

**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

OAL DKT. NO. EDS 10045-18

AGENCY DKT. NO. 2018-28406

**M.D. AND S.H. ON BEHALF OF L.D.,**

Petitioners,

v.

**VINELAND CITY BOARD OF  
EDUCATION,**

Respondent.

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**Mark W. Voight**, Esq. for petitioners (Law Office of Mark W. Voigt, attorneys)

**Jay D. Branderbit**, Esq., for respondent (Kent/McBride, P.C., attorneys)

Record Closed: January 16, 2019

Decided: February 11, 2019

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

**STATEMENT OF THE CASE**

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1401-1484(a). Petitioners, M.D. and S.H., on behalf of their minor son L.D. (born in January 2006), seek out-of-district placement at the Centreville Layton School (Centreville Layton), reimbursement for petitioners' payments to Centreville Layton for extended school year (ESY) 2018 and the 2018–19 school year, compensatory education, reimbursement for expenses associated with the Independent Education Evaluation (IEE) performed by Dr. Kay, and other costs due to the alleged failure of the Vineland School District (Vineland or District) to provide a free appropriate public

education (FAPE) to L.D. The District alleges that its June 20, 2018 proposed individualized education program (IEP) provided FAPE to L.D. and that Centreville Layton is not a proper placement. At issue is whether the District provided L.D. with a FAPE.

### **PROCEDURAL HISTORY**

On June 29, 2018, petitioners filed a due process petition with the Office of Special Education Policy and Procedure (OSEPP). The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on July 17, 2018 pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13. The hearing was conducted on November 13, November 30, and December 13, 2018. The parties submitted post-hearing summations, and a hearing was held on January 16, 2019 to finalize exhibits and the record closed.

### **FACTUAL DISCUSSIONS AND FINDINGS**

#### **Testimony**

##### **For Respondent:**

**Meghan Ziller** (Ziller) was L.D.'s case manager during the 2017-18 school year. Part of her duties was to oversee the proper implementation of L.D.'s IEP for sixth grade. Ziller has fifteen years of employment with Vineland, six years as a Special Education teacher and nine years as a Learning Disability Consultant. Her job is to evaluate students and assist in the preparation of their IEPs. Ziller is a certified learning disability consultant.

L.D. attended kindergarten in the District but his parents enrolled him in Vineland Public Charter School (Charter) for his first through fourth-grade years. For fifth grade, L.D.'s parents reenrolled him in the District where he attended Pauline J. Petway Elementary School (Petway). L.D. arrived at Petway with a Section 504 Accommodation

Plan<sup>1</sup> in place, and on September 20, 2016, Vineland created its own Section 504 Plan for L.D.'s fifth-grade year that was approved by petitioners. (R-7 and P-4.) Ziller had no connection with L.D. while he was a fifth-grade student at Petway, but she was familiar with L.D.'s school records from fifth grade. Her familiarity included her awareness that S.D. made a referral to the CST for evaluations in December 2016 that was denied. S.D.'s second request in February 2017 was granted in March 2017. There was an IEP meeting on August 16, 2017 and L.D. transitioned to the sixth grade at the intermediate school with an IEP in place. (R-13.)

As L.D.'s case manager, Ziller observed L.D. in the classroom during sixth grade. At some point, Ziller became aware that S.H. was concerned that L.D. was not progressing with the technology being offered as part of L.D.'s accommodations under his IEP. According to Ziller, she offered to convene a team meeting but S.H. rebuked the offer as just more talking, so the meeting did not occur. At the annual review IEP meeting convened on April 23, 2018, petitioners attended with their attorney and unbeknownst to the other attendees, S.H. tape recorded the meeting. (R-3.) Ziller began the meeting by noting that L.D. was very bright. As a result, L.D. receives general education curriculum with modifications and accommodations. L.D. is assigned a special education teacher for all core academics as in-class support, as well as the general education teacher assigned to the class. L.D.'s special education teachers, Cavaliero and Young, were present to express their concerns and discuss L.D.'s progress during his sixth-grade year. A pervasive theme regarding L.D.'s progress was that if he was interested in the material or the subject matter, he was motivated and successful. At other times, L.D. would refuse to complete the assignments or cooperate with the technologies or accommodations offered to him. He would completely shut down. As a result, L.D. failed to complete assignments. To address this concern, the discussions at the meeting focused on how to better use the technology, such as Read and Write for Google which requires no writing, and the recommendation that L.D. may be better served in a resource room (pull-out) for Language Arts, L.D.'s weakest subject. Because the parents and the CST were still waiting to review the petitioners' IEE, Ziller extended the offer of a second meeting. Ziller's impression gleaned from the questions and comments posed by the parents and

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<sup>1</sup> This is a reference to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

their attorney was that petitioners were not interested in the suggestions offered by the CST. As case manager, Ziller felt strongly that the CST had not exhausted their options to help L.D. At the end of the meeting, petitioners' attorney stated that petitioners were seeking an out-of-district placement for L.D. at Aim Academy in Conshohocken, PA.

Ziller recalled that prior to departing from the meeting, L.D. was invited to join the meeting and discuss his concerns. L.D. stated that he most enjoys tinkering around in his garage and that he wants to be a welder.

In May 2017, the CST received and reviewed the IEE report from petitioners' expert, Dr. Kay. Based upon the testing and the reports, the CST felt it was appropriate to alter L.D.'s classification to multiply disabled to encompass all of L.D.'s areas of concern. L.D. was found to have Attention Deficit Hyperactivity Disorder (ADHD), provisional Tourette syndrome (Tic Disorder), a Specific Disability in the area of writing, and provisional Oppositional Defiant Disorder (ODD). The writing piece was the specific learning disability that gave L.D. the most difficulty. While the team felt that most of Dr. Kay's suggestions had already been included within L.D.'s IEP, they also felt it was appropriate to adopt some recommendations that were not included. Nine recommendations from Dr. Kay's IEE were included within the IEP. (R-14.) Dr. Kay had recommended a specific writing program by Diana Hanbury-King. After the CST discussed the program with the District's reading specialist who confirmed the recommendation, Vineland agreed to purchase the program and incorporate it into L.D.'s instruction. The CST also recommended that L.D. be placed in a pull-out resource room for Language Arts to implement the Hanbury-King instruction and focus on the writing disability. The resource room has a maximum of twelve students with one special education teacher and one resource person. Ziller stated that the team believed the resource room would be the best placement to start the seventh-grade year. However, depending on L.D.'s progress, his placement would be revisited during the school year with the goal of returning him to the general education classroom with in-class support. In response to how the program would be utilized, Ziller stated that L.D.'s teachers would receive training on the program to incorporate its methods into L.D.'s other core classes.

There was a meeting on June 20, 2018 to discuss the IEP. This meeting was also secretly taped by S.H. L.D.'s parents were not receptive to the resource room pull-out suggestion because of their concern that L.D. would be functioning at a higher level than the other students given his advanced reading ability. Ziller countered by stating that L.D. would be receiving appropriate seventh-grade materials and the special education teacher was able to accommodate each student in the room according to each student's needs. At the end of the meeting, petitioners' attorney requested that L.D. be placed at Centreville Layton in Delaware for seventh grade. Ziller stated that Vineland was given no prior notice of the request or an opportunity to consider it. Petitioners immediately rejected the June IEP and disenrolled L.D. from Vineland on July 2, 2018. Ziller felt that the parents never intended to consider the June IEP or leave L.D. in district for seventh grade.

On cross-examination, Ziller recalled that the April 2018 IEP meeting lasted approximately two hours and there were discussions about L.D.'s present levels of achievement, the annual goals, appropriate modifications, and placement. Ziller explained the difference between a CST meeting and an IEP meeting. She responded that she never worked with L.D. on a one to one basis but she observed L.D. in a small group setting. Ziller stated that she was not involved with L.D. while he was a student at Petway during his fifth-grade year and consequently did not know L.D.'s fifth-grade teachers. L.D. did not have an IEP in place until sixth grade. Ziller was not involved in drafting the August 16, 2017 IEP for sixth grade. In response to questions about why ESY was not offered for 2017 or 2018, Ziller responded that L.D. was not identified until August 2017. Ziller explained the protocol and stated that the District looks at accumulated data for signs of academic regression. As L.D. only came to the District in fifth grade, there was not enough available data from which to gauge regression. ESY was not offered after sixth grade because L.D. exhibited no signs of academic regression.

Ziller was questioned about whether L.D.'s grades showed progress when he received an F in homework and he went from a C in the first marking period to a D in the second marking period for Language Arts. Ziller responded that homework grades are not the only indicator of progress and that Language Arts was the area of concern for L.D. that was being addressed in the June 2018 IEP. On cross-examination, Ziller was asked

to review the Teacher Input Questionnaires from L.D.'s sixth-grade teachers that were used by Dr. Kay in her IEE. (P-21.) Given that the teachers remarked that L.D. was unhappy, argumentative, and does not complete schoolwork, Ziller was asked why a behavior intervention plan was not initiated. Despite the negative comments, Ziller stated that from a CST perspective L.D.'s academic needs would be addressed before behavior intervention is warranted. L.D. was clearly very bright and at times he was highly motivated, but he could also be argumentative. Ziller stated that these behaviors were addressed with L.D.'s parents. The CST did not feel that behavior was the main issue for L.D.

Ziller was asked to review petitioners' written request for an IEE with Dr. Kay dated February 22, 2018 (P-18) and Vineland's response dated March 1, 2018 (P-32, page 9). It was Ziller's understanding that the District was unable to accept petitioners' choice of Dr. Kay because Kay did not hold a NJ Certification. She also knew that the District had a list of NJ certified providers which they shared with parents. (P-38.)

Ziller was questioned about the goals in the June 20, 2018 IEP and whether they were measurable. Ziller stated that the goals were objective and measurable and the base lines for the goals are the writing samples and the learning evaluations. L.D.'s measurable goals were divided into benchmarks and determined on an eighty percent success rate. The teachers work together to determine what the child is capable of and what the child should be capable of by the end of the year. She stated that any one of his teachers could review the IEP and know what to do. The goals and objectives are created by the teachers with input from Ziller. She stated that these goals are specific to L.D.

