the year, homework picked up again, coming in completed and done neatly with fewer errors. (Id. at 32.) Although the teacher would ask all the students about whether they had needed help with their homework, L.B. always said she did the work by herself. "I'm not sure if she didn't need the help or didn't ask for the help, but she never mentioned anything about receiving help on homework," Hockenbrock said. (Ibid.)

Ruth Herron Ross, who was admitted as an expert in the fields of special education and social skills development, provided social skills training to L.B. in a forty-five minute group session once a week in the 2014-2015 and 2015-2016 school years. She explained that social skills are behaviors used for interactions between individuals, part of the social norm for how people interact with one another. (Tr. September 19, 2016, at 198.) Although initially introverted, L.B. grew bolder after four or five sessions,

and in general "was usually the one showing the most appropriate behaviors during the group." (Id. at 201.) She testified that in both years, she did not feel that L.B. needed the class. (Id. at 202.) Nonetheless, she recommended that L.B. continue the class into third grade, because Ross continues to run the class there, and "with a new environment and a new skill set and level of expectation in the new building, I thought it would benefit her to have a familiar face and get that social skills support." (Id. at 207.) Ross acknowledged that early on, L.B. did exhibit some negative behaviors, such as using a disrespectful tone of voice, and complaining when she was not getting what she wanted. (Id. at 215.) Ross also created a goal related to what she thought might be isolating behavior, because L.B. frequently picked reading a book alone over playing a game with other children. But Ross noted that when doing so, L.B. generally placed herself in close proximity to the children, and made frequent comments to them. (Id. at 206-207.)

The District experts who examined L.B. as part of her three-year evaluation also testified that, for various reasons, they did not think she was exhibiting educational impacts. Catherine Jenkins, an expert in speech and language pathology, testified that a March 2012 assessment of L.B.'s speech and language capability performed by Deborah Mason demonstrated that L.B. did not meet the standards for a child in need of specialized speech and language services. This is because the standard requires a child to fall below the tenth percentile on two overall language skills tests, and L.B. did not.

In February 2015, Jenkins, who works for the District as a speech language specialist, conducted another speech and language evaluation. (See J-58.) She administered the Clinical Evaluation of Language Fundamentals-V (CELF), the Test of Language Development, Fourth Edition (TOWL), the Test of Auditory Processing Skills (TAPS), Third Edition and the Pragmatic Language Skills Inventory—and L.B.'s overall scores in each of them were average. (Tr. September 21, at 14, 15.) The CELF tests grammar in simple isolated sentences, and the TOWL evaluation looks primarily at single-word vocabulary. (September 21, 2016, at 42, 43.) In a subset of one test, which measured auditory processing, L.B. scored in the below average range. (Tr.

September 21, 2016, at 24.) Additionally, in the Social Language Development Test, she scored below average. One portion of that section involved giving L.B. an oral problem to solve, while another segment involved showing her a picture and asking her to provide two explanations of what the picture might mean. (Id. at 25.) Jenkins did not administer a completely separate test when she evaluated pragmatics; rather, she asked L.B.'s teachers to answer a series of questions. (Id. at 40.) Asked about testing by outside experts that showed deficiencies in L.B.'s performance, she responded that she did not credit them with much value, as she believes that an "artificial testing situation" is different than performing every day in school. (Id. at 49.)

This was one of the reasons that, although Jenkins had seen the expert report from the Princeton Speech and Language Center, she did not give it much weight. Jenkins said that the TOWL, Fourth Edition, which was administered by the Center, was only normed for children between ages nine and eighteen, and since L.B. was eight years and three months old when it was given, the results would not be valid. (Tr. September 21, 2016, at 21.) In a different test looking at auditory process, L.B. scored at the top of the average range, in contrast to the below-average result on Jenkins' test of the same skill. (Id. at 24.) With regard to the Social Language Development Test, on which L.B. scored below average at the Princeton Center, Jenkins said the test did not necessarily indicate L's pragmatic skills, as she would likely behave differently in a clinician's office than in a school setting. (Id. at 26.)

Kristy DeSanto, school psychiatrist, conducted a psychological evaluation of L.B. in January of first grade to look at L.B.'s cognitive ability. L.B. tested average in the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), with the exception of below average in the vocabulary subtest of the Verbal Reasoning component. In two other subtests, similarities and comprehension, she scored an eight, which is average. Average range for these subtests is a score of eight to twelve. In sum, however, overall, DeSanto found L.B.'s intellectual ability to be within the average range. (J-57.) She also gave both L.B.'s parent and her teachers what is known as the Behavior Assessment System for Children (BASC), because there was a difference in what teachers and parents were anecdotally reporting. The teacher result revealed no areas

of concern; the parent evaluation fell in the clinically significant range in the areas of hyperactivity, aggression, conduct problems, externalizing problems, atypicality, withdrawal and attention problems. (Id. at 63.) DeSanto also asked L.B.'s special education teacher to fill out a BASC evaluation, and she also reported no areas of concern. (Id. at 65.)

Julie Bates, learning consultant, conducted an annual educational evaluation as part of the tri-annual assessment of L.B. in January 2015. Currently, she also serves as L.B.'s case manager. Bates administered the Woodcock-Johnson III Test of Achievement in reading, writing ,and math. L.B. had overall scores of average in all three subjects. On a subtest related to reading fluency, she scored in the high average range.

