

**FINAL DECISION**

OAL DKT. NO. EDS 07572-11

AGENCY DKT. NO. 2011 17218

**J.M. AND H.M. ON BEHALF OF H.M.,**

Petitioners,

v.

**OCEANPORT BOARD OF EDUCATION,**

Respondent.

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**Jayne M. Wesler**, Esq, for petitioners (Sussan and Greenwald, attorneys)

**Sharon Krevor-Weisbaum**, Esq., admitted pro hac vice, for petitioners (Brown, Goldstein & Levy, attorneys)

**Eric L. Harrison**, Esq. for respondent (Methfesel & Werbel, attorneys)

Record Closed: April 4, 2012

Decided: May 3, 2012

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

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On May 24, 2011, petitioners J.M. and H.M. on behalf of minor child, H.M., filed a due process petition under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 et seq. and the Rehabilitation Act, 29 U.S.C. §§794 et seq. seeking a program for H.M. that includes Braille instruction. Respondent Oceanport Board of Education (Oceanport) filed an answer setting forth that it provided a free and appropriate education (FAPE) in the least restrictive environment. On June 30, 2011, the petition and answer were filed with the Office of Administrative Law. On July 26, 2011, the parties participated in a settlement conference, but they were unable to reach

a settlement. The case was scheduled for a due process hearing on September 19, 2011. The hearing proceeded on that date and continued on October 11, 2011, October 31, 2011, November 3, 2011, November 14, 2011, November 15, 2011 and December 22, 2011.<sup>1</sup> The hearing continued on February 16, 2012<sup>2</sup> and March 9, 2012, and the record closed on April 4, 2012.

### **FACTUAL DISCUSSION**

H.M. is an eleven-year-old legally blind fifth grade student at Wolf Hill Elementary School in Oceanport. He enrolled in Oceanport schools as a first grader. He was adopted from China and Mandarin is his first language. English is his second language. Upon entrance to school in Oceanport, he was diagnosed with albanism and Attention Deficit Hyperactivity Disorder (ADHD). He is visually impaired due to albanism and nystagmus. H.M.'s current vision is 20/200. His ADHD is managed with medication. There is no material dispute concerning the foregoing, which I **FIND** as **FACT**.

### **TESTIMONY**

Robin Dunikoski testified that she has been the Director of Special Services for Oceanport since September 2007. She has a Master of Science degree in Education from Columbia University and she is certified in the areas of Learning Disabilities Teacher Consultant (LDTC), supervisor, principal, school administrator, K-12 teacher of the handicapped, K-8 elementary school teacher, and K-12 teacher of art. Oceanport is a pre-K-8 school district that sends its students to a regional high school. She oversees approximately eighty-eight classified students. She was qualified as an expert in special education, generally.

Ms. Dunikoski further testified that she met H.M. as an English as a Second Language (ESL) student when he came to Oceanport. He was there one year before she arrived in 2007. She heard from other educators that he was capable, eager, and happy at school. Initially, H.M. was in a self-contained classroom. All modifications to

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<sup>1</sup> A December 8, 2011 date was scheduled, but adjourned due to Mr. Harrison being called to a trial in Superior Court. A hearing scheduled for January 5, 2012, also had to be adjourned due to Mr. Harrison being in trial.

<sup>2</sup> Mr. Harrison was on trial on February 16, 2012 also, so Adam Weiss, Esq. of his firm represented Oceanport.

his program were recommended by the Commission for the Blind and Visually Impaired (CBVI), which had not yet adopted the use of assistive technology. She did not feel that his vision impairment was an impediment to his acquiring information. H.M. made good progress, of which his teacher kept a record. In 2008-2009, his second grade report card was good. The CST made modifications and accommodations, and allowed him to use magnification devices to assist his vision. H.M.'s Individual Education Plan (IEP) is devoid of goals related to blindness because he is a sighted reader. He is viewed as a sighted reader and performs as such. His progress report (R-2) indicates that he had mastered many of the tested subjects and was partially proficient in the others. He did not have any ratings that indicated that he was not proficient in any area.

Ms. Dunikoski continued testifying that, in grade three, H.M. was pulled out for individualized reading in a four-student resource room setting due to his difficulty with written language. H.M. was provided accommodations in the resource room, which consisted of a slant board, enlarged materials, special seating, and a raised desk. He was also given a hat to reduce the glare that impeded his vision. The CBVI provided enlarged worksheets for him. During his third grade year, he moved from enlarged materials to the Acrobat reader. She has not seen him use it. The Kindle also allowed him to make reading selections with an adjusted font size. Closed Circuit Television (CCTV) is also an assistive technology provided by the CBVI. H.M. was concerned that he would be stigmatized by more equipment when he was performing well in the classroom. In grade four, H.M. continued in the resource classroom for reading because his teacher, Ms. Zukus, did not feel that he was quite ready to leave. The CST also made the decision not to place him in regular education because he was changing buildings that year. For his fourth grade report card, he was observed in both the resource room and regular education settings. He was doing well using assistive technology and using accommodations well. H.M. has aides in the resource room and in a general education classroom, shared an aide.

Ms. Dunikoski further testified that she had discussions with H.M.'s teachers and believes that his grades are accurate and supported by the testing evaluations. (R-3).

His third and fourth grade elementary school report card shows that he received all “A”s as final grades. (R-3). The CogAT test is a group IQ test that measures students’ strengths and weaknesses. It gives an idea of the student’s aptitude and ability to solve problems. H.M. scored in the thirty-eighth percentile in verbal; forty-fifth percentile in quantitative ability and eighty-third percentile in non-verbal ability. This shows he has a greater strength with solving problems without language. The PASS test was not required, but given in order to determine performance. As an accommodation, H.M. was given magnifiers and testing material in large print. His skills were good in reading, listening and writing. (R-5). He was proficient both in math and language arts. On the NJ ASK, H.M. scored proficient in language arts and advanced proficient in math, which is stellar. (R-53). H.M.’s scores improved from last year. H.M. also scored advanced proficient in science. For language arts, the passages that students have to read are several paragraphs long. No one is allowed to read to the students.

Ms. Dunikoski testified that Oceanport pays for services from the CBVI. Oceanport relies on the CBVI’s expertise and oversees the program, assists the students, and provides materials. Ms. Dunikoski continued that Ann Marie Sundberg is H.M.’s case manager through the CBVI. Ms. Sundberg did an assessment of H.M. in second grade and made recommendations that were all followed. (R-9). H.M.’s parents provided glasses for him to wear outside, but he did not like to wear them. Ms. Sundberg came to the school and observed H.M. and made her reports contemporaneously. Her recommendations were considered in the IEPs for H.M. If the CBVI had recommended Braille instruction for H.M., they would not have had any objection. When the parents asked for Braille, Ms. Dunikoski did not believe that it would have been an appropriate service because H.M. could see the dots instead of reading with his fingers. Ms. Sundberg was rotated out of being H.M.’s case manager after second grade. Ms. Dunikoski thought that it would interfere with H.M.’s receipt of a free and appropriate education (FAPE) to give him Braille instruction. Dunikoski noted that H.M. was able to see and safely traverse steps, drop-offs and curbs. (R-10). His vision did not impact his mobility. Ms. Sundberg issued an addendum to her report from the evaluation that took place on April 6, 2009, which said H.M. performed eighty-two words correct per minute (WCPM) with ninety-five percent accuracy on Form A,

and ninety-four WCPM with ninety-eight percent accuracy on Form C, with an average of eighty-eight WCPM. He was able to retell both passages. H.M. was not using magnifiers or corrected lenses during this assessment. Ms. Sundberg recommended CCTV for home. The CBVI did not feel that it was a good tool for him, like Acrobat was for the classroom. Ms. Sundberg's conclusion mentioned Braille because Mr. and Mrs. M. vocalized the need for their son to be taught it. Ms. Sundberg concluded that, "Braille and print are equally valuable as media for reading and writing however, a best practice approach encourages reading and writing methods that are least restrictive for the student." (R-11).

Ms. Dunikoski continued testifying that H.M.'s IEP was created in March 2009, for use in the 2009-2010 school year. Ms. Dunikoski did not attend the IEP meeting. Donna McCartin was H.M.'s case manager on March 26, 2009. The CST reviewed H.M.'s performance. If the parents presented concerns, they were considered in formulating the IEP. The CST decided H.M.'s performance was such that he would not need Braille instruction. H.M.'s curriculum was not modified, but there were lighting changes made to accommodate his disability. Ms. Dunikoski has not seen whether the reading assignments getting longer will cause fatigue as H.M. gets older. Ms. Dunikoski received a letter from Mrs. M. dated April 8, 2009, objecting to the exclusion of Braille from H.M.'s IEP. She disagreed with Mrs. M. based on H.M.'s classroom performance. Mrs. M. said in her letter that Oceanport had not done the evaluations or provided documentation that Braille was inappropriate for her child. The CBVI did not support Oceanport's providing Braille. At the petitioners' insistence, however, the CBVI gave pre-Braille instruction to H.M. Oceanport contracted with the CBVI to do it. Petitioners were pleased that something had started, but the case manager informed the parents of the change without Oceanport requesting permission to change the IEP. After Mrs. M. sent the letter, Oceanport created a document entitled "parental notice following an identification/evaluation meeting." The letter to J.M. and H.M. indicated that there was a learning media assessment (LMA) to be conducted by Mary Beth Nadler, who will test, observe and interview H.M.'s teachers. This was an independent evaluation. Oceanport had never worked with Ms. Nadler before. Ms. Dunikoski continued that, on April 24, 2009, H.M.'s parents were invited to a meeting to review and revise the IEP.

The parents were allowed to invite someone who is knowledgeable about their child to the meeting. They requested Jennifer Zona, Bethany LaLonde and Carol Castellano. Ms. Castellano was viewed by the parents as an expert on blindness. At the meeting, Mrs. M. told them that the federal code requires that anyone with a visual impairment should receive Braille instruction. It was a stressful meeting. Regardless of the excellent progress H.M. had made, his parents were thinking of H.M. as a blind child, when the other CST members believed that he could function in the sighted world. Ms. Nadler conducted the LMA after observing H.M. for six days. She noted that his visual condition was stable and recommended a conventional literacy program. The prognosis was that the student functions as a visual learner with no indication that his vision will not remain stable in the future. The independent evaluation did not change the parents' perspective. Ms. Nadler's report was considered in formulating the IEP.