When asked about the pull-out resource replacement, Ziller testified that she observed the program and acknowledged that the students in the room would have varying abilities. However, there are Language Arts pull-outs on different levels and L.D. would be placed according to his need. L.D.'s writing deficit is the specific need to be addressed and the CST felt that L.D. would be best served in the resource room placement.

On cross-examination, Ziller was asked how L.D.'s problems with writing could continue, yet, the IEP's goals were marked as mastered. Ziller stated that goals and objectives are met through rubrics. She disagreed with the position that Vineland had no objective data to support L.D.'s progress.

On re-direct, Ziller explained that a rubric is a tool used by a teacher to measure whether a student is meeting goals. In L.D.'s case, the writing assignments would be reviewed by L.D.'s teachers.

On re-direct, Ziller was also asked about the teacher questionnaires used by Dr. Kay in her report. Ziller stated that Dr. Kay was asking for the extremes, L.D.'s behavior on his good versus his bad days. She also noted that when L.D. entered Vineland for fifth grade, he had a 504 Plan, but an IEP was put in place for sixth grade. Ziller also noted that the IEE prepared by Dr. Kay did not recommend a behavior plan for L.D.

**Alex Nonnemacher** (Nonnemacher) is the Supervisor of Special Education for Vineland Public Schools. He testified on behalf of the District as an expert in IEP planning and school psychology. Nonnemacher holds a Bachelor of Science degree from Ursinus College and a Master's degree in School Psychology from Rowan University. He also holds the following certifications: NJ State School Psychologist; ED.S. School Psychologist; and N.J. Supervisor Certificate. The Supervisor Certificate allows him to observe staff and make placement decisions. (R-2.) In his capacity as Supervisor of Special Education, Nonnemacher attended the IEP meetings held in April and June of 2018. Nonnemacher is also familiar with L.D.'s student file during L.D.'s time at Vineland for fifth and sixth grade; his 504 Plan in place that was maintained by Vineland for L.D.'s fifth-grade year; and the IEE.

In December 2016 after enrolling L.D. in Vineland with a 504 Plan in place, petitioners made a referral for testing. The CST considered the referral but decided not to evaluate because L.D. had only been at Vineland for a brief time and there were no emergent issues involving the student. Nonnemacher testified that this decision was appropriate to a reasonable degree of professional certainty. However, in March 2017 as

the year progressed, there were continuing issues in the classroom, so the CST agreed that the referral to initiate an evaluation process was appropriate.

On August 25, 2017, L.D. was referred by his physician to Don D. Blackburn, O.D. of Delaware Vision Academy (DVA) for a developmental optometric evaluation. (P-17.) Nonnemacher testified that the recommendations in the report had a medically necessary component for therapy and home support and an accommodation component to be followed by the school. The educationally-based accommodations were incorporated into L.D.'s IEP. (R-1 at paragraph 22.) Nonnemacher stated that vision therapy is a controversial area but looking at L.D.'s test results, vision therapy was not warranted. Dr. Kay administered the NEPSY-11 Neuropsychological Assessment to L.D. as part of her evaluation. The Visuospatial Processing subtests measure how well a child sees and arranges visual information. L.D. performed at the "At Expected Levels" and "Above Expected Levels" except on the design copying process motor score which was "Borderline." In addition to the DVA report, Dr. Kay's testing did not support the need for vision therapy by Vineland as a related service. Nonnemacher stated that he was curious that Kay recommended it because it was not born out by the test results.

Nonnemacher took issue with the methodology used by Dr. Kay for the IEE as well as the findings made and ultimate opinions reached. Due to L.D.'s ADHD, Nonnemacher questioned the efficacy of subjecting L.D. to a battery of tests over two very long days after he endured a two-hour drive to the appointment. All the testing was done in the Lancaster Pennsylvania office, and there were no visits to Vineland or observations of L.D. in the classroom. The testing was divided between Kay and Victoria Zuckerman, Ph.D., so Nonnemacher questioned why Kay did not administer all the tests herself. He found it troubling because the interpretation of clinical results and drafting a report is a craft. Nonnemacher saw discrepancies between the scores on the tests administered by Vineland with Kay's testing results calling into question the validity of Kay's findings. In July 2017, Vineland administered the Wechsler Intelligence Scale for Children-V (WISC-V) and an educational assessment using the Wechsler Individual Achievement Test-III (WISC-III). (P-12.) The IEE found deficits in language-based reading delays, working memory, and attention and executive functioning that was not supported by the results of the WISC-V and the WISC-III. The example given is that L.D.'s working memory was in



the average range, but Kay used working memory as a weakness and recommended ESY. L.D.'s cognitive ability tested in the above average range, but Kay's testing determined L.D.'s cognitive ability to be just average. On the Conner's 3rd Edition, Nonnemacher noticed that Kay relied on the reporting from the parents significantly more than she considered the reporting from the Vineland teachers. He also found that Kay overstated the significance of differences in the Behavior Assessment System for Children: Second Edition (BASC-3) administered by Vineland and Centerville Layton. Kay made claims about a language-based reading disorder being present that was not supported by any of the testing. Kay focused heavily on an instrument called Comprehensive Test of Phonological Processing-Second Edition (C-Topp-2) that looked at language-based disorders but did not make any diagnoses or recommendations about reading.

Kay administered the Woodcock-Johnson IV Standard Tests of Cognitive Abilities (W-J IV Cog) that showed L.D. scored in the "Average range" for Working Memory consistent with the Vineland testing. Yet, Kay opined that L.D. needed an ESY program due to his challenges with working memory.

Nonnemacher remarked that the data on the Attention and Executive functioning subtests of the NEPSY-2 administered by Kay could be open to more than one interpretation and he did not agree with how Kay interpreted the data. The data revealed expected level to above expected level on multiple measures. Inhibition represented an area of relative weakness, but the broad clinical picture showed a student who completed challenging tasks to multiple modes of attention and executive function and scored in expected levels. Nonnemacher stated that the data and observations used by Kay from the Centerville Layton staff showed that L.D.'s behaviors were similar to his behavior while at Vineland. He noted that it would not be a true comparison because summer programs are much shorter and less demanding than the regular school year. L.D. presented as a bright and likeable student. Nonnemacher reviewed L.D.'s Progress Report from Centerville Layton and did not find any significant differences from L.D.'s Progress Reports at Vineland. L.D. continued to have struggles with writing and homework. (P-53.)

Nonnemacher took issue with Kay's characterization that the goals and objectives in the June 20, 2018 IEP were vague. After receiving Kay's IEE, the CST team met to discuss her testing results and recommendations. According to Nonnemacher, Kay's determination that L.D. had a language-based reading disorder is not consistent with observable academic achievement measures, including his average scores in Reading Comprehension. Teachers use the Scholastic Reading Inventory (SRI) test to assess students' levels of Reading Comprehension. SRI helps determine at what level a student is reading and L.D.'s scores were high. Nonnemacher acknowledged that the Comprehensive Test of Phonological Processing – Second Edition (CTOPP-2) testing revealed some low test scores but those scores did not represent the overall picture of what was going on in the classroom.

In response to why ESY was not offered to L.D., Nonnemacher stated that the CST evaluates whether it is appropriate. The SRI is used as a benchmark by the special education and general education programs. There are also individual discussions regarding how the student performed after a long break or when they come back from summer recess. The CST is required to make ESY a part of every IEP discussion. In L.D.'s case, problems with regression or recoupment were never noted in any of his school records. In addition, L.D.'s working memory test results were in the average range.

L.D.'s IEP for Sixth Grade (R-13) contained measurable goals, bench marks and objectives. Nonnemacher stated the IEP was appropriately ambitious but achievable. The goals for Reading, Writing, and Mathematics were clearly spelled out. The evaluation procedures attached to each goal included teacher devised tests or worksheets and class participation. (R-13, page 9.) L.D.'s goals were appropriate for a student in a general education classroom. The Progress Report, mailed to the student's home four times a year, reported L.D.'s progress in each of the goal areas defined in the IEP. (R-12.)

In addition to the Progress Report, L.D. also received a regular report card. (R-11.) L.D.'s sixth-grade Report Card noted the following final grades: Language Arts 80; Phys Ed 89; Health 97; STEM 96; STEAM 79; Art 75; World Language 41; Science 90; Social Studies 81; and Math 86. In World Language, the teacher comments reflected a "lack of effort."

A review of L.D.'s sixth-grade year in the District, Nonnemacher opined that FAPE was provided. L.D. had good attendance and generally good grades in all Core subject areas. L.D. received in-class supports by having a special education teacher in addition to the general education teacher in the classroom.

Before finalizing the IEP for seventh grade, the CST reviewed Kay's IEE. Upon consideration, the proposed IEP offered by the District incorporated specific segments from the IEE, including the recommended Reading program to help L.D. with his written expression and additional modifications to address attention deficits. The CST recommended pull-out placement in the Language Arts resource room as the best place to implement the Reading program. Pull-out replacement provides a more individualized setting. The IEP reflects the full school year, but Nonnemacher testified that changes can be made to reflect the student's needs or progress. Nonnemacher stated that the parents' recommendations are vital to any discussion, but they are not the only factor in deciding placement or program. L.D.'s parents were against the pull-out placement for Language Arts. While Nonnemacher believed there was the possibility of continuation of dialogue after the June 20, 2018 second IEP meeting, the parents rejected the IEP on the spot leaving no room for further discussions.

On August 6, 2018, after L.D. attended a summer program at Centreville Layton, Kay prepared an IEE Addendum. Nonnemacher reviewed the Addendum and felt that it did not change anything. The additional testing revealed L.D.'s at risk problem areas. Because Centreville Layton is not a New Jersey approved private school for children with disabilities, it does not have to follow the same standards as certified New Jersey schools. The District did not recommend this school for L.D. The out-of-district placement request from the parents was for a specific school; the parents did not seek input from Vineland.

