

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 10775-14

AGENCY DKT. NO. 2015-21515

S.W. AND J.W. ON BEHALF OF W.W.,

Petitioners,

v.

FLORHAM PARK BOARD OF EDUCATION,

Respondent.

Lenore Boyarin, Esq., for petitioners (Sussan, Greenwald & Wesler, attorneys)

Francis Febrens, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, attorneys)

Record Closed: June 19, 2015

Decided: September 29, 2015

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, S.W. and J.W., on behalf of their son W.W., filed a due-process petition for against the respondent, Florham Park Board of Education (the District) alleging that the District failed to provide W.W. with a free and appropriate public education (FAPE) during the 2014-15 school year.

The matter was transmitted to the OAL on August 21, 2014. A prehearing conference was held on January 21, 2015, wherein a procedural schedule was

established. Hearings were held on May 5, 2015, May 18, 2015, and July 15, 2015, wherein the District presented the testimony of three witnesses. At the conclusion of the District's case, petitioners made an oral motion for summary decision on the issue of whether the District offered W.W. a FAPE. The District agreed to proceed on summary decision on the issue of FAPE, and the parties submitted briefs and replies, solely predicated on the District's case-in-chief.¹

Petitioners request a determination that the District's proposed 2014-15 IEP, for W.W.'s seventh-grade year, failed to offer him a FAPE. Petitioners further request that the District reimburse them for the cost of their unilateral placement of W.W. at the Winston School (Winston).

SUMMARY OF THE TESTIMONY

Lauren Lee Erickson (Erickson), a certified school psychologist, is employed by the Florham Park School District. She has held that position for seven years. Erickson is W.W.'s case manager and presented testimony herein on W.W.'s educational plan and progress. She was his case manager in his first and second grade. She monitored W.W.'s performance through observations, consultations with his teachers, and if his grades suggest an issue, his report cards. She monitors his progress periodically, but particularly before re-evaluations, to develop goals and objectives.

Erickson testified that the Developmental Reading Assessment (DRA) is a reading test administered by special education teachers, which tests reading skills, such as, fluency, comprehension, *inter alia* The student reads a short book or passage and answers questions about the text. The DRA is administered three times per year. Students are not given modifications on this test, so that each students' actual abilities

¹ W.W.'s reply on the issue of FAPE was submitted on June 17, 2015. (Pet'r's Reply.) Thereafter, on July 15, 2015, while the cross-motions were still pending, W.W. presented the testimony of one witness. Because the cross-motions were made and supported prior to that testimony, that testimony will not be recounted or considered here, for purposes of the cross-motions for summary decision.

are evident. The purpose of the DRA is to monitor the students' progress throughout the school year.

i-Ready is a similar test, administered without modifications, to monitor the students' abilities through the year. The i-Ready test is also administered between three to four times per year. The results of the DRA and i-Ready tests are used to develop students' IEPs.

On cross-examination, Erickson testified that the i-Ready assessment is an assessment tool used by the school district, but she did not know whether the i-Ready assessment is used Statewide. She explained that the i-Ready assessment is administered to groups of students, while teachers circulate around the room and monitor the students. She conceded that while the i-Ready assessment explains the student's strengths and weaknesses, the i-Ready assessment does not distinguish whether a student answered a question incorrectly because of an inability to comprehend the question, or due to an inability to answer the substantive question. Erickson agreed that distinction was important, and teachers have other means of discerning whether a student's failure to answer a question correctly was due to comprehension, rather reflective of a substantive skill, such as classroom tests and observation.

Erickson testified that the school district knows an IEP is appropriate if a student is making progress and the student's response to modifications and placement. However, if a student begins to struggle, the student is not automatically moved to another classroom. Rather, she will consult with the student's teachers and parents, to discuss other modifications that could be effective. Further, such students are not automatically moved to another classroom because the school District wants to ensure the student remains in the least restrictive environment and to promote consistency.

On cross, Erickson agreed that a placement that is not appropriate can never be the least restrictive setting. There is no bright-line rule that requires a student to be

moved to a new placement if the student is struggling, rather, the school district should try different strategies before changing a placement. She determines whether a placement is appropriate based on tests, quizzes, other assessments, classroom observation, and whether the student is making progress with modifications and supports. The school district determines whether a student is receiving a meaningful educational benefit based on performance on the DRA, i-Ready, progress reports, grades, tests and quizzes, and classroom performance. Erickson identified R-1 as W.W.'s fourth-grade report card and R-2 as his IEP from January 2011 to January 2012—his fourth-to-fifth-grade school year. (R-2.)

The purpose of a student's classification is to help understand that student's needs; however, the student's IEP is not developed based on the student's classification, but rather, from the student's actual performance. The classification cannot be the basis for a student's classification, because students with the same classification can have very different needs and abilities. W.W. was classified as communication impaired. If, for example, W.W. were classified as learning disabled, instead, his services and modifications would not necessarily be different. In her experience, a student's IEP often can change, to add or delete services, change modifications or placement, and is re-evaluated every year.

A student is classified as communication impaired, if the student falls in the bottom tenth percentile on two speech and language assessments. The IEP indicates that W.W.'s program is "General Education with Supportive Instruction Assistance." "Supportive Instruction Assistance" means that there is a second staff member in the classroom, assisting with modifications or additional support. In other words, W.W. was placed in a general education classroom with supports, and studied the same general education curriculum. She testified that W.W. was receiving high grades due to the modifications and support he received.

Erickson identified W.W.'s speech and language goals and objectives listed in his IEP. She testified that the purpose of goals and objectives is to help the student

function in the classroom. She identified W.W.'s modifications listed in his IEP. She testified that those modifications would also apply to a student diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). She further identified W.W.'s standardized test modifications and accommodations.

Erickson identified W.W.'s achievement and progress listed in the IEP. She noted the IEP reflects that W.W. was to study basic math facts (addition, subtraction, multiplication, and division), which was typical for a special education math student. She noted that overall, the achievement and progress section included both W.W.'s strengths and weaknesses. His achievement and progress included observations about his attention issues, and the modifications made to address his attention issues.

Erickson identified R-18 as W.W.'s i-Ready Profile Report for reading for the 2011-12 school year. As of May 21, 2012, W.W. had been tested three times. In October, 2011, W.W. tested at Level Three, which indicates he was reading at a third-grade level. In February, 2012, W.W. again tested at Level Three, but by May, 2012, W.W. tested at Level Four, which indicates that he was reading at a fourth-grade level. She reiterated that W.W. was not given any modifications for this test, and he was in the fourth grade when these tests were administered. Because he was classified as communication impaired, she was not surprised that he tested at Level Three, without modifications. Further, W.W.'s i-Ready Profile Report for math for the 2011-12 school year indicates that he was tested twice during this period, in October 2011 and February 2012. (R-18). In October, he tested at Level Two, which indicates his math skills are on the second-grade level. In February, W.W. tested at Level Three, which indicates his math skills are on the third-grade level. However, she noted his actual score was very close to the fourth-grade level. She concluded that from October to February, W.W. made progress.

Erickson further identified R-17, as W.W.'s Special Education Report from spring 2012. The report noted his DRA score was thirty-eight, an improvement on his fall 2012 score of thirty-four. J-30 shows W.W.'s Special Education Report for November 2012,

in English language arts. His September 2012 DRA score was fifty, which indicates that W.W. was reading on a fifth-grade level. She noted that was a substantial improvement from his spring 2012 score of thirty-eight, and indicated meaningful progress. J-30 includes W.W.'s Special Education Report for November 2012 in Science as well. She noted that Report provides that W.W.'s deficiencies in vocabulary and writing were addressed through modifications, and his grade was "in the 80s . . ." (Ibid.)

Based on W.W.'s Special Education Reports, his DRA scores, and his i-Ready scores, Erickson concluded that W.W. was making meaningful educational progress in his program. He was able to meaningfully participate in the classroom, and he was learning. Based upon all of that data, Erickson testified that the January 2012 IEP developed for W.W. was the appropriate program for him.

Erickson identified J-3 as W.W.'s October 19, 2012 Reevaluation Plan. The purpose of a reevaluation is to re-determine eligibility for services. She noted that pursuant to the Reevaluation Plan, the District planned to conduct an educational assessment, a psychological assessment, and a speech/language assessment on W.W. These tests are conducted every three years to determine how the student has progressed. However, W.W.'s mother did not consent to reevaluation. Indeed, she refused to consent because she was unsure whether W.W. would still be eligible for special education services after the reevaluation. According to her meeting notes, W.W.'s mother felt he had "come a long way" and was concerned about transition to the middle school the next year. However, the special education teacher present at the IEP meeting felt that even after the reevaluations, W.W. would still be eligible. She noted that W.W.'s mother signed the reevaluation plan, to indicate that she attended, but and refused the reevaluation.

On cross, Erickson agreed that if a parent refuses to consent to a reevaluation, the school district can file for due process. Despite W.W.'s refusal to consent to a reevaluation the District was able to develop an IEP for W.W. based on his DRA scores,

i-Ready scores, tests and quizzes, class performance, and participation. She consulted with his teachers, and felt there was sufficient information to develop an IEP.

R-26 is W.W.'s fifth-grade report card. It indicates that most of his scores were between 85 and 95, though he did receive scores in the 70s in a few categories. J-7 is W.W.'s 2012-13 IEP, developed on December 19, 2012. She was W.W.'s case manager at this time and participated in the December 18, 2012 IEP meeting. She noted, again, that the IEP described W.W.'s strengths and weaknesses in each subject. Pursuant to the December 2012 IEP for the remainder of the 2012-13 school year W.W. was placed in General Education with Supportive Instructional Assistance for all of his classes. However, pursuant to that IEP, when W.W. transitioned to the middle school the following year, he was assigned to General Education with Supportive Instructional Assistance for English language arts, science, and social studies, but he was assigned to the resource room for math.

A resource room is a small group in which students can receive instruction more targeted to each student's abilities. Erickson explained that W.W. was moved to a resource room for sixth-grade math, because his teacher felt that while he could perform in a fifth-grade General Education Classroom with Supports for math; the sixth-grade curriculum was taught at a faster pace, with higher expectations. W.W. was not moved to resource room for math during his fifth-grade year, because a mid-year move would disrupt his schedule and the resource room curriculum did not align with the General Education curriculum.

She discussed the plan to move W.W. to resource room in the sixth grade with W.W.'s mother in March 2012, when he began struggling more. They agreed that W.W. should not be moved to a resource room mid-year, but at the beginning of his sixth-grade year. W.W.'s 2012-13 IEP contained goals and objectives for W.W.'s placement in a resource room for math. His progress would be monitored by the special education teacher through tests, quizzes, class participation, and observations. W.W.'s 2012-13 IEP contained a description of W.W.'s strengths and weaknesses in his science class.

The IEP included related services as well, such as speech and language therapy in a small group setting, twice a week, and occupational therapy, four times per year. The occupational therapy was designed to address his handwriting difficulties. He had received occupational therapy in the previous IEP, as well.

The 2012-13 IEP included goals and objectives for W.W.'s in speech and language therapy. These goals and objectives were formulated by Dave Burrows (Burrows), W.W.'s speech and language therapist.

On cross, Erickson explained that W.W.'s 2012-13 IEP did not include academic goals and objectives, because W.W. was learning the general education curriculum with modifications and supports. Moreover, his 2012-13 IEP did not contain goals and objectives for speech and language² because his parents requested that the speech and language services be discontinued. (J-13.)

The 2012-13 IEP included modifications both for W.W.'s general education classroom and resource room classroom. The 2012-13 IEP also contains modifications and accommodations for standardized testing.