The Woodcock-Johnson III version Bates used was first normed in 2001 and updated in 2005. Initially, Bates said she used the 2001 norms, (Tr. September 21, 2016, at 105) although on another day, after time to research her notes more closely she said she had utilized the 2005. (Tr. September 28, 2016, at 8.) The Woodcock-Johnson IV was published in 2014, and the District purchased it, but Bates said she had not been trained on the scoring, which is why she did not use the current version of the test in evaluating L.B. (Tr. September 21, at 109.) The booklet that she used carried the following instruction: "If an older version of a test is used when a newer version has been published or made available, the test users are responsible for providing evidence that the older version is as appropriate as the new version for that particular test use." (Id. at 142-143.) Bates said just the fact that the older version was still available meant that it was appropriate. (Id. at 143.) She did not believe that measuring L.B. against updated norms would matter. ". . . [T]he normative update or the WJ-IV, regardless of what score I used, she still would have been in the average range." (Tr. September 28, 2016, at 13.) Asked again, "Is it still your testimony that the norms don't—that the norms don't really make a difference in this matter?" she replied, "That would be my testimony, yes, that if I had scored her on the WJ-IV, that she still would have been within the average range." (Id. at 13-14.) Asked a number of questions about how the WJ-IV differs from the one she used, her answers varied from "the writing sample

subtests (and) . . . spelling subtest (are) still the same," to "they changed around the math fluency piece," to they added "an oral reading fluency subtest," to "I don't recall." (Id. at 18.) Lately, she uses the WJ-IV less and a test called the WIAT-III more because the WIAT is in one protocol booklet, instead of two flip booklets. (Id. at 19.) At the time she tested L.B., she was not aware of L.B. having any particular areas of academic concern.

Reports of external experts

Over the years, L.B. has been the subject of extensive testing by external experts, only one of whom testified. Nonetheless, the reports provide context for the dispute between the parties. In Fall 2012, petitioner obtained a Speech-Language Evaluation from Meryl Rosenblum, a speech-language pathologist. The Child Study Team rejected some of the key recommendations of the report on grounds that "Learning skills associated with reading is part of the developmental kindergarten curriculum that [L.B.] is currently instructed from. [L.B.'s] report card and classroom teacher indicate that [L.B.] is progressing with the reading readiness curriculum and that little teacher support is needed in this area." (J-43.) The one normed test that the District acknowledged was the Emerging Literacy and Language Assessment (ELLA). The scores included: (a) an inability to provide three of twelve letter sounds; (b) a 0 in identifying two verbally named and presented pictures that rhyme;(c) eight of twelve possible correct answers to identifying rhyming words in a verbally presented three-word cluster; (d) a 0 in being able to follow two rhyming words with other similar words; (e) the ability to name the sound of the first letter of nine of twelve words; (f) a 0 in blending isolated words into a meaningful two-word cluster; (g) correctly identifying seven of twelve common signs such as "closed" or "handicapped parking"; (h) a 0 in putting a target word with a picture. In the three items where she scored 0, Rosenblum reported that it occurred because the child appeared to be entirely unable to grasp the concept of what she was being asked to do. Rosenblum viewed these scores and other, non-normed test results as evidence of "the pervasive nature of [L.B's] speech-language and social communication impairments." (J-32.) She recommended speech-language therapy twice weekly for half an hour, and documentation of specific,

measurable goals as part of the I.E.P. (Ibid.) As noted, the District gave the report no weight.

In August 2014, Meghan L. Pavlick, senior audiologist, of the Cooper Medical School of Rowan University, conducted an audiologic and central auditory processing evaluation of L.B. The report (J-50) states that the child's hearing "is within normal limits in each ear. Results of the central auditory processing evaluation revealed an auditory perceptual deficit in BOTH ears; however, differential diagnosis of autism and auditory processing disorders is extremely difficult." Pavlick then made twelve recommendations to help "address listening issues, as well as those that may arise from developmental issues." One, an FM amplification system to bring the teacher's voice above background noise, in order to improve focus, was implemented by the District. Others, such as "work with speech pathologist to develop compensatory strategies and strengthen non-speech listening skills, such as pattern and frequency recognition," and "Use of computer based programs such as HearBuilders for practice in following auditory directions," and "supplement verbal instruction with visual cues to reinforce important concepts . . ." apparently were not. Arlene Goldfarb, district learning consultant, described the recommendations as "cookie-cutter . . . given to everybody who comes in for an evaluation. These are all good teaching practice for everybody in the class and that's what our teachers use." (Tr. September 28, 2016, at 63.) She also noted that L.B. was then seven, the youngest possible age for that kind of testing. (Ibid.) She said the report would have carried more weight with her, if it had included percentiles, instead of just "average or below average." (Id. at 64.)

Sarah Levin Allen, Ph.D. conducted a neuropsychological executive functioning screen on three dates in June and July 2015, resulting in a report dated August 14, 2015. Like Rosenblum, Allen spent some time in the classroom observing L.B. Allen reported that on testing, L.B. showed difficulty in cognitive flexibility. "In other words, (L.B.) had trouble thinking of different ways to solve the problem and was unable to appropriately self-monitor her responses. Instead, she made a number of the same responses repeatedly." (J-65.) Although Allen noted the presence of a number of strengths including cognitive and academic ability, she also pointed to the weakness in

flexibility and self-monitoring. Allen recommended that L.B. be moved to a more inclusive setting, with cognitive behavioral therapy in school as part of a counseling program. Further, she reported that L.B. was in the 97th to 98th percentile based on the anxiety scale related to the short-form RCMAS-2. The anxiety was being masked at school "by her quiet demeanor and lack of outward expression of anxiety." Ibid. She recommended that teachers "use reflective questioning techniques to further develop neuronal pathways," and that, to help with the cognitive deficits in switching, teachers "limit the amount to which instructions change . . . as well as provide enough transition time between subjects." Ibid. Siegler testified that the District considered Allen's report as a support to its determination to declassify. Siegler in particular viewed the fact that Dr. Allen said she thought L.B. could do "very well in an inclusive setting," and the absence of language specifically related to an IEP, as support for declassification." (Tr. September 14 at 105.) Apparently, the District did not view the recommendations related to cognitive behavioral therapy, changes in questioning techniques, separately addressing the anxiety, and altering movement between subjects to help with the switching problem, as relating to specialized services or instruction.