In addition, Ms. Dunikoski testified that Patricia Lyons did an orientation and mobility evaluation to ensure that he had proper supports to move to a new environment. He was able to move through his environment comfortably and he could run and jump. (R-18). Oceanport held a reevaluation planning meeting with the parents on June 11, 2009, in which the IEP Team decided that additional information is required to determine H.M.'s eligibility for special education and related services in developing his IEP. An auditory processing delay was suspected and was going to be evaluated. Dr. Sandra Kuhn conducted a central auditory processing evaluation. She did not find any auditory processing deficiency and the parents agreed. (R-27). As a result of the IEP meeting on June 11, 2009, which Ms. Nadler and Ms. McCartin, H.M.'s case manager, attended, another IEP for 2009-2010, was created. (R-21). The IEP determined that there were things they could do to increase his activities inside the school and tried to increase his social skills also. They gave H.M. an in-class support so that he would not have any pull out for social studies or science. He changed classes for math with the other students. The demand for Braille was the parents' only concern.

Stacy Liu testified that she is a Licensed Social Worker who has worked with Oceanport for seven years. She was qualified as an expert in the field of social work.

In spring 2010, she was H.M.'s case manager. She met H.M. when he was in Kindergarten, but became his case manager when he was in third grade. She knew he was visually impaired, but he moved around on his own when he was in the school. He was sensitive to light and wore sunglasses in the building if near a window. She recalled H.M.'s parents demanding that he be provided Braille instruction. The professional opinion of the CBVI was that he did not need it. At the May 2010 IEP meeting, she prepared the IEP along with teachers and the CBVI. H.M. had self-contained placement for language arts and an aide for math. He had in-class support for Science and Social Studies. H.M. was seated appropriately and had Acrobat reader and used it intermittently.

At the end of third grade, the parents hired an expert because they felt H.M. needed Braille. The CBVI said he did not need it. H.M. had no difficulty navigating through the schools. He had good grades and test scores. He was in resource room for language arts to insure that he did not regress. He was initially a non-English speaking student. An IEP meeting was held in September 2010, to discuss the independent evaluations from over the summer. H.M.'s reading fluency was an issue. The purpose of the independent evaluation was to get an exact measure of H.M.'s specific learning disability. H.M. used the Kindle for reading novels in the resource room class. He also used the Acrobat reader as needed. Ms. Liu noted from the prior school year's teachers that there was strong sunlight at the end of the day which made it difficult for them to teach science and social studies. She observed H.M. participating in class and raising his hand. H.M. had extended school year (ESY) in the summer before fourth grade. Although they considered mainstreaming H.M. for language arts, they decided that they needed to leave him in the resource room. Modification materials were placed on a cart for him and he was provided with a hat and sunglasses for the glare. He had enlarged text books for math. H.M. scored proficient and advanced proficient in all areas of standardized testing.

On cross-examination, Ms. Liu said that the data the teachers relied on to say he was doing well were other class tests, quizzes, and writing samples. Although the CST

and the attorneys agreed that an independent evaluation should be done, there was a bit of going back and forth and it seemed they never agreed on a name.

Diane Ames testified that she is the Occupational Therapist for Oceanport. She serves children with needs in the areas of motor skills and sensory delays. She is a Licensed Occupational Therapist and has her certification to teach health, physical education, biology, and driver's education. She was qualified as an expert in occupational therapy. When she met H.M. about five years ago he was having difficulty with everything because it was a new environment. The modifications they used were slant board, facing his back to the windows, dimming the lights, coloring and tracing for tool control, body awareness, and then partial independence. He improved and was able to use certain tools like markers, chalk board, and scissors. She re-evaluated him in the summer of 2009. The tests H.M. performed indicated that as his speed of reading increased, his accuracy decreased. She would observe him in class to see if the tools were working for him. She worked on keyboarding with H.M. on a program called Alpha Smart. The goals and objectives were measured by retesting and reviewing treatment notes. H.M. had not mastered two of the goals by the end of the fourth marking period. Although H.M. made gains in all major areas, he did not master all of them. He still needs occupational therapy because he needs to master the environment and body awareness. She was not involved in Braille discussions. On cross-examination, she stated that H.M. was tested on various items each for no longer than thirty minutes.

Megan Fales testified that she is a Certified Speech and Language Pathologist. She was qualified as an expert in the area of speech and language evaluation and speech therapy. She evaluated H.M. in August 2009, and prepared an evaluation. She concluded that he remained eligible for speech language therapy and had a weakness in auditory processing. He had deductive reasoning problems in that he had difficulty with things that are more abstract. She met with him once a week in a group and once a week by himself. They ended individual therapy as of September 2011. He was reading language and word problems in math and worked through difficult vocabulary. She always provided materials to him in large print. Ninety-eight percent of what H.M.



uses has been enlarged. She observed H.M. to be highly independent and did not see him as different from any other child. When she observed him outside on the playground, he was running, playing four square, and doing relay races, and interacting in the lunchroom with the other students. On cross-examination, she indicated her certificate of clinical competence was pending. She does not have a certificate in visualizing and verbalizing. She did not track H.M.'s choices of font. She agreed that the level of difficulty increases as H.M. gets older, particularly in literature and history. The expectations are higher of his ability to draw inferences and use abstract thought.

Darragh O'Donnell testified that she has been a fourth grade teacher in Oceanport for thirteen years. She was qualified as an expert in elementary education. She also has a certification in English as a second language (ESL). Fifty percent of the students she teaches have IEPs. In order to ensure that their needs are met, she goes over the IEP and works closely with the resource room teachers, parents, and CST to implement modifications as needed. She met H.M. when he was in third grade. Before he became her student, she met H.M.'s mother and discussed where to put his desk. She spoke with his third grade teacher, Mike Birnbaum. H.M. worked hard and blended in with the rest of the students despite his visual impairment. The accommodations that were made for him included enlarged copies, enlarged workbooks, a large calculator, and a magnifier. He used Acrobat on a daily basis to see the board better. There are twenty-six students in his class, six of whom had IEPs. His progress was monitored with daily assessments, tests, and quizzes. He did not have difficulty reading. Reading instruction was involved with his subjects of science, social studies, and math. A classroom aide assisted H.M. He was fairly self-sufficient. He regularly turned in his homework without any problems. They would read together for ten to twenty minutes maximum. Ms. O'Donnell said she never padded his grades. Very early in his fourth grade year, she stopped modifying his class work. He was organized, prepared and did very neat work. He only needed assistance on field trips when he was out of the class. She believed he was headed toward going into a general education program for language arts, but she was not going to make the decision. They all discussed mainstreaming him.

On cross-examination, Ms. O'Donnell said that in her class, her students would read maybe five or six novels and then several short stories, maybe another five or six throughout the year. She thought an average fourth grader would be able to read between five to fifteen pages depending on the number of words on the page and the difficulty of the material. That may be approximately three times a week. She does not know how many books the students in the resource room read with Ms. Lavalva.

Joanne Lavalva testified that she became a certified teacher of the handicapped in 1992. She is in her fourth year teaching at Oceanport in the resource room and doing in-class support. She teaches reading, math, and language arts. In reading, she teaches decoding, comprehension and writing. She was qualified as an expert in special education, generally. She talked to H.M.'s third grade teacher in preparation for him coming to her class in fourth grade. She was aware of his visual impairment and the modifications to his program using Acrobat, Kindle, and paper with darker lines. She heard of him being an excellent student and enjoyed working with him. She had two students at first in the resource room, but six by the end of the fourth grade year. H.M. did well and was always on task. She created his goals and objectives for resource room class. The curriculum coincided very much with regular education. The goals were the same, but the approach was different. He was on level with reading. They read the books, "Skinny Bones," "George Washington's Socks," and "The Magic Finger." He always used his Kindle, which magnifies the words. For writing, the aids he used were darker lead pencil, darker lined paper, a slant board, and Acrobat. She showed H.M.'s writing samples indicating what he was supposed to be writing about. (R-7). There was marked improvement between September and March. He could do sustained reading for thirty to forty minutes without difficulty getting through it. His fluency did not decrease and she did not observe him struggling. He was in the average range as a speller. She did not modify the work for H.M. and did not give modified grades. He was fully capable of achieving the goal that was set. She did not observe any fatigue reading of passages in books. She thinks he was an enthusiastic, hard working student who enjoyed reading. His spelling was sometimes inconsistent and his writing had an awkward sentence structure. She believed that he could move

to a mainstream classroom, but thought the timing may not be good in that he was moving to a new school for fifth grade.

On cross-examination, Ms. Lavalva testified that H.M. read a comparable number of books as mainstream fourth graders give or take a book or two. She had H.M. in language arts literacy from 8:35 a.m. to 9:05 a.m. Large size print books were available, but he used his Kindle. Sometimes students had to read alone silently and other times she read aloud. H.M. did not typically have to read thirty to forty minutes straight either out loud or silently. The difference between a mainstream classroom and the resource room was that the resource room was much smaller so the students got more individualized instruction. H.M. was in the resource room because of the history of when he began that he was not speaking English. She felt he was ready for the mainstream room. The resource room works at a slower pace and if the student needs more time he gets more time.

Mary Beth Nadler testified that she is certified as a teacher of the blind and a teacher of the handicapped and a supervisor. She retired from the CBVI in 2002. She was a teacher of the visually impaired (TVI). She is now a consultant to school districts coordinating services and making orders from the Myer Center, which has the materials for visually impaired children. Although her Master of Arts says it is in special education, all of her course work was for teaching the blind. She taught Braille to students who were totally blind with no functional vision. Only two of the blind students had some functional vision. She taught approximately 500 students during the course of her career. All of the blind students were Braille readers. She was qualified as an expert in the field of education of children who are blind and visually impaired and in the field of special education. She explained that a dual learner is one who learns visually, auditorally, or tactically (by feeling). The problem with teaching Braille to a visual learner is that it is hard to teach a sighted reader tactically. She reads Braille visually. She had never recommended Braille for a visual learner. She clarified that there is one student that she teaches Braille because the student is multiply handicapped and she is also teaching him computer skills to help him communicate.

