

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 06170-15

AGENCY DKT. NO. 2015 22558

T.R. AND P.R. ON BEHALF OF D.R.,

Petitioners,

v.

**MATAWAN-ABERDEEN REGIONAL
BOARD OF EDUCATION,**

Respondent.

Catherine Merino Reisman, Esq., for petitioners (Reisman, Carolla Gran,
attorneys)

Marc Mucciolo, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: August 30, 2016

Decided: September 12, 2016

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners T.R and P.R. on behalf of their son D.R. requested a due process hearing seeking an appropriate placement to provide D.R. with a free appropriate public education (FAPE), reimbursement for extended school year (ESY) tuition at Camp Excell for the summer of 2013, reimbursement for reading instruction, and occupational therapy and compensatory education from the Matawan Aberdeen Regional Board of Education (Board). The matter was transferred to the Office of Administrative Law

(OAL) as a contested matter on May 1, 2015. A settlement conference was held on May 21, 2015. At that time it appeared that the matter was settled. On June 26, 2015 it was determined that the matter did not settle. A second settlement conference was held on October 27, 2015. This matter did not settle at that time. The matter was originally assigned to Judge Robinson. It was transferred to Judge Williams. The matter was subsequently transferred to Judge McGee. The matter was transferred to me on or about January 8, 2016. Hearings were conducted on February 8, 9, April 19, 25, 27, May 12, and August 30, 2016.

FACTUAL DISCUSSION

I **FIND** the following uncontested **FACT**. Although the Board contends that it provided D.R. with FAPE, it does not contest that New Grange School (New Grange) is an appropriate placement for D.R.

TESTIMONY

Lauren Kelly

Lauren Kelly (Kelly) is a certified school social worker. She is a case manager for the Board at Lloyd Road Elementary School (Lloyd Road). As a case manager she manages student programs, placement decisions, and acts a liaison. She also gathers information on the students' present levels and goals from their teachers. Kelly became familiar with D.R. during the 2013-2014 school year. D.R. would be going to a Lloyd Road for the fourth and fifth grade. In March 2014 there was a meeting with parents whose children were going to Lloyd Road for fourth and fifth grade. D.R.'s parents did not voice any concern. Kelly was an observer at that meeting.

In the spring of 2014, Kelly along with D.R. and T.R., D.R.'s mother, toured the classroom. The tour lasted one hour. D.R.'s mother brought up the Wilson reading program, which concentrates on phonetics not comprehension. Kelly became D.R.'s case manager in September 2014. D.R. had full-day in-class resources in the general

education class. He was pulled out into a social skills small groups of two to three students to work on developing social skills once a week. .

Nicole Borelan (Borelan) is the school counselor. Kelly would speak to Borelan about special education students. After December 2014, D.R.'s services changed to push-in services. He also had a group session with Borelan. He did well in group but did not generalize his skills. His in group interactions were positive. Prior to April 2015, Borelan provided group counseling for D.R. Between April and June 2015 Kelly was the only person to provide counseling to D.R.

In the fall of 2014 none of D.R.'s teachers came to Kelly with any concerns or requests to follow up on anything. On December 12, 2014 there was an IEP meeting. The IEP placement was for full-day resources room, language/speech therapy twice a week, occupational therapy once a week, social skills small group once a week, and individual social skills sessions once a week. D.R.'s teacher said that he was making progress. D.R.'s parents had concern about his progress especially in reading. The IEP covered two years and it targeted his areas of deficiency.

T.R. emailed Kelly after the IEP meeting with questions about D.R.'s goals and objectives. The December 12, 2014, IEP was more specific in academic areas and more focused on skill and measurability. One of the goals of his 2013 IEP was for D.R.'s writing to become clear, concise, and organized. One of the goals of his 2014 IEP was for D.R. to produce clear and coherent writing. The 2013 IEP counseling goals were to develop appropriate social skills. It lists increase ability to compliment others, courtesy in listening to others, and participate with peers in a social setting.

The December 2015 IEP listed reading and writing with social studies embedded in the general/special education classes' portion of the IEP. In December 2015 D.R. had a "stay put" in place to not change the program.

T.R. wanted goals relating to grammar, comprehension, and compare and contrast skills. She was told that they could be added. T.R. wanted to observe the Learning Language Disabilities (LLD) program. This was not allowed because her child

was not in that program and it was not recommended for him. T.R. requested that D.R. have the Linda Mood Bell (LMB) reading program which was not offered to D.R. After the IEP meeting T.R. emailed Kelly with questions about D.R.'s goals and objectives. On January 14, 2015, Kelly met with T.R. for one hour because she was concerned that there was no progress and no mastered goals. She was concerned about goals being changed before mastery. Kelly does not recall speaking to Director Dorso regarding T.R.'s concerns.

Progress report dated March 31, 2015, showed D.R.'s progress with counseling. New skills were introduced and he was progressing on other skills. He was making eye contact, but not consistently.

In the summer of 2015 changes were made to the IEP to include social studies into language arts. Some materials and resources were changed. The parents were notified by an amendment letter for D.R. to receive social studies instruction through language arts. However, the parents did not agree with the change. D.R. began integrated social skills in early June 2015. After resistance he was returned to the pull out model for a few weeks. In 2015 he was doing well in the integrated model. He progressed between the fourth and fifth grade, his maturity increased as did his eye contact. He initiated conversations and spoke appropriately with peers.

T.R. has concerns about his writing skills. The April 2013 IEP stated that D.R. needed assistance when completing writing tasks. The December 2014 IEP states that D.R. is provided with assistance in the pre-writing process with organizing his ideas. In the drafting process he has assistance drafting his ideas. In the conferencing stage he has one-to-one help with proofreading and editing. The December 2015 IEP states he is in the writer's workshop but he requires one-to-one guidance with revising and editing.

In Jeanne Tighe's (Tighe) 2014 Comprehensive Communication Evaluation she recommends D.R. have reading and language arts in a small group outside of the general education classroom, concrete structured methods for understanding text, and material at the level that he can read. In 2014, D.R. was reading at a third-grade level.

He has a basic understanding of phonetics and the decoding process but he does not apply it effectively.

At the December 2015 IEP meeting T.R. stated that she wanted an out-of-district placement for D.R. She provided ten days' notice. D.R. was placed at New Grange, which is an out-of-district private placement and is not the least restrictive environment. Kelly testified that D.R. will not be exposed to peers to help his social progress and that the Board provided FAPE to D.R.

Danielle Santoro

Danielle Santoro (Santoro) Santoro is a resource special education teacher in math and science in Matawan-Aberdeen. She is certified in elementary education and special education. She is certified in multi-sensory reading methodology. As an in-class resource teacher she follows the students IEP making amendments and corrections as needed. She also works with the general education students. Santoro has taught close to 1000 special education students. She has been involved in many eligibility and placement situations.

Santoro stated that the resource class had two teachers one was a general education teacher and one was a special education teacher. A team teaching approach was used. At times that class was split so that they could be taught at different paces. D.R. did well in math. In science, where there was interaction with other students, D.R. would rather work alone. D.R. learned to work in a group. He made progress working in a group. On the September 21, 2015, progress report D.R. received an average grade of eighty-four. His math benchmark of fifty-eight was based on the pre-assessment grade.

Math was eighty minutes every day and began with a group lesson. The students would then be put into smaller groups. There was a promethean board which was also used in class for instruction. There is daily homework until one hundred percent fluency is achieved. Santoro testified that D.R. did worksheets for math, there were group sessions in math, and D.R. had to be redirected. He was distractible and

not paying attention. Even with review and refocusing, he had to be redirected. There is a pull out option for math but not science at the school. The benchmark grade in math was fifty-eight. It was done at the beginning of the school year. Most students do poorly in this.

Santoro was not present for the December 2015 IEP meeting, but she had previously provided D.R.'s math information to Kelly that accurately reflected D.R.'s math performance. She also provided the science information to Kelly. Santoro selected the math goals for D.R. They are measurable by anecdotal records and checklists. The math modifications included assigning shorter tasks; reduction of concepts introduced at one time; and be in an area free from directions. Repetition and review was done daily. D.R. needed to learn how to use math terms and answer in sentences. She maintained a stem notebook for D.R. Santoro also selected the science modifications.