The sole external expert to testify was the most recent evaluator, Marcie Fountaine, M.S., of the Princeton Speech-Language and Learning Center, who was admitted as an expert in speech and language pathology, social skills, pragmatic language and development of speech and language programs for students with speech, language and other social disabilities. Her evaluation was conducted on December 1, 3, and 9, 2015. (J-73.) In evaluating L.B.'s history, Fountaine noted in Pavlick's finding that L.B. showed "an auditory perceptual deficit in BOTH ears; however, differential diagnosis of autism and auditory processing disorders is extremely difficult." (J-50.) Fountaine said that from her perspective, the test results mean that L.B. hears information but "has difficulty processing the information to make sense of it, when it's coming strictly through the auditory realm . . . [I]t's more difficult for her to make sense of the signal." (Tr. September 28, 2016, at 148.) So multistep verbal directions become more difficult because there is no context to help. While "we can't necessarily rewire a student's brain . . . we can teach the necessary compensatory strategies to help them process information . . . (such as) teaching them to visualize information." (Id. at 149.)

Assessing the neuropsychological executive function screening done by Dr. Allen, Fountaine noted the abnormal electroencephalogram (EEG), "which is consistent with cognitive processing problems." (Id. at 152.) Allen had identified weakness in cognitive flexibility and changing behavior based on a stimulus, which Fountaine said, means that a student will have trouble trying to take another person's perspective, and difficulty switching strategies if he or she tries to solve a problem one way and it does not work. "They'll get stuck and not know how to change their behavior . . . to respond in a different manner." (Id. at 154.) Both areas popped up in her own evaluation of L.B.

Allen's report had also noted that "L. lacks self-awareness of her anxiety in the moment, as well as the ability to self-monitor her mental performance." (J-65.) Fountaine explained that when most children this young feel anxious, upset, overwhelmed or at a loss as to how to do something, "we would expect them to be able to convey that to a teacher, certainly a familiar teacher." (Id. at 157.) L.B. on the other hand, is unlikely to communicate those feelings. Therefore, she needs specialized instruction in learning how to ask and answer questions such as "Why is this true? How would we decide what to do? To create the pathways needed to connect information." (Id. at 157.)

With regard to Fountaine's own evaluation, "when things were highly structured and she was given visual supports, L.B. performed quite well . . . . There was definitely a difference in her performance once the visual supports were taken away and she didn't have another avenue to get the information." (Id. at 160.) For example, Fountaine asked L.B. an open question about whether she had a birthday party this year. It took three tries and some rephrasing before L.G. grasped what was being asked. (Id. at 161.)

Comparing her evaluation to that done by Jenkins, Fountaine explained that the school's testing on foundational, receptive, and expressive language aimed at "skills of limited information. So, word level, sentence level information was appropriate for her age." But in the school's auditory processing reasoning, her scores were at the

impaired level. She explained that the particular test involves reading a three-sentence paragraph and then asking the child something that was explicitly said in the paragraph. When it came to making the inferences, L.B. had difficulty, which is the same thing that appeared in Fountaine's testing. (Id. at 163,164.) "She does better on language tasks that . . . (don't) require her to integrate the information that's presented to her. When she has to integrate the information for a higher level task, she falls apart." (Id. at 164.) For herself, Fountaine does not use teacher response inventories alone to evaluate pragmatic language skills because results vary too much with the person's knowledge of social communication disorders. When she does use it, she does so in conjunction with standardized measures. (Id. at 165.)

One of the first things to strike Fountaine was that L.B. could not follow the instruction to take a seat at the table in Fountaine's office. While Fountaine was retrieving some evaluation materials from her desk, L.B. climbed up into the middle of the table. When Fountaine remarked on where she was sitting, LB. replied, "Yes, you told me to sit on the table." (Id. at 169.) Fountaine said that for someone of that age, the action was not a typical response, and there was no sign that the child was joking. (Ibid.) Additionally, young students often become tangential when asked open questions, but they respond to specific questions directly. Asked specific questions, L.B. "would bounce from . . . (an) idea in one sentence to another," such that Fountaine could not follow the narrative without asking a series of other questions to clarify what she was talking about. (Id. at 170.)

In testing, because the school had looked at the word and sentence level, Fountaine sought a sense of discourse-level information. She explained that the reason she used the TOWL, which is not normed for L.B.'s age level, is she feels that some speech and language assessments, because they take years to develop, have not caught up with the demands made on students in today's classrooms. (Id. at 172.) She does not measure an under-age student against the norm for nine-year-olds, but she does use it to look at higher language skills. She does this because the standard writing assessments, such as the Oral and Written Language skills tests (OWLS) in particular, only assess a student's ability to copy words verbatim and write a single

sentence. Meanwhile, in class, students are expected to write at more of the paragraph level, in part due to the common core standards. (Id. at 173.)

