State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

M.I. ON BEHALF OF M.I.,
Petitioner,
v.
NORTH HUNTERDON-VOORHEES REGIONAL HIGH BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 09957-18
AGENCY DKT. NO. 2017-24925

M.I. and C.I. ON BEHALF OF M.I.,
Petitioners,
v.
NORTH HUNTERDON-VOORHEES REGIONAL HIGH BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 17034-18
AGENCY DKT. NO. 2019-29078

Richard P. Flaum, Esq., for petitioners (DiFrancesco, Bateman, Coley, Yospin, Kuntzman, Davis & Lehrer, P.C., attorneys)

Teresa Moore, Esq., for respondent (Riker Danzig, attorneys)

Record Closed: October 7, 2019 Decided: October 30, 2019

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, Mrs. I. has requested a due-process hearing on behalf of her daughter, M.I., who is classified as eligible for special education and related services. She asserts that the North Hunterdon-Voorhees Regional Board of Education (the Board) denied her daughter a free and appropriate public education (FAPE). Mrs. I. seeks reimbursement for the expenses incurred in unilaterally placing M.I. at the Pennington School, a private non-approved placement. In addition, via a subsequent petition, Mr. and Mrs. I. seek a change in classification.[1]

PROCEDURAL HISTORY AND THE ISSUE PRESENTED

Mrs. I. filed a petition for due process (EDS 15963-16) on July 19, 2016. The matter was transmitted to the Office of Administrative Law (OAL), and assigned to the Honorable Michael Antoniewicz, ALJ. Via a decision dated March 8, 2017, Judge Antoniewicz dismissed the petition, having determined that Mrs. I.'s conduct in unilaterally placing her child violated N.J.A.C. 6A:14-2.10(c), which requires timely notice of a unilateral placement.

Judge Antoniewicz's decision was appealed to the United States District Court. Via Order dated February 15, 2018, the Honorable Anne Thompson, U.S.D.J., remanded the case to the OAL for an evidentiary hearing. Judge Thompson held that the "summary decision of the ALJ is AFFIRMED insofar as it found Plaintiff's notice was untimely." But she further held that "[b]alancing the equities, the ALJ should consider whether [petitioner] is entitled to any reimbursement of tuition despite the failure to provide timely notice, and therein potentially reach the questions of whether the Board's proposed IEP would provide M.I. with FAPE and whether Pennington was an appropriate placement." The case was reassigned to me on October 2, 2018, upon Judge Antoniewicz's elevation to the Superior Court. Via a Prehearing Order dated October 3, 2018, I framed the issue

[1] An additional issue raised in the second petition, accommodations for college entrance examinations, was not transmitted for hearing, as the proper venue for that concern is the College Board.

before me consistent with Judge Thompson's decision, moreover limiting that issue to the individualized education program (IEP) proposed for the 2016–2017 school year.

However, my review of the file revealed a letter dated January 10, 2017, via which counsel for petitioner had sought leave to amend the petition to include a challenge to a later IEP. A follow-up letter from petitioner's counsel dated January 18, 2017, implies that the motion had been granted. But the file included no Order Granting Leave to Amend; no filed amended pleading; nor any answer to that amended pleading. Via the covering letter to the Prehearing Order, I sought clarification from counsel. I advised that if leave to amend the petition indeed had been granted, I would amend my Prehearing Order accordingly. I received no reply to my correspondence.

On the first day of the hearing, I again inquired about the scope of the proceeding. Counsel for petitioner now urged that the claims at bar encompassed the IEP for the 2017–2018 school year; the Board strenuously objected. I afforded counsel time to review his file and share with me an Order granting leave to amend the original petition. Preliminarily, I continued to limit the issue presented to the 2016–2017 IEP, but indicated that I would revisit this decision if counsel could demonstrate that Judge Antoniewicz had indeed granted leave to amend. Counsel could not do so. Upon again advising counsel for petitioner that I would not consider the propriety of the 2017–2018 IEP, he moved for reconsideration. That motion was denied.[2] I **CONCLUDE** that the issue presented is as framed by Judge Thompson, and is limited to the 2016–2017 school year.

On or about October 30, 2018, petitioner filed a second request for due process. That matter was consolidated with the earlier petition at the request of the parties and by Order dated December 17, 2018. Hearings were conducted on January 25, February 6,

[2] Petitioners had ample opportunities to timely bring their claims contesting the IEP for the 2017–2018 year. Indeed, rather than amend his existing petition, counsel for petitioner could have timely filed a new petition challenging the 2017–2018 IEP at several points in this litigation, including when the matter was pending before the federal court, or once it was assigned to Judge Antoniewicz on remand, or once it was reassigned to me. See N.J.A.C. 6A:14-2.7(a)(1), which established a two-year statute of limitations for the filing of petitions for due process. Indeed, the second due-process petition filed in October 2018 could have timely included these claims. And the motion to amend, made on the record on the first day of hearing, was not timely. See N.J.A.C. 6A:14-2.7(i)(2), which provides that an order permitting an amendment must be issued no later than five days prior to "the date the matter is heard."

March 13, May 24, and July 15, 2019. Written post-hearing submissions were filed on a final hearing date of October 7, 2019, and the record closed.

FINDINGS OF FACT

This case concerns the obligations of a regional high-school district to provide FAPE to a matriculating classified ninth-grader. At the time the pertinent events arose, M.I. was an eighth-grade domiciliary of Clinton Township who had been enrolled at an out-of-district placement at the Craig School pursuant to a settlement agreement with the Clinton Board of Education. Clinton is a K–8 school district; all its students continue their high-school educations under the auspices of the North Hunterdon-Voorhees Regional High School District.