In the 2015-2016 IEP goals report Santoro noted that D.R. has problems developing and demonstrating critical thinking. Analyzing problems was difficult for D.R. He made progress in math and had limited progress in science and critical thinking. One of the IEP goals was for D.R. to listen attentively seventy percent of the time. There was no data as to the percentage of time he could listen attentively. There was no data as to the percentage of time D.R. could keep track of material. There was no data for the percentage of time he could do a particular task. The percentages of goals were based on what Santora knew of the students from participation in class, behavior in class, and homework.

D.R. told the class that he was not coming back and that he visited a new school. He was doing fine at Lloyd Road School. He was making progress.

Alison Foley

Alison Foley (Foley) is a New Jersey licensed speech language pathologist. She is employed by the Board. She works at the Lloyd Road School with fourth and fifth grade students with language and articulation disorders. She has worked with students

with autism, completed assessments of students, and provides services to twenty to thirty autistic students.

Foley began working with D.R. during the 2012-2013 school year. She targeted verbal reasoning and critical thinking. Foley testified that D.R. has problems expressing himself in class and through writing. He also had issues with eye contact and following directions. She kept daily notes of her sessions with D.R. Foley always worked with D.R. in small group settings. D.R. had major problems with verbal reasoning and receptive and expressive language. The CELF 4 tests showed that D.R. was stronger in receptive language than expressive language.

Foley had input in D.R.'s December 2014 IEP in the area of speech and language. She relied on her notes and D.R.'s teachers' input to determine his present levels. There was discussion of a reading program for D.R. She used verbal prompts with activities with expressive language. He would do better in areas that interested him. His goals for the first and second year she taught him were similar but at different levels. D.R. experienced anxiety.

D.R. took a problem-solving test and a social language development test. The results of these tests were used in determining appropriate speech goals for D.R. Foley also has input on D.R.'s 2015 IEP in the areas of speech and language. She was present at the IEP meeting but does not recall it. The progress report showed D.R. was progressing but he had not mastered any speech goals. Autistic children have difficulty mastering verbal reasoning and critical thinking skills. D.R. was making slow progress. The services Foley provided for D.R. were appropriate and consistent with D.R.'s needs.

Foley testified that she kept data in each session on the amount of prompting. D.R. was pulled out of class for speech. T.R. was concerned that D.R. was being pulled out of math class. She does not recall T.R. asking for data or concerns about progress reports. She knew that P.R. was unhappy with the school.

D.R. did well carrying over a task from session to session. He required prompting in higher level critical thinking skills. D.R.'s progress reports were based on the data she collected and her conversations with D.R.'s teachers.

Claudia O'Mullan

Claudia O'Mullan (O'Mullan) is an occupational therapist employed by the district in March 2015. She is a registered occupational therapist and began working with D.R. in March 2015 on a weekly basis. She worked with D.R. on handwriting spacing, self-care, attention, focus, carry over tasks, and visual attention. O'Mullan recalled that D.R. did well on paying attention, shoe tying, carry over tasks, and handwriting. He was receptive to redirection. The occupational therapy (OT) was pulled out. D.R.'s teachers did not contact her regarding D.R.

In the 2014-2015 school year she had five sessions with D.R. D.R.'s IEP goals were carried over from the 2014-2015 IEP to the 2015-2016 IEP. In the 2015-2016 school years the OT was done in a classroom which had equipment. D.R. was distracted by the equipment so a visual barrier was put up. The tasks for D.R. usually took five to ten minutes. He was given prompts when the tasks were less structured. O'Mullan looked at writing samples and consistency of writing for progress reports. One of the goals was to write drop-line lower case letters at eighty percent mastery. She does not recall what his baseline was prior to implementing this goal. The handwriting baseline would have been taken after the IEP was implemented. He mastered three of five goals. He was working on the goals that he did not master.

O'Mullan was responsible for the OT portion of D.R.'s December 2015 IEP. She based her portion of the IEP on her assessment of D.R. as a whole, some of his work, input from teachers, and previous evaluations. She reviewed the OT evaluation of Lisa Dicther dated April 28, 2014 (J-103). Dicther recommended OT sixty minutes per week, and a sensory diet among other things. D.R. had OT once a week in school. A sensory diet was not in place for D.R. A sensory diet is doing things to keep child attentive; that is, finding things to keep centered and focused. D.R. could have problems with eye

contact because of his visual sensory issues. He generalized the skills that she taught him.

O'Mullan did not formally observe D.R., but she did observe him in Ms. Zwirko's class. D.R. was distractible.

Nicole Gwizdz

Nicole Gwizdz (Gwizdz) is a fifth grade in-class special education resource teacher. She works with a general education teacher in the same class. She maintains the special education students IEP's and makes sure they get what they need. She has taught twenty to thirty special education students in the district.

Gwizdz became familiar with D.R. in the 2015-2016 school year. She was his language arts and social studies teacher as well as his homeroom teacher. Prior to meeting D.R. she read his IEP and noted that he was distractible and needed to be redirected. At the beginning of the school year there was a problem with homework. T.R. wanted Gwizdz to make sure that the homework was put into his backpack, which she did.

The fifth grade combined language arts with social studies. The students were reading nonfiction. D.R. had difficulty finding evidence in the text to say what he wanted to say. The class consisted of reading workshop, writing workshop, writing about reading instruction, and guided reading. Monday consisted of one hour of writing about reading and guided reading. Tuesday and Wednesday was a reading workshop and a writing workshop and guided reading Thursday and Friday was for writing about reading and guided reading. The reader and writer's workshops are forty minutes. The writing about reading is sixty minutes. The guided reading tested the students to determine their reading level. D.R. had guided reading approximately twice a week. A STAR diagnostic test was done on D.R. The results of the test showed Gwizdz what D.R. needed to work on which included integration of ideas. D.R. scored highest on vocabulary. She knew that D.R. would have difficulty with non-explicit things because of his autism.

Writing about reading used articles about topics the students read about and broke them down highlighting the main ideas of the paragraphs. The readers' workshop focused on reading skills. The student would read a story, talk about the story, then the student would pick out character traits from a list that matched or did not match the storyline.

D.R. had difficulty staying on task in the beginning of the school year. He had difficulty with consecutive sentences. He needed redirection and monitoring. Rubrics were used to grade the writing. Each rubric had a score of from zero to four. The scores from each rubric would be added together and converted to a numerical grade. Transitions, the words at the beginning and end of sentences were difficult for D.R. He would use the same transition words. D.R. has assistance in all steps of writing. The local rubric was used as a guide but the district rubric was used for the final scores. Class assignments were graded on the system of checks. Check plus was equal to a grade of ninety-five. Check was equal to a grade of eighty-five and check minus was equal to a grade of seventy five. There were more reading assignments than writing assignments. D.R.'s reading grades (J-128) and writing grades (J-12) are accurate for D.R. with support and a graphic organizer for the writing. Class participation is included in the reading grade. D.R. had to be encouraged to raise his hand in class. If D.R. became overwhelmed being in the general education class, he could have been pulled out of that placement.

Gwizdz was present at the December 8, 2015, IEP meeting for D.R. She did present levels, modifications, goals and objectives for language arts. The IEP goals and objectives were developed prior to the IEP meeting. She determined progress by looking at the rubrics. He was progressing in many of the goals at the time of the IEP meeting. He had trouble with higher order thinking skills. He used a graphic organizer to help his higher order critical thinking. D.R. did better in social studies because the non-fiction reading is more explicit.

One of D.R.'s language arts goals was to write an opinion piece with eighty percent mastery. D.R. needed to use used a graphic organizer to write an opinion

piece. A graphic organizer is used to collect research for an essay. The research would be put into categories. His grade would be based on his objectives. He was interested in socializing with other students. She tried to facilitate social interaction between D.R. and the other students. Exit slips were used to ensure that students understood the lessons that were taught. In one instance D.R. did not use a word from the text but the context of the word he used was the same as the word in the text. T.R. was concerned that D.R.'s grades were not appropriate. She was also concerned with social studies being embedded in the language arts class.