Vineland's proposed seventh-grade IEP contained assisted technology, specific modifications, and accommodations directly from Kay's IEE. It also addressed work load issues, contrary to Kay's statements in her Addendum. The IEP (R-14) modified test times, work load and homework assignments. For the 2018-2019 school year, Centreville Layton prepared a Student Accommodation and Modifications Plan (SAMP). Nonnemacher reviewed the SAMP and determined that it did not meet New Jersey

standards. There were no evaluations or benchmarks and the goals were less specific than what is required for an IEP in New Jersey. The academic goals were less specific in the SAMP. The Reading goal was vague and confusing and did not consider that L.D. was already reading on a seventh-grade level. Kay had stressed the need for remedial working memory, vision therapy, and behavioral supports but none of these areas were addressed in the SAMP. Nonnemacher did not believe Centreville Layton was an appropriate placement for L.D.

During L.D.'s two years attending district schools, Nonnemacher determined that L.D. was provided with FAPE. He also stated that the June 2018 IEP would have continued to provide FAPE. It incorporated concerns of all parties and utilized appropriate testing.

On cross-examination, Nonnemacher stated that he was not a tenured employee with Vineland. Nonnemacher also stated that he does not work as a supervisor for the students with 504 Plans. Vineland decided to proceed with evaluations for L.D. in March during L.D.'s fifth-grade school year which was the first year L.D. was attending school in the District since kindergarten. Therefore, according to Nonnemacher, there was no violation of Vineland's "child find" obligation. Nonnemacher was questioned about Vineland's failure to evaluate L.D. for vision therapy. Nonnemacher responded that if it's appropriate Vineland would have evaluated L.D. In the normal course, the school districts offer vision screening by a nurse. L.D.'s evaluation by DVA recommended modifications for the school which were provided to L.D.

Nonnemacher agreed that testing data in Kay's IEE supported her finding that from an academic standpoint L.D. performs well in Math Reasoning and has adequately established basic Reading skills; however, he demonstrates severe academic underachievement in Written Expression and fluency of Math facts recall. Nonnemacher disagreed with Kay's statement that Vineland's IEP did not contain specifically designed instruction. At Vineland, L.D. received modifications of the best teaching practices universally designed for students in general education.

Nonnemacher responded that the pull-out resource placement was a specifically designed program for L.D. (P-27, page 12.) The section of the IEP titled Present Levels of Academic Achievement and Functional Performance (PLAAFP) contains the specifics. (P-27, pages 2-8.) The PLAAFP details the specifics of the writing skills program, its implementation, and any additional supports required. Teachers are not specifically named in an IEP, partly because teaching assignments are not determined until summer. The District's reading specialist travels and supports teachers with instruction on how to implement the programs offered in Language Arts. On cross-examination, Nonnemacher was asked whether parents were just supposed to trust that this would happen. While there is a degree of trust, Nonnemacher had no reason to question the ability of the District's reading specialist. In response to questioning regarding the resource room, Nonnemacher answered that there were twelve students in a resource room with various degrees of disability. However, Vineland is a large enough school district, allowing for a full complement of programs.

On cross-examination, Nonnemacher was questioned about the first annual goal in the area of writing which was for L.D. to "increase his ability to plan and sequence information into a coherent written passage with 80% success." Nonnemacher responded that the PLAAFP statement would have underlying data and topical information. The measurable data comes from progress notes and the information contained in the PLAAFP. Nonnemacher was also questioned whether there was a specific test given to determine if the goal was achieved. Nonnemacher stated that there is no specific test but the teacher could bring work samples, if requested. In addition, progress reports are sent home four times a year and the parents could request a teacher conference. Nonnemacher stated that the IDEA did not require the District to prove progress but only that progress be measurable.

On re-direct examination, Nonnemacher was asked whether it was required that teachers bring tests or work samples to an IEP meeting or if teachers are required to show their work to back up the progress. The answer was no; however, parents were always entitled to request teacher conferences or request the materials. Nonnemacher was also asked about modifications. For L.D., the content of the material was the general education curriculum; there was no need to modify content.

Nonnemacher was asked whether there was any explanation for L.D.'s failing grade in Spanish. L.D.'s Spanish teacher, Jaime Gomez, reported in an email to the guidance counselor that after a private conversation, L.D. revealed that he has a negative attitude toward Spanish speaking people coming to the country and expecting us to learn their language. (R-6, page 68.) L.D. was counseled by the Guidance Counselor but he still refused to participate in the class. Nonnemacher determined that L.D.'s reluctance to learn the Spanish language was unrelated to his disability.

**For Petitioners:**

**Margaret J. Kay, Ed. D., NCSP** (Kay) is a Nationally Certified School Psychologist and testified for petitioners as an expert in school psychology. Petitioners referred L.D. to Kay to prepare an IEE because L.D. had a history of poor writing, his grades were inconsistent, he demonstrated weakness in executive functioning, and his teachers indicated that he uses his time poorly.

As part of the IEE, Kay conducted a history, wherein she noted that L.D. attended All Kids First Preschool prior to entering kindergarten in the Vineland Public Schools. He attended first through fourth grades at Vineland Public Charter School and was provided with a Section 504 Accommodations Plan. At that time, L.D. had a diagnosis of ADHD, tics, fine-motor skill delays and anxiety. His 504 Plan accommodations included extended time to complete assignments and tests, frequent breaks, use of sensory objects for fidgeting, a peer buddy to help organize homework, permission to stand and move about, checks for understanding of directions, and minimizing of visual and auditory stimuli. L.D. transitioned to the District, Petway Elementary School, for fifth grade.

L.D. has a writing disability, known as Dysgraphia. Dysgraphia makes the act of writing difficult and can lead to problems with spelling, handwriting, and putting thoughts on paper. According to Kay, because writing demands increase as a student progresses grade levels, students can become increasingly stressed. The act of writing is exhausting for them.

Vineland evaluated L.D. in July 2017 and administered the Wechsler Intelligence Scale for Children-V (WISC-V). L.D. tested in the very high range and obtained a Full-Scale IQ of 126. Test results indicated that L.D. demonstrated information processing strengths in verbal reasoning, vocabulary knowledge, visual analysis/synthesis of abstract/geometric forms, visual-spatial problem-solving, non-verbal reasoning, and fluid reasoning. In contrast, L.D. demonstrated weaknesses in visual scanning/tracking speed, clerical speed/accuracy and working memory. Kay stated that while L.D. was gifted in verbal learning and creative thinking, his writing scores were average to low. Based on the WISC-V results, Vineland had recommended that L.D. use a computer with a word processor to complete lengthy assignments and be provided with extended time to complete assignments and tests.

Kay and Victoria Zuckerman, Ph.D., working as a team, administered neuropsychological testing to L.D. on April 23, 2018 and May 2, 2018. Kay noted in her report that as the testing progressed L.D. became sullen and argumentative with the examiners. He was also oppositional and refused to complete written work. (P-26, page 12.) Because L.D.'s behavior could be an obstacle to completing the testing demands, Kay stressed the importance of conducting a history and reviewing teacher and parent questionnaires.

As described in Kay's IEE, the following tests were administered:

To test L.D.'s cognitive processes, Kay chose to administer the Woodcock-Johnson-IV Standard Test of Cognitive Abilities (Woodcock-Johnson) over the WISC-V. She stated that the Woodcock-Johnson scores are generally lower than the WISC-V scores. Overall, L.D. had good verbal scores, struggled to process printed language, and struggled with graphic motor skills. On the Woodcock-Johnson, L.D. was credited with a General Intellectual Ability (GIA) cluster score of ninety-seven, which is in the average range. On the Gf-Gc Composite, which estimates a person's intellectual ability based upon comprehension-knowledge as well as fluid reasoning, L.D. scored in the high average range. The Cognitive Efficiency Cluster measures cognitive processing speed and short-term working memory, which includes controlled attention, the ability to hold information in conscious awareness, the ability to perform automatic tasks rapidly and

accurately, and the person's skill in mentally manipulating information to solve problems and achieve goals. In this domain area, L.D. scored within the average range. In the Comprehension-Knowledge CHC, L.D.'s score indicated functioning in the average range in the areas of crystallized intelligence, acquired knowledge, ability to communicate knowledge verbally, and the ability to reason using previously learned experiences and procedures. In the Fluid Reasoning CHC domain area, L.D.'s score indicated average fluid reasoning and broad ability to reason, form concepts, and solve problems using unfamiliar information and novel procedures. Finally, in the Short-Term Working Memory, L.D. scored in the average range.

Kay testified that the Woodcock-Johnson scores are typically lower than the WISC-V scores. She noted that the results of the testing were consistent. L.D. has good verbal skills. His main difficulty is writing which affects his timed tests and note taking ability.

To test receptive and expressive language, Kay administered the Comprehensive Receptive and Expressive Vocabulary Test: Third Edition (CREVT-3). The results showed that L.D. comprehends language information best when the content is short, specific, to the point, and accompanied by concrete pictorial demonstrations of what is being discussed. He communicates best when given enough wait time to formulate his thoughts for speaking.

To test L.D.'s phonological processes, Kay administered the Comprehensive Test of Phonological Processing – Second Edition (CTOPP-2). L.D. tested in the average range in the Elision and the Phoneme Isolation subtests. L.D. tested in the below average range in the following subtests: Blending Words; Memory for Digits; Non-Word Repetition; and Rapid Digit Naming. L.D. tested in the poor range in the Rapid Letter Naming subtest. Overall, L.D. tested in the average range in Phonological Awareness but below average in Phonological Memory. Kay recommended providing L.D. with intensive remedial instruction using a synthetic, phonetic code emphasis approach.

To test L.D.'s Orthographic Processes, Kay administered the Jordan Left-Right Reversal Test-3rd Edition. L.D. scored in the average range. However, in the Test of Orthographic Competence (TOC), he scored poor in punctuation and word scramble;



below average in abbreviations and letter choice; and average in sight spelling and word choice.

To test Neurocognitive processes & Visual-Motor Integration, Kay administered the Bender Gestalt Test-2. L.D. scored in the normal range. The Halstead Reitan Neuropsychological Battery (finger oscillation test) showed that L.D. was mildly impaired for the preferred right hand but for the non-preferred Left hand, grip strength was seriously impaired bilaterally. Coordinated motor speed for name writing was seriously impaired for the dominant right hand and for the non-dominant left hand and Trail Making was seriously impaired for both simple and complex tasks. These results suggest bilateral frontal insufficiencies that adversely affect handwriting and endurance in completing fine-motor tasks.