High School District Protocol for Transition from the Elementary Team

The Board operates two comprehensive public high schools, and receives incoming ninth-graders from thirteen constituent elementary districts. Mary Patricia Publicover was the director of special services in 2016, the year M.I. transitioned to high school. Publicover described the process used to transition special-education students to the regional district. Zulejka Baharev is the current director of special services. She has held her position only since 2018, but she was able to verify via documentary evidence that the protocols Publicover described have been in effect since 2015.[3] The testimony of these school administrators was uncontroverted and I **FIND**:

A document entitled "Transition to High School Procedures" contains a timeline of transition activities. The document expresses the following intent:

> It is our sincere hope that these steps will simplify the process of transitioning 8th graders to the high school to ensure services are implemented at the appropriate time. The cooperation of both elementary and high school staff is essential and appreciated as we work together to execute a smooth transition for our students.

[3] Having not been employed by the district in 2016 when M.I. transitioned to the high school, Baharev naturally could not speak to whether these protocols were actually followed.

In the spring of the seventh-grade year, elementary students are invited to tour the high school. In October of the eighth-grade year, an evening open house again introduces families to the high school. Also in October of the eighth-grade year, high-school personnel request information about incoming students from the constituent districts. In October/November, sending-district personnel are invited to visit the high schools to meet and discuss programmatic options. High-school case managers are assigned.

A transition meeting is conducted in December or January of the eighth-grade year, which is arranged by the elementary case worker and includes a high-school case manager, a special-education teacher, a regular-education teacher, the parents, and the student. The elementary case worker is responsible for inviting the parents, and also gathers the needed data to draft the Present Levels of Academic Achievement and Functional Performance section of the IEP. The high-school case manager addresses programming post June 30, and provides input to the elementary district for timely inclusion in the IEP. Personnel are reminded that the Annual Review team must be reconvened if there is a need for any programmatic modifications during February through June.

The protocols provide that "after July 1st, the parent will receive a draft and written notice stating that the document will be finalized with consent or on fifteen days of the letter." The IEP is intended to be the product of both the elementary and the high-school district, as the protocols state that "[b]oth the sending district and the high school will prepare ANNUAL REVIEWs. The elementary school ANNUAL REVIEW will end on June 30 of the current year and the high school ANNUAL REVIEW will take over on July 1." Notices, IEPs, and other official documents are not generated by the high-school district until after July 1. An electronic transfer of IEPs and the actual transfer of the hard files also take place after July 1. Classes commence at the high school two weeks prior to Labor Day.

M.I.'s Educational History and her Transition to High School

M.I. is currently a twelfth-grader at North Hunterdon High School. She enrolled as a junior after completing two years at Pennington. Until the 2018–2019 school year, she had never attended a public school. M.I. completed kindergarten at a Montessori school; attended Catholic school until third grade; and transferred to the Clinton public schools in fourth grade. But she never attended a class in the elementary district; via a settlement agreement, Clinton's Child Study Team (CST) placed her at the Craig School, a private out-of-district placement, where she remained through eighth grade.

According to her mother, M.I. entered fourth grade unable to read. Craig brought her up to grade level, using an Orton-Gillingham approach to reading instruction; a specialized curriculum; behavioral support; and extensive assistive technology. Craig does operate a high-school program, but Mrs. I. was advised that it would not be appropriate for her daughter. So she and her husband explored a variety of schools recommended by Craig, to include the Pennington School, Morristown-Beard, Newark Academy, Blair Academy, and Union Catholic Regional High School; it is noteworthy that no public schools were recommended. As a result, the assertion by Mrs. I. that she had no preconceived notion that M.I. would not attend North Hunterdon High School fell a bit flat. Mrs. I. ultimately did contact the Clinton public schools to discuss next steps; Clinton personnel clarified that their responsibility was about to end, and would transfer to the regional high school for ninth grade.

In the fall of 2015, Mrs. I. contacted the North Hunterdon special services department. She testified that "[she] did not get any information at all during the fall of 2015." But Publicover related that a meeting between the parties took place in November 2015, and it was agreed that the high-school case manager would observe at Craig. Publicover described it as a productive meeting; the parents had many questions about the transition to high school, but gave no inkling that they wished to see their daughter continue to receive instruction in an out-of-district setting. The parties talked about Read 180, a reading program available at the high school, and discussed that M.I. could be

screened to see if this program would be appropriate for her.[4] Mrs. I. could not recall if Board personnel observed her daughter at the Craig School. But I **FIND** that Rachel Wander, the transitional case manager from the high school, visited Craig on December 10, 2015. Wander related that M.I. was a participatory student who presented with some organizational deficits. Wander was not afforded an opportunity to talk to Craig personnel, although she was able to discuss M.I. and her progress with the Clinton case manager.

An IEP meeting took place in January 2016, at which time the parties discussed and reviewed a transitional IEP. The Read 180 screening was discussed. Responsibility for M.I.'s program would not transition to the high-school district until July of that year, so the IEP remained on Clinton public schools letterhead. Mrs. I. was quite apprehensive about the transition from a small supportive setting like Craig to a comprehensive public high school, and she shared her concerns at the meeting. But she was advised that since the IEP straddled two academic years, she should sign it so that M.I. could finish eighth grade at Craig. She was assured that North Hunterdon High School would have a new IEP for her, and that there was no additional information that she could be given at that time. The information that she perceived was lacking included matters as fundamental as what her daughter's classes would look like, and what supports would be in place to assist her. The need for M.I. to be in college-preparatory classes was discussed, but not fleshed out; again, the high-school representative urged that this conversation would come later. A visit to North Hunterdon High was offered at that meeting. M.I. formally enrolled at North Hunterdon and the visit was scheduled for March 2016. Mrs. I. signed the IEP on January 19, 2016.

