

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 05168-13

AGENCY DKT. NO. 2013 19372

W.K. AND C.K. ON BEHALF OF M.K.,

Petitioners,

v.

MATAWAN-ABERDEEN REGIONAL

BOARD OF EDUCATION,

Respondent.

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

David Rubin, Esq., for respondent

Record Closed: May 30, 2014

Decided: December 4, 2015

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF CASE and PROCEDURAL HISTORY

On or about March 4, 2013, petitioners W.K. and C.K., on behalf of their son, M.K., filed a petition for due process in which they seek an order finding that the Matawan-Aberdeen Regional Board of Education (“District”) failed to provide M.K. with an appropriate education during the 2010–2011, 2011–2012, 2012–2013, and 2013–2014 school years in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1400 et seq., and Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C.A. § 794(a); that petitioners are entitled to reimbursement for the

unilateral placement of their son at the Bridge Academy for the 2013–2014 school year; and that petitioners are entitled to other relief, including compensatory education, attorney’s fees, and reimbursement for other expenses.

After an unsuccessful mediation on April 1, 2013, the Office of Special Education, in accordance with 20 U.S.C.A. § 1415(e) and 34 C.F.R. § 300.506 (2015) and N.J.S.A. 52:14F-5, transmitted this case to the Office of Administrative Law, on April 16, 2013. On April 26, 2013, the parties appeared before Judge Schuster and attempted to settle the case, but their efforts were unsuccessful. On June 5, 2013, petitioners filed a motion seeking an order to provide petitioners with “any and all electronically stored information.” The District filed opposition to the motion on June 12, 2013, to which petitioners responded on June 18, 2013. Oral argument was held on June 20, 2013. I denied the motion on September 20, 2013. A hearing was scheduled for September 27, 2013. Prior to that date, petitioners unilaterally placed M.K. at the Bridge Academy in Lawrenceville, New Jersey, for the 2013–2014 school year. With the consent of the District’s counsel, petitioners filed an amended petition for due process seeking reimbursement for all costs incurred as a result of having to make the placement unilaterally. A hearing was held on September 27, 2013, October 7, 2013, November 25, 2013, March 5, 2014, and April 23, 2014.

DISCUSSION

M.K. is a twelve-year-old student who is eligible to receive special education and related services due to a diagnosis of Sotos syndrome, a genetic condition causing impairments in motor skills, attention, and information processing. Petitioners reside in Aberdeen, New Jersey, which is within the District’s boundaries. Petitioners allege that the District violated the Individuals with Disabilities Education Act because the Individualized Education Program (IEP) and placement the District proposed for the 2010–2011, 2011–2012 school years, the 2012 extended school year (ESY), and the 2012–2013 and 2013–2014 school years were not reasonably calculated to confer a meaningful educational benefit on M.K., and because the District did not conform to the procedural requirements of the special-education laws by failing to meaningfully consider petitioners’ input in developing an IEP.

TESTIMONY

Laura Reigelsperger

Laura Reigelsperger testified that she has been employed as a social worker on the child study team in the District since December 2002. She holds certificates as a school social worker, supervisor, and principal. She is also a licensed clinical social worker and a certified forensic social worker. She assumed responsibility for M.K. as his case manager in September 2012, which was the beginning of M.K.'s sixth-grade year. Her responsibility was to create an educational program that was specific to his needs, implement the program with the cooperation of teachers, and track his progress. The IEP in effect when she became M.K.'s case manager was dated June 11, 2012. (R-2.) She reviewed the various evaluations that went into the formulation of the June 2012 IEP. This included an educational evaluation by Jessica Hollinger, a learning disabilities teacher consultant (LDTC) who evaluated M.K. on April 25 and 26, 2012.

Ms. Reigelsperger understood that M.K. has a rare genetic disorder that involves processing difficulties. He has difficulty retrieving information, gaining and assimilating new information and storing it, and physical challenges. Speech was also an area of weakness, but she could understand him. He also had some disfluency and a history of stuttering. If you ask him a question, he hesitates to answer, and open-ended questions are difficult because he needs time to process the information. M.K.'s disability also required him to have occupational therapy (OT) that assisted him with organization, such as writing within the lines. The records she reviewed for this information included an old neurodevelopmental report that was done by Dr. Barbara Malamut in October 2012.

Ms. Reigelsperger, who had been on medical leave from September 15, 2012, to January 2, 2013, met with the parents for the first time at an IEP meeting on January 11, 2013. The meeting was held because M.K.'s parents were concerned about his progress. As of the January 2013 meeting, M.K.'s program was set forth in the June 11, 2012, IEP. This was in-class resource (ICR) program, an educational program in which

he received instruction from regular-education and special-education teachers. He also received physical therapy, speech therapy and OT. That year his OT was decreased because his therapist thought he no longer needed it. Ms. Reigelsperger noted that she had three people that substituted for her while she was on medical leave. One was Maura Dougherty; she couldn't name the other two.

Petitioners were upset with the decrease in OT services that occurred in June 2012. Petitioners expressed interest in an out-of-district placement. They did not feel M.K. was making progress. They agreed to accommodations for M.K. such as extended deadlines and longer time for classwork completion, but the parents still wanted an out-of-district placement. At the meeting, the CST revised the OT so that M.K. would receive the therapy once a month, but they made no other changes and did not provide the out-of-district placement.

Ms. Reigelsperger was not aware of any challenge to that IEP at that time. As of January 2013, the second marking period had not been completed. Generally, progress reports are prepared quarterly for special-education students. She identified the first-marking-period progress reports for M.K. (R-5.) The goals and objectives are either noted as introduced, progressing or mastered. There is also narrative as to the physical-therapy goals (R-5 at 6) by Dan Steinhauser, a private physical therapist.

M.K. was absent a lot in January and February due to cellulitis that caused him to be hospitalized. Cellulitis is an inflammation of the cells that can cause a systemic shutdown of the organs and needs heavy antibiotics to treat it. M.K. also had an accident in school in February 2013 during which he slipped on a paper. He also has scoliosis and had a brace for some time during the 2012–2013 school year. He would go to the nurse for stretching exercises. Ms. Reigelsperger does not believe M.K.'s absences were a result of the petitioners' desire to have him placed out-of-district.

On February 26, 2013, an amendment was proposed to M.K.'s IEP whereby M.K. would be provided with an instructional assistant for math, language arts, science and social studies. Ms. Reigelsperger clarified that although the amendment was officially signed on February 26, 2013, giving the District permission to add the one-to-one aide,

petitioners consented prior to that. (R-12.) She recognized an e-mail from petitioners dated January 29, 2013, which said, “While I do not believe this aide will be a sufficient addition to the IEP to constitute FAPE [free appropriate public education], we will consent to the amendment for the time being.” Ibid.

Ms. Reigelsperger noted that the cover letter to the due-process petition was dated the day after her letter that was sent to the parents on February 26, 2013. (R-12.) The petitioners received her letter on February 26, 2013. The cover letter was dated February 27, 2013, although it was filed on March 4, 2013. Ms. Reigelsperger further testified that she was not immediately aware that a due-process petition was filed. M.K.’s parents had shared their concerns that M.K. could not complete the demands of his homework, particularly in language arts. She highlighted the notation of language arts teacher Emily Hawrylko on January 7, 2013, that M.K. is doing well with modified homework and has a 94 percent grade average. The petitioners did not agree with math teacher Jacqueline Stanek’s assessment that M.K. had received a 91 for the first marking period and was receiving a 90 for the second. They did not feel that M.K. understood the material and believed he was struggling. She did not recall if they challenged the accuracy of the science and social studies grades of B+. C.K., M.K.’s mom, felt that the homework was difficult and the projects the teachers gave M.K. were unproductive busywork. Ms. Reigelsperger was aware that C.K. was a teacher in another district. The March 4, 2013, filing of due process triggered “stay put,” which she understood to mean that the District continues to follow the previous IEP.

Ms. Reigelsperger continued testifying that on May 31, 2013, the teachers reported M.K.’s progress and reviewed his reports from specialists. One of the specialists, Dr. Malamut, recommended the Bridge Academy for M.K.’s specific condition. Dr. Malamut had performed a neuropsychological evaluation at the parents’ request on September 24 and October 1, 2012, but her report was not given to the CST until after the January 2013 IEP meeting. Ms. Reigelsperger initially did not recall whether the parents had the report when they came to the January meeting. She noted that if there were references to the report at the meeting on January 11, 2013, then the report was probably incorporated into a finalized IEP where those comments were inserted later. The items in the amendment were incorporated in the January 11, 2013,

IEP. She believes she had seen the neurodevelopmental report by the May 31, 2013, meeting. (R-4.) There was nothing in that report that persuaded her that an out-of-district placement was required for M.K.

In May 2013, M.K.'s performance in language arts literacy dropped to a grade average of 70. Ms. Reigelsperger believes this was due to M.K. being injured and his attendance decreasing. M.K. was out for a period of time and his willingness to do work decreased. By May 2013, M.K. had been absent from school twenty-three days. His math average was a 95. His science grades dropped, however, and his teacher said that his work production decreased significantly. The special-education teacher used study hall to get him caught up. The aide was used to help him keep up with the progression of his work.

Ms. Reigelsperger further testified that in the January 2013 IEP, the only thing that she looked at was related services. This differs from the May 2013 IEP (R-4), which covered the period from June 3, 2013, to May 30, 2014. In the May 2013 IEP, the one-to-one aide was being discontinued. The physical-therapy goals were changed because M.K.'s goals were not reflective of the new building to which he had been moved. Some goals were added as a result of the injury he sustained during the school year. Occupational therapy was discontinued.

M.K.'s teachers felt that the ICR was the best setting for him within the District based on how he was performing, his interaction with peers and his interaction with adults in the room. The CST recommended in-district placement despite the petitioners' request for out-of-district placement at the Bridge Academy because of how he was doing overall in the building. He did have a drop in grades, but the teachers were working diligently to get him caught up from his missed classes. Petitioners felt that M.K. was not making progress and that the setting was inappropriate for him. Petitioners noted that M.K. was reading two years below grade level and was not retaining information from class. They felt that he had lost significant skills that he learned from a program he had attended over the summer. Ms. Reigelsperger found out by letter dated July 11, 2013, from the petitioners' attorney that petitioners were going to be placing M.K. at the Bridge Academy.

Ms. Reigelsperger continued testifying on cross-examination that M.K. was placed in a computer class as a study hall to get his assignments completed. However, the teacher in the room was teaching a class at that time, and although M.K. could raise his hand to ask for assistance, the teacher was not a special-education teacher. Ms. Reigelsperger reviewed the goals and objectives in the January 2013 IEP. (R-3 at 8-1.) She admitted, particularly with reading goal 3.1, that the goal is really an overall core-curriculum standard, not individualized for M.K. The objectives are age-appropriate for all students. M.K.'s previous teacher wrote the goals. She does not know whether progress reports are automatically given to the parents, but she knows that they are in the school's computer system. Although she has been working in the District ten years, she is not sure how parents access their children's progress reports. She noted that the progress report (R-5) was dated March 5, 2013, and the due-process request that was filed in this case was received on March 4, 2013. She did not have a specific reason why the progress report was printed out the day after the due-process petition was received. It does not say on the document that M.K. needed 80 percent to master a goal. It also does not say at what grade level he had to perform the skills of writing. The teacher, Ms. Starr, was a sixth-grade teacher, so she evaluated him based on the grade level, despite that it does not say so. She assumes that she based it on her experience with other sixth-graders. She did not know what "3.1 reading" meant under the academic and functional area. (R-3.) Once the petitioners requested that M.K. be placed at the Bridge Academy, she did not call anyone at the Bridge Academy or go there. She only looked it up on the computer to see what kind of program it was, and found out it was reading based.