Overall Fountaine said, L.B. "has a really strong base." But when she has to use those language skills for higher level tasks, "she starts to break down." (Id. at 176.) Her scores on making inferences were below average; on determining causes, borderline below average; on problem-solving, impaired; on internal negotiation (another form of problem-solving) impaired; and the total score on social language development, below average. (Id. at 177.) Fountaine explained that faced with a conflict situation, A.B. demonstrated an average ability to state what the problem was, earned low-average scores in identifying potential solutions, and measured at the impaired level in her ability to explain why a solution was appropriate. (Id. at 178.) She went on to say that this profile was consistent with the neuropsychologist's report, because L.B. struggled in interpreting a picture in more than one way. (Ibid.) The difficulties in sequencing, inferencing, determining causes, and problem-solving also reflected in her writing sample, which was a story about a picture. For one thing, it lacked an introduction and a conclusion, by which she meant something as simple as "One day," or "The end," (Id. at 189, 179.) For another, L.B. wrote that "a tree was on fire," and "then a storm came," when it was obvious that the storm caused the fire. (Id. at 180.) In order to learn the sequencing skill, Fountaine said, L.B. would require specialized instruction, typically one-on-one or in small-group study. (Id. at 185.) Fountaine did not think the fact that L.B. had fifteen minutes instead of forty-five to write a sample caused the lack of the introduction or ending, or more importantly, the fundamental misunderstanding of the picture. (Id. at 190.) Similarly, although Goldfarb had said that the fact L.B. could recognize words correctly alone but not in context did not mean she had not mastered them, Fountaine said that if L.B. really had mastered those words, her error rate in using them would not have been so high that she scored below average. (Id. at 193.)

The fundamental disagreement is over the presence of a disability that is significantly impacting L.B.'s access to education. Fountaine's testimony on the difference between what and how she measured and the measurements by the various in-district specialists was highly persuasive. Therefore, I **FIND** that the District tested at

the basic word recognition level, but did not assess the areas where L.B.'s disabilities lie. I **FIND** that the executive functioning problem coupled with the central auditory processing disorder (which, as Fountaine noted, can be difficult at this young age to separate out from autism) caused L.B. to test at the impaired levels in problem solving, flexibility, and inferencing, and that these are significant disabilities that interfere with educational performance.

I **FIND** that the difference between the District's perspective and the parents' perspective is that, as Fountaine explained, L.B. does well in highly structured situations, which is exactly what Resource Room teaching in the primary subjects for first and second grade created.

When L.B. entered first grade, she was the only child in the resource room coming from T-1. Since T-1 is supposed to cover the first half of first grade, L.B.'s good grades in reading and math for the first half of her first grade year would seem to reflect the fact that she was repeating material that she had, in fact, learned previously. The writing component was a weakness, but the teachers were not grading writing in the first half of the year. By the fourth marking period at the end of the year, the grades dropped to B-Plus level, still marking a high level of academic progress. (J-100.)

In second grade, I **FIND** that L.B. had a reading group of one, and particularized math instruction because she was performing more highly than students who have greater impairments in things such as memorizing math facts. I **FIND** that L.B.'s progress in forming solid decoding skills were tied to the specialized instruction she received in the resource room, which uses a portion of the Orton Gillingham program focused on decoding to teach spelling. (Tr. September 19, at 41.) Even with this high level of attention and support, as the curriculum grew in its demands, the middle of the year got rocky. Homework, which is graded on the "turned-in, not-turned-in" level, but not for accuracy, started to reflect numerous errors on concepts that she apparently knew the day before. Nonetheless, to her great credit, through constant consultation and careful monitoring, L.B.'s teacher saw to it that the child remained on a learning schedule similar to children in the general education case.

I **FIND** that the District learning consultant that administered the Woodcock-Johnson in January 2015, used an older version first normed in 2001 and updated in 2005. The booklet that she used carried the following instruction: "If an older version of a test is used when a newer version has been published or made available, the test users are responsible for providing evidence that the older version is as appropriate as the new version for that particular test use." (Id. at 142-143.) The new one had been purchased by the District, but was not used. The explanation that the older version's availability to her meant it was as appropriate as the new version, was not persuasive, particularly as "The Standards for Educational and Psychological Testing" published by The American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education states that it is the test user's responsibility to avoid "inappropriate use of norms that are out of date and to strive to ensure accurate and appropriate score interpretations." (P-4.) Moreover, Bates's rationale for using the old test was linked with the assertion that it did not matter what test she gave, L.B. "still would have been in the average range," a statement which suggested she devoted little attention to the tool because she had predetermined what the answer would be. Similarly, the explanation that she has been using a different test lately because she prefers the way the pages flip in the book, gave little comfort that the testing protocol was being selected for its ability to carefully measure a particular child's abilities. As a consequence, little weight has been given to her findings.

While most children have the natural ability to self-develop problem-solving, inferencing, sequencing, changing behavior based on a stimulus naturally, and being able to take another person's point of view, I **FIND** based on Fountaine's testimony, supported by her explanation of Allen's report, that L.B. has demonstrated she does not possess these abilities, and requires specialized instruction to create alternate pathways of thinking. Further, I **FIND** that, although Herron Ross said she did not believe L.B. needed social skills training since L.B.'s performance was superior in relation to the more-disabled students in the same group, the fact that Herron Ross was pleased with L.B.'s adoption of the strategies taught and recommended continuing the group when entering a new school is indicative that L.B. benefited considerably,

probably because it included a pragmatics component which addresses the social use of language, and the "friendly face" addressed the weakness in adapting to non-highly-structured environments.