Erickson testified that W.W.'s classification would not impact the services he was offered because a classification of autism would require the same modifications and accommodations as a classification of communication impaired with social skills challenges.

On cross, Erickson agreed that though W.W.'s November 2012 special education report for English indicated he "could use work in the area of comprehension," W.W.'s 2012-13 IEP did not include specific goals and objectives for comprehension.

² The 2012-13 IEP does appear to contain goals and objects for speech and language, on page 7. (J-2.) However, the questions on cross-examination did not focus on a specific page or section of the 2012-13 IEP, so Erickson's testimony regarding the absence of goals and objectives may be accurate, but misleading.

Erickson also identified J-10 as an amendment to W.W.'s 2012-13 IEP, which provided that W.W. would receive study guides. The study guides were tailored to W.W.'s reading comprehension needs and also assists with memory problems.

W.W.'s 2012-2013 i-Ready Report for English is set forth in R-36. Erickson noted that he was tested four times during his fifth-grade school year, in October, December, March, and May. In October, December, and March, W.W. scored Level Four, equivalent to a fourth-grade reading level, but in May W.W. scored Level Three, equivalent to a third-grade reading level. However, Erickson testified that student test scores often drop near the end of the school year because they become excited for summer break and have difficulty concentrating while the questions in the test become more difficult. She added that at the beginning of a school year, the tests mostly review previous material, but near the end of the school year, new concepts are tested. Accordingly, students typically decline near the end of the school year.

W.W. received grades in the 90s in English, even though he scored Level Four, and once, Level Three on i-Ready in his fifth-grade year, because he received supports and modifications in the classroom, but not during his i-Ready tests. R-35 is as W.W.'s 2012-13 i-Ready Report for Math. She noted he was tested five times: in October 2012, December 2012, twice in March 2013, and May 2013. He scored Level Three in October, Level Two in December, Level Five, then Four, on the same day in March, and Level Three in May.

J-11 is W.W.'s fifth-grade spring progress report for English. The progress report noted that W.W. was provided with word banks to strengthen his vocabulary and a modified spelling list. J-11 includes W.W.'s fifth-grade spring progress report for math as well. Erickson noted that the progress report acknowledged that W.W. was struggling in math, as concepts became more difficult, and required mastery of basic math skills. Finally, she noted that J-11 includes W.W.'s fifth-grade spring progress report for science. The progress report indicated that W.W. was doing well in science, and his science teacher accommodated his difficulties with memory by providing notes.

Erickson concludes that based on W.W.'s progress reports, report cards, i-Ready scores, and assessments, W.W. was able to meaningfully participate in the classroom. He made progress.

Erickson identified J-24 as W.W.'s 2013-14 report card for his sixth-grade year. His final score in English was 72, and his final score in math was 85. The final score is the average of each quarter. She noted that W.W. received a final score of 71 in science, and 77 in social studies.

J-13 is W.W.'s 2013-14 IEP developed on December 18, 2013. He was assigned to Supportive Instructional Assistance for English, social studies, and science for the beginning of the 2014-15 school year, and the resource room for math. He was placed in general education for science for the end of the 2013-14 school year, because his parent objected to a particular teacher, and no other science class fit in his schedule.

The 2013-14 IEP contains goals and objectives for W.W. for math. She explained that these goals and objectives were developed by his math resource room teacher. Further, the 2013-14 IEP includes accommodations during standardized testing, including small group testing, extended time, directions read aloud, the opportunity for W.W. to ask clarifying questions, and the use of calculators, an abacus, a number line, and a scribe.

Erickson identified J-12 is W.W.'s special education progress report for social studies for the sixth grade. His social studies teacher noted that W.W. needed to participate more frequently. However, Erickson noted that J-11, W.W.'s special education progress report for English, noted that W.W.'s participation was satisfactory. Moreover, Erickson noted that W.W.'s special education report for fourth-grade social studies (J-12) indicated that his participation was satisfactory. Similarly, W.W.'s special education report for fifth-grade social studies, J-30 indicated that W.W.'s participation

was satisfactory. Accordingly, W.W.'s sixth-grade special education report for social studies was the first indication that W.W. was not participating in class. (J-12.)

R-46 is W.W.'s sixth-grade progress report for math. The progress report indicates that he participated in class. His resource room teacher reported in R-45 W.W.'s sixth grade that he had made progress on most of the goals and objectives included in his 2013-14 IEP, specifically, he progressed in nine out of twelve goals. (Cf. J-13).

Erickson identified R-58 as W.W.'s 2013-14 i-Ready Report for reading. She noted that W.W. had been tested four times during that school year, in September, December, March, and May. In September, W.W. scored Level Four, in December, Level Three, in March, Level Five, and in May, Level Three. She reiterated that W.W. was not given modifications and supports during the i-Ready test. Erickson testified that a comparison of W.W.'s fourth-grade i-Ready Report for reading (R-18), W.W.'s fifth-grade i-Ready Report for reading (R-36), and W.W.'s sixth-grade i-Ready Report for reading (R-58) indicates that sixth grade was the first instance W.W. scored more than one grade level below average.

Erickson identified respondent's R-59 as W.W.'s 2013-14 i-Ready Report for math. W.W. was tested four times during the 2013-14 school year, in September, December, March, and May. He scored Level Three on all these tests. However, Erickson further testified that during this time, W.W. was placed in a resource room for sixth-grade math, and was not completing grade-level assignments. She explained that the purpose of administering the i-Ready test to W.W. was to give the IEP team a general idea about W.W.'s abilities, without supports and modifications, despite the fact that he was not actually performing grade-level work.

Erickson identified R-57 is W.W.'s 2013-14 spring special education report for English. W.W.'s behavior was satisfactory in all categories. The report noted that W.W.'s i-Ready scores had improved over the year.

Erickson identified R-55 as W.W.'s 2013-14 progress report for math, for the second half of the 2013-14 school year. Again, Erickson testified that these goals and objective were consistent with the goals and objectives included in W.W.'s 2013-14 IEP, J-13. W.W.'s second progress report for sixth-grade math indicated that he had made progress on all of the goals and objectives included in his 2013-14 IEP. Resource room teachers measure a student's progress through tests, quizzes, participation, classroom observation, among other things. She explained that W.W. was working on these goals enumerated in his 2013-14 IEP and progress reports in the resource room.

Erickson identified R-54 as W.W.'s 2013-14 special education report for sixth-grade social studies. The report indicates that W.W.'s tests were broken into smaller sections and he was provided with word banks. The questions are read aloud, and W.W. receives a scribe, if necessary. Erickson concluded that based on her review of W.W.'s progress reports, report cards, i-Ready assessments, and goals and objectives listed in the IEP, W.W. was able to make meaningful educational progress.

J-16 is a neuropsychological evaluation of W.W. conducted in May 2014. The report indicates that W.W. was administered the Wechsler Intellectual Scale for Children. The purpose of this test is to determine a student's cognitive and intellectual abilities. The test is scored on four scales: verbal comprehension, which measures listening, abstract reasoning, and ability to analogize or distinguish concepts; perceptual reasoning, which measures non-verbal abstract reasoning, problem solving, and visual and spatial abilities; working memory, which measures short-term memory, concentration, and attention; and processing speed, which measures the ability to scan material and reach conclusions without error. As noted therein, W.W.'s working memory score was only 56, which was extremely low. A poor working memory would impede his ability in the classroom to remember verbal directions and to retain information from day-to-day. Thus, W.W.'s 2012-13 IEP, which she participated in developing, included modifications that would address his working memory challenges. (J-7.) The modifications, listed on page sixteen, include the requirements that W.W.

repeat back directions, that the teacher gain W.W.'s attention before giving directions, that W.W. receive study guides and modifications on tests. Further, his 2013-14 IEP included modifications to address W.W.'s working memory challenges, as well. (J-13.) The modifications listed on page fourteen, include the requirement that W.W. repeat back directions, and receive modified tests and quizzes.

The Neuropsychological Report noted W.W.'s score on the Wechsler assessment in the category of processing speed was borderline. (J-16.) However, as with W.W.'s working memory challenges, both the 2012-13 and 2013-14 IEPs addressed any potential issues W.W. may have had with processing speed. Specifically, W.W.'s 2012-13 IEP provided that he would receive feedback after a few examples to ensure understanding, and that he would receive modified tests and quizzes. W.W.'s 2013-14 IEP similarly provided that W.W. would receive feedback after a few examples, and that he would receive extended time on assessments.

Moreover, his placement in a resource room for math further addressed his issues with working memory and processing speed. Specifically, in a smaller group, W.W. could work with fewer distractions, at his own pace.

Erickson noted that the Neuropsychological Report found that W.W.'s IQ was 82, in the low-average range. However, the Neuropsychological Report further noted that the discrepancy between W.W.'s scores on the Wechsler assessment suggested that the IQ score was not representative of W.W.'s intellectual abilities, and should not be used. Erickson testified that generally, many factors can affect a student's score on an IQ test, including whether the child is tired, sick, distracted, or has difficulty with attention or impulsivity.

The Neuropsychological Report indicated that W.W. was administered an executive functioning test. While Erickson testified that she is familiar with some executive functioning tests, she does not typically administer such tests. She normally receives adequate information regarding a student's executive functioning from

teachers' observations, and the Wechsler assessment. Executive functioning includes an array of skills, including working memory and processing speed, but also including other skills, such as organization and flexibility. W.W. scored in the low-average range on the executive functioning assessment. In general, if a student scored in the low-average range on an executive functioning test, Erickson would recommend placement in a resource room, or at least a Supportive Instructional Assistance classroom. In either setting, W.W. would receive more individualized instruction, and fewer distractions.

Further, the Neuropsychological Report indicated that W.W. was administered a BASC-2 assessment. The BASC-2 can be completed by a student's teachers, parents, or the student himself. It measures emotional and social functioning, and includes both clinical indicators, which are negative and adaptive indicators, which are positive. Erickson does administer this assessment to students. The assessment given to the teachers and parents is slightly different from the version given to a student, but they contain similar questions. Here, the BASC-2 was administered to W.W.'s teacher, W.W.'s parent, and W.W. himself. The teacher's assessment did not indicate anything clinically significant. However, the parent's assessment indicated that W.W.'s behavioral symptoms, specifically withdrawal and attention problems, was clinically significant. Moreover, the parent's assessment indicated that W.W.'s adaptive skills was clinically significant and at risk. Specifically, his leadership skills score was at risk, and his functional communication score was clinically significant.

The results of a teacher's and parent's BASC-2 assessment of the same student can be different, because the teacher's assessment reflects classroom observations, while the parent's assessment reflects observations in the home and community. She noted that the teacher may not observe behavioral issues, because in school, the student benefits from a structured classroom environment, clear expectations, and additional support. Erickson found that the teacher's assessment was consistent with her own experiences with W.W., as his case manager. Specifically, W.W. displayed no behavioral issues in the school environment. She noted slight hyperactivity, such as

W.W.'s tendency to leave his seat, but nothing significant. Finally, she noted W.W.'s working memory problems and distractibility could affect the results of the BASC-2 assessment he completed.

Dr. Couvadelli's Neuropsychological Report concluded that W.W. would benefit from small, language-enriched class. (J-16.) Erickson concludes that placement in the resource room would satisfy that recommendation. However, she conceded that placement in a general education classroom with Supportive Instructional Assistance would not satisfy this recommendation. The Neuropsychological Report further concluded that W.W. needed his psycho-social needs addressed. A school psychologist, or even a guidance counselor, could meet these needs. The school district employs certified professionals in each of these positions. Moreover, the Neuropsychological Report concluded that W.W. would benefit from an extended school year, "if [W.W.] is not able to attain all academic goals during the regular academic year." (J-16.) Erickson noted that the District does offer an extended school year.