M.K.'s Mother, C.K.

M.K.'s mother, C.K., testified that she teaches high-school English. She teaches students with special needs, but has a special-education teacher in the classroom for them. M.K. has Sotos syndrome, which is a rare genetic disorder caused by mutation of a gene. It causes medical problems, developmental delays and hypotonia. His scoliosis and heart defects are directly related to the Sotos syndrome. He has low muscle tone and walks slowly with an awkward gait. He is prone to tripping and falling

and hurting himself. He has low bone density, so when he gets injured he is prone to fractures. He also has lymphedema, which makes him at risk for the cellulitis that he had. The lymphedema causes swelling in his ankles and legs, so he wears compression socks and has to limit his walking. M.K. also has trouble regulating his body temperature and is easily overheated.

C.K. further testified that, in February 2013, M.K. broke his knee in school because there was a book that was left on the floor in the hallway. The hallways of the school are very crowded and busy and M.K. is slow. M.K. did not see the book on the floor and his leg slid forward and twisted, causing the knee fracture. He was on crutches, which put a huge strain on him, and the combination of the fracture and the lymphedema caused him to get cellulitis. He was in the hospital for eight days and on heavy doses of antibiotics. It was a serious infection. The poor muscle control he has continues to the muscle in his face, where he has trouble managing eating and trouble controlling his tongue. He has trouble with all of his motor skills. M.K. is always at risk for choking and has to have his food put in a blender.

C.K. stated that the learning problems M.K. has that are related to Sotos syndrome are that he has difficulty with memory and retrieval. His processing speed is extremely slow and his reading is impaired. He still, at age twelve, does not have his math facts memorized. M.K. has trouble with sequencing, not just in learning, but in areas of daily living. He has a difficult time organizing himself. When people ask him a question, he needs a lot of time to respond. M.K. has difficulty in the classroom and with his peers because when they talk about something, he is thinking about it, but by the time he can respond they are on to another topic. It is very hard for him to participate in a classroom because he cannot keep up. M.K. copes and perseveres. There are many days where he smiles at the teachers and the bus drivers, but slams the backpack down when the bus pulls away and starts crying on the walk home.

C.K. testified that she received a letter of medical necessity from M.K.'s physician at the Children's Hospital of Philadelphia (CHOP), who had diagnosed him with Sotos syndrome. The letter is dated August 23, 2010, and the parents provided it to the District. (P-1.) M.K. also has to be helped and watched at home. C.K. has gotten M.K.

many sessions of private physical therapy, private occupational therapy, and private speech therapy. The doctor also recommended horseback riding. C.K. hired a private math tutor from March 2010 until September 2013, when she and W.K. enrolled him at the Bridge Academy. The Bridge Academy recommended that they not have a private tutor because the Bridge Academy wants to make sure M.K. is learning the material. The District was using everyday math and M.K. was not learning using everyday math. M.K.'s doctors told C.K. that M.K. would have trouble understanding that program. She hired Jamie Mangini, a special-education teacher, as M.K.'s tutor. It was hard for him to learn everyday math because the curriculum does not spend enough time on one concept. It is a constant cycling and revisiting of concepts. Also, math class was held at the end of the day, which made it more difficult for M.K. He could not hold his posture and hold himself upright. M.K. gets very fatigued.

M.K.'s problems in school started in the first grade. In first grade, M.K. received one-to-one instruction in math and C.K. thought that was helpful, but then he was removed from the program for second grade. The CST said he did not need it because he had graduated from it. The teacher brought to C.K.'s attention that M.K. was having problems with organization and sequencing. M.K. also had trouble planning. It would take a long time to do anything asked of him. He was classified at the age of three years old, as preschool disabled.

C.K. continued that M.K. was with the same students from grades kindergarten through third, but in the fourth grade the other schools combined. At that time, there were many more students introduced and they were together for fourth and fifth grade. He changed schools for sixth grade, and there were many more students because now the school held sixth, seventh and eighth grade. In sixth grade, he attended the Matawan-Aberdeen Middle School (MAMS). At the time of C.K.'s testimony, M.K. was in seventh grade. He is at the Bridge Academy which is an NJ Department of Education-approved school for students with learning disabilities. All of the teachers there are certified in Orton-Gillingham, which is a specialized reading-instruction program that is language based. They also have a specialized math-instruction program. Up until the spring of 2010, M.K. appeared to be doing well academically.

C.K. did not understand why the District took M.K. out of the one-to-one help in the RTI program if it was helping him. C.K. took him to Kumon and to Sylvan learning centers.

In 2011, the District tried to declassify M.K., and C.K. had to send them a letter to object. (R-9.) The District felt that M.K.'s performance in third grade was such that he did not require special education. C.K. knew; however, that his disability was having a major impact on all areas of his life. C.K. had been told by M.K.'s doctors that as demands in the school increase, M.K.'s disability was going to impair him even more. She wrote the letter dated March 23, 2011, to stop the District from declassifying him. (R-9.) C.K. knew that M.K. did not have his math facts memorized. She also noted that M.K. was having trouble with fine motor skills that interfered with his writing. She knew that M.K. had difficulty with writing and processing speed, and the District would not be addressing that any longer. C.K. knew that his disability was not going away and that the problems were going to get worse. M.K.'s teachers reported accurately that he was having trouble, but that he was coping and working very hard to fit into the classroom. Third grade was the first grade in which M.K. had the ICR teacher as a one-to-one aide. The individual who was the director of special services in March 2011 is no longer there.

C.K.'s letter included a neuropsychological evaluation by Dr. Dan DaSilva. C.K. was seeking to continue the ICR with the special-education teacher for reading, writing, math, science and social studies. C.K. was very concerned about removing the special-education teacher, so she contracted with the neuropsychologist. Dr. DaSilva expressed that M.K. definitely needed to continue with the ICR and that M.K.'s needs would increase rather than decrease. Dr. DaSilva also thought that M.K. should have some increased use of technology because the strain of writing would become too difficult. Dr. DaSilva was concerned with M.K.'s processing speed, his visual memory, and perception. The evaluation was administered in December of M.K.'s fourth-grade year. There was no additional meeting held as a result of Dr. DaSilva's report.

C.K. testified that in fourth grade, the bullying issues began in September, and continued through October, November and December. C.K. personally witnessed children at extra-curricular events making comments to M.K. about his inability to run and being very slow. The kids could see that he was different. C.K. got the private

math tutor for M.K. when his special-education teacher, Mrs. Black, said he was having trouble functioning in math. She was not seeking an out-of-district placement at that time. She signed the IEP dated May 17, 2011, (P-2) because the District was keeping the ICR for the 2011–2012 school year. Aside from the bullying, C.K. felt hopeful that with the private tutoring, he would do well in fifth grade. C.K. then got M.K.'s NJ ASK scores in September of his fifth-grade year and she was shocked that his language-arts score had gone down by thirty-three points and his math score had gone down by eighty-eight points. (P-4.) She then realized that M.K. was not even at grade level, when she thought he was doing okay. C.K. thought he was at grade level because the scores from third grade reflected that, and M.K.'s report cards were always good. Comparing his NJ ASK scores from the previous school year, he went from 227 to 194 in language-arts literacy and from 277 to 189 in mathematics.

C.K. asked for a meeting with the case manager and the director of special services because she was really upset. They had the meeting, and the result of it was that they would wait and see how he did in the fifth grade before discussing doing something different. C.K. would not have signed the IEP if she had known those were M.K.'s scores, because it was clear his program was not working. Prior to the scores, M.K.'s report cards were always positive and he got all A's and B's. The special-education teacher noted that he was not learning with the everyday math program, but there was no indication in the IEP that he was struggling. M.K.'s NJ ASK scores were well below proficient.

C.K. continued that in every IEP the District took something away. The program proposed for fifth grade was ICR. She requested additional instruction or different programming, but all that was said was, "Let's wait and see." This was at the meeting in September or October of 2011, M.K.'s fifth-grade year.

The District said that M.K. was performing below grade level, so C.K. asked for summer reading instruction for 2012, but the District offered only more of the same instruction that was clearly not working for him. The District provided C.K. information on a summer literacy program. (P-7.) M.K. was more than two years below grade level, yet he received a B+ in reading and an A+ in writing. The program proposed was not a

special-education teacher-taught program. Therefore, C.K. took M.K. to Lindamood-Bell. She took M.K. five days a week for twenty hours per week. It is a highly prescriptive language-based program that M.K. needed. M.K. made grade levels of improvement in that program over the summer. M.K.'s communication and reading improved. He worked with a one-to-one instructor. The program is known for addressing the problems with comprehension that M.K. had. The District pretty much admitted that it was not an appropriate program that they offered, but said that is all they had.

C.K. continued that, in sixth grade, they gave M.K. an inappropriate schedule, because all of his specials were in the morning and his academic classes were at the end of the day. When the teachers said that M.K. was having a hard time learning because he was so fatigued, C.K. tried to have the schedule changed, but was told that all sixth-graders have their schedule this way and nothing could be done. She continued M.K.'s math tutor in September 2012 because he clearly needed help. There were some assignments sent home that were well beyond what he could do. His spirit and confidence were breaking and his desire to go to school was waning. One day M.K. came home with an essay, saying he made no progress on it in his class and they gave it to him to work on at home over the weekend. M.K. had to write about his hero. He got upset and did not understand why C.K. could not write it for him. C.K. sent an e-mail to the District saying that M.K. could not do the assignment. Another assignment that was too difficult was the southern-plantation project, which required drawing and writing. C.K. had to do this for him because it was too complicated. (P-16.) She tried to show him how to follow the directions.

In September 2012, C.K. met with Dr. Barbara Malamut for a neuropsychological evaluation of M.K. (R-8.) She was concerned about the drop in his reading and what she felt was the District's failure to address M.K.'s deficits. C.K. believed it was blatant and obvious that he would not make it through sixth grade without assistance.

C.K. testified that Dr. Malamut confirmed her suspicions that M.K. is of average intelligence, but his processing speed was impaired. She did not believe that M.K. was going to make it at public school, because of his lack of organization skills and working

memory. She shared Dr. Malamut's neurological report with the District after the January 2013 IEP, but no changes were proposed. Nothing happened, and M.K. was still placed in an ICR. They later added an aide because M.K. refused to go to school. When M.K. refused to go to school, C.K. talked to the vice principal, Mr. Abrahamson. M.K. cried in front of him and said he was having problems in language arts and he did not understand what was happening in the class. M.K. told Mr. Abrahamson they were going too fast and testing him after two days. C.K. did not think the aide was appropriate and did not believe it would help, but she agreed to the amendment in an e-mail to Reigelsperger. The aide helped for one week when the regular student that she worked with during M.K.'s study hall was absent, and she could work one-to-one with M.K. In class, M.K. did not want the attention of an aide.