Ms. Nadler evaluated H.M. at the request of Dr. Colucci, who is the supervisor at the CBVI. She was asked to do a learning media assessment, which is used to determine the optimal sensory channel in which to teach a student. Her report (R-17) sets forth her findings when she evaluated H.M. She found him to be a very bright child at grade level or above. She recognized that he had albinism and observed him outside having difficulty in the sun. He had no trouble getting from class to class. Ms. Nadler met H.M.'s mother who was very concerned and wanted him to be learning Braille. She reviewed H.M.'s vision report which indicated his vision is not going to change and it is not deteriorating. He is going to start wearing opaque contact lenses to limit light sensitivity which may help as he gets older. She has never taught Braille to a student with albinism because they are all visual learners. Ms. Nadler observed H.M. in several classes and saw that he had no problem reading and following along with the rest of the class. When he is reading a list of words it can be in larger print, but he prefers the smaller print to read sentences. She always takes into account what a student does although it does not completely guide her decision-making. She saw that he was not up to speed technically and he needed more keyboarding skills to use the computer more efficiently. There are iPads and Victor Readers that can help in the future. She concluded that she would recommend that H.M. not be taught to use Braille.

When asked what the harm was, Ms. Nadler said it is hard to teach Braille to someone who has vision. In graduate school, she had to learn Braille and had to put the books under the table in order to not look at the Braille. She thinks blindfolding children to teach them Braille is an oxymoron. When asked why not teach Braille now to a student who may find it more difficult to keep up with his peers five years down the road, she said that there will be more technology available. There will be more materials available auditorally. Not everything is available in Braille and it is a much slower media of learning. Physical reading is much slower than someone using large print. She does not see the point of projecting five years down the line. Other methodologies that may exist in five years include the use of technology through computers, books on CDs, iPads, and Kindles. She does not know where the technology will be. She does not believe there is an optimal time to teach Braille. She

taught students Braille as young adults. The difference in learning is based on mental ability. Her assessment of H.M. is he is an above average young man who has progressed greatly since coming to the school district.

On cross-examination, Ms. Nadler said that she only recommended Braille instruction for the student with functional vision with whom she is working now because he has multiple disabilities. Although TVIs are hard to find, it does not make it hard to teach Braille. She does not know the cost of Braille instruction. When asked if the CBVI has any official policies on providing Braille instruction, she said it was based on the evaluation by the teacher. She was not aware that the CBVI considered providing H.M. with intensive Braille tutoring over the summer of 2010. She was aware that the CBVI provided H.M. with Braille exposure in March 2009. She was not aware that it began without the parent's knowledge or approval. She evaluated H.M. in April and May of 2009. The instruments she used to evaluate H.M. were instruments from the LMA as well as his classroom textbooks and workbooks. She did one-to-one reading with H.M. where she used the books that he used in class. She did not specifically recall how long he read out of his reading book. He read silently and then she asked him questions. She could not point out specific pages in her report that indicated that H.M. had to read uninterrupted for more than five minutes. She did not time him when she was observing him. When she tested H.M. for word recognition and reading comprehension (R-17 at 42), he did silent reading and oral reading over two sessions that lasted between thirty and forty-five minutes. They were done at different times of the school day to give her a complete idea of how he was doing. None of the tests were timed, but they were all done within that thirty to forty-five minute sequence. She agreed with the statement made by John Reiff that reading demands will increase with grade level. She was not aware that when H.M. was provided with Braille instruction in the spring of 2009, he excelled at it. She agreed that listening to things on a Victor Reader is not reading; it is auditory. Ms. Nadler testified that it is not possible to learn Braille in a classroom setting with other students. Braille is taught on a one-to-one basis with a Braille teacher in a separate room and it is accomplished over a long period of time. Ms. Nadler's testimony that H.M. had made tremendous strides in his learning ability came from her understanding that he came from a foreign country and

did not speak English as his first language. In order for H.M. to learn and be proficient in Braille it takes two years, with a minimum of two times a week one-on-one for an hour each.

Diana Clark testified that she is a learning consultant who tested H.M. when she was employed by Oceanport from summer 2006 to June 2010, when she left for personal reasons. She has a Master of Arts in learning disabilities and reading. She is certified as a learning disabilities teacher consultant in New Jersey. She was qualified as an expert in the field of special education, reading, and learning disabilities. She evaluated H.M. in 2009 and wrote a report (R-28). She observed H.M. in the hallway and in class and his conduct was very much like the other students. The Woodcock-Johnson test she gave took ninety minutes. His reading vocabulary was in the average range. The passage she gave him was to be read silently, but he read it in a low tone. She could tell that he had fluency in reading. It did not seem like he needed any special accommodations when she tested him.

All of his test scores were average and some were above average. She did not test reading fluency based on his performance. She did not believe in over testing. There was no timed testing and he was given as much time as he needed. No materials were magnified. In writing samples, his score was an age equivalent score of seven years and six months old. He was almost nine years old at the time. It did not concern her because the standard scores showed that he was in the average range. Sixty-eight percent is average. H.M. had the book about ten inches from his face when he read. He was diligent and worked very hard. The Woodcock-Johnson test cannot be fudged. On cross-examination, Ms. Clark indicated that the test was given in close to a twenty-four font and H.M. was provided ninety minutes to answer.

Mary Brennan testified that she is a certified teacher of the blind and visually impaired. She is a full professor at Monmouth University. She taught Braille using her sight to read it. As a learning disabilities teacher consultant she works with teachers to help students learn to the best of their ability. She teaches the application of the Woodcock-Johnson test. In the course of her teaching, she taught 400 to 500

elementary students, three of whom were blind or visually impaired and that was about twenty years ago. She evaluated about 300 as an LDTC. She does not have any other certifications in blindness except one that she obtained thirty-six years ago in 1975. She was offered as an expert in special education generally, and in the education of the visually impaired. Petitioners objected to the teacher of the visually impaired because it was so long ago, but that objection was overruled based on her certification.

Ms. Brennan performed an independent evaluation of H.M. at the request of Oceanport. Stacy Liu gave her all the information and materials about him. She spent hours looking at his folder and observing him. She observed him in the classroom, in language arts, in the cafeteria, outside, and transitioning from one room to another when he was in fourth grade. She observed that H.M. was comfortable, secure, and mobile around the school. He wore a hat and squinted outside. She did not note significant weaknesses on administering the Woodcock-Johnson. She looked at the form of test that was done by Ms. Clark and she administered more subtests. It is not unusual for a reading teacher not to perform all thirteen tests and leave out reading fluency. The Woodcock-Johnson test has a high reliability factor and there is little room for subjective interpretation. She was not aware at the time of testing of the dispute over whether he would receive Braille instruction. It would not have made a difference in the way she tested him. When giving the test to H.M., she enlarged the student response book 157% so that he could take the test on his own. When he had to read something she gave it to him so he could use Acrobat to read it. The fluency section of the test was timed, but the majority was not timed. She marked where he finished at three minutes and then allowed him to go on for another minute and a half and placed a second mark and scored them separately. He scored average on the regular time tests. In comprehension, he tended to "word read," which is not unusual for someone of his age (R-42). H.M. scored average or higher on all of the thirteen subtests.

By the time Ms. Brennan issued her report, she became aware that H.M.'s parents were requesting Braille instruction. She factored that request into her report, although she did not know at the time of the evaluation. She concluded that H.M. has a wonderful approach to learning that would be thwarted if he was made to start to use Braille as his vehicle for reading and learning. She further gave the opinion that H.M.

has adjusted well to using low vision technology and techniques to enhance his own learning style. She has no problem with individuals learning Braille instruction who are not completely blind, but have limited vision if their vision is deteriorating. However, technology has become advanced and Braille books are very cumbersome and it is not easy to get all the books. Even if H.M. were in high school and having trouble meeting the demands of the length and complexity of reading that he was having a hard time keeping up, she still would be an advocate for the use of low vision technology and the latest software programs. She was able to test H.M. in two sessions that lasted approximately ninety minutes or so. There were no lengthy reading assignments given to H.M. during that time. The longest was three pages but with short sentences. He did not perform lower than age appropriate in any subtests. Ms. Brennan did not notice fatigue.

On cross-examination, Ms. Brennan said that she believes that children with functional vision need Braille when the amount of vision they have cannot be used with a low vision aid to read print. Braille would thwart H.M.'s approach to learning because it takes a significant amount of time to master the reading of the dots. It would take away time from his use of other tools. She was not aware that Oceanport provided Braille instruction. Very few people read, write, and communicate in Braille. She does not believe H.M. would be at a disadvantage without Braille. She has worked with a dual reader in the past and it was very difficult. That person was thirteen years old.

John Reiff next testified that he has been with the CBVI for thirty-nine years. He is a manager of field operations in the regional office. He has no formal training in the education of the blind. All the supervisors in the CBVI report to him. The CBVI assesses the extent to which vision loss impacts on the student's performance. They provide services to level the playing field for the visually impaired. They provide Braille if it is appropriate as well as other equipment designed to equalize treatment of visually impaired. The policy regarding Braille is that they recommend it if it is appropriate on a case-by-case basis. There are approximately thirty-four students being provided Braille instruction currently. Debates over whether Braille should be provided occur sometimes, but not frequently. The CBVI communicated that it was not in favor of



Braille introduction for H.M. Dr. Colucci did separate assessments. He sent an email setting forth that H.M. is reportedly doing well as a print reader and one cannot point to H.M.'s academic performance and state he would be better if he were a Braille reader. This was his opinion along with Dr. Colucci, and Margaret Bruno. They reviewed many documents in coming to that opinion including outside assessments done for H.M. The cost of Braille instruction did not come up at all in their discussion. They agreed to maintain an open mind and consider all the information available with regard to H.M.'s needs as they relate to his legal blindness, schooling, and academic success. One of the considerations was that children want to be like other children and want to be in the mainstream. Also, that is a requirement of placing the child in the least restrictive environment. He does not know of any student who did not need Braille that subsequently learned Braille. If H.M.'s teacher recommended that H.M. receive Braille, it would be no problem to provide it, however. Generally, the CBVI makes the recommendations and it is up to Oceanport whether to accept the recommendations.