LEGAL ANALYSIS

Under 20 U.S.C. § 1412(a)(1), any state qualifying for federal assistance under the IDEA must adopt a policy that assures all children with disabilities the right to a free appropriate public education. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180-81, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 696 (1982). State regulations track this requirement that a local school district must provide a FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey follows the federal standard requiring such entitlement to be "sufficient to confer some educational benefit," although the State is not required to maximize the potential of handicapped children. Lascari v. Ramapo Indian Hills Reg. High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). Third Circuit decisions have further refined that standard to clarify that such educational benefit must be "meaningful," 'achieve significant learning," and confer "more than merely trivial benefit." T.R. v. Kingwood Tp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-84 (3d Cir. 1988), cert. den. sub. nom., Ctr. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The quantum of educational benefit necessary to satisfy the IDEA varies with the potential of each pupil. N.E., supra, 172 F.3d at 247. A "child with a disability" under the IDEA must have a disabling condition and a resulting need for special education and related services to address it. 20 U.S.C. § 1401(3). The District bears the burden of proof by the preponderance of the competent and credible evidence that it has provided a FAPE to L.B. in the least restrictive environment. N.J.S.A. 18A:46-1.1.

Here, the school district makes the threshold argument that L.B. does not meet the definition of "child with a disability." In New Jersey, for a student to be eligible for

special education, he or she must meet the criteria for at least one of several enumerated classification categories of disability; the disability must adversely affect the student's educational performance; and the student must be in need of special education and related services. N.J.A.C. 6A:14-3.5. Each element of this three-pronged test must be met in order for a student to qualify for special education services. R.M. and B.M. o/b/o H.M. v. Haddon Heights Bd. of Educ., EDS 4902-08, Final Decision, (May 28, 2009), <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions>.

One of the classification categories is autistic, which is defined as:

> a pervasive developmental disability which significantly impacts verbal and nonverbal communication and social interaction that adversely affects a student's educational performance. Onset is generally evident before age three. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routine, unusual responses to sensory experiences and lack of responsiveness to others. The term does not apply if the student's adverse educational performance is due to emotional disturbance as defined in (c)5 below. A child who manifests the characteristics of autism after age three may be classified as autistic if the criteria in this paragraph are met. An assessment by a certified speech-language specialist and an assessment by a physician trained in neurodevelopmental assessment are required.
>
> [N.J.A.C. 6A:14-3.5(c)(2).]

L.B. meets the first prong, based on the assessment of two certified speech-language specialists, Meghan L. Pavlick, senior audiologist, of Cooper and Marcie Fountaine of the Princeton Speech-Language and Learning Center along with an assessment by a physician, who reported that at age 4, L.B. “presented with “findings of autism spectrum disorder, generalized hypotonia, sensory integrative disorder and pragmatic language disorder.” (J-10, Report of Lawrence Laveman, M.D.)

The core of the District’s argument is that L.B.’s disabilities are not inhibiting her academic performance. The District essentially argues that the independent external

testing is irrelevant because the only thing that matters is a teacher's classroom assessment.

This viewpoint is reflected in its own internal testing. Jenkins, the speech-language specialist who tested L.B. in 2015, evaluated pragmatics by sending the teachers a questionnaire. In general, the teachers reported no problems, although the general education teacher reported personal interactions to be in the low average range, which was different from the special education teacher, who rated them as average. (Tr. September 9, 2016, 105, 106) Jenkins used the overall positive responses to formulate her assessment of needs in pragmatics. Those generally positive responses also apparently outweighed in importance the below-average score in a subset of a test measuring auditory processing, and the below-average Social Language Development Test, involving having to solve an oral problem and having to provide alternative explanations to a picture, which were mentioned but given little significance.

As noted, the school learning consultant's report used an old version of a test with ten-year-old, outdated norms, which seemed to reflect a belief that she knew the answers before she gave the test. The earlier, first grade school psychologist report by Kristy DeSanto utilized objective testing and determined that L.B. has average intellectual abilities overall, having scored within the average range on everything except the vocabulary subcomponent of the verbal comprehension test. DeSanto did note that she provided Ms. Keneally with the BASC-2 questionnaire, which is aimed at diagnosing emotional and behavioral disorders. Ms. Keneally's responses did not indicate any of the behavior problems the tool is designed to assess. (J-57.)

The teacher assessments, which are obviously from dedicated staff members who are focused on helping children, show both an affection for L.B. and in some respects, an associated tendency to make excuses for problems because they uniformly believe that she deserves the opportunity to move beyond the resource room. When L.B. entered transitional first grade, her developmental reading skills were at a one, when entering first graders should have at least a three. She reached three in

January and by year end, was at eight, which meant that she ended the year "at a mid-year first grade level." So, although her grades were good, despite the extra support, L.B. was only at mid-year first grade in reading by the end of transitional first grade.

Because of the fact that she was in transitional first grade before she entered first grade, the fact that she made progress in first grade with resource room pull-out classes is not of great significance because she already had studied half the curriculum in transitional first grade. Thus, she had an extra half-year to digest what she already had learned, giving her a much stronger foundation to take into the second half of the year. The teachers were not assessing writing in the first marking periods, but did allow that particularly in the first half of that year, persuading L.B. to write was not always easy. She did eventually begin to write. All this was occurring in a classroom with six students, a teacher, and an aide. It is at this point that the District proposed putting her in a regular classroom for reading, math, and language arts, with eighty percent non-disabled students, moving at a faster pace, with a general education teacher.