The Neurological Report concluded that W.W. would benefit from individual and group speech therapy. The school district does offer individual speech therapy, as appropriate, as well as group speech therapy. The Neuropsychological Report concluded that W.W. would benefit from group social-skills training, and Erickson testified that the District does offer such training. The Neuropsychological Report concluded that W.W. would benefit if verbal prompts were accompanied by gestural or tactual prompts. The District's best practices for all special education teachers include the use of gestural or tactual prompts.

The Neurological Report further concluded that W.W. needed information presented in small segments and he needed to be provided with notes. Erickson testified that both W.W.'s 2012-13 IEP and W.W.'s 2013-14 IEP provided that W.W. would receive study guides. The Neurological Report concluded that information should be presented using, *inter alia*, visual media. Erickson testified that District teachers do incorporate visual media, including video, film clips, etc The Neurological Report

noted that W.W. required a quiet classroom, with few distractions. The school district teachers were required to maintain good classroom order, and classrooms were not typically noisy. Rather, classrooms are typically quiet. Resource room teachers typically present information in a variety of formats, give supplemental materials, break information down into smaller segments, and a variety of other techniques.

The District special education teachers are all certified by the State. Erickson noted that despite the Neuropsychological Report's conclusion that W.W. engage in repetition to learn new material, W.W.'s 2013-14 IEP provides for W.W. to repeat directions to ensure understanding, but does not provide for repetition of tasks, alone. Erickson explained that repetition is not considered a best practice for special education teachers.

The Neuropsychological Report recommended shorter assignments, and Erickson testified that W.W.'s 2013-14 IEP complied with this recommendation, by providing modified tests, quizzes, and assignments. W.W.'s 2012-13 IEP similarly included provisions for modified tests, and reduction of pen and paper work, which would comply with this recommendation. Erickson testified that students with attention deficits commonly have trouble maintaining focus on a lesson. W.W.'s 2012-13 IEP minimized distractions by requiring the teacher to gain W.W.'s attention, before providing instructions. W.W.'s 2012-13 IEP, which she helped to develop, addressed the recommendations in the Neurological Report, regarding his issues with memory, processing speed, and writing. The District was prepared to address these concerns in a way that would provide him with a meaningful educational benefit.

On cross, Erickson reiterated that she was not surprised that W.W. was not performing on grade level because special education students typically do not perform on grade level. She explained that if a student was performing on grade level, the student would not require special education services. Further, she conceded that the 2011-12 i-Ready Report for math, standing alone, did not establish that W.W. made meaningful educational progress. She further noted that in the fourth grade, W.W.,

scored 196 on the State-wide standardized ASK assessment in English, but in fifth grade, W.W. scored 157 on the ASK assessment in English. (Cf. J-1; J-8.)

Likewise, she agreed that this discrepancy, viewed in isolation, could indicate that W.W. lost ground between fourth and fifth grade. She agreed that in fourth grade, W.W. scored 193 on the ASK for math, and in fifth grade, W.W. scored 186 on the ASK for math. She agreed that was a decrease in his score between the fourth and fifth grade. However, Erickson explained that the standardized NJ ASK is only one measure of progress that the IEP team can consider. Moreover, whether an individualized education program is appropriate is measured by the student's individual needs and abilities, rather than by whether the student performs at the same level as general education students. A variety of measures should be considered, to determine whether the student is making meaningful progress. A student can make meaningful progress, overall, even if the student does not make progress in every subject area, every semester, as demonstrated by every assessment.

David Burrows (Burrows) has been employed as a school speech & language specialist with the District since 2004. He is a certified speech and language therapist. His responsibilities include treating and testing students with speech and language disorders, and providing case management to such students. Burrows provided such services to W.W. during his fifth-grade year and the beginning of his sixth-grade year. He also was his specialist during his pre-school years. W.W. was diagnosed with a language and articulation disorder. Generally speaking, the purpose of speech and language services is to ensure students can access the curriculum.

Burrows identified W.W.'s speech and language goals for the 2012-13 IEP, implemented on January 6, 2012, and W.W.'s speech and language goals for the revised 2012-13 IEP, implemented on December 19, 2012. (J-2; J-7.) The second IEP added articulation goals, but otherwise, the goals are the same, vocabulary, grammar, and articulation. Those goals were appropriate for W.W. He determines that goals and objectives are appropriate through testing and classroom performance. Goals can be

amended during the IEP period, if the goals and objectives are too easy or too difficult, as measured by the student's progress.

Burrows identified J-15 as W.W.'s 2012-13 Student Log for Speech and Language Goals, which he used to monitor W.W.'s progress towards the speech and language goals in his fifth grade IEP. (J-15.) He keeps track of W.W.'s accuracy in each session and notes his progress. Specifically, W.W. made progress with articulation of the letter "R" throughout the year. He explained that articulation skills should help W.W. interact with peers, as well.

Burrows identified R-47 as a progress report that he drafted for W.W. for spring and fall 2013. (R-47.) He identified J-13 as W.W.'s 2013-14 IEP, implemented on December 19, 2013. He testified that W.W.'s spring 2013 progress report indicates that he made progress on the goals and objectives contained in W.W.'s 2013-2014 IEP. (Cf. R-47; J-13.) While the progress report does not note W.W.'s progress in articulation, Burrows explained that W.W. did make progress, and the omission was an oversight. However, the progress report did note that by fall 2013, W.W. was still having difficulty translating the speech and language progress he had made into everyday conversation. While his articulation improved during his speech and language treatment sessions, with prompts and in isolation, he still struggled to implement those gains in his conversations. Accordingly Burrows opined that W.W. needed more speech and language services. Burrows noted did not have the opportunity to provide additional speech and language services in spring 2014, because W.W.'s parents decided not to consent to such services. They did not want W.W. to miss classroom instruction, which is necessary to deliver speech and language services.

Burrows explained that any time a student is provided with speech and language services, that student must miss classroom instruction, which the student will have to make-up later. The IEP team must balance the student's needs for classroom instruction, with the student's needs for additional services.

Burrows identified R-51 as W.W.'s a progress report that he drafted for W.W. for fall 2013. This progress report noted that Burrows consulted with W.W.'s classroom teachers and case managers, because he monitors W.W.'s speech and language progress in the classroom, as well. The progress report notes that he observed W.W. in the classroom where he further measures W.W.'s progress.

Burrows identified R-13 as another speech and progress report, from fall 2011 and spring 2012. J-19 is an auditory processing assessment, drafted on March 15, 2014. The report recommended "Fast Forward," which is a computer-based speech and language program. While the District does not use "Fast Forward," the District offers similar programs, such as "Hear Builders" and "Ear-robics." Both programs target auditory memory and auditory discrimination, and the ability to listen, with or without background noise. The programs are administered during speech therapy sessions.

J-29 is W.W.'s 2014-15 IEP, implemented on November 13, 2015, for W.W.'s seventh grade year. Burrows participated in the development of this IEP, and he drafted the speech and language goals. W.W. was placed in a resource room for language arts and math, and supportive instructional assistance for social studies and science. A supportive instructional assistance classroom would be considered a language-based classroom, which considers a student's language needs in the instruction delivery. The goals addressed auditory processing deficits. Similarly, W.W.'s 2012-13 IEP implemented on December 19, 2012, contained goals that addressed his auditory processing deficits.

J-20 is a speech and language assessment conducted by Susan Levine (Levine) on April 28, 2014. She employed the CELF test, which is an overall test that assesses language function, both expressive and receptive language ability. W.W. scored below average or low average on most of the sub-scales. W.W.'s deficits in the sub-scale "Word Classes" was addressed by his 2012-13 IEP, with the goal to "[i]mprove the ability to reason and tell how words and items are associated or related." (J-20; J-7.) Similarly, W.W.'s deficits in the sub-scale "Word Classes" was addressed by his 2014-

15 IEP, with the goal to “[d]escribe and define words by providing at least three salient features” (J-20; J-29.) Burrows noted that W.W.’s deficits in the sub-scale “Following Directions” was addressed by his 2014-15 IEP, with the goal to “[f]ollow oral directions of increasing length and complexity.” (J-20; J-29.) Following directions was a skill that could be reinforced in the resource room, and supportive instructional assistance classrooms. Burrows noted that W.W.’s deficits in the sub-scale “Formulating Sentences” was addressed by his 2012-13 IEP, with the goal to “[i]mprove the ability to identify incorrect grammar in spoken sentences, and present the grammatically correct form in a sentence.” (J-7; J-29.)

Burrows noted that W.W.’s deficits in the sub-scale “Recalling Sentences” was addressed by his 2014-15 IEP, with the goal to “recall and repeat sentences of increasing length and complexity presented verbally.” (Cf. J-20; J-29) W.W. did not have significant deficits in the sub-scale “Understanding Spoken Paragraphs.” (J-20.) His deficits in the sub-scale “Word Definitions” was addressed by his 2012-13 IEP, with the goals to “[i]mprove expressive and receptive knowledge of curriculum related vocabulary terms[,]” “[i]mprove the ability to give verbal descriptions and/or definitions using precise language to convey meaning[,]” and “[i]mprove the ability to reason and tell how words and items are associated or related.” (J-20; J-7.) Similarly, W.W.’s deficits in the sub-scale “Word Definitions” was addressed by his 2014-15 IEP, with the goal to “[d]escribe and define words by providing at least three salient features” (J-20; J-29.)

Burrows further explained that W.W.’s deficits in the sub-scale “Sentence Assembly” was addressed by his 2012-13 IEP, with the goal to “[i]mprove the ability to identify incorrect grammar in spoken sentences, and present the grammatically correct form in a sentence.” (J-20; J-7.) W.W.’s deficits in the sub-scale “Semantic Relationships” was addressed by his 2014-15 IEP, with the goal to “[i]mprove the ability to perceive relationships between verbal concepts and identify word pairs which are associated by class membership, antonyms, agent-action, or super-ordinate-subordinate relationships.” (J-20; J-7.) Similarly, W.W.’s deficits in the sub-scale

“Semantic Relationships” was addressed by his 2014-15 IEP, with the goal to “[d]escribe and define words by providing at least three salient features” (J-20; J-29.) Finally, W.W.’s deficits in the sub-scale “Pragmatic Profile” was addressed by his 2014-15 IEP, with the goals to “[p]roblem solve social situation verbally[,]” “[i]ntroduce a topic of conversation with adults and peers[,]” and “[e]ngage in a conversation with a peer for at least [five] conversation turns.” (J-20; J-29.) Additionally, group speech therapy assists with pragmatic skills, to allow W.W. to practice language skills with peers.

Burrows further noted that W.W. scored below average on the Core and Index Scores. (J-20.) He noted that W.W.’s deficits in the “Receptive Language Index” were addressed in his 2012-13 IEP, with the goals “[i]mprove expressive and receptive knowledge of curriculum related vocabulary terms[,]” “[i]mprove ability to reason and tell how words and items are associated or related[,]” and “[i]mprove the ability to identify incorrect grammar in spoken sentences, and present the grammatically correct form in a sentence.” (J-20; J-7.)