Kay administered the NEPSY-II that helps assess academic, social, and behavioral difficulties in children and adolescents. The sensorimotor subtests measure how well the child can control hand movement. L.D.'s performance in this domain fell between the Below Expected Levels and At Expected Levels.

To test L.D.'s academic achievement status, Kay administered the Woodcock-Johnson-Fourth Edition Standard Tests of Achievement (W-J-IV Ach) to determine if L.D. was functioning academically consistent with his ability. L.D.'s basic Reading scores were within average range. His Reading Comprehension scores were within average range. His Reading Fluency and Broad Reading were slightly below average range. L.D.'s Written Expression scores were poor. His Math calculation skills were below average, but his Math Reasoning skills were above average. His overall academic skills were in the average range, but his academic achievement and broad achievement were below average.

To test L.D.'s social, emotional & behavioral functioning, Kay administered the Behavior Assessment System for Children: Second Edition (BASC-3) used to evaluate the behavior of children and young adults. The BASC-3 Parent Rating Scale measures the student's adaptive and problem behaviors in the community and home settings whereas the BASC-3 Teacher's Rating Scale measures the student's adaptive and

problem behaviors in school. The Clinical Scales of the BASC-3 measure maladaptive behavior and negative characteristics that cause impaired functioning in home, at school, or in interaction with peers and adults. L.D.'s Clinical Scales indicated functioning at normal limits on the parent's ratings and one of his teacher's ratings. However, one of the teacher's responses placed L.D. in the at-risk range for attention problems. The Adaptive Scales of the BASC-3 measure activities of daily living, adaptability, functional communication, leadership, social skills, and study skills. On the Adaptive Scales L.D. scored in the at-risk range on the parents' ratings and in the at-risk range for adaptability, leadership, social skills and study skills on one of the teacher's ratings, with leadership being at risk on both teacher's ratings. On the scales which comprise Externalizing Problems Composite, including hyperactivity, aggression, and conduct problems, L.D. scored within normal limits on the parents' and teachers' ratings. L.D. also scored within normal limits on the Internalizing Problems Composite and on the Behavioral Symptoms Index.

Although the parents did not indicate any problems related to a diagnosis of an Autism Spectrum disorder, Kay administered the Autism Spectrum Rating Scales and reported some elevated levels based on comments from L.D.'s Language Arts teacher regarding his behavior in class. Kay testified that the results were not significant for a diagnosis of autism.

To test L.D.'s Attention and Executive Functioning, Kay administered the Conner's 3rd Edition. L.D.'s parents informed Kay that L.D. has poor concentration and difficulty keeping his mind on work. This leads to careless mistakes and impulsive behavior. L.D.'s Language Arts teacher at Vineland indicated that L.D. is often argumentative and defiant of requests in the classroom. Both parties indicated that L.D. has difficulty finishing tasks. In the Attention and Executive functioning subtests of the NEPSY-2, which measures how well the child can plan, organize, change, and control behavior, L.D.'s performance fluctuated between well below expected levels and above expected levels. Of the twenty-four scoring areas, L.D. had two above expected levels, fifteen at expected levels, three borderlines, two below expected levels, and two well below expected levels. Kay noted that during the testing, L.D. was fidgety. He would play with pencils, go off topic, and needed to be frequently redirected to task. As testing progressed, L.D. became more

oppositional, complained he was tired, and fatigued while writing. Writing is a major obstacle for L.D. that is adversely affected by his attitude and behavior. L.D.'s teachers at Vineland responded to Kay's questionnaires that L.D. has difficulty adapting to changes in routine and difficulty with study skills. The parents' responses were much more severe than the teachers in highlighting negative behavior. The testing results were within normal limits, but the scores highlighted attention problems, problems with defiance and aggression and some opposition. Kay also noted that she saw variability in L.D. while he was in her office.

In her Summary and Recommendations, Kay wrote that L.D. presented with vocal and motor tics, attention deficits, a dysregulated arousal system, obsessive-compulsive behavior, poor impulse control, irritability, temper tantrums, difficulty shifting from one activity to another, excessive talking, and problems with writing and fine-motor functioning. (P-26, page 29.) She recommended a medical evaluation of L.D. for Tourette syndrome. According to Kay, anytime L.D. had a pencil in his hand, he was in trouble. In her IEE, Kay made recommendations for specially designed instruction and accommodations.

Kay's recommended classification for L.D. was Other Health Impaired (Attention Deficit Hyperactivity Disorder/Inattentive type, Dysgraphia, and Provisionally Tourette syndrome) and Learning Disabled (Written Expression and Math calculation skills). She opined that L.D. needed summer ESY to work on his verbal short-term memory, visual-spatial short-term memory, and verbal working memory. To improve Written Expression, Kay recommended material developed by Diana Hanbury-King.

Kay prepared an Addendum to her IEE on August 6, 2018. (P-59.) In her Addendum, Kay wrote that a follow-up evaluation confirmed the diagnosis of Tourette syndrome. She based her confirmation on the July 3, 2018 letter from Susan Blumenfeld RN, CPNP (P-59, page 13), who wrote:

L.D.<sup>2</sup> is a 12-year-old boy followed by our Pediatric Neurology Group for ADHD – Combined Type complicated by tics and

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<sup>2</sup> L.D.'s first name was used in the letter but will not be used in this decision for privacy concerns.

anxiety which would allow for a more unifying diagnosis of Tourette syndrome.

In her Addendum, Kay included the responses received from L.D.'s teachers at Centreville Layton to her Teacher Input Questionnaire. (P-59, page 5.) Kay stated that the teachers at Centreville Layton presented a very rosy picture of L.D. from his summer program which she found to be the polar opposite of the responses from the Vineland teachers. Kay also testified that L.D.'s behavior during his ESY at Centreville Layton was solidly within normal limits.

In the Addendum, Kay responded to follow-up questions posed about the June 20, 2018 IEP. Kay determined that the June 20, 2018 IEP did not offer FAPE. She opined that the annual goals were not sufficiently stated. In Kay's opinion there was nothing in the IEP that stated how the problem was going to be addressed by specially designed instruction and there was no guidance in the IEP to measure how it is working. She termed the goals a "wish list." Kay stated that the classroom modifications were fairly consistent with her recommendations but there was no specifically designed instruction. She stated that the IEP does not pass the stranger test, meaning that it was not easily understandable to someone unfamiliar with Vineland's CST. She deemed the pull-out from general education to a learning disability resource room to be a placement, not a program. She stated that the pull-out was not meaningful because it lacked specificity across the board.

In contrast, Kay deemed Centreville Layton to be an appropriate placement. She wrote her Addendum after L.D. attended ESY and stated there was a striking difference between the two schools. According to Kay, the bright side of L.D. attending Centreville Layton was that L.D. was engaged. Kay reviewed the SAMP (P-64) for the 2018-2019 Centreville Layton school year and stated that it was appropriate for L.D.'s needs and that the Progress Reports (P-53) were more positive than at Vineland. She also reviewed his writing skills and noted that he was developing cursive writing skills at Centreville Layton which was very helpful. (P-60.) Kay opined that L.D. was making meaningful progress at Centreville Layton where things had been deteriorating at Vineland.

Kay testified that she did not disagree with L.D.'s prior 504 accommodations. Her concern was that the accommodations were not working. L.D. needed further training. She recommended remediation of written language skills, calculator for Math, and assistive technology. Extended time is not enough because there are only so many hours in a day. According to Kay, if L.D.'s work load remained the same, L.D. would just become exhausted. He needed to have his work load reduced. She also believed L.D. needed a counseling component.

Kay reviewed L.D.'s fifth-grade report card for the 2016-2017 school year and noted that the grades were not good for a student with a superior intellect. She also noted that the Language Arts teacher recorded behavior problems. (P-34.)

In her review of L.D.'s PARCC<sup>3</sup> scores in Language Arts for 2016-2017, Kay noted that they were lower than the year before. (P-34, page 6.)

Kay also reviewed L.D.'s IEP for Grade Six. Her criticisms were the same. She took issue with the eighty percent success rate as the goal for everything. The IEP contained basic statements but Kay stated the IEP did not indicate how to measure the student's progress. (P-16.)

Kay also reviewed the April 2018 IEP that was drafted after the annual review meeting. She noted that small group instruction is not enough. According to Kay, the IEP lacked specially designed instruction. (P-25.) Kay's criticism of the Progress Report for IEP Goals and Objectives for 2017-2018 was that it was not objective and measurable because there are no baselines. (R-12.)

In her Addendum, Kay wrote that L.D. required two years of compensatory education. She testified that L.D. was rapidly going downhill. (P-59, page 10.) Kay also testified and wrote in her Addendum that Vineland should have provided vision therapy to L.D. as a related service under his IEP. (P-59, page 11.) Finally, Kay wrote in her Addendum that Vineland should have offered L.D. ESY during the summers of 2016 and

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<sup>3</sup> PARCC is an acronym for Partnership for Assessment of Readiness for College and Careers.

2017 because L.D. was falling behind because his educational needs were not being met. L.D.'s learning was regressing due to his multiple problems. Kay submitted that her charges set forth on her invoice for the work performed were fair and reasonable.

On cross-examination, Kay was asked if L.D. displayed signs of regression or recoupment. Although there was no evidence of regression or recoupment, she recommended ESY because L.D. was having a difficult time in school and maybe ESY would have helped him. Kay was also asked whether L.D. was formally evaluated for Tourette syndrome. She responded that she recalled recommending a doctor to petitioners but did not believe there was an evaluation or a diagnosis. Kay also testified that her IEE contains many recommendations and she did not expect all her recommendations would be implemented.

The District administered the WISC-V test in July 2017 and Kay administered the Woodcock-Johnson in April 2018. On cross-examination, Kay was asked why. Kay stated that the discrepancy between the two tests is not great, but she did not want to duplicate the test given by the District. Her testing was administered in her office in Lancaster. She had no contact with the Vineland teachers and never observed L.D. in a classroom setting. Kay stated that she normally does a visit but due to expense she did not do one in this case. Her input from the Vineland teachers was by way of the questionnaires.

On cross-examination Kay was asked whether there was anything in the SAMP (P-64) that specifically stated how the goals were to be met. Kay did not specifically answer the question but responded that she was familiar with the school and how it operates. She referred two or three students there in the past.