On cross-examination, Mr. Reiff testified that Mr. DeSantis of the CBVI recommended Braille services for H.M. to be provided three days a week. The school did not contract for those services. A decision was reached based on a conversation with Mr. DeSantis that when the factors of vision, speed, and stamina were considered and ability to read over time Braille should be instructed. Mr. Reiff indicated that they should give thought to whether the case should be reassigned from Anne Marie Sundberg. A later email dated August 23, 2010, from Dr. Colucci to Mr. Reiff indicates that Ms. Sundberg will be replaced by Ms. Bruno as the contact person for several Oceanport students in that Oceanport may now be feeling the outside pressure to lean toward Braille instruction. He denied that Ms. Sundberg was replaced because she may break down and recommend Braille instruction. (R-62 at 638). Dr. Reiff indicated that if it became clear that Braille was needed by H.M., the CBVI would recommend it. He stated in the memo to Dr. Colucci, "setting aside the matter of our shrinking resources and the fact that Braille tutoring should be provided to those who truly need it to succeed academically, one question in my mind relates to the impact of taking time away from his other classes to do the Braille tutoring." (R-62 at 20). In addition to those reasons, the CBVI also considered the ophthalmologic diagnosis of H.M., which

was stable. He was not sure whether he saw an email from Ms. Sundberg to Dr. Colucci sending a transition services document indicating that blind and visually impaired children must learn compensatory skills such as reading and writing with Braille or with print using optical devices orientation and mobility skills, etc. (R-62 at 983). Although it was mentioned several times in emails that the expert should consider ADHD and what effect that has on H.M.'s reading speed, he is not aware that the CBVI ever recommended such an evaluation and is not aware that Oceanport ever had that evaluation done. He read the report of Dr. Trzasco in which Dr. Trzasco stated that fatigue will occur with greater frequency in the future.

Anne Marie Sundberg testified that she was a CBVI instructor for nine years. She had a caseload of forty students or more. She is a certified teacher of the handicapped and a TVI. One requirement for her certification is that she learn Braille. She had it for a full year and is fluent in reading it. She learned strategies for teaching Braille, the technology available for visually impaired and how to do assessments. She has taught five to seven students Braille including some tutored over the summer. She has also provided large print materials and teachers workshops on accommodations. She was qualified as an expert in the field of special education and teaching of the blind and visually impaired.

H.M. came to her as a referral in September 2006. She met the student, visited with the family, and observed two services being given. She did a LMA, which is the starting point to determine if Braille was necessary for a student to learn. (R-62 at 594). After serving as H.M.'s case manager for four years, she gave her professional opinion. She did not think H.M. would benefit from Braille because he uses vision extremely well. In language arts, when she observed him, he was very independent, located things in his binder, and his handwriting was very neat. The teacher was able to make things larger and bolder using technology. He used an activity sheet that was the same size as his peers, not enlarged. She is aware of his albinism and nystagmus. She did not have experience working with any other children with albinism who are candidates for Braille.

Ms. Sundberg's education guides her judgment in whether to determine a student's need for Braille. If a student gets visually fatigued, it is not necessarily an indication that he needs Braille. The majority of students do their work in the morning. In the afternoon, all students get tired and need a break. Audio textbooks can then be used as well as screen readers or zoom text. She provided the Victor Reader, which is a specialized CD player and Acrobat. Braille is appropriate for a student with some functional vision when print becomes too difficult. For some students, it is impossible even with the best accommodations. It is also appropriate when a student has a degenerative eye condition. When she evaluated H.M. in the 2008-2009 school year, he was functioning equal to his peers. (R-9). He sometimes would use a bar magnifier to read, but chose to read without accommodations many times. H.M. functioned nicely with regular print. Regarding the use of CCTV, H.M. did not have much functionality with it. She did not get a chance to train him and only observed him at one time in the home. Another reason she determined that Braille was not necessary for H.M. was also that best practices encourages the least restrictive environment. Since his eye condition is stable, H.M. should use printed materials. H.M. is very good at using his vision, so if they teach him Braille it would be another curriculum to have to learn. You want to encourage the use of that vision to the extent possible.

Ms. Sundberg continued to testify that each year they prepare an educational services report to summarize what services were provided for the districts and make a recommendation for the coming year. (R-24). She did another assessment on December 2, 2009 and determined that H.M. was being properly accommodated. The school had implemented her recommendations and confirmed her professional judgment. H.M. demonstrated a number of skills and did not need a magnifier to see the test. It is fine for him to bring materials close to his face to read. For H.M., he may bring it close to his face to slow down his nystagmus. It does not damage the eye to read like that. The parents frequently discussed providing H.M. with a Braille education, but she has always felt that it was not appropriate for H.M. Regarding the increased challenges to read as he gets older, she believed at that time they could explore other accommodations like technology and try to get high school students to be independent.

At some point, she did provide Braille and pre-Braille instruction to H.M. She does not recall what brought it on but she was instructed to try it.

Ms. Sundberg continued to testify that she was told to give Braille instruction halfway through H.M.'s academic year. She provided it for about three months. Braille was discontinued because it was not very efficient for him. The request came from Dr. Colucci. She sent home a notice to H.M.'s parents in his backpack. She informed them that "he is picking it up well." They concluded that it was not an appropriate modality for H.M. to read and write. She testified one can have vision, but still pick up Braille well. Ultimately, it was determined that Braille would not be a service provided by the CBVI to H.M. An email was sent to Ms. Dunikoski to that effect. One of the factors that was considered in the determination was that H.M. was reading very well. If H.M.'s vision remains stable, he is not likely to need Braille instruction. Although she did not test H.M. in a way that required him to perform sustained reading, she observed him in language arts where he did sustained reading for longer than three minutes. He was reading both silently and orally.

On cross-examination, Ms. Sundberg said that she had recommended Braille on two occasions for students who were not blind but have some functional vision. The first was a person with deteriorating vision so that eventually he or she would not be able to read print. The second was a person with a lot of vision, but as reading material got harder he or she would not be able to read print effectively enough. His or her eye condition due to a birth defect was such that he or she could not read print for sustained periods of time. She is not sure whether the CBVI has official or unofficial policies regarding Braille. Currently, H.M.'s schoolbooks are in eighteen point font and he has a long bar magnifier that increases the font to thirty-six points. She recalled the discussion at the CBVI where they discussed providing intensive Braille instruction to H.M. It was based on, as H.M. gets older, he will have to do more reading. They concluded Braille was not optimum based on his functional vision assessment and school observation as well as information collected in the file from his eye doctors. She did not necessarily agree that a larger font will decrease H.M.'s reading rate. However, she did agree that a CCTV with enlarged print would take longer to read. She agreed

that if H.M.'s reading fluency drops, the drop may inhibit H.M.'s ability to pursue certain professions. Ms. Sundberg testified that the CBVI only provided Braille because his parents wanted him to have it. It was determined to try it until the end of the school year. She thought it went to the end of the school year, but it may have ended in May. In her opinion, H.M. was reading well, using printed material effectively and at the same rate as his peers. The CBVI provided H.M. with one forty-five minute session per week, the equivalent of one class period. During the language arts class that she observed, she did note that H.M. needed more time. (R-62 at 594). One cannot be proficient with two months of Braille one lesson a week, but one can become more equipped to accept Braille as a means of instruction in that time. Ultimately, the CBVI preferred H.M. remain reading print because he was able to read it, keep up with his peers, and use technology to compensate for his vision impairment. (R-11).

Margaret Bruno testified that she has been an employee of the CBVI for six years. She is a teacher of the blind and visually impaired (TVI) and a case manager. H.M. is her current student. She is a certified TVI who also has a supervisory certificate and a certification as a teacher of the handicapped. She was qualified as an expert in the field of special education and education of the blind and visually impaired. She was H.M.'s case manager from September 2009 to June 2010. She spoke to Ms. Sundberg, who said that the parents wanted H.M. to have Braille and knew the CBVI had denied Braille. Ms. Sundberg told her that she did not think that he should have Braille. She reviewed his file and ultimately wrote a report that sets forth her school visits and services provided. (R-52). She saw that H.M. functioned well in the classroom as a typical child. H.M. demonstrated how he used the Kindle. He had numerous magnifiers, large print books, etc. He did have a problem in the computer class, so she sought out a screen enlargement to help him. There was a large print keyboard available and H.M. had other accommodations made as well. The CBVI had the large print keyboard installed about three weeks prior to her testimony. She watched him use the Acrobat in social studies. It is fine that he uses natural magnification and brings the books closer to his face. She did not see signs of fatigue during her observations. If a student does fatigue from reading, other accommodations can be made like listening to recordings of books. She testified that Braille should be

taught to someone with functional vision when they can no longer keep up with their peers and it is hindering his or her academic performance. Students are now doing well with the iPad and downloading their books onto the iPad. She has not witnessed children who are not able to keep up as they got older. She is teaching Braille to one student who can no longer keep up with his or her peers. That student also has a netbook and a screen reading program. The student is being taught Braille because the netbook is not always available and Braille is an alternative method. That student had very low vision.

Ms. Bruno testified that she reviewed an evaluation that said H.M. needed Braille but does not recall how she saw it. She does not share that view. (R-62 at 158). She agreed that the CBVI should provide zoom text. She further reviewed the report of petitioners' expert Janet Bernhardt and disagreed with her opinion that H.M. must be given Braille as his primary reading medium. She never saw H.M. act like he was in pain or say that he had neck and shoulder pain. He enjoys reading and seems to enjoy reading books on his Kindle. Ms. Bruno tried to observe H.M. at the same times that Ms. Bernhardt did to see if she saw him visually fatigued. On two occasions, she observed H.M. and he functioned very well. She observed H.M. at art class for forty minutes, math for forty-eight minutes and language arts for fifteen to twenty minutes and he enjoyed his work. He sits up front when he needs to and functions well. She did not see where H.M. needed magnification to do some of his work. After her further observation, her opinion did not change that H.M. did not need Braille.

On cross-examination, Ms. Bruno testified that the computer teacher had not made enough accommodations for H.M. The purpose of the Educational Services Report (R-52) was to summarize to Oceanport and the parents the services that had been provided during the year. H.M. was not tested in preparation of that report. She did not do any timed testing or sustained reading testing. She agrees that it takes two years to be proficient as a Braille reader. (R-17 at 141).

Dr. Kelly Lusk testified that she is currently an Assistant Professor of Ophthalmology at Cincinnati Children's Hospital. She began this position on October

27, 2011. She is also the Director of Education and Research for a program on children's low vision. She has a Ph.D. in Special Education with an emphasis in visual disabilities from Vanderbilt University. She has a M.Ed. also from Vanderbilt in Special Education with an emphasis on visual disabilities. Braille is her area of specialization. She is a certified TVI. She is still an independent consultant who evaluates students, coordinates instructions, teaches students and teachers, and follows up progress with a local TVI. She is still the primary TVI for a case load each year. As such, she attends all IEP meetings and helps develop the students IEPs.