As the dispute dragged into second grade, L.B. remained in the resource room for math, language arts, and reading, which occupy eighty percent of academic time in school. Because she was at a higher level than the other five students in the class, who have more severe disabilities, she was basically in her own private class within a class—the more so because Mrs. Hockenbrock was devoting extra time and attention to moving her as close as possible to the general education curriculum, because she thought L.B. might be declassified at any time. Moreover, Mrs. Hockenbrock was utilizing specialized instruction in reading, as she testified that she utilized Orton-Gillingham methodologies, which is a multi-sensory approach, which differs from the general education curriculum, Fundations, that relies more on rote and repetition. (Tr. September 19, at 17.) At all times, Mrs. Hockenbrock could make a decision to give more time to complete classwork or tests to any student—so much so that at one point when L.B. said she had not studied for a test, Mrs. Hockenbrock gave her time in class to study for it. While this says much for the dedicated teachers of Cinnaminson, it does not provide proof that L.B. can function in a full-time general education curriculum

without an IEP and associated supports in the form of specialized instruction aimed at her problems in auditory processing, flexible thinking, and problem-solving.

In second and third grade, L.B. received additional special services in the form of the social skills group run by Ruth Herron Ross, who laid out specific goals for each of the students. She explained why she chose the goals she did for L.B., how she determined they were being achieved, and in general how pleased she was with LB.'s progress. Although Ross said that L.B. performed at a higher level than some other students in the group in second grade, she nonetheless recommended participation in third grade because of the transition to a new school with higher expectations.

The fundamental issue with the District's argument is that the child has functioned at an average, occasionally low average level with a high degree of specialized support in the form of one-on-one resource room instruction, close monitoring, use of the Orton-Gillingham reading approach, extra time related to testing, a full extra year in which to mature and learn, plus social skills training with specific goals. In L.J. through N.H. v. Pittsburg Unified School District, 838 F.3d, 1168 (2016), the Ninth Circuit addressed a case in which the district treated the educational value of the services it provided as irrelevant to its determination to refuse to classify the child. In that instance, the school district over a two-year period had provided a child with specialized services which resulted in the child's materially improved performance. Nonetheless, the district steadfastly refused to create an IEP, on grounds that the child did not meet the criteria for eligibility, which the Ninth Circuit observed, meant that the child was "not guaranteed the services his mother believes that he needs, such as one-on-one educational therapy, counseling services, and behavioral intervention services." (Id. at 1171.) The District Court had concluded that L.J. was not eligible for special education "because he was academically performing satisfactorily without receiving special education services." The Ninth Circuit pronounced this clear error because "many of the services the district court viewed as general education services were in fact special education services tailored to L.J.'s situation." (Id. at 1176.)

Here, too, the school district argues that L.B. is not eligible for special education because she is performing satisfactorily. But as delineated above, she is performing at average level with a substantial array of special education services. So her supported performance cannot be used as proof that she can succeed without those services. Therefore, I **CONCLUDE** that the District denied a FAPE from the time it determined to declassify in the middle of first grade (the 2014-2015) throughout second grade (the 2015-2016 year), to the present time, in the middle of third grade, by refusing to do an annual individualized education plan that took into account her specific disabilities and provided a specialized program of supports and instructions to address those needs.

Additionally, I **CONCLUDE** that the District denied FAPE in the 2012-2013 school year, which placed L.B. in developmental kindergarten, because the IEP was deficient on its face. District staff acknowledged that, although the IEP placed L.B. in a general education class, the IEP had no goals. On that rationale, a school district could place any child in a private placement and give no further thought to individualized goals. The IDEA requires each IEP to contain a specific statement of the child's measurable annual goals, including academic and functional goals; and the proposed educational and supplementary aids and services to be provided. 20 U.S.C. §1414(d)(1)(A). The generalized rationale that the class is aimed at helping children with weaknesses says nothing about which weaknesses will be targeted, with what strategies, or how success will be measured.

The problem with the IEP for transitional first grade was that it repeated the goals from pre-kindergarten. There were no new goals. So, if that IEP was appropriate than it was reporting the failure of the developmental kindergarten program. This underlines the problem with the failure to set any goals for developmental kindergarten, and also demonstrates that no real consideration of L.B.'s particular strengths and weaknesses was given in addressing the IEP for transitional first grade. Therefore, I **CONCLUDE** that the District also failed to provide a FAPE for the transitional first grade year.

The first grade IEP did provide an updated list of goals, some of which did address issues raised by Fountaine, among others. For example, one goal was working

on repeating a story in proper sequence, and another, writing a story with a beginning, middle, and end, which were weaknesses identified by the experts. The parental concern about shyness and nonparticipation was addressed with a goal of encouraging talking during class discussion, and the problem solving was addressed at least in part by the math goal related to solving word problems. Additionally, the District eventually added Ross Herron's social skills training, which had a pragmatics component. So I **CONCLUDE** that entering first grade, the split placement between the resource room and general education class, the goals, and the addition of social skills together meant that L.B. did have an IEP reasonably calculated to produce educational benefit to the individual child Board of Educ. of Hendrick Hudson Central School Dist. V. Rowley, 458 U.S. 176, 192 (1982). It might not have featured the thrice-weekly speech language therapy sought based on Rosenblum's recommendation, but a district is not required to provide the best education available. Lascari v. Board of Educ. of Ramapo Indian Hills Regional High School Dist., 116 N.J. 30, 47-48 (1989). An IEP must be reasonably calculated to provide more than a minimal benefit. Polk v. Cent. Susquehanna Intermediate Unit, 583 F.2d 171, 178 (Third Cir. 1998). However, it need not necessarily provide "the optimal level of services" that parents might desire for their child. See Holmes v. Millcreek Township Sch. Dist., 205 F.3d 583, 589, 590 (Third Cir. 2000) (quoting Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995)). Therefore I **CONCLUDE** that the IEP for the first grade year was within the IDEA, and because it was continued through stay-put in the second half of the year, despite the declassification proposal, no compensatory education is due for that year.