Similarly, W.W.’s deficits in the “Receptive Language Index” were addressed in his 2014-15 IEP, with the goals “[f]ollow oral directions of increasing length and complexity[,]” and “[r]ecall and repeat sentences of increasing length and complexity presented verbally.” (J-20; J-29.) W.W.’s deficits in the “Expressive Language Index” were addressed in his 2012-13 IEP, with goals one, two, three, four, and five.³ (Cf. J-20; J-7.) Likewise, W.W.’s deficits in the “Expressive Language Index” were addressed in his 2014-15 IEP, with goals seven and eight. (Cf. J-20; J-29.) W.W.’s deficits in “Language Memory Index” were indirectly addressed in his 2012-13 IEP, with goal four. (Cf. Joint Ex. 20; Joint Ex. 7.) His deficits in “Language Memory Index” were addressed in his 2014-15 IEP, with goals five and six. (Cf. J-20; J-29.)

³ Much of this testimony is duplicative. The actual goals are specified in the exhibits, so the specific goals will not be recounted here. (See J-7.)

Burrows explained that the mere fact that not all of W.W.'s deficits as identified by Levine were addressed in his IEPs does not mean the IEPs were not appropriate. First, when the 2012-13 IEP was developed, W.W. had not been tested in several years. Second, the goals that were actually included in the 2012-13 IEP were appropriate. Third, just because W.W. continued to score below average on speech and language sub-scales, did not mean that his previous goals and objective were not appropriate. Fourth, if every one of W.W.'s deficits was addressed at the same time, none of the deficits would be addressed sufficiently. Rather, the IEP team must strike a balance, and prioritize goals. He opined that skills such as the ability to listen and follow directions in the classroom, the ability to understand vocabulary in the classroom, and the ability to express himself in the classroom were priorities. These goals helped him to access the curriculum.

Burrows noted that Levine also conducted a "Narrative Speech Sample" that assesses W.W.'s conversational skills. W.W.'s goals and objectives addressed W.W.'s conversational skills, because his goals and objectives provided the building blocks of conversational language. Levine's assessment measured articulation/oral motor/prosody skills as well, and noted that W.W. had deficits in distortion of the "r" sound, positions of words, and "r blends," substitution of "f" and "d" for voiceless "th," and substitution of "v" and "d" for voiced "th" sounds. W.W.'s IEPs addressed these deficits, and Burrows worked with him on these deficits in speech therapy.

Burrows concluded that W.W. continues to struggle in these areas, but has made progress. A student who is classified as communication impaired typically continues to experience language and articulation issues, which can take time to correct.

Burrows noted that Levine recommended a small classroom environment, which the resource room classroom and supportive instructional assistance classroom provided. Levine also recommended that W.W. "should be placed with children with whom he can relate." (J-20.) A resource classroom would provide W.W. with such peers, at his academic level and age. However, in his view, W.W. should also be

placed in classrooms with typically developing peers, who provide models of typically developing language skills.

Burrows identified J-16 as a Neuropsychological Evaluation, conducted by Dr. Barbara Couvadelli (Dr. Couvadelli) on March 12, 2014 and May 5, 2014. Dr. Couvadelli recommended that W.W. be placed in a small language-enriched class. She also recommended that a “trained individual” must work with W.W. However, Burrows disagreed, and opined that someone who has been trained specifically in speech and language articulation must work with W.W. Burrows never told Dr. Couvadelli that he recommended W.W. stop speech therapy. Burrows did not notice W.W. exhibit any social skills difficulties in his speech therapy sessions. Rather, W.W. would converse with his peers during therapy sessions, and even introduce topics. He concluded that the District can provide the necessary speech and language services to enable W.W. to access the curriculum, and receive a meaningful educational benefit.

On cross, Burrows conceded that he did not attend W.W.’s fifth- or sixth-grade IEP meeting. He conceded that W.W.’s student log illustrates that W.W. did not attend all of his speech therapy session, during fall 2013. (J-51.) He noted that J-17 is a letter from W.W.’s mother, which states, in entirety,

[a]s discussed, I am writing to you today to ask to discontinue speech services for [W.W.] My husband and I feel that at this point being pulled out of his academic classes will adversely affect his overall performance in school. We would like to discontinue the speech services effective immediately. Thank you and if you have any questions please do not hesitate to contact me.

W.W. only received three speech therapy sessions in fall 2013, anyway. On redirect, Burrows explained that particularly in the beginning of the school year, W.W.’s school used block scheduling, which made scheduling speech sessions with all of his students very difficult, since he provides services throughout the District.

Burrows noted that Dr. Sgarlato, the person who conducted an audiological evaluation of W.W. on March 15, 2014, was not an employee of the District. She was retained by W.W.'s parents. He did not utilize computer-based auditory processing programs with W.W., such as "Ear-robics," because his IEP did not contain auditory processing goals. He conceded that he did not recommend W.W. undergo a central auditory processing evaluation.

Burrows conceded that in retrospect, given testing that occurred after the development of W.W.'s 2014-15 IEP, more time could have been spent on language processing. Similarly, in retrospect, more time should have been spent on pragmatic language goals and semantic relationships. Further, Levine's April 28, 2014, assessments suggested that other goals and objectives could have been included in W.W.'s 2012-13 IEP, and in hindsight, in light of the assessment conducted two years later, including such goals would have been appropriate.

Burrows does not believe a program could address every single one of W.W.'s deficits throughout the day. However, the District's pre-school program did provide a full-day, language-infused program. Moreover, he collects objective data throughout his speech therapy by recording each instance that W.W. accurately (or inaccurately) articulates a sound. Those notes are reliable and accurate, and form the basis for development of W.W.'s IEP. He does not believe a language and articulation assessment, such as the CELF Levine administered, should be administered every single year.

On redirect, Burrows explained that a student's IQ is independent of a student's communication impairment. Accordingly, a student can fail to make progress on his communication impairment, despite his average IQ.

Lori-Jane Dolan (Dolan) has been employed by the District as a learning disability teacher consultant (LDTC) for ten years. She is certified as a LDTC, a teacher, a supervisor, and a principle. She was a teacher for ten years. As the LDTC,

she advises other special education teachers, general education teachers, and evaluates all students who need special education services. She was W.W.'s case manager for the 2014-15 school year. (J-29.)

Dolan explained that a student's growth is individual, but typically, students who require special education services generally progress more slowly than their typically developing peers. Just because a student who receives special education services is not at the same grade level as typically developing peers, does not mean that the student is not progressing or learning. Rather, students who receive special education services must be considered as individuals, and each student's progress needs to be measured in light of that student's abilities. Dolan explained that to measure a student's progress, the teacher uses a variety of assessments.

When she drafted W.W.'s IEP, she consulted with W.W.'s past case managers, and reviewed his past IEPs. She also considered his report cards, progress reports, tests, assessments, and other documents in the file.

A supportive instructive assistance classroom offers special education students the general education curriculum, with instructional support. Accordingly, the proposed 2014-15 IEP provided that W.W. would receive the grade level curriculum for science and social studies, but would also receive modifications in the classroom to help him access that curriculum. Moreover, W.W. would share the classroom with both general education students, and other students who receive special education services. A typical supportive instructional assistance classroom has between fifteen to seventeen students. A resource classroom follows the state curriculum, but the lessons are tailored for individual students. Resource rooms generally have six to seven students, all of whom receive special education services.

As a case manager, Dolan's responsibilities include drafting the IEPs, acting as a liaison between families and the school, consulting with the teachers, and ensuring that IEPs are being followed. She consults with teachers daily. Dolan identified R-49 as

meeting notes from the December 18, 2013 IEP meeting. Dolan reviewed this note in drafting W.W.'s 2014-15 IEP. She also consulted with W.W.'s previous case manager, Cynthia Pappa (Pappa). Pappa recommended using technology in the classroom and at home, including use of an I-Phone, and a lap-top computer. Pappa recommended W.W. be encouraged to type assignments, to improve his typing fluency, and address his handwriting deficits. She noted that Dr. Couvadelli recommended "intense typing skill instruction" to address his dysgraphia. Dolan explained that dysgraphia is a handwriting deficit.

Dolan also observed W.W. at the Winston Preparatory School (Winston). Though W.W. would be placed in a seventh-grade classroom in the District, he was in a classroom with students of varying grade levels. At Winston, he was handwriting his assignments, not typing and was in a restrictive environment. However, Dolan opined that typing would assist W.W. in the classroom by bypassing his handwriting deficits. In the District, student can access technology in the classroom, specifically, lap-tops in the classroom. If W.W. had attended seventh grade in the District, he would have been provided with a lap-top in the classroom. W.W.'s 2014-15 IEP provided that he would use a lap-top in the classroom. A lap-top would also allow W.W. to access computer programs that address his auditory deficits (such as a program that reads stories aloud, in his language arts classroom).

Dolan identified J-24 as W.W.'s report card for his sixth-grade year. She noted that W.W.'s sixth-grade report card reflects that W.W. took a class called "tech basics" in which he learned typing, as well as other computer skills. Dolan noted that in the twenty-first century, technological literacy is a basic life skill.

J-27 is Dolan's September 17, 2014 educational evaluation of W.W. Her evaluation included a classroom observation, an interview with the director of Winston, and completing evaluations. She administered the Wechsler Individual Achievement Test (WIAT-III), which is a diagnostic achievement test. W.W. was not given modifications when she administered the WIAT-III. She did not administer all

components of the WIAT-III, because Winston had administered the reading portion of the WIAT-III when W.W. enrolled, and the WIAT-III can only be administered once in a calendar year, to preserve accurate and valid results. Dolan typically administers the WIAT-III every three years. Overall, in the areas Dolan was able to assess, the WIAT-III indicated that W.W. had deficits in written expression, math, and math fluency.

Dolan explained that the WAIT-III and the Woodcock-Johnson (WJ-III) assessment are different achievement tests, and accordingly, a comparison of W.W.'s scores on both is not helpful. Dolan noted that Dr. Couvadelli administered the WJ-III. The WJ-III Dr. Couvadelli administered revealed that W.W. scored slightly below average in reading, and below average in math. Dolan explained that a resource room would be an appropriate placement to address these deficits. A resource room would allow W.W. to receive individualized assistance with his deficits. Similarly, a resource room would be an appropriate placement to address W.W.'s deficits in written expression.

Dolan considers a students' report card in formulating an IEP. She identified R-1 as W.W.'s fourth-grade report card. W.W. received eighty to ninety percent in his classes, which means that W.W. was retaining eighty to ninety percent of the general education curriculum. Dolan identified R-26 as W.W.'s fifth-grade report card. Again, W.W. generally received eighty to ninety percent in his classes, with the exception of one semester of language arts, and one semester of math, in which he received seventy-two and seventy-five percent, respectively. Dolan identified J-24 as W.W.'s sixth-grade report card. His grades declined during his sixth-grade year. She noted that when a student declines, the IEP team will explore the reason. The IEP team will try additional modifications and accommodations, to try to keep the student in the least restrictive environment, but if the student cannot access the general education curriculum with supports, the student will be moved to a resource room. However, Dolan concluded that while W.W.'s grades declined, he was still learning.

W.W. moved to the middle school for his sixth-grade year, from the elementary school. The transition to middle school can affect a student's performance, not only students who receive special education services, but general education students, as well.

A comparison of W.W.'s 2013-14 and 2014-15 IEPs reveal several changes to his academic program. (Cf. J-13; J-29.) First, he was moved from a supportive instructional assistance language arts classroom to a resource room language arts classroom. (Cf. J-13; J-29.) She recommended that change, in light of W.W.'s declining grades in language arts.

W.W. was still placed in supportive instructional assistance for science and social studies because those subject involve less reading and math, and more hands-on, group oriented work. Moreover, the supportive instructional assistance classrooms allow him to interact with his typically developing peers, and access the general education curriculum with modifications and supports.