On re-direct examination, Kay stated that although the accommodations in the IEP were generally sufficient, accommodations do not equate with specially designed instruction. Kay stated that L.D. needed remediation.

**S.D.** testified on behalf of her son, L.D. She began her testimony by stating that her son has struggled academically since kindergarten. There were times when it was a

struggle just to get L.D. out of the door. Her primary concerns were L.D.'s lack of time management, poor organizational skills, poor written expression, and problems with executive function. She always believed that her son was grossly misunderstood. After problems in kindergarten, S.D. and her husband decided to send L.D. to the Charter School because they felt L.D. would benefit from smaller class sizes. The Charter School was a brand-new school, and this was also appealing to them. Despite good intentions, L.D.'s struggles continued through fourth grade. His writing was scratchy and illegible. S.D. praised the dedication of L.D.'s third-grade teacher but nothing seemed to work. L.D. was diagnosed with ADHD and was prescribed medication.

S.D. and her husband, M.D., decided to enroll L.D. in the district for fifth grade. S.D. recalled attending the first Open House and advising L.D.'s teachers about L.D.'s problems with writing. She recalled that there was a 504 meeting at Vineland and she made a verbal request for evaluations at the start of the new school year. The 2016-2017 fifth-grade year at Vineland was marked with struggles and frustration with homework taking over two hours to complete. On December 5, 2016, S.D. made a written request for evaluations (P-31, page 2) that was referred to the CST (P-5). On December 22, 2016, S.D. received the findings and conclusion of the CST that evaluations were not warranted. (P-6.) S.D. stated that they did not agree with that conclusion. Through email correspondence (P-31, page 3) S.D. reached out to L.D.'s teachers and shared her concerns about L.D.'s writing difficulty, missing assignments, and failing grades.

S.D. sent an email message to Heidi Nieves, MA, School Psychologist, for a referral for testing and special education services. The message was stamped received on February 16, 2017. (P-31.) By notice dated March 16, 2017, the District advised S.D. of its determination that an evaluation of L.D. was warranted. (P-7.) In April 2017, S.D. exchanged emails with L.D.'s teacher about L.D.'s attitude. In one email, S.D. suggested sending L.D. to the counselor. The teacher responded that she would consider sending L.D. for counseling if the behaviors escalated. (P-31, page 6-7.)

On April 10, 2017, S.D. brought her son to Nemours DuPont Pediatrics for an Occupational Therapy Assessment. Tameka L. Johnson, Pediatric Occupational Therapist, conducted the assessment and prepared a report. (P-9.) S.D. testified that it

was clear to her that L.D. needed help. She provided a copy of the report to L.D.'s teachers to help them understand L.D. better and she believed they were grateful for the report. The plan in the report was for eight weeks of occupational therapy at Nemours, evaluation by a Developmental Optometrist, a school-based occupational therapy evaluation, and accommodations for school.

On April 26, 2017, L.D. had an Occupational Therapy Evaluation by Vineland Public Schools. (P-10.) The evaluator found that school occupational therapy was not recommended. The recommendations of the evaluator that L.D. should be encouraged to form his letters correctly were viewed by S.D. to be insulting. The report continued the accommodations of breaks for long writing tasks, reduced work load, and encouraged typing of written work.

L.D. had eight weeks of occupational therapy over the summer at Nemours. The parents paid their co-pay out of pocket. The therapy stopped when school started. S.D. was pleased and thought the therapy was very helpful.

In describing L.D.'s fifth-grade school year, S.D. said that L.D. got average grades because he tests well, but she was not satisfied with the number of incompletes or the low PARCC test scores. His final grades in his core subjects were C's in Language Arts, Science, and Social Studies, and a D in Mathematics. (P-34.) L.D.'s work product was not legible, so S.D. would often scribe his assignments for him. (P-35.)

To determine L.D.'s eligibility for special education services, Vineland administered evaluations in the following areas:

1. Heidi Nieves, School Psychologist, for Vineland conducted a Psychological Evaluation of L.D. on July 11, 2017. (P-12.) Nieves administered the WISC-V. L.D. received high scores in Verbal Comprehension, Visual Spatial, and Fluid Reasoning, an average score in Working Memory, and a very low score in Processing Speed. L.D.'s full scale IQ was very high with a score of 126, corresponding to a 96th percentile rank.



2. Leona Porter, the CST social worker, performed a social history evaluation on July 11, 2017. (P-13.)

3. Bernice Longini, LDT/C, performed an Educational Assessment on July 12, 2017 and administered the Wechsler Individual Achievement Test – Third Edition (WIAT III. (P-14.) L.D. received average scores in Total Reading, Basic Reading, Mathematics, and Reading Comp & Fluency. He received a below average in Written Expression and a low in Math Fluency. (P-14.)

On August 16, 2017, a CST meeting was convened. S.D. stated that it was a very good meeting and she felt hopeful. The proposed IEP was discussed and S.D. executed the Consent to Implement Initial IEP at the end of the meeting. (P-16.)

On July 22, 2017, S.D. took L.D. to Delaware Vision Academy (DVA) for a developmental optometric evaluation by Don D. Blackburn, O.D., to determine if L.D. had any visual conditions that were contributing to his reading difficulties. (P-18.) Dr. Blackburn included accommodations as part of his recommendations. S.D. testified that she shared Blackburn's report with Vineland but did not feel that his accommodations were implemented. However, S.D. was very pleased with the vision therapy and she felt that the glasses prescribed allowed L.D. to participate in sports for the first time.

At the open house for the start of sixth grade, S.D. felt like she was dismissed as she attempted to advocate for her son. She stated that the sixth-grade teacher rolled her eyes when S.D. explained that L.D. has ADHD and commented that half her class had ADHD. In sixth grade, L.D. had discipline issues resulting in a detention and in-school suspension. (P-32.) S.D. expressed her concerns about homework in emails to L.D.'s teachers. While S.D. stated that the teachers were receptive, the option of typing his assignments was not working because L.D. was not proficient with a computer.

On February 22, 2018, S.D. sent a letter to Theresa Godlewski, Vineland's Director of Special Education, requesting an independent Educational/Neuropsychological Evaluation with Dr. Kay at public expense. (P-18.) S.D. testified that after learning of her son's intelligence from his Vineland evaluations, she was convinced that his dysgraphia

was the handicap to his success and she wanted to remedy the situation. S.D. researched professionals and based on her research she picked Kay as the most qualified to deal with the issues facing her son. By letter dated March 1, 2018, S.D. received notification that Vineland denied approval for Dr. Kay. (P-32, page 9.) Attached to the denial letter was Vineland's list of independent evaluators for S.D.'s consideration. (P-38.) S.D. rejected the candidates because she did not feel anyone matched Kay's credentials in the specific areas required. Dr. Kay was chosen to perform an IEE because of her nationally recognized expertise. S.D. testified that the testing was exhausting for L.D. but he was committed to do his best.

In March 2018, S.D. exchanged emails with L.D.'s teachers about L.D.'s defiant and inappropriate behavior and lack of participation in class. (P-32, pages 10-13.)

The annual review IEP meeting occurred on April 23, 2018. S.D. attended the meeting. She described it as long and intimidating. She recorded the meeting. There was a discussion about the modifications and S.D. pointed out that the modifications were not working. There was also a discussion about pull-out programming for Language Arts. At the end of the meeting, S.D.'s attorney made their request for an out-of-district placement at Aim Academy in Conshocken, PA. L.D. had spent a day at Aim shadowing another student, and S.D. loved the school. S.D. testified that she was losing faith in Vineland's ability to help her son. When S.D. learned that L.D. was not accepted by Aim because the school could not meet L.D.'s emotional needs, she was crushed. She believed her son was spiraling downward and showing signs of depression.

The continued annual review meeting occurred on June 20, 2018 after everyone had a chance to review Kay's IEE. S.D. stated that it was a short meeting because their minds were made up. They were sending L.D. to a summer program at Centreville Layton for a trial basis and S.D. was very impressed with L.D.'s change in attitude. S.D. felt the IEP process at Vineland was too slow, programs were being doled out in small increments and Vineland kept experimenting. They requested ESY from Vineland, but it was denied claiming L.D. did not need it. S.D. did not believe that Vineland had a plan to fix the writing gap.

S.D. was pleased with L.D.'s progress at Centreville Layton. His work samples were more legible and L.D. was also able to sign his name in cursive. (P.60.) These improvements were evident from L.D.'s first Progress Report. (P-53.) In reviewing L.D.'s work from Centreville Layton, S.D. stated that she became optimistic about her son's future. Before Centreville Layton, S.D. felt her son was misunderstood, now she feels that he is in the place he belongs.

On cross-examination, S.D. stated that her first written request to Vineland for initial evaluations was on December 5, 2016. S.D. acknowledged that L.D.'S first marking period grades were higher than he had ever gotten. Initially, she felt L.D. was thriving at Petway. (P-6, page 2.) Although S.D. participated in the referral meeting, she stated that she could not recall the details but believed evaluations were not warranted because L.D.'s grades were considered good enough. When questioned about L.D.'s occupational therapy at Nemours during the summer after fifth grade, S.D. testified on direct examination that the therapy had to be discontinued because school started. This was contradicted by Nemours occupational therapy assessment wherein it was noted that L.D. was discharged from outpatient therapy on August 21, 2017 after completing his goals. S.D.'s attention was also directed to the August 14, 2017 letter from Nemours that recommended accommodations such as a keyboard for writing but not therapy. (P-15.)

S.D. stated that she used her IPAD to record the meetings and that she disclosed it on her reply to the invitation to the meeting. During the meetings, she was never precluded from asking questions, but she felt her questions were not being answered. S.D. admitted that she felt a lack of trust. So even when Vineland offered to purchase the Hanbury-King program, she did not trust Vineland to properly train its staff on how to use the program. She felt there was a lack of training across the board of the Vineland staff. S.D. also said they were already shopping around for a different school out of district.