The failure to provide a new IEP for second and third grade, because it completely lacked consideration of L.G.'s progress and what specific strategies needed to be used to address her various disabilities again violated her right to a FAPE, and thus I **CONCLUDE** that compensatory education is due for second and third grade up to the present. In general, this should take the form of speech therapy, cognitive behavioral therapy, and pragmatics instruction.

Given the substantial evidence that L.B. may be able to function in a less restrictive setting, meaning a general education classroom for all five subjects, I

CONCLUDE that she should be moved to the general education classroom in English, Mathematics and Language Arts, upon the completion of an IEP that provides her with goals and supports that address her weaknesses. These could include more time to complete various activities, role-playing activities to address problem-solving, a social skills group to improve her ability to respond appropriately in less structured situations, an added emphasis on multi-sensory approaches, and additional programming aimed at teaching proper sequencing, and assistance of a teacher trained in special education. Assuming this change is made, careful attention should be paid to the emotional impacts of switching to a larger, faster class, where the rules may be less familiar.

ORDER

Therefore, the District's determination that L.B. should not be classified is hereby **REVERSED**. I **ORDER** that L.B. be provided compensatory education as delineated above, in relation to the lack of FAPE for developmental kindergarten, transitional first grade, the middle to end of first grade, all of second grade, and the third grade up to the present. I further **ORDER** that L.B. be moved to a less-restrictive setting with an appropriate IEP as outlined above, to support her success in that setting.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2016). 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.

December 28, 2016
DATE

LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency _____

Date Mailed to Parties: _____

LIST OF WITNESSES

For Petitioner

Marcie Fountaine

M.B.

For Respondent

Jane Alexander

Susan Siegler

Janette Oliver

Laura Flail

Dawn Martin

Brittany Hockenbrock

Ruth Herron Ross

Catherine Jenkins

Kristy DeSanto

Julie Bates

Barbara Scola

Arlene Goldfarb

LIST OF EXHIBITS

Joint Exhibits

J-1	Petition for due Process
J-2	Answer
J-3	Documents from New Jersey Early Intervention System, July 2010
J-4	Initial Learning Evaluation by Arlene Goldfarb, October 19, 2010
J-5	Psychological Evaluation by Janice Wills-Kingsbury, October 27, 2010
J-6	Speech and Language Evaluation by Deborah Mason, November 29, 2010
J-7	Confidential Social Evaluation by Susan Norton, MSW, LSW, November 15, 2010
J-8	Eligibility/Classification Conference Report, December 8, 2010
J-9	Disability paperwork from 2011
J-10	Neurodevelopmental Initial Evaluation, Children's Specialized Hospital, December 29, 2011
J-11	Occupational Therapy Evaluation, Children's Specialized Hospital, January 3, 2012
J-12	Psychology Department Evaluation, Children's Specialized Hospital, January 4, 2012
J-13	Speech Therapy Department Evaluation, Children's Specialized Hospital, January 16, 2012
J-14	Audiology Evaluation, Children's Specialized Hospital, January 20, 2012
J-15	Request for initial evaluation, January 24, 2012
J-16	Evaluation planning meeting, February 10, 2012
J-17	Initial Learning Evaluation by Arlene Goldfarb, March 2, 2012
J-18	Initial Occupational Therapy Evaluation by Carolyn Quigg, OTR, March 19, 2012
J-19	Initial Physical Therapy Evaluation by Kris Pozega, PT, March 23, 2012
J-20	Confidential Social Evaluation by Lauren Williams, MSW, March 20, 2012
J-21	Confidential Speech and Language Evaluation by Deborah Mason, April 4, 2012
J-22	Confidential Psychological Evaluation by Jennifer McNally, April 12, 2012

J-23 Eligibility/Classification Conference Report, April 24, 2012

J-24 Individualized Education Program, April 24, 2012

J-25 Parental Notice of Proposed IEP, April 24, 2012

J-26 IEP for September 5, 2012, through June 19, 2013

J-27 Parental Notice of Proposed IEP, May 29, 2012

J-28 Correspondence from petitioner to District regarding Independent Evaluations and IEP, August 28, 2012

J-29 Correspondence from District to petitioner regarding request to change IEP and Independent Evaluations, September 5, 2012

J-30 Not in evidence

J-31 Not in evidence

J-32 Independent Speech/Language Evaluation by M. Rosenblum, October 30, 2012

J-33 Not in evidence

J-34 Notice of Agreement, January 4, 2013

J-35 Email Chain between Jennifer McNally and petitioner regarding communication log, January 14 and 15, 2013

J-36 Correspondence from District to petitioner regarding amending IEP to include communication log, January 23, 2013

J-37 Correspondence from petitioner's counsel to F. Cavallo, Jr., Esq., January 30, 2013

J-38 Correspondence from F. Cavallo, Jr., Esq. to petitioner's counsel, February 8, 2013

J-39 Correspondence from Dr. Laverman at Children's Specialized Hospital, February 16, 2013

J-40 Complaint Investigation Report, March 6, 2013

J-41 Re-evaluation Plan, March 7, 2013

J-42 IEP for July 1, 2012, through June 30, 2013, dated March 7, 2013

J-43 IEP for July 1, 2012, through June 30, 2013, dated May 29, 2013

J-44 Not in evidence

J-45 Not in evidence

J-46 Not in evidence

J-47 Teacher recommendation for 2014-2015 school year

J-48 IEP for July 1, 2014, through June 30, 2015, dated May 13, 2014

J-49 Parental Notice of Proposed IEP, May 13, 2014

J-50 Independent Audiologic and Central Auditory Processing Evaluation, by Meghan Pavlick, August 27, 2014