Dolan noted that Dr. Couvadelli found that W.W. had a low-working memory. She explained that W.W.'s working memory deficits can affect his abilities in math, because math requires building on previously learned skills. Accordingly, placement in a resource room would allow W.W. to work on skills that he has not yet mastered, and work at his own pace. Similarly, Dr. Couvadelli recommended that W.W. need to be continuously monitored, and his educational program adjusted on an on-going basis. Dolan explained that his resource room teachers would provide that continuous monitoring, and do adjust his program to his changing needs. The resource room teachers develop W.W.'s IEP, and adjust his goals, objectives, and modifications as necessary.

Dolan noted that parents are given report cards four times a year, but W.W. was assessed throughout the year, at least weekly. Some assessments are generated by teachers and some are published by the text-book publishers. Again, the District's

program delivers the state-mandated curriculum. When Dolan interviewed the director of the Winston school, she indicated that Winston does use the State-mandated curriculum, but rather, an employs an “eclectic approach.” Winston listed different types of reading programs, such as Recipe for Reading, Orton, and Wilson reading programs. Dolan explained that those are not related to the State-mandated curriculum, but rather, are programs designed to be supplementary to the curriculum. They are instructional techniques, not substantive curriculum. For example, they do not include substantive lessons in social studies or science.

When Dolan observed W.W. in Winston, she did not observe the teachers employing Recipe for Reading, Orton, or Wilson. The classroom did not include a supplementary aid, or a special education teacher. Dolan was told that not all of the instructors are State-certified teachers. The Winston class included four to five students. The other students were not the same age or grade level as W.W. However, in the District, W.W. would have been placed in classrooms with students his own age and grade level. Moreover, in the District, W.W. would only be taught by State-certified teachers and State-certified special education teachers.

In the supportive instructional assistance classroom, W.W. would have the opportunity to be educated with his typically developing peers. Dolan explained that the benefits of exposure to typically developing peers include role models and social interactions with typically developing peers. In contrast, all of the students in Winston are eligible for special education services. Accordingly, Winston is a more restrictive environment than the District.

Dr. Couvadelli found W.W.’s placement in a supportive instructional assistance classroom “utterly surprising” (J-26.) She disagrees. The supportive instructional assistance classroom provided a special education teacher to assist W.W. in the areas he exhibited deficits. However, that did not mean that W.W. would miss the general education teacher’s instruction. Rather, the general education teacher will deliver a lesson, and when the students begin independent work, the special education teacher

will offer assistance. Typically, the general education teacher does not lecture for the entire period. Moreover, the special education teacher will individually assess each student during the period, to ensure comprehension.

Dolan also disagreed with Dr. Couvadelli's conclusion that W.W.'s placement in supportive instructional assistance and resource room classrooms was not appropriate to address W.W.'s social skill needs. To the contrary, exposure to his typically developing peers would enhance his social skills.

Further, that Dr. Couvadelli recommended that W.W. receive intense instruction for written expression. Dolan explained that W.W. would receive such intense instruction in a resource room and supportive instructional assistance classroom.

Dr. Couvadelli's conclusion that W.W.'s ability to encode new information is below average. Dolan explained that modifications in W.W.'s proposed IEP, such as provision of study guides, visual cues, small group instruction, modified tests, etc . . . addressed these issues. (J-29.)

Dolan identified J-19 as Dr. Sgarlato's auditory processing report. Dr. Sgarlato recommended interventions such as Orton Gillingham, Wilson, and Lindamood-Bell. Dolan explained that these are all multi-sensory reading supplemental instructions. The District offers Project Read, which is a similar multi-sensory reading supplemental instruction. Dr. Sgarlato recommended that W.W. receive intense direct instruction using one of these methods, one to two hours per day. Dolan explained that in the District program W.W. would receive intense direct instruction for at least sixty minutes per day.

Dr. Sgarlato further recommended that W.W. use multi-sensory reading supplemental instruction "across all curricula." (J-19.) She did not understand that recommendation, because reading supplemental instruction is separate from substantive content such as social studies or science.

Dr. Sgarlato also recommended W.W. type and use a lap-top. Again, Dolan testified that W.W.'s IEP provides that W.W. would receive instruction in typing to improve his fluency, and would use a lap-top in his classes. Similarly, all of Dr. Sgarlato's recommendation are included in W.W.'s 2014-15 IEP, or constitute best practices of District teachers, anyway.

Finally, Dr. Sgarlato recommended the use of an FM system. Dolan explained that there are two types of FM systems; classroom FM systems, and individual FM systems. Both allow students to access auditory information more clearly. W.W.'s 2014-15 IEP included an enrichment class where students are assisted with navigation of middle school improving their study skills, typing skills, and individual reading time. (J-29.)

On cross, Dolan agreed that W.W. was last evaluated by the District in 2007. W.W. was not reevaluated in 2010, because W.W.'s parents waived the evaluation.

FINDINGS OF FACT

Based on the foregoing testimony and exhibits, I **FIND**

1. The District determines whether a student is receiving a meaningful educational benefit based on performance on the DRA, i-Ready, progress reports, grades, tests and quizzes and classroom performance.
2. On October 19, 2012, the District offered to reevaluate W.W. (J-3.)
3. W.W.'s parent refused to consent to a reevaluation.

4. In spite of the refusal, the District created a 2012-13 IEP for W.W., based on his DRA scores, i-Ready scores, tests and quizzes, class performance, participation, and in consultation with his classroom teachers.

5. Pursuant to the December 2012 IEP, for the remainder of the 2012-13 school year, W.W. was placed in General Education with Supportive Instructional Assistance, for all of his classes. However, when W.W. transitioned to the middle school the following year, he was assigned to General Education with Supportive Instructional Assistance for English Language Arts, Science, and Social Studies, but Resource Room for Math.

6. W.W. was not moved to Resource Room for math during his fifth grade year, because a mid-year move would disrupt his schedule, and the Resource Room curriculum did not align with the General Education curriculum. W.W.'s parent agreed with the decision not to move W.W. mid-year.

7. The 2012-13 IEP included goals and objectives for W.W.'s in speech and language therapy. These goals and objectives were formulated by Burrows, W.W.'s speech and language therapist.

8. Based on W.W.'s progress reports, report cards, i-Ready scores, and assessments, W.W. was able to meaningfully participate in the classroom during his fifth grade school year, and made meaningful progress.

9. W.W.'s 2013-14 IEP, developed on December 18, 2013, assigned W.W. to Supportive Instructional Assistance for English, social studies, and science for the beginning of the 2014-15 school year; and Resource Room for math, and General Education for science for the end of the 2013-14 school year.

10. The math goals and objectives in W.W.'s 2013-14 IEP were developed by W.W.'s math Resource Room teacher.

11. W.W.'s first semester progress report for sixth grade math indicated that he had made progress on most of the goals and objectives included in his 2013-14 IEP, specifically, nine of twelve goals. (R-45.) Similarly, W.W.'s second progress report for sixth grade math indicated that he had made progress on all of the goals and objectives included in his 2013-14 IEP. (R-55.) Resource Room teachers measure a student's progress through tests, quizzes, participation and classroom observation, among other things.

12. Based on W.W.'s progress reports, report cards, i-Ready assessments, and goals and objectives listed in the IEP, W.W. was able to make meaningful educational progress during his sixth grade year.

13. Both W.W.'s 2012-13 and 2013-14 IEP contained modifications to address W.W.'s working memory and processing speed deficits. (See J-7, 13.)

14. W.W.'s 2012-13 and 2013-14 IEPs addressed the recommendations in Dr. Couvadelli's Neurological Report, regarding W.W.'s issues with memory, processing speed writing and his placements complied with Dr. Couvadelli's recommendations. (See J-16.)

15. Burrows used W.W.'s 2012-13 Student Log for Speech and Language Goals to monitor W.W.'s progress in meeting the speech and language goals in his fifth grade IEP.

16. W.W. made progress with articulation of the letter "R" throughout the year.

17. Burrows recommended that W.W. continue speech therapy through his sixth grade year, but W.W.'s parents decided to discontinue such services, because they believed W.W. was missing too much classroom instruction.

18. Burrows participated in the development of W.W.'s 2014-15 IEP, and drafted the speech and language goals.

19. Most of W.W.'s speech and language deficits, identified in the speech and language assessment conducted by Levine on April 28, 2014, were addressed in W.W.'s 2014-15 IEP. (J-20.) All of W.W.'s deficits could not be remediated simultaneously, so the District prioritized remediation of his most serious deficits.

20. W.W. should be placed in classrooms with typically developing peers, who provide models of typically developing language skills.

21. The District can provide the necessary speech and language services to enable W.W. to access the curriculum, and receive a meaningful educational benefit.

22. A student's IQ is independent of a student's communication impairment. Accordingly, a student can fail to make progress on his communication impairment, despite his average IQ.

23. Dolan was W.W.'s case manager for the 2014-15 school year. (J-29.)

24. To draft W.W.'s IEP, Dolan consulted with W.W.'s past case managers, and reviewed his past IEPs. She also considered his report cards, progress reports, tests, assessments, and other documents in the file.

25. W.W.'s proposed 2014-15 IEP provided that he would be placed in a supportive instructional assistance classroom for social studies and science, and resource rooms for math and Language Arts. (J-29.)

26. A resource room would allow W.W. to receive individualized assistance with his math deficits. Similarly, a resource room would be an appropriate placement to address W.W.'s deficits in written expression.

27. W.W. was still placed in supportive instructional assistance for science and social studies, because those subject involve less reading and math, and more hands-on, group oriented work. Moreover, the supportive instructional assistance classrooms allow W.W. to interact with his typically-developing peers, and access the general education curriculum with modifications and supports.

28. W.W.'s 2014-15 IEP was reasonably calculated to provide W.W. a meaningful educational benefit.

PARTIES' ARGUMENTS

Petitioner argues that "Child Find was clearly violated as all of W.W.'s age-matched peers performed significantly higher." (Pet'r's Mot. for Summ. Decision 10.) Further, petitioner contends that because W.W. scored in the bottom 1% on an auditory processing assessment, "as a matter of law, the mainstream was inappropriate to meet W.W.'s needs." Moreover, petitioner suggests that a comparison between W.W.'s progress in the District and Winston establishes that the District did not offer W.W. a FAPE. However, W.W. does not explain how the fact the W.W. performed below his peers is a violation of "Child Find." (Ibid.) Again, W.W. cites no legal authority for that proposition, nor does W.W. divulge his understanding of the principle of "Child Find."⁴ (Ibid.)

Petitioner also generally asserts that the District violated numerous procedural safe guards". Specifically, petitioner contends:

⁴ Petitioner cites a document that was not admitted in evidence, to establish W.W.'s progress at Winston, despite the fact that counsel for W.W. was repeatedly told that document was not in evidence, and accordingly, could not be considered. Accordingly, even if W.W.'s progress at Winston were relevant to determine whether the District provided a FAPE, such alleged progress has not been established in this record.

[a]s the District relied very heavily on W.W.'s report card grades, it has made a serious error in judgement as we have authority that between report card grades and standardized assessments, the latter is afforded greater weight. As W.W. tested Partially Proficient year after year on the New Jersey Assessment of Skills and Knowledge, the District knew or should have known that, under Child Find, it was obligated to administer standardized assessments to determine whether the report card grades or the NJASK scores were accurate.

[Id. at 11 (citing D.S. v. Bayonne Bd. of Educ., 602 F.3d 553 (3d Cir. 2010).]

D.S. does not remotely suggest “that between report card grades and standardized assessments, the latter is afforded greater weight.” (Ibid.; D.S., supra, 602 F.3d at 568 (reiterating, to the contrary, that “we consistently have declined to adopt bright line rules to determine whether a student is receiving a meaningful educational benefit under the IDEA”).