The December 2014 IEP had D.R.'s developmental reading assessment level (DRA) as thirty. The next highest DRA level is thirty-four. Thirty is equal to third-grade level. The DRA test was done in October 2014. In D.R.'s 2015-2016 IEP goals report (J-96) one of the goals for D.R. was develop and demonstrate critical thinking skills measured by anecdotal records and check lists. Gwizdz used the rubrics to measure this goal.

D.R. had difficulty writing openings for assignments. His handwriting was at times hard for Gwizdz to understand but D.R. could read his writing out loud to her. D.R. made progress in her class especially with writing. His progress with reading was slower but he was doing independent reading.

The reading material in the readers' workshop and writing about reading was at a fifth-grade level. D.R. read on a third-grade level. D.R. was never assigned independent work above his reading level. During reading workshop, he read at his level.

The class combined social studies with language arts. There was a concern that the combination would be difficult for D.R. There was a Reading 100 program that incorporated computer, direct reading, writing, and vocabulary, and gives constant feedback. D.R. would have benefitted from this program. P.R. did not want D.R. to have any time on computers.

Jeanne Tighe

Tighe is a certified speech language pathologist. She is trained in Orton Gillingham and LMB methodologies. She has a certificate of clinical competence. She does evaluations and provides treatment. She is the owner of Beyond Communication. Ninety percent of her clients are children with learning based disabilities. She has contracts with four school districts to provide speech pathology services. Tighe has done IEP goals and present levels. When her company is a provider of service to a district, they are part of the IEP team. She has never taught in New Jersey but she has taught in Pennsylvania mainly with the hearing impaired. When she is retained by a parent, she does not as a matter of course go to the IEP meeting.

Petitioners contacted Tighe because they had concerns regarding D.R.'s reading comprehension, writing, and keeping up in class. She observed D.R. He had mildly inappropriate behavior. D.R. could read and participate. His answers were not always on topic. She reviewed records of D.R. which revealed he had an IQ of eighty-nine, which is in the lower end of normal. The speech language evaluation that was previously done by the district revealed that D.R. expressive and receptive language scores lower. Tighe evaluated D.R. in 2014 and 2015.

Tighe did a listening comprehension test with D.R. where his score was seventy, which is significantly low. He has difficulty when he has to listen to language for a period of time then respond to questions. In narrative comprehension, where language is presented on a connected level, D.R. tested in the lower average range. The comprehension was all explicit recall, which D.R. does well at. In expressive language, where D.R. had to make up a story, he had a narrative structure but the story was disjointed and not connected. The social thinking test, which is the ability to read people, D.R. was shown pictures and had to discuss each. He had difficulty with this and scored in the second percentile for his age. His social understanding is impaired. He has difficulty connecting events and he has difficulty with cause and effect. His score for making inferences was below average. In problem solving, his solutions are not realistic. He was asked to read a story and discuss character traits and he had difficulty. D.R. has a problem with understanding motivations. Point of view is also a

problem for D.R. He does not understand how people react to situations. D.R. could not read facial expressions. He wants to avoid conflict. D.R. had difficulty with multiple interpretation and interaction skills. His interaction skills were in the one percent range for children his age. D.R.'s reading comprehension was two years behind his grade.

Tighe explained that Reading 180 instruction consists of students working on reading skills in three environments: computer reading and writing, silent reading, and small group reading with a teacher. The student rotates between the three environments. In the silent reading the book is chosen at the child's individual reading level. In the computer environment, the computer determines the level of each student. This is not recommended for D.R. because he has difficulty transferring learning from one environment to another and D.R. needs direct instruction not silent reading.

Exhibit J-129 is a rubric of opinion essay of D.R.'s. Tighe does not agree with the grading. She does not see any transitions. There is no introduction, comparisons are simplistic. The grade should not have been eighty-two. Tighe told petitioner to look for an out-of-district placement for D.R. Tighe has no formal connection to New Grange. She has one contract for specialized speech at New Grange, but the district pays for that.

The Common Core are the standards on which curriculum is based. The general curriculum applies to all students; however, special education students have access to modifications. In 2014, Tighe thought D.R. should be in small groups for language based literacy skills. He did not progress. He could not access the information in science class. D.R. has not made progress with reading, writing, or listening. The program in the IEP is not appropriate for him. Tighe recommends an out-of-district placement. D.R.'s writing in (J-129) which was done in September and October 2015 is not fifth grade work. It shows critical processing problems. Tighe testified that New Grange is appropriate for D.R. It embeds social instruction with verbal instruction.

T.R.

T.R. is the mother of D.R. She has a Bachelor of Science degree in education.

T.R. became concerned when she received D.R.'s results from the Northwest Evaluation Association's Measures of Academic Progress (MAP) in October 2013 because D.R.'s reading was not up to par. She requested a change in D.R.'s OT in January 2014, which was done. D.R. had an assignment where he was supposed to fill in the blanks and he left it blank but received a wonderful sticker. On March 25, 2014, at the eligibility conference, T.R. pushed for independent evaluations. T.R. requested by email independent evaluations in speech, reading, OT, and a neuropsychological evaluation on March 30, 2014. She did not agree with the evaluations conducted by Board. She disagreed with the speech evaluation because D.R. had regressed and she wanted speech three times a week. She was also concerned with D.R.'s reading comprehension. He could read but could not absorb what he had read.

In April 2014, an independent OT was done for D.R. at his parents' expense. In the 2014-2015 school year D.R. was in an in-class resource class. T.R. was concerned because D.R. was having problems with explanations, and recognizing angles and degrees. When he was retested he still had the same problems. He also had problems with compare and contrast.

D.R.'s reading fluency can make it seem that he is absorbing the lessons but he is not. He is two years behind in reading. After Tighe's report, T.R. requested pull-out resource for reading and language for D.R. and the LBM reading program. The LBM program is a visualizing and verbalizing program. In December 2014, District Supervisor Dorso offered the Aimesweb program for D.R. T.R. was concerned that her son was not reading at an appropriate level. On December 16, 2014, T.R. sent an email to Kelly stating that the progress reports do not show where the progress began and where it is now. In addition some goals that were listed as mastered in June are now listed as progressing. The meeting for the IEP that was scheduled to be implemented on December 28, 2014, was held on December 12, 2014. D.R.'s goals were changed even though he had not mastered his previous goals in reading and writing. T.R. did not agree with the change to the goals. She did not meet with Kelly within fifteen days of the IEP meeting to discuss her concerns.

T.R. asked to view the LLD class but her request was denied because D.R. was not in the LLD program. In January 2015, T.R. met with Dorso. She told Dorso that Aimesweb was not appropriate for D.R. She wanted D.R. in a small group setting with pull-out direct reading instruction. She also wanted D.R. in an in-class resource but with pull-out reading with a person trained in LMB. She was told that giving D.R. LMB would be a change in program requiring a new IEP.

On March 30, 2015, T.R. followed up with Kelly and Director of Special Services Dorso regarding whether D.R. could get the LMB reading program. When she met with Dorso he proposed the 180 reading program for D.R. T.R. spoke to Tighe who stated that the 180 reading program was not appropriate for D.R. She was told that her request for the LMB program would be a change in program requiring a new IEP. She wanted the LMB program because it is geared to details and attention. During D.R.'s second grade IEP, T.R. was told by Chrysten Olsen that reading services are not offered unless a student is two years behind his grade level in reading. T.R. always brought her concerns about D.R.'s reading to the Board.

D.R.'s April 2015 progress report showed limited progress in one goal, which T.R. knew that he was not progressing in, and all the other goals are just being introduced months after the IEP was in place.

T.R. was concerned that D.R. had not met with Borelan for social skills by March 30, 2015. Kelly took over the social skills program. D.R. did not meet with Borelan until September 2015.

D.R. had a notebook with expectations as to what was to be done during center time. Center time is independent work such as reading or an assignment from a list. She was given the notebook at the end of the year. Only twenty-two pages were filed out by D.R. Only on a few of the pages did D.R. provide the information that was expected during center time. At one point he did not finish the task.

T.R. recalled the spring of 2015 when D.R. had spring testing. He was partially proficient but she could not determine how much progress he made because the spring

2015 test was different than the test from the third grade. In the area of reading literacy he only met expectations in one area. In the writing workshop a lot of the writing appears to be the teachers writing. The final copy was taken from a draft and written by Reistman. The rubrics for writing that she received were vaguer than the one in J-126. J-127 is D.R.'s grades. T.R. does not believe that the grades are accurate based on how much a fifth grader should be able to write, his writings, his grammar, and the length of his writing.