On cross-examination, S.D. was shown an email dated February 7, 2018 wherein S.D. wrote to L.D.'s Language Arts teacher venting her frustration over L.D.'s writing disability but claiming that L.D. was meeting his potential in Math and Science. (R-6,

page 61.) In another email dated February 6, 2018, S.D. thanked and congratulated L.D.'s science teacher for earning the respect and admiration of her son. (R-6, page 66.)

Before the June 2018 IEP, S.D. knew her son was accepted at Centreville Layton. She rejected the proposed IEP the night of the meeting and never reviewed it with Dr. Kay. Although the June 2018 IEP incorporated a number of suggestions offered by Dr. Kay, S.D. did not trust Vineland to implement the program.

Finally, on cross-examination, S.D. was asked whether she considered any of the providers from Vineland's list of approved providers. (P-38.) S.D. responded that time was not her friend. She had to make a choice based on the best interest of her son.

On re-direct examination, S.D. stated that L.D. is thriving at Centreville Layton. When the Nemours occupational assessment revealed that L.D. was only writing at a second-grade level, S.D. knew that too much time had been wasted. S.D. stated that writing was L.D.'s kryptonite.

**Barton Reese, Ed.D.** is the Head of School for Centreville Layton. He testified for petitioners. Reese met L.D. during the summer session. Reese was familiar with Kay's IEE and he paid close attention to L.D. during the summer program. Centreville Layton is a specialized private school for children who learn differently. There is a multisensory curriculum in the Language Arts program with teachers certified in Wilson and Lindamood-Bell reading methods. Every student is given a chrome book and voice to text software is available. The class sizes range from five to ten students. Reese testified that he was familiar with the Hanbury-King Reading Program but did not know whether it was being used at Centreville Layton.

Reese was asked to review the SAMP which Reese described as the school's in-house IEP. (P-64.) To describe L.D., Reese used words such as friendly, congenial, good conversationalist, eager, coachable, engaged, and hard working. L.D. is embracing the program at Centreville Layton. Reese could not talk about the delivery of any of the subjects. The occupational therapist helps L.D. with the physical part of writing and other assistive technology. L.D. receives this as a pull-out from class. Reese played no role in

any of the testing. All L.D.'s teachers are impressed with L.D.'s improvement and evolution since arriving at Centreville Layton. L.D. is making academic progress. He stated that L.D. needs reminders about getting his homework done but he has never noticed any extremely disruptive behavior. The tuition is \$28,950 for the 2018-2019 school year and parents are responsible for payment.

On cross-examination, Reese stated that he is not part of the team that prepares the SAMP. He admitted that there were no modifications listed for L.D. on the SAMP. Instead, Centreville Layton provides accommodations. (P-64, page 3-4.) The SAMP listed that Math and Reading are areas for L.D. that require support. (P-64, page 3.) Reese could not testify about what type of support was being offered. The SAMP showed that on June 18, 2018, reading testing using the Brief Reading Inventory (BRI) was administered and L.D. tested at an eighth-grade level in word decoding and comprehension. (P-64, page 11.) Under the heading for accommodations in the SAMP, L.D. was given a sixth-grade reading placement. Under the Goals and Objectives, Reese was questioned why L.D.'s present level of performance was listed at seventh grade for BRI for Reading Comprehension when the testing showed eighth-grade level. Reese could not respond why the goals did not match up with the testing. (P-64, page 4.) Unlike Reading where L.D. was placed in a sixth-grade program, his placement for Math was in a seventh-grade program with supports. (P-64, page 6.) The internal support services offered under the SAMP were speech and language therapy, occupational therapy, and reading intervention. Reese agreed that the reading intervention had no frequency listed so there was no way of knowing from the document whether the support was offered. (P-64, page 8.) The SAMP does not mention any specific writing program and Reese did not know the name of any writing program specifically being utilized for L.D.'s curriculum.

On re-direct examination, Reese stated that Centreville Layton is not governed by a district. Modifications in the SAMP fall under the accommodations category. However, teachers have discretion. For example, L.D. has a private space he can go to if he needs to get away from the stress of the classroom. Those types of modifications are not listed in the SAMP.

On re-direct, Reese stated that the school is accredited by Middle States Association, but Reese was unaware whether it was approved by the New Jersey Department of Education.

**L.D.** was present during the hearing and he wanted to testify on his own behalf. L.D. stated that he is happy at Centreville Layton and always felt misunderstood at Vineland. He views his disability in the same way a person with diabetes views his disease. He knows it is something he will have to live with and try his best to manage. L.D. did not mind the drive to Centreville Layton each day because he spends the time with his dad in the car. He stated that he wants to be successful so that he could afford to send his children to a school like Centreville Layton if they ever needed it.

### **FINDINGS OF FACT**

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility conclusions "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

In determining credibility, I am aware that District employees support the program they developed for their student and would represent that the program provided L.D. with FAPE. I am also aware that L.D.'s parents want the best for their child and are motivated to seek the best program and placement available. Against this backdrop, I must also weigh the credibility of petitioner's expert, Dr. Kay. Nevertheless, the documentary evidence presented supports the testimony that each witness provided to the best of his or her abilities. Indeed, it is not so much the facts that are in dispute, as the IEP speaks for itself, but rather the inferences that can be made from the evidence and testimony

provided by the witnesses in concluding whether the IEP prepared by the District offered FAPE to L.D.

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

L.D. began attending Vineland schools in fifth grade. At the time of his transfer, L.D. was diagnosed with ADHD, Dysgraphia, and Anxiety. He had a 504 Plan in place that was continued by Vineland. L.D. is very bright but he has significant anxiety about his ability to complete work. The quality of his handwriting and written expression is poor. He has difficulty doing written work in a timely manner. L.D. does not write a complete thought, use complete sentences, or use appropriate punctuation. L.D.'s attention and ADHD symptoms are not consistent, some days he does better, some days worse. L.D. was prescribed Adderall at fifteen milligrams for his condition.

L.D. entered fifth grade in the District with a 504 Plan from his Charter School. The District held a 504 eligibility determination meeting on September 20, 2016 and put a 504 Plan in place for the school year 2016-2017. The following accommodations were put in place: allow extra time for task completion; provide benchmarks for long-term assignments and/or projects; arrange physical layout to limit distractions; develop signal for when break is needed; have student demonstrate understanding of instructions before beginning assignment; additional time to complete classroom test/quizzes; student may use a sensory object to help with fidgeting; and permit L.D. to stand for some tasks.

While fifth grade started on a positive note with L.D.'s mother expressing that L.D. was receiving the best grades he had ever gotten, she was convinced that L.D. needed more than a 504 Plan to address his needs. In December 2016, L.D. requested an initial referral for special education. The written referral indicated that L.D. is diagnosed with ADHD, dysgraphia, and anxiety. The referral report contained teacher comments from L.D.'s fifth-grade teacher, Ms. Anderson, who described L.D. as very bright but has anxiety about completing his work. She shared that there are times when L.D. is unable to sustain focus during academic instruction. In contrast when attention is not a problem,

L.D. is capable of level to above average academic performance. His instructional modifications included using a chrome book, instead of writing, abbreviated assignments, additional time, preferential seating, and use of agenda book. Ms. Anderson shared that she believed providing additional time helped with L.D.'s anxiety. The use of the agenda book was to provide daily feedback to L.D.'s mother. Moving his seat to the back of the class allowed L.D. to be more relaxed. The teacher felt that some of the accommodations have helped to make L.D. less anxious. L.D.'s teachers observed that L.D.'s ADHD symptoms are not consistent. The District's expert, Nonnemacher, determined that the December 2016 decision was reasonable because L.D. had just transferred to the District, was obtaining average grades, and seemed to be responding to the 504 Plan. There is nothing in the record to refute that determination.

S.D. made a second referral to the CST in February 2017 because she was concerned that her son's grades were declining. She noticed that he was refusing to write and he was receiving incompletes on his assignments. At the March 16, 2017 meeting, the District determined that an initial evaluation was warranted. L.D.'s grades had declined to a "D" average in his general education setting. S.D. consented to the evaluations. An IEP meeting was convened on August 16, 2017. At the end of the meeting, S.D. gave her consent to implement the initial IEP for her son's sixth-grade year.

Pursuant to N.J.A.C. 6A:14-3.4(e), the District had ninety days, or by June 14, 2017, to complete the initial evaluations. The evaluations were not completed until July 12, 2017. However, the evaluations were completed in time for review and implementation into the 2017-2018 IEP that was put in place by consent for L.D.'s sixth-grade school year. This procedural violation did not directly impact L.D.'s educational progress.

Based on the results of the CST evaluations, the District determined that L.D. was eligible for special education services under the disability of Other Health Impaired. The recommended program for L.D. was the general education sixth-grade curriculum with in-class resource placement for his core subjects of Language Arts, Math, Science, and Social Studies in the general education setting. The District determined based on its evaluation that L.D. did not require occupational therapy. The therapist recommended



that L.D. practice typing, be given long breaks, and limited assignments. S.D. noted her disagreement and she was directed to request an independent evaluation for occupational therapy. Under the heading of "Needs" the IEP listed L.D.'s below average functioning in written expression, sentence composition, and essay composition skills. As a result, L.D.'s written language requirements were reduced whenever feasible. The IEP contained Reading, Writing, and Mathematics goals based on an eighty percent rate of success. L.D.'s classroom modifications incorporated the requirements recommended by L.D.'s vision therapist from DVA. The modifications included: providing L.D. with a copy of class notes to avoid all copying from the board; adjust number of items student is expected to complete; encourage student to enlist support of note-taking buddy; allowed typed rather than written responses; provide short breaks to reduce eye fatigue; minimal font of fourteen points; use of a magnifying ruler; refocusing and redirection; allow dictated responses; and technology that will allow him to speak and have it translated into writing. L.D. was to have access to computer, access to word processor, and access to personal auditory trainer. (R-13.)

Kay's statement in her Addendum that L.D. should have been offered vision therapy as a related service under his IEP is contradicted by the DVA report and the inclusion of the DVA recommendations in the IEP. The District followed the recommendations of the developmental optometric evaluation prepared by Dr. Blackburn of DVA (P-17) and offered the recommended modifications in the 2017-2018 IEP. (R-13.) Kay's determination that the District should have provided L.D. with occupational therapy is also not supported. On April 10, 2017, L.D. was privately evaluated at DuPont/Nemours. The listed recommendations included: attendance at an eight-week occupational therapy session; evaluation by a developmental optometrist; evaluation by a school-based occupational therapist; and accommodations during school. (P-9.) On April 26, 2017, the District performed its Occupational Therapy Evaluation and did not recommend school occupational therapy but recommended typing, breaks, and limiting work. (P-10.) The recommendations from both Occupational Evaluation reports were incorporated by the CST into the Sixth-Grade IEP. (R-13.)