Petitioner further contends that the District's failure to reevaluate W.W. in 2012, because W.W.'s parents refused to consent to a reevaluation, was improper. Petitioner argues that the District should have proceeded to due process to ensure the reevaluation took place if they, in their professional opinion, thought it was in the best interest of the child. Thus, petitioner concludes that since the District did not institute litigation against W.W.'s parents, to compel an evaluation, there was a procedural violation of IDEA.

DISCUSSION, FINDINGS AND CONCLUSIONS

IDEA ensures that children with disabilities have access to a “free appropriate public education” (FAPE). 20 U.S.C.A. § 1400(d)(1)(A). In turn, “[t]he issue of whether an IEP is appropriate is a question of fact.” S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 271 (3d Cir. 2003). To determine whether a school district provided a FAPE, the hearing officer “must (1) consider whether the school district complied with IDEA’s procedural requirements and (2) determine whether the educational program was ‘reasonably calculated to enable the child to receive educational benefits.’” Mary Courtney T. v. Sch. Dist. of Philadelphia, 575 F.3d 235, 249 (3d Cir. 2009) (citing Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).) However, the hearing officer must “determine the appropriateness of an IEP as of the time it was made, and should use evidence acquired subsequently to the creation of an IEP only to evaluate the reasonableness of the school district’s decisions at the time that they were made.” D.S., supra, 602 F.3d at 564-565. Moreover, “[a] procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits.” Id. at 565. See also N.J.A.C. 6A:14-2.7(k)(1-3). Accordingly, while “it is important that a school district comply with the IDEA’s procedural requirements, rather than being a goal in itself, such compliance primarily is significant because of the requirements’ impact on students’ and parents’ substantive rights.” D.S., supra, 602 F.3d at 564-565.

Initially, the Third Circuit held that a FAPE requires “that an IEP offer more than a trivial or de minimis educational benefit.” T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (quoting Oberti v. Board of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1213 (3d Cir. 1993).) The Third Circuit later amended that standard, to require “that a satisfactory IEP must provide ‘significant learning’ and confer ‘meaningful benefit.’” Ibid. (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).)

However, it is well established that IDEA does not require a school district “supply an education to a handicapped child that maximizes the child's potential” D.S., supra, 602 F.3d at 556. As the Sixth Circuit colorfully analogized, IDEA requires “the educational equivalent of a serviceable Chevrolet” rather than a “Cadillac solely for [the student’s] use.” Doe v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455, 459-460 (6th Cir. 1993). Accordingly, “though the IEP must provide the student with a ‘basic floor of opportunity,’ it need not necessarily provide ‘the optimal level of services’ that parents might desire for their child.” D.S., supra, 602 F.3d at 557 (quoting Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000).) In New Jersey, the school district bears the burden to establish that the district offered a FAPE. N.J.S.A. 18A:46-1.1.

The United States Supreme Court long ago rejected the proposition that IDEA requires students with disabilities receive the opportunities necessary to perform on-par with their typically developing peers. Rowley, supra, 458 U.S. at 198-199. The Court reasoned that the

educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom. The requirement that States provide “equal” educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of “free appropriate public education”; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child’s potential is, we think, further than Congress intended to go. Thus to speak in terms of “equal” services in one instance gives less than what is required by the Act and in another instance more.

[ibid.]

Accordingly, the determination of whether a student receives a FAPE cannot be reduced to a single test, or by measuring the student's progress by the progress of his typically developing peers. Id. at 198-202. Rather, the Court noted that IDEA

requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills.

[Id. at 202.]

In short, case law has long and uniformly rejected "a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3d Cir. 1999).

When parents unilaterally place a student in a private school, and seek tuition reimbursement, the hearing officer "must first determine whether the IEP afforded the student a FAPE. A comparison between the two programs is irrelevant to the adequacy of the proposed placement under IDEA." H.W. v. Highland Park Bd. of Educ., 108 Fed. Appx. 731, 733 (3d Cir. 2004) (quoting Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004).) Rather, if the district offers a FAPE, the parents are barred from seeking any tuition reimbursement. N.J.A.C. 6A:14-2.10(a).

In New Jersey, the school district bears the burden to establish that the district offered a FAPE. N.J.S.A. 18A:46-1.1. New Jersey regulations clearly delineate the rights and responsibilities of the school district and parent with respect to reevaluations. See N.J.A.C. 6A:14-3.8. Students eligible for special education services should be reevaluated every three years. N.J.A.C. 6A:14-3.8(a). However,

[i]f a parent provides written consent and the district board of education agrees that a reevaluation is unnecessary, the reevaluation may be waived. If a reevaluation is waived, the date of the parent's written consent shall constitute the date upon which the next three-year period for conducting a reevaluation shall commence.

[N.J.A.C. 6A:14-3.8(a)(1).]

Moreover, “[p]rior to conducting any assessment as part of a reevaluation of a student with a disability, the district board of education shall obtain consent from the parent according to N.J.A.C. 6A:14-2.3.” N.J.A.C. 6A:14-3.8(c). In turn, N.J.A.C. 6A:14-2.3, which addresses parental consent, generally, provides that

[c]onsent shall be obtained . . . [p]rior to conducting any assessment as part of a reevaluation, except that such consent is not required if the district board of education can demonstrate that it had taken reasonable measures, consistent with (k)7 below, to obtain such consent and the parent failed to respond . . . [and w]hen a parent and district board of education agree to waive a reevaluation pursuant to N.J.A.C. 6A:14-3.8(a).

[N.J.A.C. 6A:14-2.3(a)(3), (9).]

With respect to parental consent, the regulations further provide that

[w]hen a parent refuses to provide consent for implementation of the initial IEP, no IEP shall be finalized and the district board of education may not seek to compel consent through a due process hearing. However, if a parent refuses special education and related services on behalf of a student, the district board of education shall not be determined to have denied the student a free, appropriate public education because the student failed to receive necessary special education and related services nor shall the district board of education be determined in violation of its child-find obligation solely because it failed to provide special education or related services to a student whose parents refused to provide consent for implementation of the initial IEP.

[N.J.A.C. 6A:14-2.3(c).]

Similarly, once a parent **revokes** consent

for special education and related services on behalf of a student, the district board of education shall not be determined to have denied the student a free, appropriate public education because the student failed to receive necessary special education and related services nor shall the district board of education be determined in violation of its child-find obligation solely because it failed to provide special education or related services to a student whose parents revoked consent for implementation of services.

[N.J.A.C. 6A:14-2.3(e)(4) (emphasis added).]

However, the regulations provide that “[f]or those areas set forth in [N.J.A.C. 6A:14-2.3] (a)1, 3 and 4 above, if a parent refuses to provide consent and the district and the parent have not agreed to other action, the district **may** request a due process hearing according to N.J.A.C. 6A:14-2.7(b) to obtain consent.” N.J.A.C. 6A:14-2.3(c). In turn, the district board of education or public agency responsible for the development of the student's IEP may request a due process hearing when it is unable to obtain required consent to conduct an initial evaluation or a reevaluation, or to release student records. N.J.A.C. 6A:14-2.7(b) (emphasis added). Thus, read *in pari materia*, several basic principles emerge. See N.J.A.C. 6A:14-2.3(c); N.J.A.C. 6A:14-2.7(b). State regulations make clear that if a parent refuses to consent to a reevaluation, the district **may** file for due process to compel that reevaluation, but is not required to file for due process. N.J.A.C. 6A:14-2.7(b). If the parent and district agree to waive reevaluation, the regulations do not suggest that the District would be permitted to file for due process. See N.J.A.C. 6A:14-2.3(c) (enumerating scenarios that permit the district to file for due process, which do not include an agreement to waive reevaluation). Indeed, such an omission is logical, as if the parties agree reevaluation is unnecessary, no dispute exists to resolve through due process. See Ibid. The regulations leave the ultimate determination of whether a child will receive services to the parent. See N.J.A.C. 6A:14-2.3(c); N.J.A.C. 6A:14-2.3(e)(4).

Moreover, the same regulations provide that a parent who refuses to consent to services, cannot later argue that the district failed to provide a FAPE. N.J.A.C. 6A:14-2.3(c); N.J.A.C. 6A:14-2.3(e)(4). In other words, a parent cannot refuse to allow the school district to offer a FAPE, and later seek reimbursement for a unilateral placement, predicated on the school district's failure to offer a FAPE. N.J.A.C. 6A:14-2.3(c); N.J.A.C. 6A:14-2.3(e)(4). The regulations do not expressly provide that if a parent refuses to consent to a reevaluation, the parent can later argue that the failure to reevaluate was a denial of FAPE. See N.J.A.C. 6A:14-2.3(c). However, the spirit of these regulations strongly suggests, and logic dictates, that a parent may not withhold consent for an evaluation or service, and later argue that the district's failure to administer that same evaluation or deliver that same service constitutes a denial of FAPE. See Ibid.

Petitioner's reliance on the principle of "Child Find" is totally misplaced. Pursuant to the "Child Find" provision of IDEA.

[a]ll children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

[20 U.S.C.A. § 1412(a)(3)(A).]

However, the Child Find section further provides that "[n]othing in this title . . . requires that children be classified by their disability so long as each child who has a disability . . . and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part" 20 U.S.C.A. § 1412(a)(3)(B).

In other words, "Child Find" is the legal term of art for a school district's responsibility to identify students with disabilities, who do not yet receive special

education services. Ibid. The section expressly does not address the proper classification of students, only the narrow determination of whether a student is eligible for special education services, at all. Ibid. Notably, even pursuant to Child Find, “[w]hen a school district has conducted a comprehensive evaluation and concluded that a student does not qualify as disabled under the IDEA, the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required.” Ridley Sch. Dist. v. M.R., 680 F.3d 260, 273 (3d Cir. 2012); see also P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir. 2009) (district not in violation of Child Find for delay in evaluating student after parent’s request, and noting that district complied with child find because district “routinely posts child find notices in the local paper, makes the information available on its website, and sends residents the information in their tax bills. Targeted posters and pamphlets are placed in private schools”). Notably, petitioner does not cite and research does not reveal, application of “Child Find” to a student who already receives special education services, but argues for more or different services.

Finally, the sole case that W.W. cites, D.S., does not remotely suggest that “that between report card grades and standardized assessments, the latter is afforded greater weight.” (Pet’r’s Br. at 11 (citing D.S., supra, 602 F.3d at 557).) Again, D.S. reiterated that the Third Circuit has “consistently have declined to adopt bright line rules to determine whether a student is receiving a meaningful educational benefit under the IDEA.” D.S., supra, 602 F.3d at 568. In D.S., the Third Circuit criticized the District Court’s reversal of the ALJ’s decision, because the District Court relied too heavily on the student’s grades, standing alone, to determine that the student made meaningful educational progress. Ibid. The Third Circuit noted that “[i]t certainly was reasonable for the Court to consider D.S.’s academic progress in evaluating the appropriateness of the IEP for ‘evidence of a student's later educational progress may [] be considered in determining whether the original IEP was reasonably calculated to afford some educational benefit.’” Id. at 567 (citing Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993)).