C.K. wanted M.K. to have a study hall with a teacher available, but the District responded that there was no teacher available to do that. The teachers also agreed with her that study hall with a teacher was what M.K. needed. C.K. had asked for this back in November 2012. The District's version of a study hall instead of gym was placing M.K. in a computer class where a class was going on and the teacher was busy with the class. M.K. was supposed to study there, but he had no assistance from anyone, as the teacher was busy with the other students he was teaching. M.K.'s absences from school were slightly more because of his multiple medical problems, but similar to other years.

In third grade, M.K. had scored advanced proficient in math despite his absences. C.K. attributes the decline of his grades in spring 2013 to the quick pace of middle school, the higher demands, and the many different teachers, including special-education teachers that changed for different classes rather than having one that stayed with him throughout the day. In January 2013, C.K. requested that M.K. be placed at the Bridge Academy, but the District denied that request. Academically, M.K. was struggling despite the continuance of the math tutor.

C.K. further testified that on July 11, 2013, she sent a letter to the District letting them know that she and her husband were planning to unilaterally place M.K. at the Bridge Academy if the matter was not resolved. (P-9.) The District did not convene an

IEP meeting or communicate with petitioner in response to that letter. Petitioner signed a contract with the Bridge Academy on August 30, 2013. M.K. is doing very well there. He has become a different person and he is able to complete his homework every day without help. He does not report bullying incidents and does not come home crying. C.K. testified in November 2013 that they had never made it so far into the school year without some classmate threatening M.K.'s physical well-being. On July 26, 2013, M.K. had been given a neuropsychological follow-up evaluation by Dr. Emily Perlis, who works with Dr. Malamut. She had submitted it to the District prior to M.K.'s placement at the Bridge Academy, but the District did not respond. They never had a meeting to discuss the results of the evaluation. The District never proposed any changes to M.K.'s IEP. For seventh grade, the District proposed the same ICR program, and removed OT.

On cross-examination, C.K. recalled her former law firm sending a report from Dr. DaSilva with a neuropsychological evaluation conducted on March 23, 2011. She could not recall anything about his report that she disagreed with at that time. C.K.'s attorney encouraged the District to accept Dr. DaSilva's report. This was her son's fourth-grade year, the year that the special-education teacher, Mrs. Black, indicated that M.K. was having problems with everyday math. At the end of the summer of M.K.'s fourth-grade year the NJ ASK scores came in, and the scores concerned C.K. She believes M.K.'s language-art scores kept going down in the fourth, fifth and sixth grades. She believes that middle school was more difficult for M.K. due to the different classes, different teachers, different expectations and different ways of wanting him to organize his material. C.K. does not agree that the level of rigor was more challenging. The main thing was that M.K. was not performing at grade level. By the afternoon, M.K. was tired and could barely hold himself upright. Although he was tired at the end of the day, he was pleased to see the tutor arrive because he knew he would be getting real instruction. C.K. agreed that the report cards M.K. received always showed high grades, but she disagreed that the summaries of the teachers in each of the IEPs were fairly positive. She believed that the summaries were mixed.

In reviewing the June 11, 2012, IEP (R-2), C.K. noted that Andrea Longo gave a summary from reading/literacy indicating that M.K. had a developmental reading

assessment (DRA 2) level of 30. C.K. testified that Mrs. Longo explained to her that the DRA level was several grades below grade level, and she explained that M.K.'s comprehension was also worse. She agreed that his oral fluency is stronger than his comprehension. She agreed with Mrs. Longo that when he reads independently he has a difficult time expressing the meaning of the text. C.K. believes that M.K.'s performance on the NJ ASK confirms the belief that he was not doing well in school. She saw problems before he took the NJ ASK, but she thought she could handle it with private tutoring, Sylvan and Kumon. C.K. noted that the problem with the teachers' summaries was that there was never a standardized reading assessment done for M.K. until fifth grade, so when his teachers in second, third and fourth grade reported on his reading abilities, she did not know what their reports were based on. The summer reading program came about for M.K. because at a meeting, the CST told her that M.K. was not reading at grade level based on the DRA results. C.K. left upset, thinking that M.K. might not be permitted to get into the program, so C.K. had to look for something herself. Dr. Pearsall said that there was going to be a program, but she did not know if M.K. would have a spot because there were a limited number of spots. The DRA results mirrored what was found out from Lindamood-Bell.

Susan Pearsall, Ph.D.

Susan Pearsall, Ph.D., testified for the petitioners. She served as M.K.'s case manager from December 2010 through June 2012. She is a certified school psychologist whose first job was with the District. She knew M.K. as a student in the ICR program who had speech, occupational therapy and physical therapy. She described him as playing an instrument, having friends and seemingly happy. She was aware that his reading skills were slightly below grade level based on other assessments, but on the Wechsler Intelligence Scale for Children IV (WISC IV), he scored quite well. In the spring of 2012, DRA scores were new to the District. M.K. had scored a 30. The DRA is a reading assessment that looks at fluency and comprehension. His 30 was below grade level. Dr. Pearsall was also aware that M.K. was being bullied by another peer in the 2011–2012 school year, M.K.'s fifth-grade year. She recalls that other students said something mean to M.K., but she does not remember if she spoke to him at that time. Petitioners sent her an e-mail on October 6,

2011, setting forth three incidents of bullying, the latest of which was October 5, 2011. (P-17.) Dr. Pearsall was aware that the District had a new anti-bullying program, and she went to the principal to verbally let her know about the e-mail. She does not know whether the e-mail was investigated. She believes the student stopped bullying M.K. Physically, M.K. is a big boy and walks a little bit unevenly. Dr. Pearsall is aware of his stuttering and articulation problems.

Dr. Pearsall, who holds a Ph.D. in cognitive development, testified that she met with M.K. a couple of times over the 2011–2012 school year. She observed him in school in his classes probably three or more times, and in Mrs. Longo’s class. Mrs. Longo was his special-education teacher. Dr. Pearsall went to M.K.’s school quarterly to find out how he was doing, and also visited other times. The DRA was administered in April 2012. It was inputted into the IEP on March 29, 2012. Although she recalled that the DRA score of 30 was one and one-half years below grade level, the chart of DRA levels showed that M.K. tested as beginning third grade, which would be two and one-half years below grade level. (P-19.) The chart was from Riverview, which she is familiar with as a publishing house that is involved with academics. It was the first time the DRA had been given, and Dr. Pearsall learned from others that it takes two years before the numbers are considered accurate. She does not believe that the test was administered without training, however.

Dr. Pearsall further testified that an ESY is a continuation of the current program over the summer, so that students who had successive regression in recoupment of information can maintain what they have learned. The team decided that M.K. was not eligible for ESY, because the teacher’s report indicated that over vacations and breaks there was no significant regression beyond what M.K.’s peers would be expected to forget. Dr. Pearsall is not aware of any other factors. She became aware that there was going to be a summer reading program in the summer of 2012; however, the criteria was not defined yet. The curriculum staff defined the criteria for eligibility for that program. The description of the summer literacy program says that it is targeting students who are at or about two years below grade level (P-7) and exiting grades three to five, or students who have not made adequate progress for students exiting grades one and two. It is not confined to students with IEPs, and any student can be a part of

this program, but M.K. was not initially offered it. Petitioners expressed concern that there would not be a special-education teacher present in the program. If the literacy program did not exist, M.K. would not have been eligible for any type of summer program in the summer of 2012. Dr. Pearsall acknowledged that M.K. has difficulty with reading comprehension. At some time, Dr. Pearsall became aware that petitioners were interested in placing M.K. in the Lindamood-Bell program, a language-based reading-fluency and comprehension program. Dr. Pearsall presented the request to her director, Joseph Jakubowski. By that time, the attorneys got involved, and they were actually present at the IEP meeting on the evaluation. No one disputed M.K.'s need for the program. The records reflect that he does lose information quickly and he has a difficult time maintaining that information for math facts.

Dr. Pearsall further testified on cross-examination that she became employed at the same time she started working with M.K. in December 2010. In M.K.'s fifth-grade year, 2011–2012, she reported the bullying incident to her principal, which was part of the procedure under the new bullying program and the anti-bullying bill-of-rights act. She received one report of bullying from C.K. The report involved the same child to whom she spoke because she was part of her caseload. Dr. Pearsall counseled the child on what she does and how she attacks other people. She did not recall any other reports. As far as Dr. Pearsall knew, the purpose of the DRA was for each child to achieve a reading level where he or she could read independently. She believed that there was a learning curve on getting reliable results from the assessment. Going into the meeting with the parents, the CST's thinking was that it was not going to recommend ESY for M.K. M.K. did not meet the regression-recouping standard. It was at the end of the meeting that the parents asked for the District to pay for Lindamood-Bell. When Dr. Pearsall's responsibility ended for M.K., it was because he was going to middle school and she was going to the pre-school.

Andrea Longo

Andrea Longo, M.K.'s fifth-grade special-education teacher in 2011–2012, who testified for the petitioners, stated that she taught M.K. in an in-class support room, where there was a general-education teacher and a special-education teacher in the

classroom each day. There were approximately twenty-three students that she had for reading and language arts, and the same twenty-three for math. She was in charge of M.K. for all subjects: reading, language arts, math, science, and social studies. She and the general-education teacher generally co-taught. Ms. Longo taught science, the general-education teacher taught social studies, and they worked together on math. They would take turns teaching the reading lessons. In reading, the District started implementing the new reading program, Reader's Workshop, as they were trained in it. Shared reading was the first component of the Reader's Workshop program implemented. Guided reading was not implemented until the spring, and that is when the DRA came into play.

Ms. Longo would help M.K. during independent practice. There were times when he needed assistance, and there were other times when he was able to complete the work independently, depending on what the skill was. Not all the materials she used were on his grade level. Ms. Longo had some material she provided to him that was on a fourth-grade level. Toward the end of the school year, she began using guided-reading books that were at a third- or fourth-grade level. They determined what level books were appropriate for each student based on the results of the DRA, which tested fluency and comprehension skills.

Ms. Longo testified that she was trained in the administration of the DRA that year. She believes she had a good understanding of how to administer it. She did not have any difficulties with its administration. The administration of the test is subjective on the comprehension portion of it because, based on what you know of the student, you may give an answer a score of 2, while someone else may give it a score of 3. Ms. Longo believes that the DRA score of 30 was an accurate assessment of M.K.'s abilities. Ms. Longo was responsible for grading M.K., and graded him on different levels depending on the subject. She made modifications. So, in science and social studies it was grade-level material with modifications made. In guided reading, she taught at M.K.'s instructional level. In shared reading, she taught at grade level. The shared reading is as a group, and the students are graded on shared reading. M.K. had difficulty in reading with the anthology and in Reader's Workshop when it came to certain skills and strategies. He needed assistance in both because he had trouble with

reading comprehension and locating answers or information. Ms. Longo wrote down the pages on which the answers could be found. As everyone was working independently, she went around the room, and M.K. was one of the students with whom she would work. Ms. Longo described him as a “people pleaser.”