And although Mrs. I. agreed to tour the high school in March 2016, and to a Read 180 screening, she urged that she let everyone know at the January IEP meeting that she remained interested in a private-school placement. Both Publicover and Wander felt that placement at North Hunterdon High School was the clear focus of the discussion, and that a desire by the parents to see continued private-school placement was not discussed. Our courts have held that "credibility findings . . . are often influenced by matters such as

[4] Interestingly, the protocols shared by Baharev note that if Read 180 is contemplated as a programmatic option for an incoming freshman, the high-school case manager should "obtain consent to access the student, prior to July 1."

observations of the character and demeanor of witnesses . . . that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A credibility determination requires an overall assessment of the witness' 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). Mrs. I. presented as a concerned and loving parent, who genuinely wants to see her daughter succeed. But she was a less-than-credible witness.

On cross-examination, pointed questions about whether critical information was shared with school personnel were often met with "I do not remember." When asked if she signed an Enrollment Contract at the Pennington School in May 2016, Mrs. I. stated, "I don't remember what it was that I signed. I signed something." She later confirmed that she holds a law degree, making any confusion that the document she signed was a contract less than believable. Mrs. I. forgot or omitted that she met with high-school personnel as early as November of the eighth-grade year, or that an observation at Craig in fact took place. I thus deem the district's version of the discussion at that January 2016 meeting the more credible, and I **FIND** that no mention was made that the family might press for a private placement when they met with school personnel in January 2016.

Mrs. I. dropped M.I. off to take the Read 180 assessment on March 16, 2016. Mrs. I. was unwell that day, but nonetheless later returned for the tour. She arrived at the high school mid-morning, and by her own admission missed a visit with the soccer coach and a tour of one or two classrooms. She did visit the resource room for about five minutes. Mrs. I. was quite concerned because this did not appear to be the right classroom for her daughter. The student cohort seemed to have significant learning differences and it was not a college-preparatory class. Mrs. I. alleged that she asked about strategies and accommodations, and about available assistive technology, but her questions could not be answered. Mrs. I. stated that afterwards her daughter expressed unhappiness with what she had been shown. M.I. said the school was too chaotic, too distracting, and the courses not college preparatory. Mrs. I. related that M.I. told her, "I want to go to college." Wander confirmed that the tour of the high school was cut short, because the family arrived late, and then precipitously had to leave. Wander offered a return visit but one never took place. M.I.'s father did not participate in the tour.

Mrs. I. testified that she heard nothing further from North Hunterdon until after July 1, 2016.[5] But this also was not entirely accurate. Via email dated March 9, 2016, Mrs. I. was invited to open an online account to access high-school-related information. In May 2016 a routine letter that verified course schedules was sent to the family; a schedule of classes was enclosed, confirming that M.I. would be enrolled in college-preparatory mathematics, science, and history. But the parties did not speak again until after June 30, 2016. And I **FIND** that prior to July 1, the parents had still not advised anyone at North Hunterdon that they desired a private-school placement for their daughter. This notwithstanding the fact that by letter dated March 10, 2016, M.I. was accepted at the Pennington School. And this notwithstanding the fact that in May 2016, an Enrollment Contract was executed by the parents placing M.I. at Pennington.

On July 1, 2016, M.I. officially became the responsibility of the high-school district. On or about July 5, 2016, an IEP was sent to her parents, now on high-school letterhead. The covering letter from case manager Rachel Wander stated that she was enclosing "a copy of the IEP which is being proposed by the district." The letter informs the parents of their due-process rights.[6] Wander had tweaked the document, but felt she had made no significant programmatic changes. So when Wander heard that the parents were displeased with the IEP she was a bit surprised. She urged that she had no reason to believe that it would not simply go into effect at the expiration of the fifteen-day notice period.

But Mrs. I. felt that much was missing from that IEP, to include appropriate goals and objectives, and proper placement in a college-preparatory classroom for English. No assistive technology was offered. On July 11, 2016, she wrote to Clinton and indicated that she did not feel that her daughter had been offered an appropriate program in the least restrictive environment, and that she wanted her immediately placed in "an out-of-

[5] M.I.'s mother did not receive the Read 180 results until August. It was explained that they were forwarded to Clinton, its personnel were supposed to send them, and they had neglected to do so. The scores reflected that M.I. was reading at grade level and that Read 180 was not an appropriate intervention for her.

[6] I **FIND** that no meeting was offered prior to sending the IEP in July; Publicover explained that this was because it was a transitional IEP that had already been agreed upon.

district placement in the appropriate high school." Clinton promptly referred her back to North Hunterdon. To reiterate, by then M.I. had been accepted at Pennington, and Mrs. I. had signed an agreement to enroll M.I. there. But when asked at the hearing if she had alerted anyone in Clinton about the status of the Pennington School placement, Mrs. I. replied, "I don't remember."

On July 14, 2016, the director of the Craig School authored a letter recommending Pennington for M.I. When asked if she had a conversation with Craig director Janet Cozine advising her that M.I. had been accepted at Pennington, Mrs. I. replied, "I might have." Mrs. I. later changed her testimony and said she told no one about the Pennington acceptance because she wanted to keep her options open. On July 30, 2016, she paid the first installment of tuition at Pennington. I **FIND** that Mrs. I. again did not alert North Hunterdon that she had done so. She explained that the family was still actively considering placement at the public high school. Mrs. I. urged that she would have willingly lost that deposit if North Hunterdon had produced a viable IEP.

The amount paid to Pennington by the family was $9,500. It was not a small amount, and it was not refundable. I questioned Mrs. I. about her willingness to risk such a large sum of money, and she replied that her daughter's welfare was worth it. I **FIND** that of course it was, but that was why she placed M.I. in a school privately, and at great personal expense. Mrs. I.'s statement that the family was actively considering placement at the public high school was disingenuous. It strains credibility that parents would spend close to $10,000 to hold a spot at a school in which they did not earnestly intend to enroll their daughter.

Mrs. I. filed for due process on July 19, 2016. The petition sought an out-of-district placement, but still did not indicate that M.I. had been unilaterally placed. Also that day, Mrs. I. emailed Publicover to express her dissatisfaction with the proposed IEP. Publicover replied the next day, offering to meet on July 28, 2016. The parties ultimately met not until August, and with attorneys present. When asked if school personnel were told at the August meeting that M.I. had been accepted at Pennington, Mrs. I.'s answer again was vague: "I don't remember if the word accepted was ever used." When asked

if she shared that a signed contract had already been signed and a deposit paid to Pennington, Mrs. I. stated, “I don’t remember.”