On February 22, 2018, S.D. requested an Independent Educational/ Neuropsychological Evaluation with Dr. Kay at public expense and attached a proposed

contract for the IEE. (P-18.) Theresa Godlewski, Director of Special Education for Vineland, responded in a letter dated March 1, 2018 advising petitioners of the requirements under N.J.A.C. 6A:14-2.5(c)(3) for independent evaluations at public expense. (R-10.) The District did not deny petitioners' request for an IEE; it denied petitioners' choice of evaluators because Dr. Kay did not hold a New Jersey Certification or license. In the letter, Godlewski stated that she researched the choice and spoke with the county office and was informed that the proposal was not acceptable because the choice does not hold a New Jersey Certification. Godlewski provided petitioners with a list of approved providers. After the exchange of these two letters, there was no further collaboration between the District and petitioners. Petitioners went forward and unilaterally retained Kay. Vineland's Policy 2468 for Independent Educational Evaluations requires appropriate certification and/or license in New Jersey unless the parent can show unique circumstances that warrant deviation from the requirement. (R-15.) Petitioners presented Kay as nationally certified and licensed in Pennsylvania and Delaware. S.D. testified that time was of the essence because L.D. was spiraling downward. These factors alone are not enough. There is nothing in the record to show that petitioners presented the District with unique circumstances justifying their choice before they made the unilateral decision to hire Kay.

The annual IEP review meeting was convened on April 23, 2018, prior to the completion of Kay's IEE. I listened to the audiotape recording made by S.D. (R-3.) There was an exchange about whether L.D. was not completing certain assignments because he could not do the work or whether he was not interested in doing the work. The Principal also commented that L.D. can be disrespectful to his teachers. It was apparent to me, as the listener, that S.D. took exception to the Principal's comment. S.D. retorted that L.D. is encouraged to question and that he has an extreme sense of justice. Despite the tension at the meeting, all parties participated and discussed programs, goals, and objectives for L.D.'s educational progress. At the end of the meeting, petitioners requested an out-of-district placement at Aim Academy in Conshohocken, Pennsylvania. Petitioners' IEE report from Kay was not yet available, so the meeting was adjourned to allow all parties to review and consider the report.

The parties reconvened on June 20, 2018. After consideration by the CST of the IEE, the District proposed changing L.D.'s classification to Multiply Disabled. Due to L.D.'s specific disability in writing, the CST agreed that the identified program in the IEE, Writing Skills by Diana Hanbury King, should be implemented. The other identified program, Read and Write for Google, was already being used by L.D.'s Language Arts teacher. The CST recommended a placement change for Language Arts to a pull-out resource room which is a smaller setting and would allow the special education teacher to focus on the writing program with L.D. The writing program would also be introduced in L.D.'s core subjects in the general education classroom setting. Teachers would be trained on the program. Parents opposed the pull-out resource room by expressing concern that L.D. would be bored. The CST also used the recommendations from the IEE to adjust L.D.'s modifications for the 2018-2019 school year. This meeting was also recorded by S.D. and I listened to the tape recording. From the questions posed by the parents and their attorney, I observed the cadence and tone of voice which was more adversarial than collaborative. The parents requested that S.D. be placed at Centreville Layton for the 2018-2019 school year without any further consultation with Kay about the proposed changes to the IEP. At the end of the meeting, S.D. signed the form stating that she did not consent to the proposed IEP.

The District did not recommend ESY for L.D. In her IEE, Kay recommended ESY to address L.D.'s working memory struggles and suggested Cogmed Working Memory Training. (P-26.) The parents understood that this training would help improve L.D.'s executive functioning. According to the testimony of Nonnemacher, the data from the NEPSY-2 showed that L.D. performed at the expected level to the above expected level on multiple measures. (R-1.) Based on the testing, the CST determined that L.D.'s working memory is in the average range. In the Addendum to the IEE, Kay opined that L.D. should have been offered ESY during the summers of 2016<sup>4</sup> and 2017 to address the multiplicity of his learning and information processing problems. (P-59, page 11.) The District witnesses testified that ESY is always discussed by the CST; however, in L.D.'s case, it was determined not to be warranted. L.D.'s first year in the District, 2016-2017, he did not have an IEP. L.D.'s initial eligibility determination was on August 16, 2017.

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<sup>4</sup> This tribunal assumes that the dates referred to in the Addendum are the summers of 2017 and 2018 because L.D. was not attending school in the District at the end of the 2015-2016 school year.

Ziller and Nonnemacher testified that ESY is considered when there is a determination by the CST that an interruption in educational programming causes the student's performance to revert to a lower level of functioning and recoupment cannot be expected in a reasonable length of time. This is the standard set forth in N.J.A.C. 6A:14-4.3(c). While L.D. had only been in the district for a short period of time, the CST did not notice any indication of regression or problems with recoupment. Kay testified on cross-examination that she did not see any evidence of regression or recoupment, but she believed that L.D. was struggling and ESY might have helped him. I do not deem the testimony of Dr. Kay regarding ESY to be credible. Kay did not make her recommendations within the framework of the New Jersey Administrative Code. She did not dispute L.D.'s average scores in working memory. Instead, she used ESY as an enrichment or enhanced educational tool and based her opinion within that framework. I deem the testimony of the District's witnesses to be credible. They demonstrated a knowledge and understanding of the purpose of ESY and were able to articulate why the CST deemed it was not warranted for L.D.

In the Addendum to the IEE, Dr. Kay opined that the proposed June 20, 2018 IEP did not offer FAPE:

The district did agree to provide Diana Hanbury-King's Writing Skills program and also indicated the book entitled, "Taming the Tiger" which was recommended in the IEE report, be purchased for staff. The district did not agree to any special education programs or services to address L.D.'s deficits in working memory, to provide a comprehensive assistive technology evaluation, or to address L.D.'s attention deficits and Tourette symptoms.

Kay testified that the IEP lacked specially designed instruction and the goals and objectives were vague. However, Kay acknowledged that the proposed IEP contained many of her recommendations. Ziller and the District's expert, Nonnemacher, offered credible testimony refuting Kay's criticism of the proposed IEP. The District's witnesses testified that the recommendations from the IEE and the existing modifications in the IEP were designed to address L.D.'s ADHD and writing disability while providing a grade level general education curriculum. The numerous modifications were clearly listed in the IEP and these modifications were formulated after consideration of the private and CST

evaluations, and teacher input. Ziller and Nonnemacher testified that they were familiar with the resource room pull-out for Language Arts. They agreed that it was the best placement option for implementing the new writing program as it would provide a smaller setting with more individualized instruction while L.D. gained familiarity with the program. During her testimony, Kay had recommended a smaller setting with individualized instruction but discounted this placement. She did not articulate her reasoning. Kay never observed L.D. in any classroom setting. Kay's statement that the IEP failed to address L.D.'s deficit in working memory was refuted by the testimony of Nonnemacher and his explanation of the test data showing that L.D.'s working memory was in the average range. Another factor in Kay's determination was because she claimed there was no comprehensive technology evaluation offered. Such an evaluation was never requested. Moreover, the proposed IEP provided for special sections in keyboarding, spelling, and handwriting. It incorporated the writing program recommended by Kay, as well as other assistive technology. Kay further stated that the proposed IEP did not address L.D.'s attention deficits while failing to acknowledge that it incorporated her interventions to address attention and ADHD concerns as additional modifications. (P-26, page 36.) Kay also claimed that the IEP did not address L.D.'s Tourette syndrome. During cross-examination Kay stated she did not believe that L.D. had an evaluation leading to a diagnosis of Tourette syndrome. There is nothing in Kay's report to show that L.D.'s provisional Tourette's impacted his educational progress. I further deem Kay's statement in the Addendum about the summer program at Centreville Layton to have no bearing on whether the proposed IEP offered FAPE. Nonnemacher testified consistent with his Certification (R-1) that the provisions of the proposed June 2018 IEP were reasonably calculated to provide, and, if implemented, would have provided a FAPE to L.D. had he stayed enrolled. I deem the expert testimony of Nonnemacher to be highly credible. He testified in a straightforward and direct manner and gave a measured assessment of the test data.

In the Addendum, Kay also opined that Centreville Layton was the appropriate placement for L.D. She testified that L.D. benefitted from the change in placement and that his behaviors significantly improved. I have no reason to doubt her assessment of the change in L.D. as it was corroborated by L.D.'s own testimony. However, as Nonnemacher credibly noted a comparison of behavior exhibited during an eight-week

summer program to a student's behavior during the regular school year is not a fair or true comparison. Nonnemacher and Ziller testified that L.D. also presented as a bright and likable student while at Vineland. Nonnemacher reviewed L.D.'s Progress Report from his first marking period at Centerville Layton. In comparing them to L.D.'s Progress Reports at Vineland, Nonnemacher did not find any significant differences. L.D. continued to have struggles with writing and homework. Therefore, I do not deem Kay's opinion about the appropriateness of the placement at Centerville Layton to be supported by the credible evidence.

### **LEGAL ANALYSIS**

The Individuals with Disabilities Education Act (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 (1982). One of the 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. § 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. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C. § 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, 458 U.S. at 203. New Jersey follows the federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." The Rowley standard was recently questioned by the United States Supreme Court in Endrew F. v. Douglas County School District RE-1, 580 U.S. \_\_\_\_, 137 S. Ct. 988 (2017). The Supreme Court determined that a school district must show a cogent and responsive explanation to support its position that the

IEP is reasonably calculated to enable the child to make progress that is appropriate considering the student's circumstances.

The New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit cases require similar inquiry into the educational proposal of the district in compliance with the requirements of Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, 458 U.S. at 200). The IDEA does not require that a school district "maximize the potential" of the student, Rowley, 458 U.S. at 200, 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 (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 made in light of the individual potential and educational needs of the student. T.R., 205 F.3d at 578; Ridgewood, 172 F.3d at 247–48.