Ms. Longo testified that the goals and objectives for language arts and literacy and reading were selected from a long list based on what they needed to work on and what she knew of M.K. (R-1 at 6-1.) The goals come from a computer. The common core standards were adopted this year. She admitted she was not sure when the District set them, but she realized that the standards were a big focus in school this year. The standards are not in the IEP, but in the lesson plans for all students. The 3.1 next to the standard in reading corresponds to a certain grade level. So “4.1” refers to fourth grade. Ms. Longo reported progress for M.K. on the goals and objectives for him individually on each specific goal. When M.K. got a 30 on the DRA that she gave him, she was not surprised. She knew M.K. was below grade level in reading and had difficulty with it.

Ms. Longo recalled attending an IEP meeting in 2012, during which M.K.’s summer program was discussed, but she does not recall much about what took place. Ms. Longo recalled that the parents were concerned about M.K.’s NJ ASK scores from the fourth grade. She had met with them and discussed strategies and skills to help him bring up his grade. She found out at that meeting that the parents were exploring Lindamood-Bell. After learning that M.K. had a score of 30 on the DRA, Ms. Longo thought that his services should be continued for reading and language arts because he needed assistance. She did not recommend any changes. Ms. Longo’s suggestion was to continue the in-class-support resource room, which meant to continue what he was receiving without changes. She did not have any conversations with M.K.’s teachers when he entered the sixth grade. Her last communication about M.K. was in June 2012. She did not recall that he had a lot of absences that year. Ms. Longo believed that he had a standard number of absences that did not impact anything.

Ms. Longo noted that she has a teacher-of-the-handicapped certificate and an elementary-education certificate. At the time of her testimony, she had taught in the

District for ten years. Ms. Longo testified that she would not have had direct involvement with M.K.'s program for the summer of 2012 or sixth grade. She prepared the summary on the language-arts portion of the 2012 IEP. (R-2 at 2-1.) It was a sincere assessment of M.K. at that time. Ms. Longo does not know M.K.'s disability, but knows that he was classified as "other health impaired," meaning he had a number of different disabilities. When she taught M.K., he did not seem to be having great difficulty in participating in the shared reading portion of the class, which was using fifth-grade materials. Although writing is on the IEP, she did not have a recollection of his writing as of the time of her testimony. The skills assessed at the fourth-grade level would have been inferring, drawing conclusions, cause and effect, mental images, character traits, and things like that. She does not remember what M.K. was able to perform independently with regard to those skills. Her progress reports are based on teacher observation and assessment. Although pulled from a menu on a computer, the goals Ms. Longo chose were specific to M.K. For example, she further explained that tech features that contribute to comprehension mean that the goal is that the student is able to identify tech features and use them to help with reading comprehension. She was not sure whether in fifth grade the parents received reports about a student's progress by parent-teacher conferences or by the computerized parent portal. Ms. Longo said that she kept in constant communication with M.K.'s parents throughout the year.

Dr. Barbara Malamut

Dr. Barbara Malamut testified that she is a neuropsychologist with her own private practice. She evaluates a person's cognitive skills and relates them to brain functioning. More specifically, she tests a person's memory, problem-solving skills, language and motor skills, sensory skills, and all the ways in which people process information and how they learn. Dr. Emily Perlis works with her, and she is a neuropsychologist licensed in Pennsylvania and New Jersey. She is also a certified educational psychologist. Dr. Malamut has a master's degree and doctorate in neuropsychology and was trained in all the different types of educational tests used today. She sees clients with all types of learning disabilities. Dr. Malamut was qualified

as an expert in neuropsychology, as well as an expert in assessments and programming options, limited to focusing on children's neuropsychological difficulties.

Dr. Malamut performed a neuropsychological evaluation of M.K. on September 24 and October 1, 2012, at the request of C.K. C.K. reported that M.K. was not doing well in school and that his proficiency had declined to the partially proficient range according to the NJ ASK standardized testing results. He was also showing some anxiety in school. Dr. Malamut was aware of his diagnosis of Sotos Syndrome and knew what that was and the cognitive abnormalities that can be associated with it. M.K. had intellectual functioning above 70 (normal). His arched palate made speaking and eating difficult, and his learning disabilities, specifically in executive functioning and processing, were indicative of Sotos syndrome. M.K. was in sixth grade when he was evaluated.

Dr. Malamut testified that she reviewed M.K.'s records before making her plan for M.K. They included his IEPs, evaluations, therapy reports, hospital reports and previous neurodevelopmental evaluations from CHOP. The records indicated that he had slow processing speed and weakness in his visual-perceptual abilities, as well as in handwriting. He had difficulty with math, reading comprehension and critical thinking. He had difficulty completing his homework because he was slow, although he worked hard. She looked at his executive functioning, which is a person's ability to plan, organize, and regulate his own behavior. Working memory and attention are also part of executive functioning. She administered various tests of executive functioning and measured M.K.'s fine motor skills. On the second day, Dr. Malamut gave him an auditory-processing test called a SCAN. She also gave him a test evaluating his receptive and expressive language and the Wechsler Individual Achievement Test (WIAT), because he had completed a Woodcock-Johnson test a few months earlier.

Dr. Malamut found that M.K.'s memory was not nearly as strong as she had predicted based on his above-average verbal-intelligence functioning. The California Verbal Learning Test—Children's Version, showed that his learning was below average. The test was based on his recollection of random words. It showed that when you present information at a normal pace and you keep talking to him, he begins to decline

without using a delay. The test also showed that he did not have a specific learning strategy; because he did not always spontaneously organize the words in the order they were given. The next test was story memory, which should have been easier because there is a context to the words. M.K. was below average after hearing the stories and retelling them. After a delay, his score declined more, but his recognition was better than his recall. M.K. did better when the information was in a context, but he was still not learning at the level that one would expect given his above-average verbal IQ. M.K. has a weakness in his working memory, his organizational skills and his speed of processing. She next performed the Rey-Osterrieth Complex Figure Test of recall, and M.K.'s scores were markedly deficient. M.K. had to draw a design from memory and draw it again thirty minutes later. His drawing was disorganized and his recall was not good, but his recognition of details was good. The testing showed that one cannot present too much information to M.K. at one time without taking breaks and without breaking the information into smaller amounts and repeating it. If M.K. does not take breaks between different concepts, he experiences retroactive interference, so that the new learning interferes with the information just learned. At M.K.'s age, Dr. Malamut expected to see certain executive-functioning skills develop that she did not see, so while other children in his age group are making progress, M.K. is now starting to fall behind. Dr. Malamut recommended several strategies to address his working-memory weaknesses. Specifically, she would not lecture to him, would present smaller amounts of material to allow him to process it, and would ask him questions about what he learned.

Dr. Malamut's overall finding, according to the WIAT, was that M.K.'s reading comprehension was average; his writing was average to just above average; and his math problem solving was below grade average and also below grade level. M.K. had a weakness in complex problem solving, organization skills, critical thinking, and working memory. When she saw M.K., he had just completed the Lindamood-Bell program that helps children with reading and critical-thinking skills. He made great progress over the summer with that program according to pre- and post-testing. She noted that when M.K. tries to explain a complex thought, he begins to blink, which is an indication of anxiety. When anxiety goes up, learning goes down and memory decreases. M.K. did not acknowledge depression or anxiety in his self-reporting. Dr. Malamut noted that his

verbal intellectual functioning is above average, so he is likely to be bored if he is being taught at a lower grade level. When he was in fifth grade, he was being taught at a third-grade level in reading, writing and language arts. To keep M.K. stimulated, he should be taught at a level that is appropriate for his age. The third-grade material would not teach the level of critical thinking required for a child about to enter the sixth grade. Dr. Malamut opined that M.K. needs a careful balance of instruction to challenge his thinking and keep him interested in learning, while helping him to improve some of the more fundamental skills.

Dr. Malamut reviewed M.K.'s IEP from fifth grade (R-1). M.K. was in an in-class-support resource classroom and had specials in regular-education classrooms. Speech and physical therapy were his services. He had between sixteen and twenty students in his in-class-support resource classroom. Dr. Malamut did not believe that the IEP was appropriate for M.K., because he is below grade level in all subjects according to the Woodcock-Johnson scores. He was more than a year behind in reading fluency and passage comprehension. (R-7.) In math fluency and applied problems, he is more than a year behind. M.K. was also more than a year behind in all written expression, so he is not keeping up with his peers. She believes that the approach the school is taking is responsible for his falling behind. M.K. feels very self-conscious and tends to withdraw. In a smaller group setting, M.K. would participate more and not feel the same pressure. In language arts in particular, he needs a lot of attention. The recommendations in the IEP do not have enough of a multisensory approach, the class sizes are too big, and there is not enough focus on the cognitive skills he needs to learn at this level. She based this on the test results and looking at the IEP.

Dr. Malamut reviewed the scores of the Woodcock-Johnson test conducted by Dr. Perlis, who did a follow-up evaluation of M.K. (P-10.) In July 2013, Dr. Perlis noted that M.K. declined in all areas except for untimed calculation skills from April 2012, according to the Woodcock-Johnson test results. The scores reflect that he is not keeping up with the pace of learning of his peers. Based on the Woodcock-Johnson, he is not making meaningful academic progress. If the program does not address M.K.'s executive functioning, the pattern of the way he learns and remembers, M.K. will continue to decline in the future.

Dr. Malamut has evaluated other students and recommended that they attend the Bridge Academy after she has visited. For M.K., she liked the short distance between classrooms due to it being a very small school. She liked the small class sizes also, so that he could get specialized attention to keep him from getting frustrated and anxious. She also liked that it is a school for children with learning disabilities, so they use a multisensory approach to learning. The school is able to work on M.K.'s cognitive weaknesses. Based on the Woodcock-Johnson test scores and the fifth-grade language-arts portion of the NJ ASK, on which M.K. tested partially proficient, Dr. Malamut thinks that the Bridge Academy will help him make meaningful progress.

On cross-examination, Dr. Malamut agreed that her notes from her initial interview with C.K. (R-19) say that the parent would like for M.K. to go to the Bridge Academy, and that M.K. is visiting that school in October (2013). C.K. was unhappy with and concerned about M.K.'s progress. The purpose of retaining Dr. Malamut was to look at his pattern of cognitive functioning and determine whether the Bridge Academy was an appropriate school or if he needed another placement. She knew that the parents had already obtained legal counsel. She assumed that C.K.'s expressed concerns about how M.K. was doing were accurate. M.K. also confirmed them, and she viewed the records. She did not talk to anyone from the District or observe M.K. in classes in the District. Through M.K., she understood how much individual attention he was getting in the large classroom in the District. She also relied on his IEP, which did not have anything written into it about individual attention. She based her opinion that he was not getting enough individual attention on the fact that his scores had gone down. It would surprise her to know that his NJ ASK scores went up to 207 in language arts and 216 in mathematics, both proficient scores, in M.K.'s sixth-grade year. She noted that M.K. went to the Lindamood-Bell program through the summer, so she would have expected some progress. Dr. Malamut added that M.K.'s grades declined in the second half of the sixth-grade year and he became emotionally distraught, including refusing to go to school one day. He was out of school far more than usual in the second half of the sixth grade due to a fall. Being absent for a long period of time, such as two to three weeks, can affect a child's academic performance.