Publicover and Wander asserted that they learned about the unilateral placement only later, and I **FIND** that M.I.'s mother did not tell school personnel that she had unilaterally placed her daughter when they met in August 2016. On August 11, 2016, a form letter welcomed the family to the high-school district; that letter included a copy of Parental Rights in Special Education (PRISE). M.I. did not attend the first day of school at North Hunterdon High School on August 24, 2016. I **FIND** that the Board for the first time was formally advised that M.I. had been unilaterally placed at Pennington via an email from counsel dated September 1, 2016. I **FIND**, per the decision of the District Court, that this email did not timely afford the district ten-days’ notice of the parents’ intent to unilaterally place M.I.; in fact, the email came some five months after they signed a contract with Pennington, and about a month after they made a substantial initial tuition payment.

The Program Offered to M.I. and the Reasonableness of the Parents’ Conduct

The program offered by the school district is described in the January and July 2016 IEPs. Both documents address the period from January 19, 2016, though January 18, 2017. Both provided that M.I. would continue at Craig School for the remainder of her eighth-grade year, and then attend public high school. Her high-school program would consist of pull-out replacement English instruction, and in-class support in mathematics, science, and social studies.

The cover page of the January IEP classified M.I. under the category “specific learning disability” (SLD). The IEP confirms the diagnosis of dyslexia. But later in the document, in answer to the query of “how the student’s disability affects his or her involvement and progress in the general education curriculum,” the IEP uses the classification category “other health impaired” (OHI), and explains that ADD is the basis for this classification. Yet surprisingly, the document contains no study skills or organizational goals, and no modifications or supplementary aids or services appropriate for a child with attentional deficits. The IEP included no behavioral intervention plan, and

no assistive-technology support. It is curious that the IEP was acceptable to Mrs. I., as it contained many of the omissions about which she presently complains.

Inside the document, the results of an assistive-technology evaluation conducted in 2012 are shared, and the IEP relates that "[i]t is exciting to see how [M.I.] utilized Inspiration, Microsoft Word, Ginger Spell Checker, and Text to Speech as part of the writing process." But within the document, it again indicates that assistive technology was considered but deemed not applicable; this is quite at odds with the description of M.I.'s program at Craig as being technology rich. The IEP contains only very brief reading goals. It stipulates that the parents will provide transportation. It includes modifications for PARCC testing administration to include extended time. The IEP reported that M.I. had made great strides in reading, and reads fluently and comprehends on grade level.

The IEP forwarded to the family in July 2016 is essentially the same document, with the changed classification to OHI. Wander explained that she perceived that the SLD classification was a typographical error, as the document elsewhere offered no support for that classification category. The IEP again quotes the assistive-technology evaluation providing that "the district may want to consider giving [M.I.] access to digital books via the Bookshare or Learning Ally services." It contains very limited goals, again parroting the reading-comprehension goals included in the elementary IEP. But it does now include modifications that are appropriate to a child with attentional issues, to include access to notes, extra time, use of a calculator, organizational assistance, benchmarks for long-term assignments, frequent checks for understanding, visual aids, oral directions, directions repeated and clarified, and small-group test taking. Once again, technology is noted as "considered but not applicable." On page 11, an apparent typographical error indicates that "the student can participate in extracurricular activities at Clinton Public School," notwithstanding this is now a high-school IEP. Accommodations for PARCC testing administration are included.

Wander was admitted as an expert in school psychology. She opined that the July IEP was responsive to M.I.'s needs for assistance with organization and focus. Wander rejected the suggestion that the IEP was cookie cutter, and urged that it was designed to provide individualized instruction to M.I. Relative to the absence of any specific

technological supports, Wander urged that technology was readily available to all students; if the parent wanted something specific she needed merely to ask. Importantly, Wander also pointed out that the CST routinely does a thirty-day review of all new students, at which time the technology issues could have been addressed.

Holly Blumenstyk was admitted as an expert in special-education placements and programs for students with disabilities. She is certified as a learning disabilities teacher consultant. Blumenstyk operates a private consulting firm; families and students are her only clients. She reviewed relevant documents, to include evaluations, school records and IEPs; interviewed the family; and observed M.I. in two classes in her current placement at North Hunterdon High School. Blumenstyk also reviewed the prior testimony in this case. She was not retained by the family until December 2018 and thus did not, nor could she have, assessed M.I.'s program in real time at Pennington. Nor could Blumenstyk speak to, nor was she privy to, the events that led up to the development of the 2016–2017 IEP.

Blumenstyk opined that M.I. would not have made meaningful progress under the IEPs offered by the Board in January and July 2016. She highlighted the fact that M.I. would not have been enrolled in all college-preparatory classes with in-class support; no provision was made for assistive technology; and the IEPs contained inadequate reading goals, focusing exclusively on comprehension. Blumenstyk urged that even if the IEPs had offered the appropriate in-class support, M.I. would not have progressed because she would not have been properly supported by technology.

Blumenstyk compared the IEPs offered in 2016 to the one used during the 2018–2019 school year, the year M.I. enrolled in the public high school. She emphasized that the current IEP offers much in the way of assistive technology, to include spellchecking and audiobooks. It includes goals and objectives for study skills, reading, and mathematics, and social, emotional, and behavioral goals. It includes oral-test-taking options, permission to type answers to tests, and individual and small-group test taking. Blumenstyk stressed the importance of these supports for a student with dyslexia. Another extremely helpful program in her view was the Ginger Spell Checker, an enhanced spelling device. But a review of the 2018–2019 IEP reveals that the Ginger

Spell Checker is only mentioned in a summary of the assistive-technology evaluation completed in 2012. And as to assistive-technology devices, the document continues to read "considered but not applicable." Blumenstyk pointed out that in her current IEP M.I. has two periods a day of study hall or study skills; the special educator assists there. Tests can be taken there. These supports were absent from the 2016–2017 IEP. While this may be a service that M.I. received that year, it is not reflected in the 2018–2019 IEP.