Dr. Lusk wrote an article in the Journal of Visual Impairment and Blindness that determined that the decision of visual medium must be individualized to the student and no formula determines what services are provided. It depends on myriad factors that must be investigated completely. She has given numerous lectures on the subject of dual media learners and the notion of what is in a child's "toolbox", which references to all the tools that are available to a child with a visual impairment. Regarding her articles, she found out in her research that for teachers, students, and parents, reading stamina was the highest concern. Stamina becomes a bigger problem when print speed drops off. Ultimately, she was qualified as an expert in the fields of: (1) special education with an emphasis in visual disabilities of blindness, and low vision; (2) a teacher of students with visual impairments; (3) the development of educational programs for the blind and visually impaired; and (4) assessing the needs of students with visual impairments. Petitioners' request to have her qualified as an expert in research methodologies for determining evidence-based practices for visually impaired students was held until such time as a question required that level of expertise.

Dr. Lusk observed H.M. at home for one and one-half hours and reviewed his school records. Based on the school's data, it was not likely that H.M. would require Braille instruction. It is generally unlikely that a child with 20/200 visual acuity would require Braille instruction. When she observed H.M. she saw him move the CCTV camera to magnify text rather than move the material under the camera. She had never seen anyone operate the reader in that manner. H.M. told her he had never been instructed in the CCTV. H.M. was fine with the vocabulary word list. In

comprehension, he read at a fourth and fifth grade level above eighty percent. He reached the ceiling at sixth grade. His testing after three to five minutes was sixteen words per minute less, which told her that after even more time, he would lose even more speed. She thought that H.M. should actually have a higher reading speed after three to five minutes because he had warmed up with the material. She then started to question whether he had a problem with his stamina in sustained reading. Stamina incorporates two things. The first is the sustainability to read at any given time. The second is more of a fatigue that takes place throughout the day. She started to wonder whether H.M. needed Braille after the morning tests.

H.M.'s parents told Dr. Lusk that H.M. completed homework around 7:30 p.m. She testified that she felt that would be an appropriate time to test. She used a different longer five to ten minute passage. She got permission to take the school's CCTV home to administer the passage. She noted that when H.M. would read, he would re-read. He had no fluency that evening. He was rubbing his eyes and said they were itching. In comprehension, he was not even reading at a fourth grade level. He was unable to answer all of the questions. She was concerned about his comprehension and his reading speed, which was slower in the evening. She was very surprised to find that he had difficulty finding where to start and lost his place. Based on his reading speed in the morning, he should have been able to do okay in the evening. The significance of this is that as his work level increases, he will have more problems during the day and doing homework in the evening. Her findings were different from Ms. O'Donnell. Ms. O'Donnell said H.M. was able to hold the text ten to twelve inches from his face and used the standard font of ten to twelve point. At night, Dr. Lusk found that H.M. chose a eighteen to twenty point font and held the text five to six inches from his face. He was unable to read the Kindle ten inches from his face. It became clear that H.M. was not able to sustain print reading beyond a few minutes especially not over a whole day. He needs an alternative medium to be able to access reading after tiring. The assistive technology recommended such as a live reader is helpful, but audio is not a literacy medium. There is no spelling, punctuation, capitalization, grammar or syntax. Braille mirrors print. A child without access to reading media will be illiterate. Success in employment requires reading. Her testing



showed that H.M. read fifty percent faster in the morning than he did in the evening, which demonstrates the need for an alternative medium. Modifications must be made to allow H.M. to succeed. There is no other way to do that other than Braille. She noted that the CBVI did not have any records on H.M.'s sustained reading, just brief reading speed. She questioned why the CBVI would not do tests for sustained reading to support their conclusion that he does not have a problem with stamina. In her opinion, omitting it shows a clear bias against Braille.

Dr. Lusk went on to testify that Braille should be learned as early as possible as with regular reading. It is the foundation of all education. Students who are better readers do better in other subjects. H.M. is a visual learner for short periods of time; however, it will not be sufficient as his sole tool. He needs Braille to increase his literacy. It is another way to access print without taking away print media. For a child to obtain Braille skills, it will generally take two school years with intense instruction daily. Delaying it will make it more difficult. In addition to one and one-half hours per day of Braille instruction, she recommends that H.M. be given twenty to thirty minutes per day instruction of how to use the Acrobat efficiently. It is fine to delay Braille another couple of months to ensure print functionality, and then devote that entire time to Braille instruction. H.M. will still have a language arts teacher who will evaluate him to ensure he is not losing functionality in print. Braille will reinforce print skills, not be outside of the reading skills he has learned. The TVI would do the teaching of Braille and assessments along with his reading teacher and his parents. Dr. Lusk further noted that tactile sensitivity decreases with age. Children who learn any language learn better. In two years, it will be extremely late for him to learn. Federal law indicates that one can take into account a student's future needs, but in H.M.'s case it is not just about future needs. He already could be using Braille because he has difficulty in sustained reading. H.M. will still be primarily a visual learner, but he will have Braille as an alternative. He will be able to decide for himself what medium to use. Right now he has no option when his reading sustainability in print ends.

Dr. Lusk's observations of H.M. in the reading class indicated that prolonged reading was not required of him. She explained albinism as the inability to keep light

out of one's eyes because the pigmented part of most irises that blocks the light is not pigmented. It becomes painful for the person to be in the light. It becomes hard to maintain focus and concentration. She does not dispute that H.M. is a visual learner. She disagreed with the opinions in Ms. Sundberg's report. CCTV can take some of the stress off the eye, but ultimately it contributes to visual fatigue and does not decrease it. Ms. Sundberg did not test sustained reading even with the CCTV. It was not appropriate for the CBVI to make a recommendation without evaluating his decrease in acuity and visual fatigue over time.

Dr. Lusk notes further that Ms. Brennan in her report (R-42) does not explain how H.M.'s education would be thwarted by teaching him Braille. He would not start using Braille as a vehicle until he was taught how to use it with appropriate instruction. Braille is not a language, but a code, and thus a different way to write and read English. In her teaching of Braille, she has never had a problem with children who are visual learners reading dots visually. There is no supporting literature for Ms. Brennan's assertions. She agrees that H.M. should continue to use assistive technologies and Braille is a form of assistive technology. She has taught Braille to students with even more vision than H.M. Braille will be another tool in his "toolbox" along with the handheld magnifiers and assistive technologies. Based on her knowledge and experience, her professional opinion is that Oceanport failed to assess completely H.M.'s instructional needs. It will not be a detriment to remove him from his resource room to teach him Braille, rather it is a detriment not to be able to have access to text. Ms. Dunikoski's testimony that Braille is not appropriate for a student who has stable vision like H.M. is not correct. His condition may be stable, but his visual functioning is not stable. He functions differently throughout the day. She finds it interesting that the CBVI discussed the need to look at H.M.'s stamina, yet never did it. She noted the phrase in the email among the CBVI indicating, "setting aside shrinking resources" and said the resources are not to be considered when placing a child. The comment shows a bias against Braille because it is costly. Although the CBVI said the tests she did are skewing the results, they have not even looked at the concerns the parents brought to their attention years ago.

Regarding H.M.'s IEP, Dr. Lusk testified that students with a visual impairment need goals and objectives that are related to their primary disability. She never heard anything as the director testified that when a child is a sighted reader, they do not make goals and objectives dealing with blindness. The goals and objectives must relate to how the student's program needs to differ from his peers. She noted the overwhelming number of modifications and accommodations made to H.M. to deal with his trouble in class that Braille could actually help. Those modifications take away instructional time. If his present level shows a need, then there must be goals and objectives related to that need. In Dr. Lusk's opinion, H.M.'s IEP is not one from which he can make meaningful progress. She noted that none of the goals and objectives were measurable or specific to H.M. It was not individualized. In her opinion, it was literally the worst IEP she has ever seen. A measurable goal is something you can take data on and has a number and frequency. It should not matter how long the IEP is. It must address the needs of the student.

On cross-examination, Dr. Lusk testified that there has been a decline in Braille usage as there are fewer programs to prepare teachers to teach Braille. There are states that do not require competence in Braille so it may be difficult to learn it. Braille is not accessible for most people, so it is scary. Teachers may not be competent to teach it. Attitudes have changed over time, partly due to technology. Braille used to be the only other option. It is not anymore. She agreed that in her study of dual media learners, she may have been more likely to receive responses from those who are more enthusiastic about Braille.

Dr. Lusk testified that it was impossible to know whether Braille instruction would increase H.M.'s print literacy skills. It is possible that if Braille is introduced to H.M., his print rate may not increase as much as it would if he was only doing print media. Introducing it is worth it; however, because fatigue would not be a factor. The time of day was certainly significant as he did better earlier in the day than later. Fatigue can also be mitigated by breaks, but even with a longer break, she would still question the functionality of being able to read only five to ten minutes at a time. She noted that the Kindle is not part of a student's educational program. She had recommended

technological assisted devices where it would be appropriate. The Kindle can be a positive in that it can change color, contrast, and brightness. She tested him in the medium. She noted that enlarging the print for H.M. only creates more work for the eye.

Dr. Lusk was aware that the parents wanted Braille instruction and that Braille instruction had been started by Oceanport and then abruptly stopped. She was asked to look at H.M.'s program and determine if Braille was an appropriate additional medium for him. The teachers that had previously tested H.M. said that his reading was fine, but they did not have any documents to show data or an evaluation to rely upon. She noted that audio books are not a literary medium. Audio transmits language and can supplement one's writing in the Braille writer. Regarding his ADHD, it is controlled by medication; it does not impact his educational environment. When asked whether the fact that H.M. was proficient in reading with his accommodations might explain better Oceanport's position rather than bias, Dr. Lusk said that it is possible, except that in multiple emails it has been brought up that H.M. needed to be evaluated for Braille usage and Oceanport did not. She is unclear why Oceanport did not go ahead and do that a long time ago. Coping is not the standard. His visual fatigue is a potential problem and Braille is the only feasible way to counteract it. If it were not for all the technologies, H.M. would have to be a Braille reader. She is familiar with zoom text as a magnification program where software converts words to the spoken word. Dr. Lusk says it is supplemental media that decreases retention because it is passive and not active. Audio is excellent to supplement, but not to take the place of a text medium.

Janet Bernhardt testified that she is the owner of a business that provides low vision devices for schools and parents. These products include Acrobat and other enhanced vision products. She is a consultant for schools at the Louisiana Center for the Blind. She does assessments, develops lesson plans, and attends IEP meetings at the request of private and public schools. She teaches the Braille code to teachers and helps them write lesson plans. Braille should be taught early because if one waits until a child starts failing, it becomes an uphill battle to teach them. In her consulting, if a teacher is not experienced, she will write the goals and objectives for the teacher.