When asked what Dr. Malamut recommended in her report that could not be implemented in a public school district, she said that the speed at which information is presented to M.K. needs to be slow, and information needs to be presented using a multisensory approach. This is very difficult to do in a class of twenty children. Other children become restless while waiting for M.K. to verbalize his responses, an objective written into M.K.'s IEP. She does not believe that the District's program was specifically designed for M.K.'s cognitive weaknesses and deficits.

Dr. Malamut did not see a conflict between the conclusions reached by Dr. DaSilva when he wrote his report (R-9) and the conclusions she reached in her report.

Susan Morris

Susan Morris testified that she is the principal at the Bridge Academy, which is a school designed for students that need a special kind of teaching due primarily to language-based learning disabilities. It serves children ages eight to eighteen. The Bridge Academy offers an Orton-Gillingham-based approach to teaching language. It helps with math as well. The school is accredited with the State Department of Education, as well as the Academy of Orton-Gillingham Practitioners and Educators. She has a master's degree in special education, and principal and supervisor of instruction certificates. She sits in on about seventy IEP meetings per year. Her job now is to facilitate the process among the CST members. She was qualified as an expert in the development of special-education programs.

She is in charge of the admissions process for her school. The admissions process consists of reading all past evaluations. The school looks for students who are average to very bright cognitively, but who have not had success in other academic situations.

At the time she testified, she had been familiar with M.K. as a student at her school for about six or seven months. He has classes in reading, writing, language

foundations, math, science, social studies, health and physical education, and art. There is also recess and lunch.

Ms. Morris testified that M.K. had average skills, but it was difficult for him to process and organize language. He needed a slower pace of instruction. They were not familiar with his medical condition, so they researched it and talked to the parents. She also reviewed the sixth-grade IEP for 2012–2013. (R-3.) M.K. told her that things were moving too fast for him in the District and he was overwhelmed. He wants to please and to be successful. He was not feeling very good about school when she met him. He has a hard time deciding how to start a project, which tools he needs to solve a problem, and what he needs to do. She found out through observation that he did not have command of subtraction and multiplication math facts. He has problems with both organizing and expressing his thoughts. He is still working on fluency and he needs a lot of teacher contact time. She has ways to give him more time to process directions and answer questions when she sees him in her “social house,” which is a group of children of various ages that perform community service.

Ms. Morris did not observe M.K. in the District, but based on her knowledge of him and reading his records, an in-class-support model with twenty-three students would not work for M.K. He cannot assimilate the information at the pace of instruction in a regular class. He needs directions repeated multiple times and the main points of a lesson to be given to him multiple ways. An inclusion teacher cannot catch M.K. up. He or she cannot change the content, the pace, or the number of times the general-education teacher hits vocabulary or teaches the main concepts.

Ms. Morris testified that M.K. is grouped with students of like age and like need. In reading, the ratio is 3 to 1; writing, 4 to 1; and math, 4 to 1. In terms of M.K.’s medical needs, he participates with everyone else. He ambulates fine, although he wears a scoliosis back brace that he removes for physical activity. M.K. is pretty independent with his homework and it is good quality. He has made a lot of progress at the Bridge Academy socially and he is engaged in physical activity at recess. He transitions well into classes and knows what materials he needs in order to be ready for instruction. He raises his hand and participates, which he was not doing when he

arrived in September. M.K. is a child who really wants to learn. Even in smaller groups, sometimes if M.K. can avoid being called on, especially in math, he will sit quietly. Without participation, M.K. is not engaged, so he is not getting what he can out of his education.

On cross-examination, Ms. Morris testified that she did not contact the District to find out its view on how M.K. was doing there. It is not unusual for a student to progress socially upon arrival to a new school. She agreed that a smaller class size is generally better for all students.

M.K.

M.K. testified that he recalled leaving the District after his sixth-grade year. He recalled the names of his teachers: Ms. Hynes; Ms. Stanek; Mr. Tarrazi; Ms. McFadden; Ms. Mescal; Ms. Hawrylko; and Ms. Starr. He remembered his language-arts class, and that he could not understand the teacher because she went too fast. He recalled telling his mom and dad, but did not remember if he told the teacher or asked for help. He did not understand much of the material that he learned in the class. His parents helped him with his homework in sixth-grade language arts, as they had done in fifth grade. He needed a lot of help with his homework. He had a tutor who met with him once a week and explained concepts to him on a one-to-one basis. One of the other language-arts teachers, Ms. Starr, would take him to the back of the room to teach him and a few other students, maybe ten. He did not understand the language-arts material much better when she did that. She either moved too fast or too slow. He rarely was taken to the back of the class in math.

M.K. further testified that he had friends in school that he had had since preschool. Those friends are the ones that he hung around with. He recalled one instance of bullying in which a student said, "Look everyone, there's [M.K.] the retard." Everyone in band with M.K. just ignored that student, but the student kept on calling him that. At lunch when he was eating with his friends, the same student shouted, "Hi, hi, retard." M.K.'s friends ignored the student. M.K. did not like it that he said those things. He talked to Mr. Abrahamsen, the vice principal, about these incidents, and M.K. felt like

Mr. Abrahamsen wanted to hear what he had to say. In another incident, in fourth grade, M.K. recalled a girl accusing him of hogging the gym when he was there for physical therapy. She said it to the other kids and he felt embarrassed. He told his mom and dad. M.K. also remembered an incident when he was on crutches and a kid said to him, "Hey, you want to fight?" When M.K. pointed out his crutches, he said, "Yeah, I know. After you get the crutches off." M.K. was confused why the kid would want to fight him when he was on crutches. The same boy put his phone up to M.K.'s ear with loud music playing from it. He did not like that he did that.

M.K. recalled being accompanied around school by an aide. She pushed his wheelchair, walked around with him, and looked at what he was doing. She helped with his learning a little. He liked her as a person, but did not like that she was so on top of him walking him around. The language-arts teacher had the two of them sit at the back table in the back of the room with no other students present.

M.K. testified that he liked the Bridge Academy a lot, with there being few kids in all of his classes and a lot of attention paid to whether each student understands the concepts being taught. He is learning and he has many friends.

On cross-examination, M.K. testified that the reason that he was in court was so he could go to the Bridge Academy. His mother and father told him that they wanted him to come to court to discuss how he felt about the District. His parents told him that he should go to the Bridge Academy because he has certain learning disabilities and it is a school for students with his kinds of disabilities. M.K. remembered that he stopped getting homework, because it was given to him in the computer lab when he did not go to gym. He recalled having medical problems in the first half of his sixth-grade year caused by his falling on a book in school. He was in the hospital for a while and returned to school in a wheelchair.

M.K. testified on rebuttal that Ms. McFadden would come in to help him with his work every other day. She helped him get his work started, then asked if he understood, then she walked out of the room. He did not recall if the pace of the language-arts class slowed down after the IEP meeting in January 2013.

BOARD'S REBUTTAL TESTIMONY

Andrea Longo

Andrea Longo testified on rebuttal that in September 2012 she filled out forms at the beginning of M.K.'s sixth-grade year at the request of Dr. Malamut. Her answers were based on her having taught M.K. the year before. C.K. told Dr. Malamut at that time that she wanted M.K. to go to the Bridge Academy, according to Dr. Malamut's notes. (R-18.) Neither C.K. nor Dr. Malamut told her that C.K. wanted M.K. to go to the Bridge Academy. To her knowledge, Dr. Malamut did not observe M.K. in his school setting. The forms were her only source of information on M.K. Her account of M.K. differs from what Dr. Malamut wrote, in that she never encountered M.K. being angry, so that is not an accurate statement of her position. Ms. Longo also has no knowledge of how he would adjust to a new teacher.

Ms. Longo agreed that a large percentage of students at the school, approximately 90 percent, were not reading on grade level, based on the scores. She reviewed Dr. Malamut's recommendations, and testified that all of those things were either already being done or could be done. She had already done recommendations 1.a and 1.b, as helping a student to make inferences and instructing the student to reread passages that the student does not understand are strategies for all students. Ms. Longo believed that she gave M.K. extra time to process information, as recommended in 2. She testified that the reader's workshop gave him guided practice and shared reading, as recommended in 3. She takes a small group of students and teaches a skill away from the rest of the class. Regarding recommendation 4, she had M.K. seated closer to her to help him stay focused, and broke directions down one at a time. She did not do recommendation 5 during reading or math, but during science and social studies. Ms. Longo said she did recommendations 6, 7, 8 and 9 as things she does as a teacher, such as the hands-on activities. She agrees that they should be done. Ms. Longo testified that they also did all the things in recommendation 10. They did not do recommendations 11 and 12, which suggest letting M.K. use a calculator, because on the NJ ASK he would not be able to use a calculator. M.K. had a hard time

memorizing multiplication facts, so she taught him strategies to get the answer to a math question without using a calculator, such as by using manipulatives. They also had different games and cards to use in everyday math. She also had M.K. highlight information, and all the other items as recommended in 13, and gave him breaks when needed, as recommended in 14. Giving M.K. tests in a separate room was already being implemented, as recommended in 15, and he was already receiving speech, as in 16. She never meant to convey that M.K. had anger or anxiety issues, as set forth in 19, except maybe anxiety about a test. His mood was always happy. He tried his best and worked hard to please.

Ms. Longo testified that she did not talk to M.K.'s sixth-grade teachers, so she has no way of knowing whether those strategies were carried over in sixth grade. Although she gave him more time, she did not monitor his progress, except through unrecorded observations. The number of students in her class was in the low twenties. M.K. was not able to keep up with the material at the same pace as his peers. His processing speed was slower. He was not reading on grade level at the end of fifth grade. She never observed M.K. in sixth grade.

Marybeth McFadden

Marybeth McFadden testified as a rebuttal witness that she is a sixth-grade special-education teacher in the District, and has been at the District for thirty-seven years. She has bachelor's degrees in elementary and special education. She has a master's degree, and a certification as a learning disabilities teacher consultant. She also has an endorsement in special education and is certified in grades K through 12. She taught M.K. in science and social studies for M.K.'s first year of middle school in the sixth grade. One day she would see him for science and the next day she would see him for social studies, so she would see him five days a week. He would physically move from one classroom to another. She believes that there were twenty students in the classes in which she taught him, and she would co-teach with the regular-education teacher. This was an in-class-resource class. If needed, she would remove students to meet modifications in their IEPs. She met with Ms. Reigelsperger at the beginning of the year and read M.K.'s IEP in order to learn his needs. Ms. McFadden spoke to her

by phone because she was out on medical leave. She also spoke to Ms. Reigelsperger's replacements when needed. She did not speak to any of M.K.'s teachers from prior years about him.