Notwithstanding, Blumenstyk persuasively opined that a comparison of the two IEPs highlighted omissions in the 2016–2017 document. I **FIND** that the IEPs offered by the school district in January and July 2016 did not include study-skills goals and objectives, clearly something appropriate for a child with attentional deficits. Read 180 testing revealed no need for a special reading program, Blumenstyk thus persuasively opined that M.I. should have been placed in a mainstream English class with support. No modifications or accommodations were offered in the January IEP. And the list of modifications offered M.I. in July could have and should have expressly included such additional supports/accommodations as access to Bookshare and other technological tools.

Blumenstyk also opined that the decision by Mr. and Mrs. I. to place M.I. at Pennington was "educationally sensible, necessary, and reasonable because their daughter was not offered a college-preparatory program in all subjects at North Hunterdon High School along with the supports, instruction, modifications and assistive technology necessary for students with dyslexia and ADHD." A determination whether the parents were reasonable is one for me to make as the trier of fact based on the totality of the record; it is not a matter for expert opinion. And even assuming that my decision could be properly influenced by expert testimony, Blumenstyk's opinion is unpersuasive. The mere qualifying of a witness as an expert does not permit her to give unsupported opinions. The witness' expertise qualifies her to take facts, and from those facts, form an opinion relevant to the issue before the court which a non-expert, with the same data, could not do. Bowen v. Bowen, 96 N.J. 36, 50 (1984). An expert's opinion must be based on a sound factual foundation. See N.J.A.C. 1:1-15.9(b)(2); Pomeranz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011).

Blumenstyk relies exclusively on documents, and on information supplied by the parents. She was not privy to the conversations that took place during IEP meetings, or other meetings between the parties. Blumenstyk has no way of knowing what tone was set; how forthcoming the parents were with their concerns; or how eager or willing school personnel were to elicit and address any parental concerns. Blumenstyk did not speak to school personnel. I am thus unable to accept her view that the parents were reasonable; the evidence actually forces a quite different conclusion.

The parents' historical preference for a private-school setting is readily borne out by the record. When the IEP provided for M.I.'s attendance at the private school of her parents' choice, its contents concerned Mrs. I. very little. The parental-concerns section of the January 2016 IEP notes that the parents wish to continue the interventions provided by Craig. But Mrs. I. signed the IEP notwithstanding the fact that few if any of those interventions were expressly outlined in the IEP itself.

Mrs. I. aggressively explored private-school placement for M.I. when the transition to high school drew near. And by the time the July 2016 IEP from the high-school district arrived, M.I. had already been enrolled at Pennington. While the summer of 2016 could have been used for productive development of an IEP, instead, the family asked Craig personnel to write in support of their quest for continued private placement, and quietly sent in a large deposit to hold M.I.'s seat at Pennington. These facts make it impossible to accept that the parents came to the high school anxious to collaborate on developing an in-district placement. While the IEPs should have contained all the services that the district intended to provide, it is nonetheless clear that the IEPs' shortcomings could have easily been addressed. The proof is in the proverbial pudding; when the family was ready to enroll M.I. in a public-school setting, the result was an IEP that Blumenstyk opined provided M.I. "educational benefit" in the "least restrictive environment." I **FIND** that relative to M.I.'s program for the 2016–2017 school year, the parents did not collaborate with the CST, and their conduct overall was not reasonable.

Pennington School

Pennington is a non-approved private school with a residential campus that supports students with disabilities via the Cervone Center for Learning. I received no testimony from a witness truly competent to describe Pennington and its program. Mrs. I. knew that she was satisfied with the program there. She urged that it offered M.I. technological support, but could not describe that support with any specificity. Blumenstyk again based her discussion on a paper review. Blumenstyk never observed M.I. at Pennington, nor did she confer with staff there about M.I. specifically. She indicated that she had toured the school on one occasion, and had spoken to the admissions director and Cervone Center director on "a number of occasions." She was uncertain if the Cervone instructional staff were certified special-education teachers. Nonetheless, it appears uncontroverted, and I **FIND**, that Pennington is an all-college-preparatory program that uses assistive technology and offers individualized instruction to students with learning differences. Moreover, it was uncontroverted, and I **FIND**, that the Cervone Center provides a Communication Skills Class which provides compensatory strategies and remediation. Educational and assistive technologies are used to help students participate in the mainstream. Attention is paid to helping students learn study and organizational skills. College-preparatory-level work can be offered in a smaller setting via the Center.

Blumenstyk noted that no copy of the ninth-grade program was available for her review, and she commented that "the detailed plan for tenth grade is provided below and it is likely similar to the type of program developed for ninth grade." Since an IEP commits the parties to an educational course for one year, and children evolve from year to year, Blumenstyk's discussion of a program offered for a year different than the one at issue was less than helpful. M.I. left Pennington after it was mutually agreed that it was no longer an appropriate setting for her. This came in the aftermath of a diagnosis of bipolar II. M.I. now attends North Hunterdon High School, pursuant to IEPs that offer her an in-district program with support, and that classify her as other health impaired (OHI).

M.I.'s Classification for the 2018–2019 School Year

Elaine Nestel, a learning-disabilities teacher consultant employed by the Board, was admitted as an expert in the field of learning disabilities and special education. She did not work with M.I. until the 2018–2019 school year. Nestel's testimony centered on the classification assigned to M.I. via the 2018-2019 IEP. M.I.'s parents felt that she should be classified under the category specific learning disability (SLD). The family's concern centers around M.I.'s diagnosis of dyslexia. The parties agree and I **FIND** that M.I. has a diagnosis of dyslexia. Nonetheless, district staff felt that her attentional issues were the focal point of M.I.'s learning differences.