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. § 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, 116 N.J. at 48.

The Board will have satisfied the requirements of law by providing L.D. with personalized instruction and sufficient support services "as are necessary to permit him 'to benefit' from the instruction." G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671 (D.N.J. Feb. 27, 2009) (citing Rowley, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed.2d at 701). The IDEA does not require the Board to maximize L.D.'s potential or provide him the best education possible. However, an IEP must provide meaningful access to education and confer some educational benefit upon the child. Rowley, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed.2d at 703. To meet its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. (2017); 137 S.Ct. 988; 197 L.Ed.2d 335.

The IDEA requires a board of education to provide the educational equivalent of a "serviceable Chevrolet" to special education students; it does not require provision of a "Cadillac." DOE v. Board of Educ. of Tullahoma City Sch., 9 F.3d 455, [27] 459-460 (6th Cir 1993); see also J.C. and E.C. o/b/o K.C. v. Warren Hills Reg'l High Sch. Bd. of Educ., OAL Dkt. No. EDS 11048-02 (OAL August 12, 2003). In other words, the fact that all students have the right to receive a free and appropriate public education does not mean that they are entitled to their own Cadillac of education. A showing that L.D. benefitted in his out-of-district placement is not proof that the proposed IEP was inappropriate.

Here, the proposed IEP for L.D. maintains his grade level general education curriculum with in-class support for all core subjects, except Language Arts. Writing is identified as L.D.'s major area of concern and there was agreement by the CST and the parents that L.D. required changes in his IEP to help him succeed. The CST determined that a pull-out resource room for Language Arts would be best for L.D.'s needs to provide him with individualized instruction in a smaller setting. The CST also considered the



recommendations in the IEE and agreed to incorporate the recommended writing program and accommodations designed to address attention and concentration, in addition to the modifications for L.D.'s dysgraphia and vision issues, previously included. The District personnel testified that the goals are standard based and specific to address L.D.'s needs in the areas of Writing and Mathematics.

L.D. is very bright and his parents were understandably concerned about L.D.'s continued struggles with school and homework. They have been dealing with L.D.'s medical and educational disabilities since he began school. However, L.D. only entered the District in fifth grade and his IEP was put in place for sixth grade. Although he was able to obtain average to above average grades in his core subjects, his school performance in his general education setting was inconsistent and his struggles with writing continued. The next IEP, proposed at the annual review, was intended to address those concerns by implementing a more restrictive placement for Language Arts, introducing a new writing program approved by parents' expert, and expanding the modifications to more fully address L.D.'s difficulties. I **CONCLUDE** that the June 20, 2018 IEP proposed by the District offered L.D. a free and appropriate public education with the opportunity for meaningful educational benefit and progress appropriate in light of L.D.'s circumstances, within the least restrictive environment.

When a court examines whether a district has provided FAPE, the appropriateness of an IEP is not determined by a comparison between the private school unilaterally chosen by parents and the program proposed by the district. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Rather, the pertinent inquiry is whether the IEP proposed by the district offered FAPE with the opportunity for significant learning and meaningful education benefit within the least restrictive environment (LRE). G.B. and D.B. ex rel J.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., EDS 4075-06, Final Decision (June 13, 2007), <http://njlaw.rutgers.edu/collections/oal/>. Upon a finding that the district provided FAPE, the appropriateness of the private school program is irrelevant. H.W. and J.W. ex rel A.W. v. Highland Park Bd. of Educ., 108 Fed. Appx. 731, 734 (3d Cir. 2004).

The District in this case has proven by a preponderance of the competent and credible evidence that the IEP proposed by the District offered L.D. a free and appropriate education with the opportunity for meaningful educational benefit appropriate in light of L.D.'s circumstances, within the least restrictive environment. To the extent that I have concluded that the District has provided a FAPE to L.D., the appropriateness of a placement at the Centerville Layton school is irrelevant.

In accordance with N.J.S.A. 6A:14-2.10, reimbursement for unilateral placement by parents is only required upon a finding that the District had not made a free, appropriate public education available to the student in a timely manner prior to the enrollment. Here, the parents had already decided to enroll L.D. at Centerville Layton before the June 20, 2018 IEP meeting. While I understand that the parents herein were motivated by the best interests of their son, they failed to fully participate within the collaborative process with the District in developing an IEP for 2018-2019 school year. Because I am satisfied that the proposed IEP by the District for the 2018-2019 would have offered FAPE, if implemented, I **CONCLUDE** that the parents are not entitled to reimbursement for the unilateral placement of L.D. at Centerville Layton.

No conclusions in this decision should be interpreted as a repudiation of the parents' action in striving to find the best placement for their son. However, parents who unilaterally change their child's placement, without the consent of local school officials, do so at their own financial risk and are barred from recovering reimbursement if it is ultimately determined that the program proposed by the District affords the child with a FAPE. It was apparent throughout the hearing that petitioners are deeply and thoroughly dedicated to pursuing the best education available for L.D. and are sincerely concerned with his welfare. While every student with a disability is entitled to an education conferring meaningful educational benefit in the least restrictive environment, the school district is not obligated to provide the best possible educational opportunity. Parents who wish for their child to receive extra service beyond what is available to nondisabled students in the public schools cannot expect the public to pay for the privilege. G.N. and S.N. o/b/o J.N. v. Livingston Bd. of Educ., EDS 3547-04, Final Decision, (January 27, 2005) <<http://lawlibrary.rutgers.edu/oal/search.html>>; M.S. and C.S. o/b/o A.S. v. Bd. of

Educ. of Ridgewood, EDS 5814-03, Final Decision, (March 16, 2004) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

**ORDER**

Based on the foregoing, it is **ORDERED** as follows:

1. Petitioners' request for reimbursement for their unilateral placement of L.D. out-of-district is **DENIED**.
2. Petitioners' request for compensatory education is **DENIED**.
3. Petitioners' request for reimbursement for the costs of Dr. Kay's IEE is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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 (2017). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

February 11, 2019

DATE

\_\_\_\_\_  
**KATHLEEN M. CALEMMO, ALJ**

Date Received at Agency

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

cmo

**APPENDIX**  
**WITNESSES**

**For Petitioners:**

S.D., Mother of L.D.

Margaret J. Kay, Ed.D. NCSP

Barton Reese, Ed.D., Head of School for Centreville Layton

**For Respondent:**

Meghan Ziller, Case Manager

Alex Nonnemacher, Supervisor of Special Education for Vineland Public Schools

**EXHIBITS**

**For Petitioners:**

- P-1 WIAT-III Report
- P-2 Section 504 Plan – Charter School (2/22/2016)
- P-3 Section 504 Plan – Charter School (3/11/2016)
- P-4 District’s 504 Plan
- P-5 Child Study Team Referral Form
- P-6 District Denial of Evaluation
- P-7 District Consent to Initial Evaluation
- P-8 Parental Consent for Initial Evaluation
- P-9 OT Assessment DuPont Nemours
- P-10 OT Evaluation District
- P-11 Notice of Continuation of 504
- P-12 Psych Evaluation-Nieves (District)
- P-13 Social History – Porter (District)
- P-14 Education assessment – Longini (District)
- P-15 OT Note – Johnson

- P-16 Initial IEP
- P-17 Vision Evaluation DVA
- P-18 Parents demand for IEE
- P-19 Neurology Assessment – Blumenfeld RN
- P-20 Teacher Input Questionnaire – Finkbeiner
- P-21 Teacher Input Questionnaire – Roche
- P-22 Teacher Input Questionnaire – Haller
- P-23 Teacher Input Questionnaire – Anderson
- P-24 Teacher Input Questionnaire – Brooks
- P-25 April 19, 2018 IEP
- P-26 IEE- Kay
- P-27 June 20, 2019 IEP
- P-28 Rejection of IEP
- P-29 Due Process Complaint
- P-30 Note – Nemours
- P-31 Correspondence – 2016
- P-32 Correspondence – 2017
- P-33 Disciplinary Log
- P-34 Progress Reports – 2016
- P-35 Work Samples
- P-36 Progress Reports – 2017
- P-37 Work Samples
- P-38 List of District – approved providers
- P-39 OSEP Guidance
- P-40 J.S. obo A.S. v. Parsippany-Troy Hills Twp. BOE
- P-41 Excerpt from Federal Register
- P-42 US DOE Letter to Petska
- P-43 US DOE Letter to Young
- P-44 US DOE Letter to Parker
- P-45 US DOE Letter to LoDolce
- P-46 OSEP Letter to Chief School Administrator
- P-47 OSEP Letter re: Vision Therapy
- P-48 CV of Kay

- P-49 CV of Reese
- P-50 Notes/records Blackburn
- P-51 Information – Centreville Layton School
- P-52 Parents' out-of-pocket expenses
- P-53 Students' testing, progress reports – CLS
- P-54 CV of Blackburn
- P-55 Vineland BOE Policy – IEE
- P-56 OT reports/notes Nemours
- P-57 Speech/Language Eval – Nemours
- P-58 Beyderman, M.D. – Notes
- P-59 IEE Addendum
- P-60 Work Samples – Centreville Layton
- P-61 NJ Dept. of Ed. Assessments
- P-62 Transcripts – Centreville Layton
- P-63 Trieu – Vision Evaluation 2015
- P-64 SAMP

**For Respondent:**

- R-1 Certification of Nonnemacher
- R-2 CV of Nonnemacher
- R-3 Audio Recording of 4/24/2018 IEP Meeting
- R-4 Audio Recording of 6/20/2018 IEP Meeting
- R-5 Audio Recording of S.D. and Aim Academy
- R-6 Emails Bates Stamped 1-78
- R-7 Vineland 504 Plan
- R-8 WIAT III Record Form
- R-9 WISC IV Record Form
- R-10 3/1/18 letter from Godlewski to Voigt
- R-11 6th Grade Report Card
- R-12 VPS Progress Report
- R-13 6th Grade IEP
- R-14 VPS proposed 7th Grade IEP

R-15 Policy for IEE

R-16 5th Grade Report Card

R-17 Charter 4th Grade Report Card