Ms. Bernhardt continued that most students with albinism are not dual readers. They do not require Braille. She has taught Braille for thirty-four years. She reads Braille with her eyes and thinks everyone sighted reads with their eyes. She was qualified as an expert in the education of students who are blind and visually impaired, providing low vision therapy and teaching Braille. She defined legally blind as correction to 20/200 or better in the better eye. She noted that perfect 20/20 vision means one can stand back at 200 feet to read it. 20/200 means that they would have to go as close as twenty feet to see the writing. About ninety percent of her blind students have some vision. She is aware of the presumption that a visually impaired child should have Braille.

Ms. Bernhardt testified that Dr. Ruby Ryles came to her and asked her to meet a mother who needs help. She did a quick low vision assessment of H.M. She initially did not believe a child with albinism would need Braille. She did her first evaluation at a convention. She found, however, that H.M. cannot do sustained reading. She performed the Lighthouse Near Acuity Test which tests how well a child can read. She found his actual acuity is 20/250. H.M. can read print with magnification, but the problem is his sustained reading. He gets tired after a minute of reading. She timed H.M. for one twenty-minute stretch and instructed him to read orally so she can tell if he knows the words. The first ten minutes he had a speed of 120 words per minute; the second interval of ten minutes he read at sixty words per minute, one half of the previous time. He had to hold the material very close to his eyes. She tested H.M. before he entered fourth grade. At the end of the test, his nystagmus bothered him. His eyes were moving and his head was bobbing. She concluded H.M.'s primary reading medium should be Braille. He would be able to be proficient if he started doing it now. He would not have the neck, back, or eye strain that he is having now. She noted it is very tiring to hold a book up three to four inches from one's face and be able to read at a good speed and maintain it. Instead of reading in a resource room, H.M. should have Braille instruction. He will be able to read faster, longer and more comfortably as a Braille reader. Oceanport will not be nearly as successful with Braille if they do not spend enough time. She sees students fail because they have not had

Braille education. Braille readers sometimes are slow readers because they do not start early enough. She is aware that fifty percent of blind and visually impaired children in the United States drop out of high school because they do not have a way of reading or writing.

Ms. Bernhardt testified that she came to New Jersey to do a more thorough evaluation of H.M. than she had done at the conference. She observed him all day at school and home between 3:00 p.m. and 5:00 p.m. She saw H.M. at home using the accommodations of the Acrobat and the Kindle. She noted that in school, the teacher in computer class did not read the instructions out loud. H.M. had to get so close to the keyboard to see the keys. He used the Kindle at home. She made a note to talk to his teacher about Zoom Text, which is a software program that is better than Acrobat. Zoom Text should have been recommended by the TVI, but it was not used the day she observed H.M. When she observed H.M., he was the last one to get started. He was trying to see the material. Everyone else was typing as he was still trying to see. She could tell he was exhausted at the end of the day. She tested him later in the day and found his acuity was 20/200 with squinting and much effort on his part.

Ms. Bernhardt reviewed Ms. Dunikoski's testimony that H.M. is not blind; he is a sighted reader who performs better than a lot of sighted readers. Ms. Bernhardt disagreed with that statement as the Social Security Administration and IDEA say that he is blind at 20/250 acuity. He is a sighted reader because he reads print and he has never been taught Braille. She tested H.M. on a third grade book. H.M. held the material at six inches and was able to read at 108 words per minute. The longer he reads, the less he is able to read. She used the National Reading Media Assessment to determine whether H.M. should be a print reader, a Braille reader, or a dual reader. She was on the committee to develop the assessment. It is the best test she has seen because she has evaluated seven children with it. In her opinion, it is a valid and reliable test although it is not marketed yet.

Ms. Bernhardt testified that the test showed that H.M. should begin Braille immediately because waiting will make it harder for him. She believes H.M. should

have Braille five days a week for sixty to ninety minutes per day based on Best Practices. She believed H.M. would read for pleasure if he learned Braille. In the meantime, H.M. should be encouraged to use his vision, but he will ultimately be faster in Braille. He would not need as many modifications if he had Braille. She questioned if H.M. is doing so well why he is pulled out for reading. He should be doing the same work as other kids. Regarding speech to text, she believes it is a wonderful assistive technology, but it is not a substitute as listening is passive, but reading is active. Once H.M. is proficient in Braille, he will comprehend more and be able to access the information easier. She did not see where H.M. was making tremendous progress nor where his future needs were being addressed. She does not believe Oceanport is giving H.M. meaningful educational benefit because it is not addressing his future needs. If H.M. were to begin Braille today, he would be proficient in approximately one year and a half. A lot depends on the teacher, hours, and times per week. Regarding teaching H.M. Braille, although some children look at dots, H.M. probably cannot see them. H.M. has not had his tactile skills developed, but he will. He is the only child who uses an Acrobat in class, so that sets him apart as much as it would to use Braille books. In her opinion, students who were proficient as Braille readers do not experience problems in high school. H.M. is able to read, but he has a problem seeing.

Ms. Bernhardt found that her testing in New Jersey confirmed what she had done at the conference in Dallas. She finds fault with Oceanport in challenging her findings since New Jersey never tested H.M.'s sustainability in reading. She disagrees with the CBVI's suggestion that her testing skewed the results. All students were required to be evaluated at all times of the day because that is what the IDEA requires. Braille instruction should start immediately. If H.M. has a good Braille teacher, he should not take long to learn it. Ms. Sundberg had noted he was really good at learning when it was taught to him. It was not a restrictive environment issue because he is already being pulled out of mainstream classes for reading.

On cross-examination, Ms. Bernhardt agreed that fewer people are using Braille, probably because colleges are not preparing Braille teachers. She does not believe that the advent of technology is responsible for the decline in Braille usage. She has

not had any working familiarity with a Kindle in her thirty plus years as an educator. It is not a tool she would use with students since she teaches Braille. She teaches students how to use magnifiers on print. She knows that Kindle has features as good as Acrobat, but the monitor is better. Even with the Kindle, H.M. will not be able to sustain reading. H.M. will be able to use Acrobat when there are materials that are not in Braille. She wants him to be able to choose either. She agreed that she did not conduct the interview of the classroom teacher in her evaluation. She administered student and parent interviews during the NMRA. She noted that she is a certified low vision therapist of which there are very few in the country. She believes that the CST was wrong when it determined Braille was not necessary regarding H.M.'s success in grades and standardized tests. She has seen a lot of grade inflation with blind students. She is aware H.M. was diagnosed with ADHD, but she did not see any hyperactivity.

Ms. Bernhardt saw that H.M. got all "A"s, but he also seemed behind in completing assignments when she observed him. He had his eyes closed and was not participating in science. She believes that H.M. is struggling and taking longer to complete tasks. People who use Braille regularly love it. Blind and low vision students who use Braille are very independent and self-confident. The Braille enhances their ability to access technology. The person that she reports to is totally blind. She does not believe that her leaving out the teacher interview impacted the scores that she got when she tested H.M. The bottom line is that H.M. cannot read for long periods of time. Even if H.M. was not pulled out of his reading class, she would still recommend Braille.

H.M.'s mother, Mrs. M., testified that she adopted H.M. from China in July 2006. She has another son who is also a special education student in the middle school and has had no disputes over her other son's IEPs. H.M. spoke Mandarin Chinese when he arrived in the United States and did not know English. He learned English very quickly from exposure at home and school. He is very eager to learn. He was not in an English as a Second Language (ESL) Program. He received speech therapy in English. He learned English in approximately one and a half years to become fluent. It is now hard to know that English is not his first language. He was classified as needing



special education when he began school in Kindergarten and was placed in a self-contained class. At that time, Oceanport was aware of the need for evaluations of him. H.M.'s first diagnosis was albinism. He is legally blind and has nystagmus, which is involuntary eye movement. She has done a lot of reading on teaching students with albinism. According to the National Organization for Albinism and Hypopigmentation (NOAH), whether a student needs Braille depends on the individual. (P-10).

Mrs. M. believes H.M. needs Braille because he is on the worse side of the visual scale. As he gets older, he suffers more from eye strain and fatigue. He becomes tired very quickly. H.M. does not read for pleasure or enjoyment, but she believes he would if it did not hurt to read. She watches him and anytime over five minutes he starts to rub his eyes and rub his neck. She does not believe he is being given the same reading assignments as other fifth graders. His homework that comes home is vocabulary and spelling, no actual reading assignments. In the mainstream classrooms the reading teacher assigns novels. She believes that he could be taught Braille in a gradual shift from text to Braille. As he learned the code, it could be incorporated into his regular curriculum. A good TVI knows how to pull the regular material into Braille lessons. She first asked Oceanport to provide Braille in August 2008, in an email to Ms. Dunikoski. It was shortly before H.M.'s second grade year that she could see early signs of fatigue starting. Oceanport did not respond by evaluating H.M.'s sustained reading. There is no analysis of his future needs. She was told an evaluation would be done in October 2008. However, she did not receive that evaluation until February 2009, and it was not a complete evaluation because it did not include an evaluation of reading speed, his stamina, or his future needs. She continued to ask for Braille instruction between October 2008, and February 2009. She inquired with her TVI and Ms. Sundberg. She had a conference with the IEP Team and they discussed the possibility of Braille.

In a March 2009, meeting, Ms. Sundberg expressed the possibility of Braille being given once a week, but there was no other discussion. The IEP of March 19, 2009, sets forth Mrs. M.'s parental concerns that H.M.'s ability to see fluctuates throughout the day. She was concerned because it seemed like the team was

surprised that she was even asking for Braille. They said things like H.M. did not complain. Her son does not complain. He will try to do his work and not do anything to be seen to be causing a problem. If asked if he can see, he will say he can. The health of his eye is stable, but his ability to use his eyesight varies during the day. She watches him and asks him to read things. He learned these coping skills from growing up in an orphanage in China where he was physically and emotionally abused. He learned to “stay under the radar.” She found this out from an American woman who volunteered at the orphanage. H.M. has scars on his hands and ears from the orphanage. H.M. must learn Braille in order to do well. Oceanport must give him a chance to be effective in it. Oceanport keeps talking about technology and audio, but listening is not reading. Audio does not give you sentence structure and punctuation. H.M. should be reading as much as other children by now.