Nestel opined that the OHI classification was appropriate for M.I., and allowed for an IEP that met her complex and individualized needs. Nestel conducted educational testing in November 2018 when M.I. returned to district. The Woodcock-Johnson test that she utilized was appropriate for a child with both dyslexia and ADD. Nestel tested for comprehension orally and found that M.I.'s reading-comprehension skills were squarely in the average range. Reading comprehension when asked to read independently was also in the average range, albeit weaker. Nestel explained that although diagnosed with dyslexia, by the eleventh grade M.I. did not match the Woodcock Johnson dyslexia profile. Nestel additionally noted that psychological testing revealed no discrepancy between ability and achievement; indeed, in some areas M.I. performed better than expected.[7] Nestel pointed out that M.I.'s cognitive ability was in the low-average range. Accordingly, her scores were commensurate with her ability. The SLD classification sought by the family thus was inappropriate.

Nonetheless, Nestel stressed that the IEP did address M.I.'s lingering reading issues. It included reading-comprehension goals. Although dyslexia is thought of as a decoding issue, it can likewise lead to difficulty in comprehension. The IEP provided for in-class support for M.I. by providing classroom modifications; assisting with comprehension strategies; and reteaching concepts as needed. There were several

[7] In determining eligibility for an SLD classification, the CST was required to consider both testing and functionality in the classroom. Here, the testing did not reveal the 22.5-point discrepancy needed for classification, and M.I.'s strides in reading likewise prompted the CST to focus on her attentional deficits when considering a classification category.

items included on the modifications page that would assist M.I. as well, to include access to notes; additional time on tests; oral and written directions; and access to audiobooks. These supports, in Nestel's view, were responsive to any lingering deficits caused by M.I.'s dyslexia. Kimberly Vander Groef is a school psychologist who likewise tested M.I. upon her return to the public high school. She also agreed that OHI was the correct classification for M.I.

I heard no persuasive testimony to the contrary, and accordingly, I **FIND** that OHI was an appropriate classification category for M.I.'s 2018–2019 IEP. Importantly, although Blumenstyk noted that the parents did not agree with the OHI classification, she nonetheless opined that an IEP that delivered services to M.I. under that classification was appropriate. This further buttresses my finding that the OHI classification was an appropriate one.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

As a recipient of federal funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to FAPE. 20 U.S.C. § 1412. FAPE includes special education and related services. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public school district. N.J.A.C. 6A:14-1.1(d). The Board will satisfy the requirement that M.I. receive FAPE by providing "an educational program reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances." Endrew F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335, 352 (2017).

The Procedure Used to Develop an IEP for M.I. upon her Transition to High School

Both New Jersey and federal law require that "[e]ach district board of education . . . provide educational programs and related services for students with disabilities required by the individualized education programs of those students for whom the district board of education is responsible." N.J.A.C. 6A:14-4.1; see also 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a) (2019). The I. family resides within the

jurisdiction of both the Clinton elementary and the North Hunterdon/Voorhees high-school districts, raising the issue of which district was responsible for M.I.'s educational programming, and when. Clearly, the Clinton district was responsible for M.I. and her educational programming through eighth grade. And the North Hunterdon/Voorhees district became responsible for M.I. at the start of her ninth-grade school year. The New Jersey school laws provide that "[t]he school year for all schools in the public school system shall begin on July 1 and end on June 30." N.J.S.A. 18A:36-1. Accordingly, I **CONCLUDE** that North Hunterdon was not responsible for delivering educational services to M.I. until July 1, 2016.

North Hunterdon/Voorhees nonetheless is responsible for ensuring that all transitioning special-education students receive appropriate IEPs once they matriculate to the high school. Mrs. I. urges that during the eighth-grade year, North Hunterdon's personnel were inattentive to her needs and showed no interest in a smooth transition. This position is unsupported by the record. The formal protocol described by the school-district administrators seeks to start the transition early. Notwithstanding the fact that M.I. would not become the responsibility of the North Hunterdon CST until July 1, 2016, the high school began to participate in the transition activities as early as January 2016. A representative of the high-school CST attended the January 2016 IEP meeting. The high school offered tours and classroom observations to M.I. and her parents, did Read 180 testing, and otherwise stood willing and ready to collaborate with the family prior to July 1. Some of the transition activities described by Publicover and Baharev started as early as the seventh-grade year, and it is true that M.I. was not invited to tours of the building or meetings that took place earlier than January of the year she would come to the high school. But the Board generally abided by its own transition protocols.

The requirements of N.J.A.C. 6A:14-4.1(g) are instructive. The regulation discusses the process "[w]hen a student with a disability transfers from one New Jersey school district to another . . . ." This is what occurred here, even though M.I. and her family did not themselves physically relocate to a new community. The Administrative Code requires that, "[f]or a student who transfers from one New Jersey school district to another New Jersey school district, if the parents and the district agree, the IEP shall be implemented as written." N.J.A.C. 6A:14-4.1(g)(1). The regulation envisions the new

district accepting an IEP developed elsewhere, and with no participation by the incoming district's personnel. North Hunterdon thus did more than the regulations required. Its personnel participated in the development of the IEP that would ultimately transfer to the high school when the parties met in January 2016. And Mrs. I. signed that IEP; it encompassed the first half of M.I.'s ninth-grade year; and accordingly, it would have been reasonable for the district to have believed that the "parents and the district agree[d]" and that the IEP could be "implemented as written," without a need for a further meeting.