The Rowley Court indicated that a special education student who is being educated in the regular classrooms of a public school system' and who is performing well enough to advance from grade to grade generally will be considered to be receiving a meaningful educational benefit under the IDEA. D.S., supra, 602 F.3d at 567 (citing Rowley, supra, 458 U.S. at 203). Nevertheless, the Rowley Court further emphasized that IDEA is not amenable to bright line tests, and declined to hold "that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education. D.S., supra, 602 F.3d at 567 (citing Rowley, supra, 458 U.S. at 203).) However, in D.S., the student received "all of his academic instruction in classes composed entirely of special education students in its 'cluster' program." Ibid. Accordingly, the Third circuit held that "when the 'mainstreaming' preference has not been met so that high grades are achieved in classes with only special education students set apart from the regular classes of a public school system, the grades are of less significance than grades obtained in regular classrooms." Ibid.

Granted, the D.S. court cautioned in dicta against placing too much significance on special education classroom scores since there may be a disconnect between those scores and a student achievements in standardized testing. Id. at 568.

Notably, the D.S. court further clarified that the referenced "standardized testing" is not a state-wide assessment administered to all children in the state, such as the ASK, but rather, individual "standardized testing" of the special education student's individual abilities, such as the WIAT and the Woodcock-Johnson. Ibid. As noted above, those same assessments were administered to W.W., implicated in this due process petition, and duly considered. Simply put, it is clear that D.S. does not stand for the proposition that between report card grades and standardized assessments, the latter is afforded greater weight.

I **FIND** that petitioner's various assertions can be easily resolved. Again, W.W. suggests that "Child Find was clearly violated as all of W.W.'s age-matched peers

performed significantly higher.” However, as explained above, W.W. progress cannot be gauged against his typically-developing peers, but rather, his own individual abilities. Rowley, supra, 458 U.S. at 198-199. Indeed, as illustrated by Rowley, such a standard would be impossible to apply to many IDEA cases, as many students with disabilities will never perform at the same level as typically developing peers. Ibid. Indeed, as emphasized in the testimony of the District’s witnesses, if W.W. was able to perform on par with his typically developing peers, he would not require special education services, at all. Moreover, W.W.’s suggestion that the failure to ensure W.W. performed on par with his typically developing peers was a Child Find violation is nonsensical; W.W. has received special education services from the District since pre-school, and the District made every effort to ensure that W.W. was evaluated and properly classified, as evidenced by the District’s offer to reevaluate W.W. in 2012. (J-3.)

W.W. suggests that because he scored in the bottom 1% on an auditory processing assessment, “as a matter of law, the mainstream was inappropriate to meet W.W.’s needs.” However, the issue of whether an IEP is appropriate is a question of fact.” S.H., supra, 336 F.3d at 271. The Court has uniformly rejected “a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student’s individual abilities.” N.E., supra, 172 F.3d at 248. Accordingly, whether the “mainstream” (or, more accurately, a supportive instructional assistance classroom, as described by the District’s witnesses is appropriate for W.W. cannot be decided as a matter of law, but as a matter of fact. As the District’s witnesses amply established that W.W.’s placement in a supportive instructional assistance classroom for social studies and science was appropriate, because such placement was reasonably calculated to confer a meaningful educational benefit. I **FIND** that a supportive instructional assistance classroom provided an opportunity for W.W. to access the general education curriculum, with supports, in subjects that do not require strong reading and writing skills. The supportive instructional assistance classroom provided W.W. with an opportunity to interact with his typically developing peers, which provided linguistic role models, to further address his communication impairment.

Moreover, I **FIND** that the record includes no competent evidence, whatsoever, that the fact the W.W. scored in the bottom 1% on an auditory processing renders his placement in a supportive instructional assistance classroom inappropriate. Rather, that assertion is simply a conclusory statement and unsupported with any facts.

I **FIND** petitioner's attempt to compare W.W.'s progress in the District and Winston to support its contention that the District did not offer W.W. FAPE is irrelevant to the issue of whether the District provided a FAPE. See H.W., supra 108 Fed. Appx. at 733. Again, the threshold issue is whether the District provided a FAPE, and [a] comparison between the two programs is irrelevant to the adequacy of the proposed placement under IDEA. Ibid. W.W. suggests that at Winston, he made more than one year's progress in less than one year, and is working on closing the gap between himself and his peers.

Assuming, *arguendo* that the assertions are true and supported by the record herein, I **FIND** that W.W. is not entitled to the best education money can buy, at the taxpayer's expense. See D.S., supra 602 F.3d at 565. Again, the District is not required to "supply an education to a handicapped child that maximizes the child's potential. . ." Ibid. While W.W. may prefer a Cadillac education, I **FIND** that the District indisputably offered a serviceable Chevrolet. See Doe, supra 9 F.3d at 459-460.

Petitioner further broadly asserts that the District "violated numerous procedural safe guards" without specifying a specific violation. As noted above, "[a] procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." D.S., supra, 602 F.3d at 565.; see also N.J.A.C. 6A:14-2.7(k)(1-3).

[a]s the District relied very heavily on W.W.'s report card grades, it has made a serious error in judgement as we have authority that between report card grades and standardized assessments, the latter is afforded greater weight. As W.W.

tested Partially Proficient year after year on the New Jersey Assessment of Skills and Knowledge, the District knew or should have known that, under Child Find, it was obligated to administer standardized assessments to determine whether the report card grades or the NJASK scores were accurate.

[Id. at 11 (citing D.S., supra, 602 F.3d at 553).]

As previously noted, D.S. does not remotely suggest “that between report card grades and standardized assessments, the latter is afforded greater weight.” Ibid.; D.S., supra, 602 F.3d at 568 (reiterating, to the contrary, that “we consistently have declined to adopt bright line rules to determine whether a student is receiving a meaningful educational benefit under the IDEA”). Rather, D.S. reiterated the long-standing principle that that consideration of a student’s “academic progress in evaluating the appropriateness of the IEP for ‘evidence of a student’s later educational progress may [] be considered in determining whether the original IEP was reasonably calculated to afford some educational benefit.’” Id. at 567 (citing Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993)).

D.S. further reiterated that the Rowley Court “indicated that a special education student who ‘is being educated in the regular classrooms of a public school system’ and who is performing well enough to advance from grade to grade generally will be considered to be receiving a meaningful educational benefit under the IDEA.” Ibid. (citing Rowley, supra, 458 U.S. at 203.) D.S. merely rejected the District Court’s reversal of the ALJ’s determination that the District did not provide a FAPE, because the District Court relied too heavily on the student’s grades, in classrooms entirely populated by special education students. Ibid. Specifically, the District Court held that “when the ‘mainstreaming’ preference has not been met so that high grades are achieved in classes with only special education students set apart from the regular classes of a public school system, the grades are of less significance than grades obtained in regular classrooms.” Ibid. Here, with the exception of the second half of his sixth grade year in Math, W.W. was placed in supportive instructional assistance classrooms, with general education students, and learned the general education curriculum, with supports. Accordingly, the D.S. holding that grades received in strictly

special education classrooms are afforded “less significance” than grades earned in general education classrooms, simply does not apply to this case. Moreover, the record contains no evidence, whatsoever, that the District “relied very heavily on W.W.’s report card grades” (Pet’r’s Mot. for Summ. Decision at 11.) To the contrary, the District’s witnesses testified that they used a variety of measures to determine the most appropriate placement for W.W., including classroom observations, classroom assessments, i-Ready tests, previous assessments, and close, objective monitoring of W.W.’s progress in speech therapy.

Moreover, the “standardized tests” that D.S. mentioned were individualized assessments, such as the WIAT and Woodcock Johnson, not state-wide standardized tests administered to all students. See D.S., supra, 602 F.3d at 568. The District administered similar tests to W.W., and considered the results in formulating his IEP. The record contains no evidence of the definition of “Partially Proficient” on the NJ ASK, but the undersigned will take judicial notice that “Partially Proficient” essentially means that a student does not perform as well as expected in comparison to his peers of the same grade level. Accordingly, I **FIND** W.W.’s assertion without merit since he “tested Partially Proficient year after year on the New Jersey Assessment of Skills and Knowledge, the District knew or should have known that, under Child Find, it was obligated to administer standardized assessments to determine whether the report card grades or the NJASK scores were accurate. As noted above, “Child Find” is a legal term of art that has no application to this case, as W.W. was indisputably eligible for special education services, and received such services, since pre-school. And, as noted above, the District offered to reevaluate W.W. in 2012, but his parent refused to consent to a reevaluation. (J-3.)

Finally, I **FIND** that the record includes no evidence that either the NJASK or W.W.’s report card grades were not “accurate.” The District witnesses testified that W.W. was able to access the general education curriculum, with supports, which was reflected in W.W.’s grades. The record contains no evidence that the fact the W.W. scored “Partially Proficient” on the NJASK undermines the “accuracy” of his grades.

Based on the totality of the record, I **FIND** and **CONCLUDE** that the District has established, by a preponderance of the credible evidence, that the District offered W.W. a FAPE, which was reasonably calculated to confer a meaningful educational benefit.

CONCLUSION

I **CONCLUDE** that The District offered W.W. a FAPE, because the District offered an educational program that was reasonably calculated to confer a meaningful educational benefit.

ORDER

Therefore, based on the above findings and conclusions, I hereby **DENY** the petitioner's Motion for Summary Decision. I hereby **GRANT** the District's Cross Motion for Summary Judgment. Thus, the petition for due process is hereby **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2014) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2014). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

September 29, 2015

DATE

IRENE JONES, ALJ

Date Mailed to Agency

September 29, 2015

Date Mailed to Parties:
sej

September 29, 2015

APPENDIX

WITNESSES

For Petitioner

Scott Bezsylo

For Respondent

David Burrows

Lori-Jane Dolan

Lauren Erickson

EXHIBITS

For Respondent

- P-1 IEP dated 3/31/10
- P-2 Central Auditory Processing Evaluation – Becky B. Meyer, Au.D., 4/22/10
CCC-A (SD)
- P-3 Pediatric Neurodevelopmental Evaluation – Kathleen Selvaggi, Fadden, M.D.
5/18/10
- P-4 NJ-ASK – Report, Spring 2011
- P-5 Written Consent for Amendment to IEP, 9/27/11
- P-6 Physical Therapy Discharge Summary – Gina Cicarelli, MSPT (SD) 1/5/12
- P-9 Teacher Note dated 10/19/12
- P-10 Special Education Report, 11/16/12\
- P-11 Note by Lauren Erickson re: Annual Review – Re-Eval. Dated 12/18/12
- P-12 IEP, 12/18/12
- P-13 Student Log – Speech/Language Therapy with transcribed notes, 2012-2013
- P-14 E-Mail to JW from Katie Williver with reply from J.W.
- P-16 Note by Lauren Erickson re: Parent Meeting dated 3/22/13
- P-17 Written Consent for Amendment to IEP, 3/25/13