Tighe changed her opinion that D.R. needed a small group setting to D.R. needed to be placed in a private school, after her reevaluation of D.R. T.R. attended and taped the December 2015 IEP meeting. She had concerns about the assessments because of inflated grades. The STAR testing showed that D.R.'s reading was at a second-grade level. His guided reading was foundational. The general education teacher said that D.R. responds with simple answers and sentences. When he writes, he gives no details, which is not consistent with fifth-grade expectations.

R-48 is the goals and objectives report for D.R. dated March 31, 2015. Meghan Reistrom was D.R.'s teacher. She wrote the progress notes for language arts, reading, math, science, and social studies. She was a new teacher. T.R. knew that it Reistrom would have to get to know D.R. In the report the goal of ability to write narratives of real or imagined experiences using effective techniques and descriptive details, D.R. made limited progress. All of the other goals were being introduced. T.R. did not receive a follow up in June 2015 of the status of D.R.'s goals and objectives.

In June 2015 T.R. received the centers book for D.R. In approximately February 2015, T.R. knew that D.R. was getting centers instruction. She was concerned about D.R. getting centers instruction because of his ability to do work independently. T.R. believes that D.R.'s grades were inaccurate because he was not able to do what the grades showed. He was not answering questions appropriately. He was given grades of check plus for one-sentence answers. D.R. does not care about grades. It does not make a difference to him if he receives a check or a check plus. He does not understand what he needs to do.

T.R. was also concerned that the number of students in the general education class was between seventeen and twenty-four. T.R. again requested LMB program for D.R. which was not provided. She requested pull-out resource for science and social studies. She was told there were no pull-out programs for science, social studies, or language arts.

The integration of social studies with language arts is a problem for D.R. because he has problems with language arts fundamentals. He has a problem writing more than one paragraph. The texts were at a fifth-grade level and D.R. would be required to read and understand the books. After the IEP meeting T.R. stated that the IEP was inappropriate and she would look for a private placement for D.R.

T.R. found New Grange through Tighe. She wanted D.R. to be in a LMB program which New Grange has. She visited New Grange in November 2015. T.R. also looked at other schools in addition to New Grange. New Grange appropriately addressed D.R.'s needs. When she met with the district in December 2015 for the IEP, she did not tell them that she wanted D.R. placed at New Grange. At that time she was not sure that D.R. would go to New Grange. However, he was placed in New Grange immediately after the December 2015 holiday break.

Kristen Baker

Kristen Baker (Baker) is a school social worker and counselor. She is a licensed social worker employed by Matawan. She provides social skills counseling. She does individual and group counseling.

Baker met D.R. in September 2014. She saw him once a week for social skills counseling from September 2014 to March 2015, when she went on maternity leave. She returned to Matawan in November 2015 and saw D.R. two additional times in November 2015 and December 2015. D.R. was in a social skills group with three other students. The students were on the same social level. Two were special education students and two were general education students. He struggled with peer and adult

interaction, lack of eye contact, and not initiating conversations. The sessions were forty minutes.

Initially D.R. was overstimulated by the colors and posters. He did not engage with the other students and needed to be prompted. He did not stim? when he was with her. When he was overstimulated, Baker would verbally prompt him. She spoke to T.R. in December 2014 regarding D.R. being overstimulated. T.R. was concerned that her son was not generalizing the skills that he was learning. The social skills that he was learning were foundational skills.

Baker told D.R.'s teachers what she was working on with him. None of his teachers voiced any concerns about D.R. with her. D.R.'s teachers told Baker that D.R. was making progress.

Baker had the students in the group create their own rules that are typed and then signed by the students. At the end of the session students were given an exit ticket for them to reflect on what they did in the group and what they could have done better. Baker reviews the exit ticket with the student. In March 2015 Baker believed that D.R. had made progress with eye contact, peer and adult interaction, and initiating conversations with others. He still needed to be prompted to stay on task and not be distracted. He was aware of body language, was self-aware, and understood social cues in social settings.

In November 2015, Baker saw a change in D.R. When she first saw him, he came up to her and said that he was glad that she was back. He interacted more with peers. Baker worked on the December 2014 IEP. She worked on the counseling goals with Kelly for the December 2014 IEP. Increased eye contact and initiating conversation were two of the goals.

T.R. wanted D.R. to have more social skills. Instead of having a group session, Kelly would go into the class and assist D.R. with his social skills. Baker would inform Kelly of the areas that she was working on with D.R. She would touch base with Kelly after each of D.R.'s social skills. D.R. made progress—he progressed in interaction

with peers and Baker, eye contact, self-awareness, awareness of others, and imitating conversation. All of these improvements were in a structured setting. On several of the exit tickets D.R. wrote the thing he could do better is stay on task. Even when D.R. was actively engaged in the counseling sessions, he had to be prompted to remain on task and stay focused. Baker does not take formal data, just progress notes.

Baker testified that she attended the December 8, 2015, IEP meeting and had not had a session with D.R. for the 2015-2016 school year at that time. She does not have any data on D.R.'s social skills in a non-structured setting. No one took data on D.R.'s goals while he was in counseling. In the individual counseling notes (J-52) Baker notes that D.R. mastered nonverbal communication in a structured setting. The 2014 IEP lists counseling goals as "D.R. will establish eye contact with one or more peers eighty percent of the time without prompting." The IEP does not state D.R.'s percentage of eye contact with peers without prompting at the time of the IEP. One of the goals on D.R.'s IEP goals and objectives report dated March 31, 2015, states "By the end of the IEP D.R. will pay attention in a conversation to a person speaking eighty percent of the time." The report says that he is progressing but does not state how far he has progressed in terms of percentages. The percentage that the student has progressed is never listed in the objective and goals report. Baker has not seen any counselling notes of D.R. for the time she was on maternity leave.

D.R. had three different special education teachers from January 2014 to March 2014. Baker spoke to each of them regarding D.R.

Meghan Reistrom

Meghan Reistrom (Reistrom) is a fourth-grade special education teacher in Matawan-Aberdeen and has been employed there since January 2015. She has the following teaching certificates: elementary, special education, and reading specialist. She has instructed students with autism. She taught in class resource (ICR) in Matawan-Aberdeen with a general education teacher. There were twenty-five students in the class four to five were special education students.

Reistrom met D.R. in January 2015. At that time the teachers were instructing the students on reading, writing, math, science, and social studies all day. D.R. had Spanish, health physical education, music, and computers with other teachers. He basically stayed in the classroom all day. During the 2015-2016 school year D.R. would switch from class to class with different teachers for different subjects.

Reistrom did not attend any IEP's for D.R. although she reviewed his IEP before providing instruction. Reistrom did not initially have concerns with D.R. his strength was math and he liked independent reading. She met with T.R. who was concerned with D.R.'s reading comprehension and handwriting. D.R. had an issue of getting out of his seat during class. Reistrom implemented a strategy which caused D.R. end that behavior. He was not distractible in her class and did not have any behavioral problems.

She worked with D.R. in guided reading. There was a group of no more than three students on their independent reading level determined by the DRA score. The DRA assessment is given to all students to determine their independent reading level. D.R. was given the DRA assessment in February 2015. To determine which DRA assessments to give you look at the prior DRA assessment and based on that score you go up or down. D.R.'s instructional level reading score was thirty-four. The areas tested are reading comprehension and oral reading fluency. D.R.'s oral fluency score states thirteen out of sixteen, then it states eleven out of fourteen. The eleven to fourteen range is where they want the student in to be considered at to be independent level. D.R.'s oral reading fluency score was within the range that they were looking for.

D.R.'s reading comprehension score was fourteen out of twenty-four. This score was within the instructional level. D.R. could be instructed on level thirty-four. Level thirty was his independent reading level. In "Oral Reading Words per minute, percent of Accuracy" test D.R. scored in the advanced category. He had no missed cues or omissions. This was done on level thirty-four instruction level. This level was high enough to go to the reading comprehension portion of the test. D.R. was in the instructional category for comprehension. Since D.R. was at the instructional level for comprehension, she kept him at level thirty-four. He was in the intervention range for

literal comprehension his score was one and he scored two in “use of text features and reflection.” She focused instruction on D.R.’s opportunities to construct literal questions and helped him locate and record specific details in a text.