When Ms. McFadden was asked how she taught M.K., she spoke generally about how she taught the class, and how she pulled out IEP or regular-education students if they needed extra help. She testified that she provided templates for M.K. so he would not have to write all the notes, but could fill in words. She also kept notebooks and folders for him to keep him organized in class. She testified that many children have difficulty with organization as they transition from elementary to middle school because of the change of classes. A special-needs student would have even more difficulty. The cafeteria is on the other side of the school, which means there are longer distances to go before and after lunch. She recalled that M.K. had more absences in the winter months of the 2012–2013 school year due to his accident. She identified his NJ ASK scores at the end of that year as language arts 203 and math 216, proficient scores in both subjects. (R-23.) The scores went up from the previous year. M.K. had testing modifications such as an alternate testing location, a special-education teacher giving the test, re-reading the directions, extended time and frequent breaks. She was unaware of M.K.'s stress and anxiety that he expressed to Mr. Abrahamsen regarding tests. In science and social studies, there would be two tests per marking period. When M.K. was with her, he was always smiling, happy and easy to work with. He was reticent at first, but as the year went on he would participate and raise his hand voluntarily. In the second half of the school year, Ms. Reigelsperger made arrangements for M.K. to go into a computer lab for a study hall where he would complete the homework or classwork that she gave him. She would go in to him on her prep time and assist him by explaining directions. Then she would leave to do her planning. She would assist mainly with science and social studies, but if he needed help in language arts, she would assist with that also. She thought the time was productive.

Ms. McFadden continued that M.K. would sometimes miss her class to do stretching exercises in the nurse's office for his back. He would be gone twenty to forty-five minutes of her class and also miss part of language arts approximately once a

week. Ms. McFadden attributed M.K.'s slide in grades that year to missing work in class and not being able to make it up. M.K. would admit to not studying with the study guide the teachers had provided. Tests were 50 percent of his grade, quizzes and projects 25 percent, and homework 15 percent. M.K.'s parents questioned the usefulness of giving M.K. homework and, after his hospitalization toward the end of the year, his teachers gave less of it. C.K. mentioned at a meeting in winter 2012 that she was actually doing M.K.'s homework and projects for him. (R-3.) Ms. McFadden was told that M.K. was tired and frustrated when he got home.

Ms. McFadden testified that she was already implementing all of Dr. Malamut's recommendations, except having M.K. do all of his writing on a computer. (R-8 at 16–17.) Regarding recommendation 1, they gave him guides to the answers for improving his reading comprehension. With reference to recommendation 2, they gave M.K. all the time he needed to complete the task. Regarding recommendation 3, they were giving small breaks to the students in the middle of the seventy-four-minute block, as well as between activities. They did not teach in the lecture format, and broke the class into smaller groups. Regarding recommendation 4, they would build from literal meaning before they went to something abstract. Regarding the need for an outline, at recommendation 5, she would give M.K. copies of notes or a study guide or a template where he would only have to insert a word. She believes she combined direct instruction with strategy instruction, as recommended at number 6. They taught students songs to help them remember. Regarding recommendation 7, assistance in organizing and breaking down tasks into components, she would give M.K. a rubric to follow showing the requirements that he could check off when done. In reference to recommendation 8, she did not discern that M.K. found anything boring. Regarding recommendation 9, she had nothing to add to involving M.K. in the activity, other than what she had already testified to. Dr. Malamut's next recommendation, number 10, was that M.K. vocalize what he wants to write when he composes. She testified that this is addressed when they used Venn diagrams and planning sheets. They also used computers, as recommended in number 11, but they did not use them on a daily basis. Regarding recommendation 12, M.K. was given a calculator in science, and manipulatives like materials, scales and puzzles. Petitioner conceded that Ms. McFadden would go on to testify that she implemented all of the recommendations in

Dr. Malamut's report. Ms. McFadden did not see evidence of the anxiety that Ms. Longo apparently described to Dr. Malamut. Ms. McFadden testified that grades were on the parent portal and progress reports were done four times a year for children with IEPs, which she also understood were accessible to parents through the parent portal.

On cross-examination, Ms. McFadden testified that her knowledge of the District's Lloyd Road Elementary School, which M.K. had attended, was based on her experience there fifteen years earlier. She agreed that Ms. Reigelsperger did not go into detail about M.K.'s profile when she discussed M.K. with her. Her knowledge was limited to the IEP, which indicated that he was reading below grade level. Ms. McFadden did not notice his reading difficulties when she taught him science and social studies every day. The teachers used an abridged version of the text with students with IEPs because the reading level was a bit lower. She believed that M.K. was progressing because he answered questions correctly and performed fairly well on tests and quizzes. She did not view the modification of his instruction as a problem, although she would do it, because, on occasion, he had difficulty with the material. If M.K. did not understand all of the material, he would raise his hand to ask for assistance. He was reticent to do so initially, but more comfortable as the year went on. In her thirty-seven years of experience, she has never worked with a student with Sotos syndrome before M.K. She found out what it was when she read Dr. Malamut's report in conjunction with this due-process appeal around March 2014. She did not know what Sotos syndrome was when she began working with M.K. in September 2012. When she learned what it was, she did not feel that she should be doing anything different from what she had been doing.

Ms. McFadden insisted that she spent twenty minutes with M.K. at the beginning of every study hall. She would then come back to him in the middle, and again at the end, of the seventy-four-minute period. He would have computer time the last ten minutes if he did what he was supposed to do. When asked about the contrast between her note in the IEP written in May 2013 (R-4 at 2-3) that he has fallen behind because he doesn't do the homework and her testimony that they eliminated homework in the spring of 2013, Ms. McFadden testified that before she came up with a system to get him to do the work in study hall, she found out that he was playing computer games

after she left him. Her note states, "M.K. is very capable of doing the work." She admitted that if M.K. needed help in the assignment, he wouldn't be likely to ask the computer teacher to call her. His test grades of 80, 100, and 70 and quiz grades of 100, 70, 70 and 95 in science were based on modified assessments. (R-4 at 2–3.). She gave either fewer questions, fewer choices, or fewer open-ended questions. She believes that he comprehended the material, based on his performance in class. She further testified that the teachers post their comments on the progress reports in a system called Real-Time, which she assumed was connected to the parent portal. She had no idea that parents do not have access to their student's progress report, as Ms. Reigelsperger testified.

Ms. McFadden denied that she implemented the recommendations for every student in the same way. She testified that not every child needed recommendations 5 (an outline), 7 (help with organization) or 11 (use of a computer). The ones following 11 also were implemented depending on the lesson, the level of difficulty and the student's needs. The multisensory approach was used depending on the activity and the students in that particular class. M.K. was not required to write as much as other students. All students had the same break. She told M.K. that if he needed more time he should ask her. When they broke into small groups, he was not learning at the same level as the other kids in that group. He was completing the modified assignments, and some regular assignments.

Richard Abrahamsen

Richard Abrahamsen testified on rebuttal that he is the assistant principal at the Matawan-Aberdeen Middle School and was so during the 2012–2013 school year. In early January 2013 he had a meeting with M.K. and his mother. He knew them from the Lloyd Road School a couple of years before. C.K. was a representative of Parents of Special People, an organization that supports children with special needs. He recalled M.K. getting upset in the meeting because he did not want to come into school that day. He was having trouble with the workload and completion of the work.

Mr. Abrahamsen testified that the middle school at the time had about 900 students, with about 286 in the sixth grade. In January 2013 M.K. had a fall. Afterwards, Mr. Abrahamsen arranged a travel system to move M.K. in the hallway. He was aware that M.K. was on crutches, and had also been diagnosed with scoliosis. Mr. Abrahamsen sent out an e-mail on January 10, 2013, alerting staff members that whenever a student has a medical condition, whether temporary or long-term, the student does not participate in physical education. Rather, the middle school offers an alternate elective. M.K.'s fall occurred sometime between the meeting and the sending of the e-mail. He sent the e-mail in consultation with Ms. Reigelsperger. He communicated C.K.'s concerns to Ms. Reigelsperger with the intent that she and the staff provide M.K. with the assistance he needed. He was aware of an incident at the end of February 2013 when M.K. was on crutches and a student challenged him to a fight. The student, who was an older eighth-grade student, also said, "Hey, I know you. I think you were left back." He was not there, but the incident was brought to his attention. The student admitted that he said those things, and the administration did issue a consequence, although Mr. Abrahamsen did not say what the consequence was. Mr. Abrahamsen was also made aware of a previous incident in which that same student approached M.K. and asked M.K. if he wanted to wear his headphones, and proceeded to put the headphones by M.K.'s ear. M.K. did not want to listen to the student's headphones.

Mr. Abrahamsen further testified that he was told of a conflict with a boy in the band room in which the boy called M.K. a "retard." M.K. had dropped drum sticks or an instrument, and the boy pointed M.K. out at lunch and said words to the effect of, "There's the boy who dropped the instruments." The incident was addressed by the guidance counselor, and it was considered a conflict. It did not rise to the level of harassment, intimidation or bullying. There was a consequence issued to the boy for his choice of words.

Mr. Abrahamsen continued, testifying that in January 2013 he discussed with M.K. and his mother the difficulty that M.K. was having keeping up with the workload. M.K. became upset. His mother conveyed that she, his father and other family members helped at home. M.K. said that one teacher was talking too fast, and he could

not keep up with the pace in his language-arts class. He conveyed that information to M.K.'s case manager. He believes that the case manager met with his teachers. The IEP meeting of January 11, 2013, was the meeting in question. (R-3.)

CONCLUSIONS OF LAW

I. Did the Board Provide M.K. with a Free Appropriate Public Education in Accordance with the Individuals with Disabilities Education Act?

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400 to 1485, is designed "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.A. § 1400(d)(1)(A). The federal government provides financial assistance to states and local school districts for this purpose. 20 U.S.C.A. §§ 1411 to 1413. Under the New Jersey regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to -10.2, "[e]ach district board of education is responsible for providing a system of free, appropriate special education and related services to students with disabilities age three through 21." N.J.A.C. 6A:14-1.1(d). A free appropriate public education, or FAPE, means, in part, "special education and related services that . . . are provided in conformity with [an] individualized education program [IEP]." 20 U.S.C.A. § 1401(9); 20 U.S.C.A. § 1414(d).

An IEP is a detailed written statement that is prepared at a meeting between the child's IEP team, which shall include a qualified representative of the school district, the child's case manager, at least one of the child's regular-education teachers, at least one of the child's special-education teachers, the child's parents or guardian, and, where appropriate, the child. 20 U.S.C.A. § 1414(d)(1)(B); N.J.A.C. 6A:14-2.3(k)(2). An IEP includes a description of the child's current levels of academic achievement and functional performance, the child's annual academic and functional goals, and the special education and related services and supplementary aids and services that the child will receive. 20 U.S.C.A. § 1414(d)(1)(A); N.J.A.C. 6A:14-3.7(e). The measurable goals "shall, as appropriate, be related to the core curriculum content standards through

the general education curriculum unless otherwise required according to the student's educational needs" and "shall include benchmarks or short-term objectives" that allow the child to participate and progress in the general education curriculum." N.J.A.C. 6A:14-3.7(e)(2), (3). At the start of every school year, "the district board of education shall have in effect an IEP for every student who is receiving special education and related services from the district" and the IEP must be reviewed "not less frequently than annually to determine whether the annual goals for the child are being achieved." N.J.A.C. 6A:14-3.7(a)(1); 20 U.S.C.A. § 1414(d)(4). An IEP is the "primary mechanism for delivering a [FAPE]" to a disabled child. Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 756 (3d Cir. 1995).