Mrs. M. testified that she was told that Oceanport decided to give H.M. pre-Braille exposure in the amount of once a week for forty-five minutes. She was concerned because there was no IEP meeting yet. She wrote a letter to Ms. McCartin on March 13, 2009 (P-11) expressing that she was upset that an IEP decision was made without her. She indicated the disappointment with the change without her approval and indicated that the TVI only visited H.M. a few times a year. The TVI dropped off supplies, but never really worked with H.M. on using the tools effectively. As of March 2009, there had been no measurement of H.M.’s reading speed or stamina and that is the most important part of what she was asking. There was no discussion about how the Braille program would be structured so she expressed her concerns. She asked the superintendent to come to the meeting on March 26, 2009, but the superintendent refused to come. Mrs. M. allowed H.M. to have the Braille instruction because it was in his interest to start. The TVI never offered to evaluate his reading stamina, writing ability, or future needs.

At the IEP meeting of March 26, 2009, Dr. McCartin said they needed something in writing that the Braille instruction was approved. She approved it. She knew that the CBVI had a contract with the Board to provide the Braille instruction. (P-13). The TVI later sent home a note that H.M. was really good at Braille. (R-14 at 580). She has

learned a lot about blindness from reading on websites of NOAH, National Federation of the Blind, and the Perkins School for the Blind as well as support groups. With regard to Oceanport's contentions, H.M. was given the Acrobat, but the TVI never gave instructions on how to use it. He gets tired of reading on the CCTV though he does homework with it. The light from the screen hurts his eyes and only a part of a page can be seen at one time. The Kindle gives some benefit, but he still gets tired of reading on that. He can read on it for about five minutes.

Mrs. M. continued to testify that when Oceanport finally agreed to have an independent evaluation of H.M., only two names were presented to her and one was not available. Ms. Nadler was the only one available and she was not truly independent. Mrs. M. later learned that Ms. Nadler had been a long-term employee of the CBVI. Oceanport did not disclose her relationship with the CBVI. The next IEP meeting was June 11, 2009, and by that time Braille instruction had ceased. Oceanport never explained why they stopped Braille. Mrs. M. was just told at the June meeting. Mrs. M. continued to argue that H.M. should have another way of reading. She attended a national convention on vision. She was not making any progress with Oceanport. She wanted to ensure she was doing the right thing. Mrs. M. had been told many students with albinism do not need Braille. She met Ms. Bernhardt and asked if she would just look at H.M. If Braille was not appropriate for him, Ms. Bernhardt would let her know and it would be objective and impartial. Ms. Bernhardt said she would be surprised if he did need it. Watching H.M. read changed her mind. Ms. Bernhardt did timed reading tests that confirmed what she had observed. (P-5). Ms. Bernhardt wrote up an evaluation which Mrs. M. shared with Oceanport.

Mrs. M. had also been questioning why H.M. was still in the resource room. (R-27). When asked if Braille was ever in the IEP, she said eventually it was. She had Dr. Trzasko evaluate H.M. on June 10, 2010. She shared this report with Oceanport also. She had the report done to evaluate H.M.'s academic abilities, not just vision. After his evaluation, the special education team and Oceanport's attorney agreed to do the testing that Dr. Trzasko recommended for sustained reading. However, none of the evaluations after that included sustained reading, which was the main point. Mrs. M. testified she had clearly wanted an evaluation that included sustained reading. In her

emails, she asked Oceanport to evaluate H.M.'s sustained reading ability. (R-23). After that she did not contact the school directly, but had an attorney contact them as her agent. Ms. Bernhardt's evaluation caused her to request a more comprehensive evaluation. (P-6). Ms. Bernhardt noted the same visual fatigue that Mrs. M. had seen. By the end of the day he was worn out.

Mrs. M. further testified that she did not have faith in Ms. Brennan as an evaluator. Ms. Brennan did not test what she had requested and the conclusions that she drew included negative comments without actual testing. The Woodcock-Johnson Test was not appropriate for H.M.'s problem. Mrs. M. had Dr. Trzasko brought in and ordered to give a true independent reading. She shared his report with Oceanport. (P-9). Dr. Lusk, when she did her evaluation, observed the same things that she had observed in H.M. about his suffering in the evening. Dr. Trzasko said that H.M. needs Braille, and as time goes on, H.M. will only have more difficulty completing his work. H.M. shows signs of fatigue and work is getting harder. She shared Dr. Lusk's report with Oceanport.

At the June 15, 2011, IEP meeting, the IEP Team again said that H.M. would remain in the self-contained resource room. She had asked that he be moved and was told that he would be moved out at the end of third grade, then at the end of fourth grade, and then they decided not to move him for fifth grade either. No one presented a plan for getting him out of the self-contained class. H.M. spends twenty-five percent of his school day in the resource room - ninety minutes per class five days a week. He cannot keep up with mainstream work, however, with the accommodations that Oceanport is giving him. It should be in his IEP that he learn how to be proficient with these devices. The Kindle has an audio function, but it is not a dedicated book reader. He does not have the tools right now to be an independent reader. Mrs. M. is aware that H.M. does well on his report cards, but she has not seen data that backs up what the grades are based on. The grading is subjective. H.M. has not been assigned a book to read until recently. The fourth graders were allowed to select a book each week and write a summary. She agrees that H.M. has made great progress from not

knowing English to now. However, he is not making progress commensurate with his ability.

On cross-examination, Mrs. M. testified that she did recall H.M.'s class reading as a group in Ms. Lavalva's class. They had self-selected books, but they were not finished. It was anticipated that the students would read at home, but they told H.M. he could keep moving along. It was her understanding that most children were finished the book in a week, but H.M. was not able to finish. H.M. essentially wanted to pick out a new book every week like his friends did. His cognitive reading ability shows no doubt he is ready to be out of the resource room. The staff felt that he was not ready. There seemed to be a whole lot of uncertainty among the IEP Team. They were worried about his adjustment, but Ms. Lavalva thought they should make the change to general education. The real concern was that the general education class had too much visual reading. She is concerned that H.M. does not have the necessary accommodations to keep up visually with the work in a general education reading class. Mrs. M. strongly disagrees that technology is the way to go. The Kindle that he was given is not a talking book player. It was in his IEP that he would get one, but he never got it. The Acrobat is a light emitting device, so it is less effective because of H.M.'s light sensitivity. Also, he was not trained on it by his TVI. She expressed to the CBVI her overall dissatisfaction with H.M.'s accommodations. The help he received with the computer class did not come in until February 2010. H.M. was told that Oceanport was going to order a CCTV immediately. She finally purchased it herself and sought reimbursement. Regarding a laptop, she was told before fourth grade that H.M. would get one. They never obtained it the whole year. H.M.'s new TVI is Ms. Bruno. Mrs. M. has not found her to be receptive to anything that she sends her. Ms. Bruno has not specifically told her what more should be done. There are no goals or objectives related to H.M.'s vision. She asked that H.M. receive adequate training on the technology. They are all in line that H.M. will not get Braille. (R-62 at 613 to 620 and R-63).

Dr. Joseph Anthony Traszko testified that he is currently employed as a Psychologist at St. Dominic's in New York, an agency for developmentally disabled

adults. He received his Bachelors in Psychology in 1967 and a Masters in Psychology in 1969. He has a Ph.D. in Psychology from the University of Vermont, which he received in 1972. From 1982 to 2002, Dr. Trzasko was employed by the Jewish Guild for the Blind and conducted thousands of psycho-educational evaluations on individuals, half of whom had vision impairments and all of whom were disabled. He has been licensed as a psychologist by New York State since 1977. He was qualified as an expert in the areas: (1) statistics; (2) psycho-education; (3) psychology; (4) evaluation of the blind and visually impaired; and (5) development of programs for the blind and visually impaired.

Dr. Trzasko performed an evaluation of H.M. at the request of Mrs. M. on June 10, 2010. Mrs. M. contacted him and asked him to observe H.M. because she had concerns about the role that H.M.'s vision plays in his academic performance. Dr. Trzasko observed H.M. for a full day beginning with arriving at school, continuing through his classes and leaving school. He observed that the Acrobat system was present, but essentially was not used in H.M.'s language arts class. H.M. used his vision during the day. The reading that he did during the day was very limited. The Acrobat was not present in his reading class. When the Acrobat was present, H.M. had limited desk space and the Acrobat obscured his view of the teacher. Dr. Trzasko's report (P-8) recommends that Oceanport evaluate H.M.'s sustained reading and visual fatigue. The recommendation was to further explore what happens to his reading over a prolonged period. H.M.'s nystagmus and albinism both play a role in his visual fatigue. The fluorescent lights in the classroom produce a glare that makes H.M. likely to have difficulty in the class.

Dr. Trzasko returned on March 5, 2011, to assess H.M.'s reading ability. His previous assessments do not address what happens to his speed and comprehension over a prolonged period. (P-9). He saw no indications of ADHD. He gave H.M. breaks in between various tests to alleviate his visual fatigue. The first test showed that as the reading material became longer and more difficult, H.M.'s reading speed decreased dramatically. He next used a book entitled, "New Jersey Adventures in Time and Place," in a fourteen point font to test him. He did a prolonged reading test that lasted

twenty-eight minutes. Between the second five minutes of the test and the last three minutes of the test, H.M.'s reading speed decreased from 101 words per minute to eighty-six words per minute. Using the Acrobat, H.M. had quite a bit of variability in the percentage of questions he was able to get correct about the material. His reading speed dramatically changed minute by minute, which is characteristic of fatigue. One expects minor variability, but he had very wide swings in his scores. Also, H.M. was significantly slower in using the Acrobat than using large print.

Dr. Trzasko used a graph to show how words per minute decreased as a function of the continuation of time in five-minute intervals. (P-17). H.M. read fewer and fewer words over a course of time. He can say statistically that the graph is ninety-nine percent correct in showing the significant decrease in reading speed after fifteen minutes. The longer H.M. reads, the fewer words he is able to read. The average reading speed for his age is approximately 140. His testing showed that H.M. is reading significantly slower than other fourth graders without visual impairments. At his highest, H.M. was at 114 words per minute. Dr. Trzasko could not find an indication of expected reading speed on the NJS/NJPASS standardized test. According to his calculations, it is about eighty words per minute. This is based on a manual indicating how long the reading paragraphs were and how long they were given to do the segment of the test. Reading at eighty-six words per minute may get H.M. through the NJPASS, but it is below average fourth graders. By high school and college, students are expected to be upwards of 300 words per minute. H.M. is likely to stay in the range he is with his diagnosis.