But the IEP was not implemented as written. The IEP sent in July had changes, some that the parent found objectionable, like the change in classification, and some that improved the document, like the inclusion of enhanced modifications and accommodations. I **CONCLUDE** that Wander's actions in sending the IEP on North Hunterdon letterhead to the family without first reconvening the IEP team was inconsistent with N.J.A.C. 6A:14-4.1(g)(1) because she edited the document before sending it. The regulation does envision a scenario in which the parties do not agree to implement the existing IEP; in that case the district has thirty days from the date of enrollment to implement a new one. See N.J.A.C. 6A:14-4.1(g)(1). Wander did not follow this process either, which she could have done simply by inviting the parents to meet sometime in July 2016. I **CONCLUDE** that the actions of the North Hunterdon/Voorhees district again were procedurally deficient.

Did the 2016–2017 IEP Deliver FAPE?

Case law recognizes that "[w]hat the [IDEA] guarantees is an 'appropriate' education, 'not one that provides everything that might be thought desirable by loving parents.'" Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (citation omitted). Indeed, "meaningful participation does not require deferral to parent choice." S.K. ex rel. N.K. v. Parsippany-Troy Hills Bd. of Educ., 2008 U.S. Dist. LEXIS 80616, at *34–35 (D.N.J. October 9, 2008) (citation omitted). Nor does the IDEA require that the Board maximize M.I.'s potential or provide her the best education possible. Instead, the law 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). Although the law did not require that North Hunterdon/Voorhees acquiesce to the parents' preference for a private

school, it did require more than the IEPs it presented to the family in January and July 2016. I **CONCLUDE** that these IEPs did not deliver FAPE.

The process designed to ensure a smooth transition to the high school was a thorough and well-thought-out one, but North Hunterdon/Voorhees staff followed it rotely, and without attention to the specifics of M.I.'s case history. I have been critical of Mrs. I.'s failure to concern herself with the IEP when it gave her the school she wanted, but the same criticism extends to school personnel. Wander attended the January 2016 meeting, but appears to not have noticed, or not concerned herself with, the fact that she was committing the district to a less than fully formed IEP. The January IEP did not contain adequate goals and objectives, nor did it contain adequate modifications and accommodations. It was clearly an IEP written only to formalize an understanding between Clinton and the I. family that the elementary district would accede to their wish for private schooling. If this Board wanted to move in a different direction, it would have behooved its staff to examine the IEP a bit more thoughtfully. And even the IEP presented in July, although an improvement, did not deliver FAPE. Essential goals and objectives in study skills were lacking. Although the district completed Read 180 testing, its continued placement of M.I. in a resource center for English did not seem to account for the results of that testing. Query why a student reading at grade level would require as restrictive a setting as the resource center?

Are M.I.'s Parents Entitled to Tuition Reimbursement for the Pennington School during the 2016–2017 School Year?

Parents who unilaterally withdraw their child from public school and place her in a private school without consent from the school district "do so at their own financial risk." Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359, 374 (1985). They may be entitled to reimbursement for the costs of their unilateral private placement only if a court finds that the proposed IEP was inappropriate and that the private placement was appropriate under the IDEA. 20 U.S.C. § 1412(a)(10)(C)(ii); N.J.A.C. 6A:14-2.10(b). Having determined that the IEPs in January and July 2016 did not offer FAPE, I must now determine whether the Pennington placement was appropriate. Our courts have held that "when a public school system has defaulted on its obligations under the [IDEA], a private

school placement is 'proper under the [IDEA]' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'" Florence Cty. Sch. Dist. v. Carter, 510 U.S. 7, 11 (1993) (quoting Carter v. Florence County Sch. Dist. Four, 950 F.2d 156, 163 (4th Cir. 1991)). Since the Florence decision, the Supreme Court in Endrew F. has redefined FAPE. I thus **CONCLUDE** that the placement made by this petitioner is proper if, and only if, it was "reasonably calculated to enable [M.I.] to make progress appropriate in light of [her] circumstances." Endrew F., 137 S. Ct. 988 at 1001.

While I would have preferred a better presentation of what Pennington had to offer, under the Florence standard it is nonetheless plain to me that Pennington was appropriate. It is an academic environment that makes accommodations for students with special needs. It ultimately proved not to be a good fit for M.I., but after two years there she exited able to enter a comprehensive public high school at grade level. The Board's argument that the school was not appropriate because it was not approved, and does not appear to employ certified teachers, is unpersuasive. Our courts have held that "parents [are] entitled to reimbursement even [when a] school lacks state approval because the [FAPE] state standards requirement[s] . . . [apply] only to placements made by a public authority." L.M. ex rel. H.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 297 (D.N.J. 2003) (citing T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 581 (3d Cir. 2000)); see also Warren G. v. Cumberland Cty. Sch. Dist., 190 F.3d 80, 83 (3d Cir. 1999); 34 C.F.R. § 300.148(c) (2019); N.J.A.C. 6A:14-2.10.

Having concluded that the Board denied FAPE to M.I., and that the placement at Pennington was appropriate, I am authorized to "grant such relief as [I determine] is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). Our courts have held that "equitable considerations are relevant in fashioning relief under the IDEA." Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985). A court may reduce or deny reimbursement costs based on the parents' unreasonable behavior during the IEP process. 20 U.S.C. § 1412(a)(10)(C)(iii). New Jersey regulations likewise confirm that the cost of reimbursement may be reduced or denied "[u]pon a judicial finding of unreasonableness with respect to actions taken by the parents." N.J.A.C. 6A:14-2.10(c)(4). The regulations specifically require that parents advise the district at the "most

recent IEP meeting" that they were rejecting the IEP and give at least ten business days' notice of their concerns or their intent to enroll their child in a nonpublic school. N.J.A.C. 6A:14-2.10(c)(1) and (2). The intent of the regulation is to afford the district an opportunity to respond to the parents' concerns; work collaboratively with the parents to develop an IEP that delivers FAPE; and obviate the need for unilateral placement. The intent of the regulation is to afford the parties one last opportunity to develop a plan for the student in the manner that the federal law intended.