J-51 Notice of Agreement, September 4, 2014

J-52 Physical Therapy Reevaluation by Kara Neal, September 29, 2014

J-53 Occupational Therapy Progress Report by Kristen Read, October 23, 2014

J-54 Correspondent from petitioner to District requesting IEP meeting, November 18, 2014

J-55 Meeting Invitation, December 4, 2014

J-56 Reevaluation Planning meeting document, December 11, 2014

J-57 Psychological Evaluation with January 29, 2015, addendum, by Kristy DeSanto, April 2, 2015

J-58 Speech and Language Evaluation by Catherine Mellwig Jenkins, February 5, 2015

J-59 Education Evaluation by Julie Bates, February 6, 2015

J-60 Eligibility/Classification Conference Report, March 17, 2015

J-61 Correspondence from petitioner to B. Scola, March 23, 2015

J-62 Social Skills Progress Summary, 2014-2015

J-63 Occupational Therapy Progress Report, June 1, 2015

J-64 Email chain between petitioner and District, June 10-11, 2015

J-65 Independent Neuropsychological Executive Functioning Screen by Sarah Levin Allen, August 14, 2015

J-66 Email chain between District and petitioner, August 8, 2015

J-67 Meeting Invitation, September 11, 2015

J-68 Eligibility/Classification Conference Report, September 24, 2015

J-69 Email from Susan Siegler to petitioner, September 28, 2015

J-70 Correspondence from C. Morgan, Esq. to petitioner's counsel forwarding student records, October 19, 2015

J-71 Correspondence from petitioner's counsel to C. Morgan, Esq. regarding request for independent evaluation, October 19, 2015

J-72 Correspondence from C. Morgan, Esq to petitioner's counsel regarding request for independent evaluation, October 26, 2015

J-73 Princeton Speech-Language & Learning Center Comprehensive Language and Social Communication Evaluation, December 2015

J-74 Curriculum Vitae for Julie Bates

J-75 Curriculum Vitae for Maureen Coller

J-76 Curriculum Vitae for Kristy DeSanto

J-77 Curriculum Vitae for Arlene Goldfarb

J-78 Curriculum Vitae for Brittany Hockenbrock

J-79 Curriculum Vitae for Catherine Mellwig Jenkins

J-80 Curriculum Vitae for Laura Keneally

J-81 Curriculum Vitae for Stephanie Landritsi

J-82 Curriculum Vitae for Dawn Martin

J-83 No exhibit

J-84 Curriculum Vitae for Jennifer McNally

J-85 Curriculum Vitae for Janette Oliver

J-86 Curriculum Vitae for Ruth Herron Ross

J-87 Curriculum Vitae for Barbara Scola

J-88 Curriculum Vitae for Susan Siegler

J-89 Curriculum Vitae for Jullian Watson

J-90 Curriculum Vitae for Marcie Fountaine

J-91 Daily progress report sheets

J-92 Reading and Math Benchmarks, October 2012

J-93 M. Rosenblum evaluation with case manager's notes, November 2012

J-94 Sign-in sheet from January 11, 2013 meeting

J-95 Goals added to March 7, 2013 IEP

J-96 2012-2013 Work Samples

J-97 2012-2013 End of Year Reading Readiness Assessment and work samples

J-98 2012-2013 Report Card

P-99 2013-2014 Report Card

J-100 2014-2015 Report Card

J-101 Pre-Planning Meeting Notes, September 17, 2015

J-102 Proposed 504 Plan, September 24, 2015

J-103 Written Language Review by A. Goldfarb, September 29, 2015

J-104 Physical Therapy Progress Report, November 2015

J-105 Correspondence from B. Hockenbrock to parent

J-106 Email from B. Hockenbrock to parent, February 1, 2016

J-107 Daily Communication Log, February 29, 2016

J-108 2015-2016 Work Samples

J-109 2015-2016 Report Card

J-110 Physical Therapy 2015-2015 Annual Summary and Recommendations for 2016-2017

J-111 Diagnostic Reading Assessment Score Interpretation Chart

J-112 Additional Documents from Cumulative File

J-113 IEP Goals

J-114 Additional documents provided by petitioner's counsel

J-115 PLAAFP for 2015-2016

J-116 Emails from District

J-117 Screening Test from December 5, 2014

J-118 DRA Levels, Communication Log, Worksheets

J-119 Progress Report, Second Grade Report Card

J-120 Curriculum Vitae for Sarah Levin Allen

J-121 Nurse's records

J-122 Homework assignments, general education classes

<u>For Petitioners</u>

P-1 Common Core English Language Arts Standards—Language—Kindergarten

P-2 Woodcock-Johnson III Test of Achievement—Protocol

P-3 Recording of IEP Meeting

P-4 Standards for Education and Psychological Testing—American Educational Research Association, American Psychological Association, National Council on Measurement in Education

For Respondent

R-1 Screenshot of cell phone

R-2 Woodcock-Johnson III Normative Update, Score Report date of testing January 30, 2015,

R-3 Woodcock-Johnson III Normative Updated

R-4 New Jersey Student Learning Standards for English Language Arts—Grade 2—Progress Indicators for Language

R-5 Pediatric Case History Form and the Testing Booklets, Princeton Speech-Language & Learning Center