Another DRA assessment of D.R. was done by Ms. Sneiderman on October 2, 2014, earlier in the year at level thirty. On that assessment he had an oral fluency score of eleven out of sixteen and his comprehension score was twelve. His oral fluency score was in the independent level and his comprehension score was in the instructional level. The comprehension level of the test has six areas. If the score is above twelve in comprehension, the student is not in the intervention range. D.R. made progress from the October 2014 thirty level assessment to the February 2015 thirty-four level assessment.

D.R. does better when asked questions orally. When he has to write there is a problem. The DRA only assessed D.R.’s written comprehension.

Reistrom testified that D.R. was good in math, though he sometimes rushed through work. D.R. was given modifications such as using graph paper. In math he was not allowed the use of a calculator but he had the following modifications: small group, extended time, questions taken out, directions or questions rephrased, and questions read aloud.

D.R.’s progress report dated February 5, 2015, was one week after she began teaching D.R. The general education teacher gave her input.

D.R. was working on the Centers notebook before Reistrom began teaching him. In the vocabulary collectors Reistrom did activities with D.R., he would tell her the answer and she would write it in the Centers notebook. She did not feel that this activity benefitted D.R. Reistrom communicated weekly with T.R. She believes that D.R. progressed in her class. She put progress reporting in D.R.’s progress notes in June 2015; however, they did not show up in the progress report.

When she began teaching D.R., Reistrom changed his activities to more focused activities because by looking at the Centers notebook it was clear that D.R. was not producing the work that was asked of him. The activities were changed to more word study which was done by the entire class. The DRA was used as D.R.'s reading records.

On May 14, 2015, Reistrom and T.R. exchanged emails. One issue was D.R.'s DRA score. T.R. was told that D.R.'s DRA score was thirty-four independent, which is third-grade reading level. D.R. moving from level thirty-four instructional to thirty-four independent is considered growth.

On the May 2015 DRA (J-134) D.R. struggled with literal comprehension on the exercise "the Flood". He scored on the independent comprehension level on two areas, the instructional level in two areas and the intervention area in one area (J-134 p. 256). The DRA grades oral fluency and comprehension separately. Comprehension is weighed more heavily than oral fluency.

At the end of the June 2015 school year D.R. was at level thirty-eight instructional in guided reading. D.R. normally had guided reading four times a week with three to five students in his group. At the end of the day D.R. would often stand by the window, but it was not a behavioral problem.

FACTUAL DISCUSSION

In light of the contradictory testimony presented by the witnesses, the resolution of this case requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall

assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

The witness that I find most credible is Tighe. She evaluated and observed D.R. in 2014 and again in 2015. In 2014, she recommended that D.R. stay at Lloyd Road with small group instruction outside of general education for reading instruction. In 2015 after evaluating and observing D.R. a second time, she recommended an out-of-district placement. She had an opportunity to see if D.R. was making progress.

Based upon the consideration of the testimonial and documentary evidence presented at the hearing, and having had an opportunity to observe the witnesses and to assess their credibility, I **FIND** the following **FACTS**:

Kelly is an expert in general case management and school social work. She is the case manager for D.R. Santoro is an expert in teaching special education to students with autism. She was D.R.'s in class resource teacher beginning in the fall of 2015 in math and science. Foley is an expert in speech and language pathology. She provided language therapy to D.R. O'Mullan is an expert in occupational therapy. She provided occupational therapy to D.R. Gwizdz is an expert in teaching special education. She was D.R.'s language arts and social studies special education resource fifth grade teacher. Baker is an expert in school social work. She provided social skills counselling to D.R. Reistrom is an expert in teaching general and special education. She is also an expert reading specialist. She was D.R.'s fourth-grade teacher beginning in January 2015. Tighe is an expert in speech and language pathology, language based learning disabilities, development of education programs for children with language based disabilities and development of programs for students in social communication.

D.R. went to kindergarten at Cliffwood School. He was placed there because his behaviors would be addressed in the autism class. He was in general education math class with an aide. The Cliffwood program was based more on behavior than academics. In the first grade he went to Strathmore School. He was placed in LLD classes. He was in general education math classes. D.R. did not have academic problems in the first grade. D.R. went back to Cliffwood School in the second grade where he was in the ICR. Cliffwood had a social worker who worked on social skills with the students. He was in the ICR class at Cliffwood in the second and third grade. D.R.'s IEP for the 2013-2014 school year (J-21) did not include ESY which T.R. wanted for D.R. for reading, and social skills. She placed D.R. in Camp Excell which was a social skills program for autistic and ADHD children. The goal of the staff was to work on social skills. It did not address reading or academics.

The April 9, 2013, IEP (J-21) listed several benchmark and short term objectives for D.R. The IEP goals and objectives reporting from April 2013 to December 2014 (J-104) does not show how any progress is measured. All of the reports list a date and state whether D.R. is progressing, has limited progress, has mastered an objective, or the objective is not introduced. It does not state the amount of progress made. The objective of "Generate possible ideas for writing through recalling experiences, listening to stories, reading brainstorming and discussion," in April 26, 2013, it states that he is progressing. On June 18, 2013, it states that D.R. has mastered this objective. On November 3, 2013, February 10, 2014, and April 24, 2014, on the same objective it states that D.R. is progressing. On June 22, 2014, the IEP reporting again says that D.R. mastered the objective, which it stated that he had mastered on June 18, 2013.

Three of the objectives in the goals and objectives reporting for D.R. lists him as progressing in April 2013 and June 2013 and in November 2014, those same objectives are listed as being introduced. The goal of orally define words with minimal assistance was not introduced to D.R. until April 25, 2014. The goal of drawing inferences from material orally presented with minimal assistance was not introduced to D.R. until November 10, 2013. The goal of role play with minimal assistance was not introduced

from April 2013 to November 2014. However, the progress report shows that D.R. is progressing on fifteen goals and has mastered two goals.

The April 2013 IEP regarding reading states that at times independent reading is difficult. His 2013-2014 progress report states that D.R. was progressing, but it does not state how. The IEP goals and objective progress reporting of December 16, 2014, updated on February 11, 2015, says D.R. has made limited progress. It does not state the percentage of progress nor the grading rubrics that are being used.

He was at the Lloyd Road School for the fourth grade. The December 2014 IEP provides for full-day ICR with a general education teacher and a special education teacher with language arts, math, science, and social studies. Language therapy in a small group twice a week, OT once a week individually, social skills once a week in a small group, and once a week integrated. Kelly agreed with the placement. D.R.'s mother asked for a specific reading program, the LMB Program. The child study team (CST) talked about the LMB program but stated that the current program was correct for D.R. The report and recommendation of Tighe was reviewed. In the counseling section it lists more goals measuring the progress with percentages. For example eye contact eighty percent of the time.

D.R.'s counseling present levels in the 2014 IEP came from the 2014-2015 social skills progress notes (P-52). In P-52 on page 716 has progress notes from February 6, 2015, it comments on listening skills and eye contact. It does not list data collected or percentage improvement. The 2014 IEP under goals and objectives states that in all instructional areas D.R. will develop and demonstrate critical thinking skills. It mentions that the skills will be measured by the attached rubric, which is not attached. The December 2014 IEP has a writing goal of "When given a narrative writing prompt, D.R. will compose a narrative piece organizing an event sequence naturally with moderate assistance with eighty percent accuracy as measured by the grading rubric." The IEP does not contain a present level for this goal and the progress reporting does not contain D.R.'s progress as measured by the rubric.

The December 2014 IEP contains a summary of Tighe's 2014 report. It specifically states "he is at a third grade level in reading fluency but he does not attack less familiar words effectively which is likely to become a liability with fourth and fifth grade texts." No one on the CST disagreed with this statement of Tighe.

D.R. had difficulty with the following: eye contact, initiating conversations, maintaining conversations, focus and ability to maintain meaningful peer relationships. Reading Comprehension, Language Arts organization are major issues for D.R. Attention and distractibility are problems for him. He needs to be redirected. When he is redirected, he comes back quickly. He struggled with critical processing.