Here, the conduct of the district was well-intentioned, but procedurally and substantively flawed. Nonetheless, the Third Circuit Court of Appeals put it well when it stated that the requirements of the IDEA were not intended as "a hook on which to hang a tuition reimbursement claim." C.H. v. Cape Henlopen Sch. Dist., 606 F. 3d. 59, 70 (3d Cir. 2010). These parents reached out to the high-school district only to set up a reimbursement claim. The I.'s actively, and secretly, pursued private-high-school placement. They did not attend IEP meetings earnestly seeking to collaborate on the development of an appropriate educational plan for M.I. A wholly inadequate IEP was readily signed by Mrs. I. when it achieved her goal of continuing M.I. at the Craig School, notwithstanding the fact that the very same IEP placed her daughter in a mainstream high-school setting with few supports. Mrs. I. urged that she earnestly visited the high-school program, but she did so simultaneously applying to private schools and without letting on that she was doing so. Not once did she say that the program offered by the Board was so inadequate that she might need to privately place M.I. if the district did not adjust or amend the IEP in the ways she saw appropriate.

When the second IEP arrived in early July 2016, Mrs. I. promptly expressed her dissatisfaction with it. And only about two weeks later she filed for due process. But although she had a signed contract to enroll M.I. at Pennington she again did not inform North Hunterdon/Voorhees personnel. And by the end of July a nearly $10,000 deposit would hold M.I.'s place at Pennington, again unbeknownst to the CST. The parties met in August and again Mrs. I. did not alert school personnel that the flaws in the IEP might compel her to privately place M.I. and seek reimbursement for her expenses. July and August were months that could have, and should have, been used to allow the district to appreciate how earnest Mrs. I.'s dissatisfaction was, and to amend its IEP accordingly.

The prior ALJ and Judge Thompson both concluded that Mrs. I. gave late notice to the district of her daughter's unilateral placement. I now **CONCLUDE** that in addition, Mrs. I.'s conduct was so unreasonable as to serve as a bar to the relief she seeks. Her notice was not just a bit late, it was egregiously late, and was colored by an utter lack of candor. Our courts recognize that "[t]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations." C.H., 606 F. 3d. at 72; see also M.S. v. Mullica Twp. Bd. of Educ., 485 F. Supp. 2d 555, 568 (D.N.J. 2007), aff'd, F. App'x 264 (3d Cir. 2008).

M.I.'s Classification

In reaching its determination that the appropriate classification for M.I. was "other health impaired," the CST was guided by the definition contained at N.J.A.C. 6A:14-3.5. "Other health impaired" means

> a disability characterized by having limited strength, vitality or alertness, including a heightened alertness with respect to the educational environment, due to chronic or acute health problems, such as attention deficit disorder or attention deficit hyperactivity disorder, a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes or any other medical condition, such as Tourette Syndrome, that adversely affects a student's educational performance. A medical assessment documenting the health problem is required.
>
> [N.J.A.C. 6A:14-3.5(c)(9).]

It is clearly the classification category that is the gateway for programming attentive to M.I.'s attentional deficits.

Conversely, "specific learning disability" is "a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written . . . ." N.J.A.C. 6A:14-2.5(c)(12). It is "determined when a severe discrepancy is found between the student's current achievement and intellectual ability" in any number of

areas, to include reading. N.J.A.C. 6A:14-2.5(c)(12)(i). The regulation provides that, if a district utilizes the severe-discrepancy methodology, it must "adopt procedures that utilize a statistical formula and criteria for determining severe discrepancy. Evaluation shall include assessment of current academic achievement and intellectual ability." N.J.A.C. 6A:14-2.5(c)(12)(iv). The facts here revealed that the CST employed this methodology to determine that SLD was not the classification best descriptive of M.I.'s needs. While all agree that M.I. suffers from dyslexia, testing performed by district personnel confirms that dyslexia is not the disability that currently is primarily affecting M.I.'s ability to access her educational program. Nor did the district's statistical formula yield a severe discrepancy between ability and performance.

I thus **CONCLUDE** that the Board, through its CST, classified M.I. in a manner consistent with the requirements of N.J.A.C. 6A:14-2.5 during the 2018–2019 school year.

ORDER

Based on the foregoing, together with the record as a whole, the consolidated petitions of appeal are **DISMISSED**.

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

October 30, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency

Date Mailed to Parties:
sej

APPENDIX

Witnesses

For Petitioners:

Holly Blumenstyk

Mrs. I.

For Respondent:

Mary Patricia Publicover

Rachel Wander

Elaine Nestel

Kimberly Vander Groef

Zulejka Baharev

Exhibits

Joint Exhibits:

J-1 Timeline

J-2 Emails

J-3 Pennington School Calendar

J-4 Upper School Admission

J-5 Psychological evaluation

J-6 Educational evaluation

J-7 Educational evaluation

J-8 Psychological evaluation

J-9 IEP (Clinton schools)

J-10 Draft IEP

J-11 Emails

J-12 Emails

J-13 Reading assessment

J-14 Correspondence

J-15 Emails

J-16 Correspondence
J-17 Emails
J-18 Correspondence
J-19 Due-process petition
J-20 Emails
J-21 Emails
J-22 Emails
J-23 Emails
J-24 Correspondence
J-25 Correspondence
J-26 Emails
J-27 Emails
J-28 Emails
J-29 Emails
J-30 Correspondence
J-31 Emails
J-32 Emails
J-33 Emails
J-34 Draft IEP
J-35 Correspondence
J-36 IEP
J-37 Draft IEP

For Petitioners:

P-1 through P-17 Not admitted
P-18 Expert report
P-19 Resume
P-20 Not admitted
P-21 Identified but not admitted
P-22 Identified but not admitted
P-23 IEP

For Respondent:

R-1 Resume

R-2 Email

R-3 IEP and accompanying documents

R-4 Educational evaluation

R-5 IEP

R-6 IEP

R-7 Psychological evaluation

R-8 through R-11 Not admitted

R-12 Resume

R-13 Resume

R-14 Application form

R-15 Resume

R-16 Correspondence

R-17 Certification with attachments