- P-18 Special Education Report, 4/26/13
- P-19 2013 CogAt Results, October 2013.
- P-20 Special Education Report, 11/26/13
- P-21a Curriculum Vitae of Lorraine Sgarlato, Au.D
- P-27a Curriculum Vitae of Jaime Lehrhoff, M.A., LDT-C
- P-28 Model Assignment, May 2014
- P-29 Letter to Yaacov Brisman, Esq., from Lenore Boyarin, Esq., enclosing reports of Lorraine Sgarlato, Au.D, and Susan Levine, CCC-SLP, 5/7/14
- P-30 Letter to Yaacov Brisman, Esq., from Lenore Boyarin, Esq. (2nd letter) enclosing Model Assignment (P-28)., 5/7/15
- P-31 Letter from Mark W. Lauria, Ph.D., Executive Director of NYSAIS to Scott Bezsylo, Executive Director of Winston Preparatory Schools, 5/29/14
- P-32 Special Education Report, 6/4/14
- P-33a Curriculum Vitae of Barbara Couvadelli, Ph.D.
- P-34 Report Card, June 2014
- P-35 Writing Sample, 2014
- P-36 Letters to Yaacov Brisman, Esq., from Lenore Boyarin, Esq., enclosing the report of Barbara Couvadelli, M.D., Ph.D., reiterating the request to place W.W. out-of-district and the second enclosing a writing sample from W.W.
- P-37 Letter to Yaacov Brisman, Esq., from Lenore Boyarin, Esq., enclosing the report of Jaime Lehrhoff, MA, LDT-C, 8/4/14
- P-38 Letter to Frances L. Febres, Esq., from Lenore Boyarin, Esq., regarding District re-evaluations, 8/7/14
- P-39 Letter to Yaacov Brisman, Esq. from Lenore Boyarin, Esq., reiterating the request to place W.W. out-of-district.
- P-42 Behavioral/Social Skills Assessment – Tara Sheerin, Ed, M, BCBA (SD), 10/7/14
- P-43 Letter from Erica Piche, MA, CCC-SLP, Director of Admissions of Winston Preparatory School in response to BOE Request, 10/15/14
- P-44 Homework Assignments completed by WW – Math, History, History (2) & Language 2014
- P-45 Letter from Winston Preparatory School to parents, November 2014

- P-46 Letter from Frances Febres, Esq., to Lenore Boyarin, Esq., 11/13/14
- P-47 Accommodation & Modifications of Test Administration Procedures for Statewide Assessment
- P-48 Letter from JW to Mrs. Hawkins, 11/12/14
- P-49 Opinion Letter of Barbara Couvadelli, Ph.D., 11/12/14
- P-51 Letter from Frances Febres, Esq., to Lenore Boyarin, Esq., 11/13/14
- P-53 E-Mail from Janet Christmann to JW, 11/14/14
- P-54 Letter to Yaacov Brisman, Esq., Frances Febres, Esq., from Lenore Boyarin, Esq., enclosing an updated report from Susan Levine, CCC-SLP., 11/20/14
- P-55 Language Arts/Literacy & Mathematics – Scores & Levels of Proficiency (Grades 3, 4, 5 & 6)
- P-56 Winston Preparatory School Winter 2014 Progress Report 3/10/15
- P-57 Letter to Yaacov Brisman, Esq. & Frances Febres, Esq., from Lenore Boyarin, Esq., enclosing work samples, 4/7/15
- P-58 Work Samples
- P-59 Florham Park’s Speech/Language Score Reporting (Please refer to Sub-Exhibits A-K”
- | | |
|---|---------|
| A. TAPS-3 | 8/25/14 |
| B. TOPL-2 | 8/25/14 |
| C. TOLD 1.4 | 8/25/15 |
| D. Battelle Developmental Inventory | |
| E. Receptive One-Word Pic. Vocab Test | 5/2/03 |
| F. Expressive One Word Pic. Vocab. Test | 5/5/03 |
| G. Test of Articulation | 4/18/07 |
| H. TOLD – P-3 | 4/07 |
| I. CELF | 4/7/04 |
| J. Expressive One Word Pic. Vocab. | |
| K. Receptive One Word Vocab. Test | 3/30/07 |
| L. TAPS | 2010 |
- P-60 Curriculum Vitae of Susan Levine, M.A., SLP

- P-61 Letter from Lenore Boyarin, Esq., to Yaacov Brisman, Esq., and Frances Febres, Esq., enclosing Ms. Levine's Curriculum Vitae, 4/13/15
- P-62 Letter from Lenore Boyarin, Esq., to Yaacov Brisman, Esq. and Frances Febres, Esq., enclosing WPS Agreement, 4/2/15
- P-63 Letter from Lenore Boyarin, Esq., to Yaacov Brisman, Esq., and Frances Febres, Esq., enclosing an email and letter, 4/7/15
- P-64 Letter from Lenore Boyarin, Esq., to Yaacov Brisman, Esq., and Frances Febres, Esq., enclosing 608 pages of work samples, 4/8/15
- P-65 Testing completed by Florham Park BOE
- P-66 Letter to Judge Jones, 4/20/15
- P-67 Curriculum Vitae of Scott Bezsylo

For Respondent

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| R-1. | Billy's 4 th Grade Report Card (R400-401) | 2011-2012 |
| R-2. | 2011-2012 I-Ready Reading Test (R497-500) | 10/19/11 |
| R-3. | 2011-2012 I-Ready Math Test 1 (R449-452) | 10/28/11 |
| R-4. | Fall 2011 Speech and Language Progress Report (R26) | 11/15/11 |
| R-5. | Special Education Report for English Language Arts (R27) | 11/28/11 |
| R-6. | Special Education Report for Math (R28) | 11/28/11 |
| R-7. | Special Education Report for Science (R29) | 11/28/11 |
| R-8. | Special Education Report for Social Studies (R30) | 11/28/11 |
| R-9. | Physical Therapy Discharge Summary (R98) | 1/5/12 |
| R-10. | Shewa Hawkins' s IEP Meeting Notes (R2) | 1/5/12 |
| R-11. | 2011-2012 I-Ready Reading Test 2 (R501-504) | 2/8/12 |
| R-12. | 2011-2012 I-Ready Math Test 2 (R453-456) | 2/15/12 |
| R-13. | Spring 2012 Speech and Language Progress Report (R31) | 3/28/12 |
| R-14. | Spring 2012 Social Studies Special Education Report (R32) | 4/30/12 |
| R-15. | Spring 2012 Special Education Report for Science (R33) | 4/30/12 |
| R-16. | Spring 2012 Special Education Report for Math (R34) | 4/30/12 |
| R-17. | Spring 2012 Special Education Report for English Language Arts (R35) | 4/30/12 |

R-18.	2011-2012 I-Ready Reading Test 3 (R505-508)	5/21/12
R-19.	Spring 2012 NJASK Individual Student Report (R424)	7/30/12
R-20.	Request for Parental Participation in a Meeting (R42-43; R590-591)	10/5/12
R-21.	2012-2013 I-Ready Reading Test 1 (R509-511)	10/09/12
R-22.	L. Erickson's Meeting Notes (R48; R596)	10/19/12
R-23.	2012-2013 I-Ready Math Test 1 (R461-464)	10/16/12
R-24.	2012-2013 I-Ready Reading Test 2 (R512-515)	12/03/12
R-25.	2012-2013 I-Ready Math Test 2 (R465-468)	12/11/12
R-26.	Billy's 5 th Grade Report Card (R402-403)	2012-2013
R-27.	2012-2013 I-Ready Reading Test 3 (R516-519)	3/05/13
R-28.	Email from J. W. to L. Erickson (R411)	3/11/13
R-29.	Email from L. Erickson to J. W. (R412)	3/12/13
R-30.	Email from J. W. to L. Erickson (R413)	3/12/13
R-31.	Email from L. Erickson to J. W. (R414)	3/12/13
R-32.	2012-2013 I-Ready Math Test 3 (R469-472)	3/12/13
R-33.	2012-2013 I-Ready Math Test 4 (R473-476)	3/12/13
R-34.	Speech and Language Progress Report (R41)	Spring 2013
R-35.	2012-2013 I-Ready Math Test 5 (R477-480)	5/21/13
R-36.	2012-2013 I-Ready Reading Test 4 (R520-523)	5/21/13
R-37.	Email from J. W. copying L. Erickson (R415-416)	6/5/13
R-38.	Email from L. Erickson to J. W. (R417)	6/11/13
R-39.	Email from J. W. to L. Erickson (R418)	6/11/13
R-40.	Email from J. W. to S. Capanegro (R420-421)	6/11/13
R-41.	Email from L. Erickson to J. W. (R419)	6/17/13
R-42.	2013-2014 I-Ready Reading Test 1 (R524-539)	9/23/13
R-43.	2013-2014 I-Ready Math Test 1 (R481-484)	9/27/13
R-44.	Occupational Therapy Progress Report (R99)	Nov. 2013
R-45.	Fall 2013 Progress Report for Math (R96)	11/25/13
R-46.	Special Education Report for Math (R95)	11/26/13
R-47.	Fall 2013 Progress Report for Speech and Language (R97)	12/11/13

R-48.	2013-2014 I-Ready Math Test 2 (R485-489)	12/11/13
R-49.	IEP meeting notes (R102)	12/18/13
R-50.	2013-2014 I-Ready Reading Test 2 (R540-543)	12/18/13
R-51.	Speech Language Session Log (R202; R555)	2013-2014
R-52.	2013-2014 I-Ready Reading Test 3 (R544-547)	3/3/14
R-53.	2013-2014 I-Ready Math Test 3 (R489-492)	3/4/14
R-54.	Special Education Report for Social Studies (R130)	5/12/14
R-55.	Spring 2014 Progress Report for Math (R133)	5/15/14
R-56.	Progress Report for Math (R132)	5/16/14
R-57.	Special Education Report for Language Arts (R129)	5/16/14
R-58.	2013-2014 I-Ready Reading Test 4 (R548-551)	5/27/14
R-59.	2013-2014 I-Ready Math Test 4 (R493-496)	5/28/14
R-60.	Test of Auditory Processing Skills (R210-233)	8/25/14
R-61.	TOLD-1:4 Examiner Record Booklet (R234-249)	8/25/14
R-62.	TOPL-2 Examiner Record Booklet (R250-288)	8/25/14
R-63.	New Jersey Department of Education Statewide Assessments Test Security Agreement (R388)	
R-64.	NJASK Roster for W.W. (R389)	2014
R-65.	Scribe Directions (R390)	
R-66.	NJASK 2014 Grades 6, 7, & 8 Teacher's Training Handbook (R391-399)	

Joint Exhibits

J-1	W.W.'s scores for the NJASK	Spring 2012
J-2	IEP	1/5/12
J-3	Re-evaluation Plan	10/19/12
J-4	L. Erickson's Meeting Notes	10/19/12
J-5	Lauren Erickson's letter to Petitioners	11/30/12
J-6	Note by Lauren Erickson re: Annual Review Reevaluation	12/18/12
J-7	IEP	12/18/12
J-8	W.W.'s scores for the NJASK	Spring 2013

J-9	Note by Lauren Erickson re: Parent Meeting	3/22/13
J-10	Written Consent for Amendment to IEP	3/25/13
J-11	Special Education and Progress Reports (ELA, Math, Social Studies, Science, and Speech and Language)	4/26/13
J-12	Special Education Reports (ELA and Social Studies)	11/26/13
J-13	IEP	12/18/13
J-14	Petitioners' email to Mrs. Pappa & Response	12/19/13
J-15	Speech Log	2013-2014
J-16	Neuropsychological Evaluation by Barbara Couvadelli, Ph.D.	2014
J-17	Petitioners letter to CST	1/6/14
J-18	W.W.'s scores for the NJASK	Spring 2014
J-19	Dr. Lorraine Sgarlato's report	3/15/14
J-20	Susan Levine /Language Assessment report	4/28/14
J-21	Jaime Lehrhoff Educational Evaluation report	5/5/14
J-22	Enrollment Agreement	5/8/14
J-23	Special Education Report (Science)	6/4/14
J-24	W.W.'s 6 th Grade Report Card	June 2014
J-25	David Burrows' report	8/25/14
J-26	Susan Levine's response to Mr. Burrow's Speech Language evaluation	
J-27	Lori Jane Dolan's report	9/17/14
J-28	Behavioral/Social Skills Assessment by Tara Sheerin, Ed, M, BCBA (SD)	10/7/14
J-29	Proposed IEP	11/12/14
J-30	Special Education and Progress Reports (ELA, Math, Science, Social Studies)	11/16/12