J-96 is D.R.'s progress report dated December 8, 2015, in language arts, reading, math, science, and social studies. There are no progress notes from February 2015 when the goals were introduced to November 2015 when the reports list D.R. as having made progress or limited progress.

D.R. began the fifth grade at Lloyd Road School. The 2015-2016 I.E.P meeting was held on December 8, 2015. This IEP proposes ICR read and writing with social studies embedded, math, and science. The IEP also included language therapy in a small group twice a week, OT once a week individually, social skills once a week in a small group and once a week in-class.

There was an IEP meeting on December 8, 2015. Kelly was present. Only the math and science teacher was missing from the meeting. His language arts teacher stated that D.R. was making progress. His developmental reading assessment increased from the previous year. D.R.'s mother believed that D.R. was not making progress especially with reading. The IEP proposed full day in-class resource. The counseling goals were to try to generalize the skills that he learned in the small group. D.R.'s mother was again concerned with his reading. T.R. requested D.R. use the LMB program. She discussed the scholastic reading program with the CST but neither was proposed for D.R.

Santoro was D.R.'s special education math and science for the 2015-2016 school year. Prior to teaching D.R. she reviewed his IEP and math pre-assessment test. D.R.'s IEP for 2015-2016 had a math goal of identifying logical and critical thinking with seventy percent accuracy. The prior IEP did not state the percentage of times D.R. could identify logical and critical thinking. She did not have any data in September 2015 as to the percent of time D.R. could identify critical and logical thinking. She was not provided with the rubrics mentioned in the IEP. She noted that he had a distractibility issue and needed redirection. He also had stimming behavior. The science class was broken into teams with each student having a role in the team. The math and science classes have twenty-one students. D.R. had difficulty in the team setting giving his ideas and input. Quizzes were modified for D.R. by giving him a study guide and eliminating essay questions. Much of the explaining of answers were also taken out for D.R. In higher level skills he had to write out the answers in the workbook, but those answers were not graded. If D.R. scored under seventy on a quiz, he could make corrections at home and turn the test in with the corrections. D.R. was pulled out of science class for speech once a week and occupational therapy once a week. D.R. needed to be refocused constantly. After one to one review and repetition, D.R. still needs to be refocused. D.R. has problems developing and demonstrating critical thinking.

D.R. has difficulty with reading comprehension. His reading fluency, however, is good. D.R. has had various reading test. A DRA is an assessment given to all students to determine their independent reading level. A DRA assessment was done on D.R. in September 2014. His oral fluency score was eleven out of sixteen. His comprehension score was twelve out of twenty four. The test has three ranges: independent, instructional, and intervention. A score under twelve in comprehension put the student in the intervention range. His oral fluency score was in the independent range and his comprehension score was in the instructional range. He was on level thirty at that time.

D.R. had another DRA done on in February 2015; Reistrom was his teacher at that time. D.R.'s oral fluency score was thirteen out of sixteen. His reading comprehension score was fourteen out of twenty-four. Eleven to fourteen in reading comprehension is in the instructional range. D.R.'s reading score was instructional

thirty-four. Level thirty was his independent reading level. In “Oral Reading Words per minute, percent of Accuracy” test D.R. scored in the advanced category. He had no missed cues or omissions. This was done on level thirty-four instructional level. This level was high enough to go to the reading comprehension portion of the test. Since D.R. was at the instructional level for comprehension, Reistrom kept him at level thirty-four. He was in the intervention range for literal comprehension his score was one and he scored two in “Use of Text Features and Reflection.”

D.R. had an additional DRA assessment in May 2015. This assessment was done at the higher instructional level of thirty-eight. Reistrom gave him the assessment at this level based on his independent reading in the classroom and other assessments throughout the school year. He scored eleven out of sixteen in oral fluency and eleven out of twenty-four in comprehension. He scored in the independent level in oral fluency and he scored in the intervention range for comprehension. The text was too difficult for him to comprehend. His score in literal comprehension increased from one to three. Reistman scored him at the thirty-four independent level after the May 2015 DRA assessment. Level thirty-four in the DRA equates to third-grade-level reading. There is not much prompting allowed in the DRA assessments.

D.R. had a STAR assessment on October 8, 2015. It is a diagnostic document that shows what skills D.R needs to work on. It is a computer based test. At the time of the assessment, D.R. was in the second month of fifth grade. The STAR assessment placed D.R. in the urgent intervention spectrum in reading. He was reading at the level of a second grader in the seventh month of the school year. In the math STAR assessment D.R. scored above benchmarks.

A qualitative reading inventory (QIR) was done for D.R. in 2014 and 2015. A student is either at the independent, instructional, or frustration level. In 2014 D.R. was not at the independent level. He could not improve understanding with re-reading. D.R. could find explicit facts when asked, but he could not answer an inferential question. D.R. was at the frustration level with second- and third-grade texts. He was at the instructional level with first-grade text. Verbal reasoning from a text is difficult for D.R. He cannot compare and contrast. D.R. was told to do a writing sample. His mechanics

of language were good. He knew the elements of a story. His writing was at the second-grade level. At that time reading and language arts in a small group pull-out sessions would have helped D.R. The district did not provide small group pull-out reading and writing for D.R.

In the 2015 QIR D.R. experienced frustration on the second- and third-grade-level text. He comprehended fifty percent of the text on the second-grade test and very little text on the third-grade test. In the third-grade text when allowed to look back he only improved on one of nine answers. He did not progress in reading comprehension in sixteen months. D.R. was frustrated at third-grade-level reading comprehension and this could lead to him not being able to comprehend his text books.

D.R.'s 2015 written assessment did not change for the better since 2014. The story was less developed. He did not connect with the pictures. There was less evidence of technical skills and there were run on sentences and missing punctuation. D.R. is writing at a kindergarten/first-grade level. D.R. still has difficulty with compare and contrast, looking at tests and explaining it and point of view.

D.R. has significant difficulty drawing novel ideas and drawing conclusion independently. D.R.'s reading comprehension was unchanged between the two evaluations; however, his reading fluency is good. He struggled with implicit questions.

Tighe administered a social language development test, reading comprehension test and written expression test to D.R in 2014 and 2105. The social language development test consisted of reading verbal inferences and multiple interpretations. In reading facial expressions they could see progress from one year to the next. The multiple interpretations test taps cognitive flexibility. His score in both years was basically the same. In 2015 D.R.'s score was compared to other fifth-grade students. He answered one more question right in 2015 than he did in 2014. He did not regress between the evaluations. His accuracy increased when compared to his peers and his fluency remained the same. His comprehension was at the level of a second grade fourth month. His comprehension did not increase at the same rate as his accuracy and fluency.

Tighe observed D.R. at school on October 15, 2015. In language arts class, he could work independently. His attention varied and he struggled with organization. His product was significantly less than his peers. His writing was not developed. He was doing a test in that class.

During recess, D.R. he was on the fringe of a group of boys playing football but not part of the group. At one point D.R. tossed a football to a girl. D.R. is socially motivated but skill deficient. During lunch D.R. was at a table with peers who were talking. She could not hear the conversations. D.R. was talking as he went to the garbage. It did not appear that there was a reciprocal conversation going on. Science class was in-class resource. The general education teacher spoke with no visuals or aides to support comprehension. D.R. was clearly not attending. He was turned off from the lesson. There was group instruction regarding car safety. D.R. was rocking in his chair; he was self-stimming, making sounds, and walking around. The attempts to bring D.R. back were minimal. The presentation of activities was not on his level. He was not supported by the special education teacher and he could not process the instructions. D.R.'s skill deficits stopped him from working in a meaningful way.

When he was in the fifth grade the district combined social studies with language arts. In class the material in the reading and writing workshop was at the fifth-grade level. D.R.'s was not assigned independent reading above third-grade level. He was taught on a fifth-grade level but practiced on his level.

At the December 8, 2015, IEP meeting T.R. informed the Board that she was seeking a private placement for D.R. D.R. was placed at New Grange after the December 2015 holiday break in January 2016.

There was no testimony regarding private reading instruction and occupational therapy paid for by petitioners.