In order to satisfy the FAPE requirement, a school district must provide a disabled child with "personalized instruction with sufficient support services to permit the child to benefit educationally from that 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). While "an IEP need not maximize the potential of a disabled student, it must provide 'meaningful' access to education and confer 'some educational benefit' upon the child for whom it is designed." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999) (citing Rowley, supra, 458 U.S. at 192, 200); see also M.A. v. Voorhees Twp. Bd. of Educ., 202 F. Supp. 2d 345, 361 (D.N.J. 2002), aff'd, 65 Fed. Appx. 404 (3d Cir. 2003) (holding that "the relevant inquiry is not whether the IEP confers more than a trivial benefit, nor whether the IEP confers the optimum benefit, but whether the IEP . . . would confer a *meaningful* educational benefit"). An educational benefit must be "gauged in relation to the child's potential." Ridgewood, supra, 172 F.3d at 247 (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 185 (3d Cir. 1988)). In assessing an IEP, "appropriateness is judged prospectively so that any lack of progress under a particular IEP, assuming *arguendo* that there was no progress, does not render that IEP inappropriate." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 (3d Cir. 1995).

In addition, a state must provide a disabled child with a FAPE in the "least restrictive environment." 20 U.S.C.A. § 1412(a)(5)(A). "The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates

disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." Carlisle, supra, 62 F.3d at 535. Indeed, there is a strong presumption in favor of integrating disabled children in regular classrooms. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993).

In New Jersey, a parent or school district may request a due-process hearing "when there is a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of [FAPE], or disciplinary action." N.J.A.C. 6A:14-2.7(a). In such a hearing, "the school district shall have the burden of proof and the burden of production." N.J.S.A. 18A:46-1.1. The hearing is conducted by an administrative law judge (ALJ), whose decision "shall be made on substantive grounds based on a determination of whether the child received a [FAPE]." N.J.A.C. 6A:14-2.7(k). If a parent alleges a procedural violation of the IDEA, an ALJ may decide that the student did not receive a FAPE only if any procedural inadequacies result in substantive harm, such that a procedural violation: (1) impeded the student's right to a FAPE; (2) significantly impeded the student's opportunity to participate in the decision-making process regarding the provision of a FAPE; or (3) caused a deprivation of educational benefits. Ibid.; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525–26, 127 S. Ct. 1994, 2001, 167 L. Ed. 2d 904, 917 (2007) (citing 20 U.S.C.A. § 1415(f)(3)(E)(ii)); C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 66–67 (3d Cir. 2010). The ALJ's decision is final. N.J.A.C. 6A:14-2.7(l).

The District argues that when petitioners filed their request for due process in February 2013, M.K.'s program for his sixth-grade year was set forth in a June 2012 IEP (R-2) that was not contested. That IEP was revised only to provide a one-to-one instructional assistant after M.K.'s accident. Ms. Reigelsperger testified at length about M.K.'s program as reflected in his IEP (R-3) and the progress he had made that year. (R-5; R-6.) M.K.'s spring 2012 NJ ASK scores of 203 in language arts and 216 in math were in the proficient range and a significant increase from the prior year. The District argues that M.K.'s complaints that the language-arts teacher was going too fast and that he was feeling anxious and overwhelmed were insufficient to counter the District's proofs in the grades and test scores that the IEP provided FAPE.

Petitioners argue, however, that the District did not meet its burden of proving that it provided FAPE through M.K.'s IEP. First, they argue that the District proffered no expert testimony or opinion that the program it offered was appropriate. The testimony regarding M.K.'s IEP came from Ms. Reigelsperger, who did not meet M.K.'s parents until January 2013 and came to M.K.'s school only quarterly. Ms. Reigelsperger admitted that the goals set forth in the June 11, 2012, IEP and repeated in the January 2013 IEP, as amended, were not individual to M.K, but rather applied to all students. Also, the IEP did not indicate how the District would measure M.K.'s mastery of the skills, what constituted mastery, or how he had progressed toward attaining those goals at the time the IEP was drafted. Ms. Reigelsperger testified that this information was in progress reports that she admitted were recorded, but not distributed. Petitioners note that the action of the board of education "shall not be accorded any presumption of correctness." N.J.A.C. 1:6A-14.1(d).

Petitioners argue further that judges and courts rely on the testimony of educational experts, not the justifications of district employees, to determine whether an appropriate program has been offered. Oberti, supra, 995 F.2d at 1216. Petitioners argue that the testimony of the District employees regarding how well M.K. was doing is biased. In contrast, petitioners presented the expert testimony of Dr. Malamut, who testified that M.K. had an above-average verbal IQ, so M.K. should not have been reading below grade level. According to Dr. Malamut, the reason that M.K. was reading below grade level was that the IEP was inappropriate for M.K. She testified that M.K. was below grade level in all subjects according to the Woodcock-Johnson scores. He was more than a year behind in reading fluency and passage comprehension. (R-7.) In math fluency and applied problems, he was more than a year behind. M.K. was also more than a year behind in all written expression, so he was not keeping up with his peers. She testified that, based on the test results and the IEP, the recommendations in the IEP do not have enough of a multisensory approach, the class sizes are too big, and there is not enough focus on the cognitive skills he needs to learn at his grade level.

Although the Board's witnesses testified that they implemented each of Dr. Malamut's recommendations on page sixteen of her report (R-8), none of the

recommendations is in the IEP from fifth or sixth grade, which are virtually identical. (P-2; R-2.) Focusing just on the June 11, 2012, IEP, even with knowing that reading comprehension is a difficulty for M.K., under Reading, the benchmarks or short-term objectives state only:

[M.K.] will understand and apply the knowledge of sounds, letters and words in written English to become [an] independent and fluent reader[] and will read a variety of materials and texts with fluency and comprehension.

....

Comprehension Skills and Response to Text (3.1.G.)

-- Use cause and effect and sequence of events to gain meaning.

Ms. Longo noted in the April 2012 IEP that M.K. “does display difficulties with reading comprehension.” She noted that when he reads independently, he has a difficult time expressing the meaning of what he has read. (R-1 at 2-2.) Yet the June 2012 IEP makes no changes from the April 2012 IEP, nor does it set forth individualized, measurable objectives that are designed to address M.K.’s difficulty with understanding the meaning of what he has read. Ms. Longo admitted that her objectives are based on the core curriculum standards that are applicable to any child, not just M.K. Ms. McFadden testified that almost all of Dr. Malamut’s recommendations that she said she implemented were implemented for every child, not individualized for M.K.

Similarly in the Math portion of M.K.’s fourth-grade IEP (P-2), M.K. was noted to have difficulty with the pacing and timed tests that are part of the everyday math program. In addition, he had “difficulties retrieving addition, subtraction, multiplication, division and fraction facts.” (P-2 at 5.) His teacher noted that he needed time to use strategies such as manipulatives, calculators, computer and the Promethean board to get to the correct answers. Ms. Longo noted the same difficulties in M.K.’s fifth-grade year with fact retention, but does not mention by name any strategies that she has shown him to get the correct answers. (R-1 at 2-2; R-2 at 2.3.) There are no

benchmarks or short-term objectives for math in either the April or June 2012 IEP, so obviously no strategies or objectives for fact retention are set forth. (R-1; R-2.)

In the 2010–2011 school year, M.K.’s teacher noted that M.K. was having difficulty with the math program. However, the District did nothing to change M.K.’s placement or program or address his inability to recall math facts. Instead, petitioners had to seek alternate math instruction for M.K. outside of school. They had to help M.K. with his homework and get a tutor to help him understand the coursework that he could not understand in class. M.K.’s NJ ASK math score for that year of 189, along with his language-arts-literacy score of 194, both reflecting partial proficiency, indicated that he did not make meaningful progress that year. Therefore, I **FIND** that the District failed to provide M.K. with an individualized education program designed to meet his individual needs in which the coursework and homework were appropriate for him. Under 34 C.F.R. 300.324(b), the District IEP team was required to ensure that M.K.’s IEP was revised, as appropriate, to “address any lack in expected progress toward the annual goals, the results of a reevaluation, information provided to or from the parents, the student’s anticipated needs, or other matters.” The IEP team did not do this in the present case. I therefore **CONCLUDE** that the District did not meet its burden of proving that it provided FAPE in the 2010–2011 school year.

Even after the District obtained the psychological evaluation from M.K.’s case manager confirming his borderline processing speed and borderline working memory in May 2012, along with the other evaluations, the District continued to give M.K. homework and classwork that he was unable to follow despite his above-average intelligence. Despite arguing now that the DRA scores were too new to be relied upon, Ms. Longo provided M.K. with materials below his intellectual level (third and fourth grade, even though he was in fifth grade) and said how well he was doing in his grades. The District did not provide any information to the parents that M.K. was struggling academically, so they had no basis to reject the IEP of June 2012. In spite of the DRA scores showing how far M.K. was reading below grade level and his NJ ASK scores, the CST proposed no changes for the 2012–2013 school year except to eliminate occupational therapy.

I credit the testimony of Dr. Malamut and **CONCLUDE** that M.K.'s IEPs did not set forth individualized, measurable goals and objectives for M.K. The above section is just one example of how the objectives were not individualized or measurable as required by the IDEA. Further, even the NJ ASK score of 203, while an improvement over the fourth-grade score, is barely proficient and not consistent with M.K.'s intelligence level. As Dr. Malamut's analysis makes sense and is based on test results, I do not find her opinion to have been overly influenced by C.K.'s statement to her that she wanted M.K. to attend the Bridge Academy. I **CONCLUDE** that the child study team failed to make significant changes to the IEP to make it individualized and measurable after M.K.'s 2011 NJ ASK scores drastically dipped and forced petitioners to obtain their own tutor for M.K. and, in the summer, pay for Lindamood-Bell to catch M.K. up with reading. I **CONCLUDE** that the child study team continued to fail to make changes to the IEP after receiving the DRA scores showing that his reading skills were more than two years below grade level, and gave a fifth-grader reading instruction on a third- and fourth-grade level. I **CONCLUDE** that the failure to make changes to provide M.K. with individualized goals and objectives that were measurable, and the failure to keep petitioners advised as to M.K.'s progress, were failures to provide an appropriate public education.

II. Did the District Comply with Section 504 of the Rehabilitation Act?

To prevail on a claim for a violation of Section 504 of the Rehabilitation Act, 29 U.S.C.A. § 794, a plaintiff must meet four requirements: 1) she is a "handicapped individual"; 2) she is "otherwise qualified" for participation in the program; 3) the program receives "federal financial assistance"; and 4) she was "denied the benefits of" or "subject to discrimination" under the program. Nathanson v. Med. Coll. of Pa., 926 F.2d 1368, 1380 (3d Cir. 1991) (citing Strathie v. Dep't of Transp., 716 F.2d 227, 230 (3d Cir. 1983)). As noted above, compensatory damages may be appropriate for Section 504 claims, and petitioners have sought compensatory damages for the alleged Section 504 violation. As set forth above, M.K. is a handicapped individual otherwise qualified for participation in a district-run special-education program that receives federal financial assistance under the IDEA. The only question is whether M.K. was

denied the benefits or subject to discrimination under the program, and if so, what is the appropriate remedy.