LEGAL ANALYSIS AND CONCLUSIONS

The IDEA provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 695 (1982). One of purposes of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] 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). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C.A. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court has construed the FAPE mandate to require the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley, *supra*, 458 U.S. at 203, 102 S. Ct. at 3049, 73 L. Ed. 2d at 710. New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, *supra*, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). The IDEA does not require that a school district “maximize the potential” of the student, Rowley, *supra*, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708, but requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “*de minimis*” educational benefit is required, and the appropriate standard is whether the IEP provides for “significant learning” and confers “meaningful benefit” to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182-84 (3d Cir. 1988), *cert. den. sub. nom.*,

Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). In other words, the school district must show that the IEP will provide the student with “a meaningful educational benefit.” S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). This determination must be assessed in light of the individual potential and educational needs of the student. T.R., supra, 205 F.3d at 578; Ridgewood, supra, 172 F.3d at 247-48. The appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H., supra, 336 F.3d at 271. Rather, the pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

Toward this end, an IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C.A. § 1414 (d)(2) and (4); N.J.A.C. 6A:14-3.7. A complete IEP must contain a detailed statement of annual goals and objectives. N.J.A.C. 6A:14-3.7(e)(2). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and “be measurable” so both parents and educational personnel can be apprised of “the expected level of achievement attendant to each goal.” Ibid. Further, such “measurable annual goals shall include benchmarks or short-term objectives” related to meeting the student’s needs. N.J.A.C. 6A:14-3.7(e)(3). The New Jersey Supreme Court has recognized that “[w]ithout an adequately drafted IEP, it would be difficult, if not impossible, to measure a child’s progress, a measurement that is necessary to determine changes to be made in the next IEP.” Lascari, supra, 116 N.J. at 48.

Parents who withdraw their child from public school and unilaterally place the child in a private placement while challenging the IEP may be entitled to reimbursement if the administrative law judge (ALJ) finds that the school district’s proposed IEP was inappropriate and that the parents’ unilateral placement was proper. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 365, 126 L. Ed. 2d 284, 292 (1993); School Comm. of Burlington v. Mass. Dep’t of Educ., 471 U.S. 359, 370, 105 S. Ct. 1996, 2002-03, 85 L. Ed. 2d 385, 395 (1985.) 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); see 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. A court may reduce or deny reimbursement costs based on the parents’ unreasonable behavior during the IEP process. 20 U.S.C.A. § 1412(a)(10)(C)(iii). In this regard, the cost of reimbursement “may be reduced or denied” if, at the most recent IEP meeting 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 the parents did not give written notice to the district of their concerns or intent to enroll their child in a non-public school at least ten business days prior to the removal of the student from the public school; or upon a judicial finding of unreasonableness with respect to actions taken by the parents. N.J.A.C. 6A:14-2.10(c)(1), (2), (4).

In this matter the issues are did the Board provide D.R. with FAPE, is petitioner entitled for reimbursement for ESY at Camp Excel, private occupational therapy and private reading instruction, and is D.R. entitled to compensatory education.

The question of whether D.R. was provided with FAPE by the district covers the 2014-2015 school year and the 2015-2016 school year. During the 2014-2015 school year, D.R has difficulties with reading comprehension although the December 12, 2014, IEP stated that he was reading at DRA 3.0, third-grade level in the present levels portion of the IEP. It states that his reading comprehension continues to develop. Tighe had done assessments of D.R. which was provided to the CST which is listed in the IEP. Her assessments revealed that D.R.’s independent reading comprehension was at a level of 2.0 or the beginning of the second grade. He was at a frustration level reading second- and third-grade text. Tighe recommended that D.R. receive reading and language arts in a small group setting outside of the general education classroom. The Board did not follow the recommendation of Tighe. D.R. was not placed in a small

group setting outside of the general education classroom for reading and language arts. The December 12, 2014, IEP did not state what D.R.'s baseline was in the goals in objectives. It stated that D.R. would achieve a goal eighty percent of the time, but did not state what percentage of the time he was achieving that goal when the IEP was done. The majority of the progress reports lists either progressing, limited progress introduced or mastered but does not give the amount of progress or limited progress D.R. achieved. The Star assessment done in October 2015, while D.R. was in the fifth grade, ten months after the December 2014 IEP shows that D.R. has a second-grade reading level. The December 12, 2014, IEP did not propose any related services in reading comprehension and language arts for D.R.

I **CONCLUDE** that the Board did not provide FAPE to D.R. in the December 2014 IEP because he had clear reading comprehension difficulties that were not adequately addressed in the IEP.

The next issue is did the December 8, 2015, IEP provide D.R. with FAPE. During the 2015-2016 school year D.R. was in the fifth grade. The Board embedded social studies into language arts. The IEP states that D.R.'s guided reading level was at the middle of the third-grade level; however, the October 2015 Star assessment states that his reading level was on a second-grade level and the QIR showed that D.R. could comprehend fifty percent of second-grade text and very little third-grade text. The IEP states "We are working on strategies to improve his comprehension." In class, D.R.'s independent reading was done at the third-grade level. The material in the reading and writing workshop was at the fifth-grade level. He was taught on a fifth-grade level but practiced on his level. D.R. was given no additional related services in reading and language arts.

I **CONCLUDE** that the Board did not provide FAPE to D.R. in the December 2015 IEP because he had clear reading comprehension difficulties that were not adequately addressed in the IEP.

Compensatory education is a remedy not specifically provided for in the IDEA. It "is a judicially designed cure for school district failures to provide [a FAPE]." Metzger,

“Compensatory Education Under the Individuals With Disabilities Education Act,” 23 Cardozo L. Rev. 1839, 1840 (2002). “Congress expressly contemplated that the courts would fashion remedies not specifically enumerated in IDEA.” W.B. v. Matula, 67 F.3d 484, 494-95 (3d Cir. 1995). Thus, a student deprived of a FAPE may be entitled to an award of compensatory education, which is an available remedy even after the student has reached age twenty-one. Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 249 (3d Cir. 1999)¹; M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996); Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 536 (3d Cir. 1995); Lester H. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990), cert. denied, 499 U.S. 923, 111 S. Ct. 1317, 113 L. Ed. 2d 250 (1991).

The legal standard for the granting of such relief is summarized by the Third Circuit as follows:

[A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonable required for the school district to rectify the problem.

[M.C., supra, 81 F.3d at 397.]

Awards of compensatory education have included an additional two and one-half years of special education where the school district had been lax in its efforts to provide a proper placement, Lester H., supra, 916 F.2d at 873, and payment of college tuition where the disabled student would apply credits obtained toward the acquisition of a high school diploma. Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F.Supp. 2d 138, 145-46 (W.D.N.Y. 1999).

¹ The holding in Ridgewood that there was no federal statute of limitations for compensatory education claims, has been superseded by statute, 20 U.S.C.A. § 1415, as recognized in P.P. v. West Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009) (A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint).

In this matter the Board did not provide D.R. with related services in the area of reading comprehension for the 2014-2014 and 2015-2016 school years. I **CONCLUDE** that D.R is entitled to compensatory education in the area of reading comprehension for one and one-half school years because D.R. started at New Grange at the beginning of the second half of the 2015-2016 school year.

D.R. went to Camp Excell in the summer of 2014. Camp Excell did not provide academic and specific reading comprehension services to D.R. There was not sufficient proof that D.R. would regress or did regress in the summer of 2013. I **CONCLUDE** that petitioner is not entitled to reimbursement due to sending D.R. to Camp Excell.

There was no testimony regarding private reading instruction and occupational therapy paid for by petitioners, therefore I **CONCLUDE** that petitioners are not entitled to reimbursement for private reading instruction and occupational therapy for D.R.

N.J.A.C. 6A:14-2.10(c) provides:

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

1. If at the most recent IEP meeting that the parents attended prior to the removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the IEP proposed by the district;
2. At least 10 business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the district board of education of their concerns or intent to enroll their child in a non-public school;
3. If prior to the parents' removal of the student from the public school, the district proposed a reevaluation of the student and provided notice according to N.J.A.C. 6A:14-2.3(g) and (h) but the parents did not make the student available for such evaluation; or

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

In this matter T.R. told respondent at the December 8, 2015, IEP meeting that she was seeking a private placement for D.R. In January 2016 D.R. was placed at New Grange. I **CONCLUDE** petitioner provided notice to defendant of her intent to seek a private placement for D.R.