The implementing regulations to Section 504 set forth that an appropriate education is “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.” 34 C.F.R. § 104.33(b) (2015). The sections cited therein refer to the educational setting, evaluation and placement, and establishment of procedural safeguards, respectively. In addition, it is discriminatory to “[a]fford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.” 34 C.F.R. § 104.4(b)(ii) (2015). In distinguishing the IDEA from the Rehabilitation Act, the Third Circuit has said, “the IDEA governs the affirmative duty to provide a public education to disabled students, while the [Rehabilitation Act] embod[ies] the negative prohibition against depriving disabled students of public education.” C.G. v. Pa. Dep’t of Educ., 734 F.3d 229, 234 (3d Cir. Pa. 2013) (citing W.B. v. Matula, 67 F.3d 484, 492–93 (3d Cir. 1995)). As such, “the IDEA provides a remedy for ‘inappropriate educational placement decisions, regardless of discrimination,’ while the [Rehabilitation Act] prohibit[s] and provide[s] a remedy for discrimination.” Ibid. (citing Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887, 901 (D.N.J. 2003)). As the Court explained in C.G., supra, 734 F.3d at 235, “[f]ailure to provide a FAPE violates Part B of the IDEA and generally violates [the Rehabilitation Act] because it deprives disabled students of a benefit that non-disabled students receive simply by attending school in the normal course—a free, appropriate public education.”

In failing to propose and implement an appropriate IEP that would accommodate M.K.’s needs, the District failed to provide M.K. with an appropriate education. The District did not provide M.K. with the educational setting, curriculum or environment to address his slow processing speed or fine and gross motor-skill impairments to allow him to make the progress other non-handicapped individuals were able to make in the classroom. Year after year, the District made no changes to make the curriculum more

accessible to M.K. despite his growing frustration with not being able to keep up with the language-arts class and being unable to retain math facts—a deficit that was still present when M.K. attended the Bridge Academy. By failing to address M.K.’s impairments, the District denied M.K. the right to accommodations, in violation of Section 504 of the Rehabilitation Act.

The remedy for such violations is damages, including but not limited to the costs of bringing suit to assert petitioners’ rights under Section 504, such as the cost of evaluations, expert-witness testimony and attorney’s fees. However, such remedies cannot be imposed by the OAL, only recommended.

III. Are Petitioners Entitled to Reimbursement for the Unilateral Placement at the Bridge Academy?

When tuition reimbursement is sought by parents for their unilateral decision to place their child in a private school, the threshold question is whether the school district timely offered a free appropriate public education. I have concluded that the program and placement offered by the District did not provide FAPE as required under the IDEA. Where, as here, the District’s program and placement are not appropriate, reimbursement is still dependent upon the parents establishing that the unilateral placement provides the pupil with an appropriate education. Burlington Sch. Comm. v. Dep’t of Educ., 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 284 (1993); N.J.A.C. 6A:14-2.10(b).

More particularly, an ALJ may require the district to reimburse the parents for the cost of that enrollment if “the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and . . . the private placement is appropriate.” N.J.A.C. 6A:14-2.10(b); 20 U.S.C.A. § 1412(a)(10)(C)(ii). However, parents who unilaterally withdraw their child from public school and place the child in a private school without consent from the school district “do so at their own financial risk.” Burlington, supra, 471 U.S. at 374, 105 S. Ct. at 2004, 85 L. Ed. 2d at 397. If it is ultimately determined that the program proposed by the district affords the

child with a FAPE, then the parents are barred from recovering reimbursement of tuition and related expenses. Ibid.

Parents must take certain steps prior to a unilateral placement. N.J.A.C. 6A:14-2.10(c). Thus, reimbursement may be reduced or denied “[i]f 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”; if “[a]t 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”; or, upon a “finding of unreasonableness with respect to actions taken by the parents.” Ibid. Here, petitioners meaningfully engaged the IEP process from fourth grade to sixth grade and took appropriate steps prior to the unilateral placement of M.K. in August 2013. I **FIND that** they first requested placement at the Bridge Academy at the IEP meeting of January 2013. They formally sent a letter giving notice to the District that they would place M.K. at the Bridge Academy in July 2013. (P-9.) I **FIND** that the District did not respond to the letter, convene an IEP meeting, conduct additional evaluations or take any action to deter petitioners’ placement of M.K. at the Bridge Academy. Thus, petitioners enrolled M.K. at the Bridge Academy in August 2013.

The next question is whether the unilateral placement provides M.K. with an appropriate education. Petitioners’ evidence that it does so is unrefuted. Susan Morris testified, and I **CONCLUDE**, consistent with the testimony and report of Dr. Malamut, that an in-class support model with twenty-three students would not work for M.K. because he cannot assimilate the information at a pace that a teacher teaches in a regular class. M.K. testified and previously complained to Dr. Abrahamsen about his inability to keep up, as well. At the Bridge Academy, due to the small class size, M.K. can have directions repeated multiple times and the main points of a lesson to be given to him multiple ways, as Ms. Morris testified he needs. The Bridge Academy uses the Orton-Gillingham approach to reading, and it is implemented in each of M.K.’s classes. M.K. is grouped with students of like age and like need. In reading, the ratio is 3 to 1; writing, 4 to 1; and math, 4 to 1. Although Ms. Morris admitted that a smaller class size

is good for all students, she explained how it is not just better for M.K., but necessary for M.K. given his slow processing speed and his inability to keep up at the regular pace of instruction even with a special-education teacher. Through testimony, petitioners have shown that M.K. has made meaningful progress at the Bridge Academy, both academically and socially. In addition, he is safer there because there are shorter distances for him to navigate and it is less likely that there will be items on the floor for him to trip over, as happened in the District. I therefore **CONCLUDE** that the Bridge Academy provides an appropriate education for M.K. and that petitioners have satisfied all the necessary standards for reimbursement of a unilateral placement.

IV. Are Petitioners Entitled to Additional Relief?

The OAL does not have the authority to award attorney's fees as relief to petitioners. As one ALJ has explained,

[t]he general rule is that parties to litigation bear their own costs. The IDEA provides an exception to that rule and allows "the court" discretion to award reasonable attorney's fees as part of costs to parents of a child with a disability where they prevail in IDEA-based litigation. 20 U.S.C.A. § 1415(i)(3)(B). See also John T. ex rel. Paul T. v. Delaware Cnty. Intermediate Unit, 318 F.3d 545, 555 (3d Cir. 2003) (citations omitted) and J.H.R. v. Bd. of Educ. of East Brunswick, 308 N.J. Super. 100 (App. Div. 1998), holding that the Superior Court also has subject matter jurisdiction to consider a prevailing parent's claim for attorney's fees under IDEA. Note, that in Arlington Cent. Sch. Dist. Board of Educ. v. Murphy, 548 U.S. ____ (2006), the Supreme Court held that, while pursuant to 20 U.S.C.A. § 1415(i)(3)(B), Courts have discretion to award reasonable attorney's fees to prevailing parents, the IDEA does not allow such parents to recover fees for services rendered by experts. (Arlington Central School District essentially reverses Chang v. Bd. of Educ. of Glen Ridge Twp., 685 F. Supp. 96 (U.S.D.C. N.J. 1988), to the extent that that earlier district court decision allowed expert witness fees to parents who prevailed relative to placement of their handicapped child.)

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

judicial, branch and the OAL is not a “court” within the intent of the above-cited section of the IDEA. ALJs are executive branch judges. Consequently, ALJs do not have authority to grant claims for attorney’s (or expert’s) fees in Special Education cases. See N.J.S.A. 52:14F-1, -4.

[W.Z. ex rel. G.Z. v. Princeton Reg’l Bd. of Educ., EDS 2563-07, Decision (April 26, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>.]

Therefore, I recommend that petitioners seek relief in the district court.

ORDER

Based on my findings and conclusions set forth above, I **ORDER**:

- 1) The District failed to offer a free and appropriate public education to M.K. for school years 2011–2012, 2012–2013, and 2013–2014. Although I concluded that the District also failed to provide FAPE in 2010–2011, the petitioners can go back only two years from the filing of the complaint in March 2013, to March 2011;
- 2) The District shall reimburse petitioners for tuition at the Bridge Academy for the 2013–2014 school year;
- 3) The District shall provide compensatory education for the denial of an ESY program in summer 2012 that required petitioners to place M.K.’s at Lindamood-Bell for reading remediation;
- 4) The District shall provide compensatory education in the amount equal to petitioners’ payment for M.K.’s tutor for the 2012–2013 school year.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) 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 (2015). 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.

December 4, 2015
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency

Date Mailed to Parties:

mph

APPENDIX

WITNESSES

For petitioner:

C.K.
Susan H. Pearsall
Barbara Malamut, Ph.D.
Andrea Longo
Susan Morris
M.K.

For respondent:

Laura Reigelsperger
Andrea Longo
Marybeth McFadden
Richard Abrahamsen

EXHIBITS

For petitioner:

- P-1 Letter of Medical Necessity from CHOP dated August 23, 2010
- P-2 IEP, dated May 17, 2011
- P-3 Progress Report from Lindamood-Bell dated July 9, 2012
- P-4 NJ ASK Report dated August 4, 2011
- P-4A NJ ASK Report dated August 19, 2010
- P-4B NJ ASK Report, dated July 30, 2012
- P-5 Exit report from Lindamood-Bell dated April 11, 2012
- P-6 Letters from Freeman to Rubin, dated April 27, 2012 and June 21, 2012

- P-7 Summer Literacy Program Overview
- P-8 Curriculum Vitae of Barbara Malamut
- P-9 Letter, dated July 11, 2013
- P-11 Evaluation of Dr. Perlis, July 26, 2013
- P-12 Resume of Susan Morris
- P-13 Packet of information from Bridge Academy
- P-14 Document from District to Mr. and Mrs. K dated January 31, 2013
- P-15 Report cards
- P-16 Examples of assignments
- P-17 E-mail from C.K. to Pearsall, October 6, 2011
- P-18 E-mail
- P-19 DRA chart (identified not admitted)

For respondent:

- R-1 IEP, dated April 20, 2012
- R-2 IEP, dated June 11, 2012
- R-3 IEP, dated January 11, 2013
- R-4 Cover letter; June 14, 2013, and IEP; May 13, 2013
- R-5 M.K.'s progress reporting towards goals
- R-7 Educational Evaluation, Jessica Hollinger
- R-8 Neuropsychological evaluation dated September 24 and October 1, 2012
- R-10 Due process petition cover letter, February 27, 2013
- R-12 Letter, dated February 26, 2013
- R-14 E-mail from C.K. to Reigelsperger
- R-15 Psychological Reevaluation by Dr. Pearsall
- R-16 Reevaluation-Functional Assessment, May 16, 2012
- R-17 Physical therapy PLEP, May 2012
- R-18 Dr. Malamut's notes dated 9/24/12
- R-19 Dr. Malamut's notes dated 10/1/12
- R-20 Dr. Malamut's notes dated 8/27/12

- R-21 Documents filled out by the teacher, Ms. Longo
- R-22 Attendance register
- R-23 NJ ASK Scores, 2013
- R-24 NJ ASK Scores, 2012
- R-25 E-mail