The parties stipulated that New Grange is an appropriate placement for D.R. Therefore I **CONCLUDE** that New Grange is an appropriate placement for D.R. and respondent must reimburse petitioners for costs associated with D.R.'s placement at New Grange.

ORDER

It is hereby **ORDERED** that petitioners' claim for private placement for D.R. at New Grange is **GRANTED**.

It is further **ORDERED** that respondent provide D.R. with one and one-half years of compensatory education in the area of reading comprehension.

It is further **ORDERED** that petitioners claim for reimbursement for tuition at Camp Excell, private reading instruction and private occupational therapy is **DENIED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2010) 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 (2010). 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.

September 13, 2016

DATE

ljb

KIMBERLY A. MOSS, ALJ

WITNESSES

For Petitioners:

T.R.
Jeanne Tighe

For Respondent:

Lauren Kelly
Danielle Santoro
Alison Foley
Claudia O'Mullan
Nicole Gwizdz
Kristen Baker
Meghan Reistrom

JOINT EXHIBITS

- 1 Petition for Due Process
- 2 Answer
- 3 IEP, May 3, 2010
- 4 IEP, May 3, 2011
- 5 PT Progress Report, March 16, 2012
- 6 Educational Evaluation, March 20, 2012
- 7 Occupational Therapy Assessment Report, March 23, 2012
- 8 Psychological Assessment Report, April 2, 2012
- 9 IEP, May 1, 2012
- 10 Amended IEP, May 1, 2012
- 11 Email chains regarding programming, May 2012
- 12 2012-2013 class schedule
- 13 NWEA score, September 2012
- 14 Email chain regarding writing and OT, December 2012
- 15 NWEA score, December 2012

- 16 Intentionally Omitted
- 17 Email chain regarding social skills progress, February 5, 2013
- 18 Email to petitioner regarding social skills progress, February 13, 2013
- 19 NWEA score, March 2013
- 20 Email to petitioner regarding social skills progress, April 9, 2013
- 21 IEP, April 9, 2013
- 22 Email to petitioner regarding feedback from meeting, May 24, 2013
- 23 Email chain regarding ESY 2013, May-June 2013
- 24 2012-2013 report card
- 25 2013-2014 class schedule
- 26 NWEA score, September 2013
- 27 Re-evaluation documents, January 2014
- 28 IEP amendment, January 13, 2014
- 29 Occupational Therapy Evaluation, February 25, 2014
- 30 Speech/Language Evaluation, February 25, 2014
- 31 NWEA score, March 2014
- 32 Educational Evaluation, March 7, 2014
- 33 Confidential Psychological Report, March 12, 2014
- 34 Eligibility meeting documents, March 25, 2014
- 35 Email from petitioners regarding evaluations, March 30, 2014
- 36 Email from petitioner regarding criteria for ESY, April 23, 2014
- 37 Spring 2014 NJASK scores
- 38 2013-2014 emails regarding social skills group
- 39 2013-2014 report card
- 40 Independent Comprehensive Communications Evaluation, July 2014
- 41 2014-2015 class schedule
- 42 IEP, December 12, 2014
- 43 Email chain regarding IEP goals, December 15-16, 2014
- 44 Email chain regarding meeting to discuss IEP goals, January 2015
- 45 Email chain regarding LLD class, January 21, 2015
- 46 Email chain regarding program, February through March 2015
- 47 Email to petitioner regarding progress in counseling, March 2, 2015
- 48 Email to petitioner regarding progress in counseling, March 2, 2015

- 49 IEP Goals and Objectives Report March 31, 2015
- 50 2014-2015 occupational therapy documents
- 51 2014-2015 speech data
- 52 2014-2015 classwork
- 53 2014-2015 social skills progress notes
- 54 Email chain between counsel, July 2015
- 55 Invitation to November 24, 2015 IEP meeting
- 56 Recording of December 8, 2015 IEP meeting
- 57 Email from E. Harrison to C. Reisman regarding resolution meeting; petitioner's notice of unilateral placement, December 2015
- 58 CV-Nicole Aiello
- 59 CV-Allison Arolla
- 60 CV-Kristin Baker
- 61 CV-Casey Barilka
- 62 CV-Nicole Borlan
- 63 CV-Jennifer Ditre
- 64 CV-Raymond Dorso
- 65 CV-Zack Dymond-Drake
- 66 CV-Randy Flaum, LDTC
- 67 CV-Meghan Florino
- 68 CV-Linda Gumina
- 69 CV-Nicole Gwidz
- 70 CV-Beth Hogan
- 71 CV-Lauren Kelly
- 72 CV-Megan Lardieri
- 73 CV-Dr. Elaine Lukenda
- 74 CV-Allison Maglione
- 75 CV-Regina Maiello
- 76 CV-Cristina Olsen
- 77 CV-Claudia O'Mullan
- 78 CV-Dr. Susan Pearsall
- 79 CV-Shannon Polakowski
- 80 CV-Lori Polhamus

- 81 CV-Meghan Reistrom
- 82 CV-Danielle Santoro
- 83 CV-Gail Schneiderman
- 84 CV-Regina Sowa
- 85 CV-Dana Tressito
- 86 CV-Andrea Trezza
- 87 CV-Lauren Vasile
- 88 CV-Diane Yorks
- 89 CV-James Zibbell
- 90 CV-Theresa Zimmer
- 91 CV-Tracy Zwirko
- 92 2015-2016 Speech Data
- 93 April 2015-January 2016 Speech Attendance
- 94 April 2015-January 2016 Social Skills progress notes
- 95 December 8, 2015, IEP Attendance/PRISE Notification
- 96 December 8, 2015, Annual Review IEP
- 97 2015-2016 IEP Goals Report
- 98 Email chain, June 22, 2015-September 27, 2015
- 99 2015-2016 OT attendance/service and student work product
- 100 2014-2015 Student Attendance
- 101 2014-2015 Report Card
- 102 Jabukowski emails, May 2012
- 103 Occupational therapy consult documents
- 104 Independent Occupational Therapy Evaluation, April 28, 2014
- 105 IEP Goals and Objectives Progress Reporting, December 16, 2014
- 106 IEP Goals and Objectives Progress Reporting, December 16, 2014, with February 11, 2015, update
- 107 Email chain between petitioner and Raymond Dorso, February 6, 2015
- 108 Email chain between petitioner and Lauren Kelly, February 10-11, 2015
- 109 Records request, March 16, 2015
- 110 Email from petitioner to Mr. Jerabek, March 30, 2015
- 111 Response to records request, April 2, 2015
- 112 Email chain regarding social skills, April 2015

- 113 Email chain between petitioner and Mrs. Reistrom, May 2015
- 114 2014-2015 student work and teacher correspondence
- 115 Independent Oral and Written Language Reevaluation, November 2015
- 116 Email chain between petitioner and Lauren Kelly, November 19, 2015
- 117 CV-Jeanne Tighe
- 118 2015-2016 Report Cards
- 119 D.R., IEP 2015-2016
- 120 February 2, 2016 New Grange Academic Achievement
- 121 D.R., Related Services 2015-2016
- 122 2016 New Grange social skills document
- 123 2/2016 New Grange social skills goals
- 124 Office of Special Services sign out sheet
- 125 2014-2015 Grade 4 Assessment Report
- 126 2015-2016 STAR Diagnostic Assessment Results
- 127 2015-2016 Sample Rubrics for Writing, Social Studies, Reading, Literary Tasks
- 128 2015-2016 Writing Grades Breakdown
- 129 2015-2016 Reading Grades Breakdown
- 130 10/15 Rubrics Completed by D.R.
- 131 2014-2015 Reading Assessment and Benchmark
- 132 2014-2015 Math Benchmark
- 133 2014-2015 Spelling Inventory
- 134 May 12, 2015, Reading Activity and Peer Checklist
- 135 Spring 2015 Quarterly Measurement
- 136 2015-2016 Shared Reading Classwork
- 137 2015-2016 Shared Reading Notebook
- 138 2015-2016 Writing Folder
- 139 2015-2016 Guided Reading Folder
- 140 2014-2015 Group Progress notes
- 141 State Common Core Standards
- 142 Centers Notebook