Dr. Trzasko continued testifying that "chunking" is a reading process by which we read not word for word, but chunk by chunk. Magnification gives only bits and pieces of the chunk, so it adds another process to reading and interferes with comprehension and processing. H.M. reads close up or greatly magnifies the text, which helps him to identify letters, but it can be counterproductive to understanding the material. In conclusion, in his opinion, H.M. needs one and a half hours of Braille instruction per day until he is proficient with Braille. He is beginning late. It is usually introduced early with

pre-Braille. There are skills to build up tactile acuity. Braille would lower the variability in his reading speed.

Dr. Trzasko was impressed with H.M.'s motivation. Despite his visual fatigue, he kept working through it. H.M. never said he was fatigued. When asked about the use of the Kindle or other software for him, Dr. Trzasko said that it is substituting one visual reading technique for another, but it is still prone to visual fatigue. That is the problem with H.M.'s diagnosis of albinism. He noted that the Woodcock-Johnson test Ms. Brennan did usually only tests for three to five minutes and does not test sustainability. H.M. would not suffer reading fatigue from that test. Ms. Brennan's suggestion that H.M. would benefit from having a buddy to help him in class was absurd. H.M.'s approach and his pace for learning new material would be enhanced if he learned Braille. The TVI can blindfold H.M. to avoid the problem of him looking at the dots. In his professional opinion, H.M. needs Braille in order to obtain meaningful educational benefits. He needs a meaningful alternative to print reading and Braille is that alternative. H.M. is five or six years delayed in receiving Braille, but he is smart and could probably learn in two to three years or less. The good grades H.M. receives are based on how the teachers grade. They do not have data supporting their conclusions when they say that he is making "wonderful progress." Braille is a priority need, so it is fine to have him miss class for that time. In his opinion, the IEP does not offer an appropriate program because it does not include Braille. He has studied the statistics on employability of people with visual impairments and blindness. The unemployment rate for visually impaired and blind is extremely high at seventy percent without Braille. That number drops to thirty percent for those with visual impairments who know Braille. It will be difficult for H.M. to succeed in high school and college without Braille because reading fatigue will set in and it will be hard to read for prolonged periods. College textbooks come in Braille.

On cross-examination, Dr. Trzasko admitted he did not test H.M. while he had access to any technological device other than the Acrobat reader. Dr. Trzasko does not read Braille. It is possible for an adult to learn Braille later in life. He stated there has been a decline in Braille usage in recent years and that there is a place for audio



assistive devices to help individuals with visual impairments. He did not observe any auditory processing issues in H.M. Although adults can learn Braille, it is much more difficult due to brain cell loss. He attributes the decline in Braille usage to a biased attitude against Braille that is de-prioritizing the use of Braille. Canada has mandated Braille for the blind and visually impaired and it is on the increase in Canada. Even though usage of Braille has decreased, the materials in Braille such as textbooks have increased. He noted that he was not permitted to use the Kindle for testing because in school H.M. used Acrobat or large print. He wanted the testing to replicate the school material. He does not own a Kindle. He has recommended assistive technology for visually impaired students. Braille is not the only option as an appropriate reading medium. It is one of three that together would greatly enhance H.M.'s learning ability.

Bruce Sexton testified that he is legally blind and functions as a blind person. He can see a little, but uses techniques that a blind person uses like a cane, which allows him to navigate his environment without fear of falling or tripping. He has Glaucoma, which makes his vision fluctuate throughout the day. He has extreme light sensitivity and can see objects that are near to him, but not in detail. He was able to see better when he was a child, but his vision deteriorated. He grew up in California and attended school with regular classes, except he had a resource room for vision help. His vision acuity in high school was 20/200. He had an above grade level IQ. He was able to read regular size print very close to his face within two or three inches until third grade. He was slower than his peers and not able to track what other kids were reading out loud. His eyes could not process the information that quickly. He had to contort his body to see the text on CCTV. He could feel his back strain from leaning close to the text. As books got bigger, he stood up and bent over the desk to read the text.

Mr. Sexton continued that, as he got to junior high, the text got longer and his vision decreased. Reading out loud became mortifying. His reading speed never got faster as he got older. It became very embarrassing; so teachers stopped asking him and then he was not able to practice the skill. He could not follow along in reading class. The teacher would write on the blackboard and refer to reading and he was expected to use his vision, but the visual devices he had took him longer. The monocular would magnify, but it would narrow the scope of what he could see so by the

time he located where she was, she had moved on. He was told he was doing well, but he believed he was doing poorly. He thought they were pity grades because when he went to teachers for help, they would excuse him from assignments and still gave him good grades. He was not taught Braille. His parents went to the IEP meetings and tried to convince the professionals, but the professionals won. The professionals said that he needed to learn print.

Mr. Sexton's parents asked for Braille because his mother was blind. He has two siblings who learned Braille early and they did better. In middle school, he felt like he was doing twice the work. The text got longer and print got smaller and his vision got worse. He got help only one hour a day twice a week. He started failing his classes because he could not read and write well enough. He tried to listen to books on tape, but they would put him to sleep. In eighth grade, he went to the School for the Blind in California. From ninth to twelfth grade he went to a local public school. He felt frustrated in that he did not know how to tell the teachers what he needed. The School for the Blind tried to teach him Braille in eighth grade, but he did not want to learn a new way and feel like he was back to second grade. He learned the teachers had betrayed him and he should have learned Braille. In high school, when he could not read large print, he got books on tape, but that did not work. He got just enough information to get by. He had vision teachers at the school read to him. The volunteer readers were inconsistent in coming to him. The readers he had would read the book out loud. He did not know that he could stop them and ask a question.

Mr. Sexton testified that he could not master giving presentations. Having to hold print up to his face blocked his voice and his face, so he felt like a failure that could never compete with his peers. Writing was difficult because when he got close to the page, his shadow would block the page and he had to contort himself to be able to see it. He graduated on time with a 2.8 average. He went to Louisiana Center for the Blind after that and was blindfolded for nine months to help him learn Braille. He knew he needed it because he had seen his brother and sister do well with Braille. It took him three to six months to learn the code of literary Braille only. He did not realize that there was math Braille and music Braille. He got up to sixty words per minute, which he uses

for pleasure reading. It is not fast enough for college. His sister reads Braille at 500 words per minute.

In fall 2001, Mr. Sexton attended a community college in California. He got his Associate's Degree in 2005. It took him four years because he had to take fewer classes and remedial math. After he graduated from college he went to UC Berkeley. Berkeley did not pay for readers for him like community college did. He was denied the accommodations he had previously had, but was trying to carry a full academic load. At the end of first semester, he had four incompletes. He was able to complete two courses. The other two he could not resolve. They expected him to be completely independent. He got the book on Psychology on CD and it read everything including the citations, so it made it very difficult to use. He shifted to using a text to speech reader, which is a computer program. It did not divide between chapters or list pagination, so it was difficult to follow the class. After 2007, he got discouraged and depressed and took eighteen months off from school. He wanted the college degree because he wanted to show he could do it. He knew he was intelligent enough to compete with his peers. He returned to Berkeley and completed his degree in December 2011. It took him eight and a half years to get a four-year degree. He still feels functionally illiterate. He is unable to write a well-organized essay or term paper. He still makes spelling mistakes and attributes his deficiencies to not learning Braille because he would have seen with his fingers the way the words were spelled along with commas and periods and nuances of words. He has used technology to read and downloaded the Kindle program on the computer, but it is not great because you cannot use a book marking function. The speech is pretty good, but it misses words sometimes.

Mr. Sexton testified that he came to testify because he does not want any other child to have to go through what he went through. He was told that using his imperfect vision was the best way, and then years later he was told he should have been taught Braille much sooner. He does not know any visually impaired adult who wishes they had not learned Braille.

On cross-examination, Mr. Sexton testified that his acuity in elementary school was 20/200 and became progressively worse. Today, he cannot see more than six to eight inches in front of him if someone holds fingers up and asks him how many he sees. He started to lose vision in seventh grade, and by eleventh grade he could not use print any more as an effective way of reading. He is not sure whether that was due to losing vision or because the text became denser. Play time in school was difficult for him because he could recognize students by clothes, but not by facial features. He now uses speech on his iPhone to read email. He can read very large text at thirty-two or forty point font. He recalled that even when his vision was 20/200, he had fatigue when reading due to having to move his body and his neck close to the desk. It caused neck strain. In standardized testing, he found it hard to color the bubbles. He was not able to read in the time frame and giving him extra time just made him more tired. He does not recall his actual classification.

He testified that he became known to the petitioners because his sister wrote about him in a book about literacy entitled, "Letters to Obama," which was given to President Obama. Attorney Krevor-Weisbaum read the story and got in touch with him. It was published by the National Federation of the Blind. His affiliation with the National Federation of the Blind is through his mom, brother and sister who are all blind. He met members when he was thirteen years old and admired how they functioned as blind people. He wanted to become confident like they were. He was provided access to assistive technology when his vision was 20/200. He had the CCTV for close viewing. He has seen the Acrobat reader. He used Zoom Text also, but it was cumbersome and slow. Just to get started, he had to move the mouse to find the limited view and some of the text went off the screen. He was not given Braille in seventh grade because the professionals did not think his vision was going to deteriorate. They thought that he should use techniques of a sighted person to look normal, but it is not normal to hold large print books up to your face. They did not believe in teaching Braille if a student had some vision. He was told before testifying that H.M. was a boy whose family wanted him to learn Braille and the school was not giving it to him. The article his sister wrote about him said that the lack of Braille prevented him from competing with his

peers. His sister saw him struggling and how long it took him to get through school. She tried to describe the importance of Braille to literacy.

Eric Guillory testified that he is Director of Youth Services for the Louisiana Center for the Blind. He administers two summer programs for the blind throughout the United States. They are three-week programs designed to expose youth to blind role models. He has a BA in Social Studies education and an MA in Blindness and Visual Impairment. He worked at the Louisiana School for the Visually Impaired in Baton Rouge. He taught instructional Braille and remained at the school and was promoted to Director of the Materials Center. There, he distributes Braille text books and does outreach and technical assistance. He teaches employment skills and resume writing.

Mr. Guillory is blind from congenital optic nerve hypoplasia. He has acuity of 20/400, which is stable. He can differentiate things if he gets very close and picks it up. He suffers from nystagmus, which means his eyes become fatigued, which tires his whole body. He is President of the National Organization of Professionals in Blindness Education. He meets the legal definition of blindness in that he cannot read signs with small print. He does cooking and other tasks nonvisually. His parents taught him to do everything based on allowing for both sighted and non-sighted tasks. He attended summer programs where non-visual skills were taught. He could not sustain print reading in elementary school more than five to seven minutes. He would lose focus due to his nystagmus. He was given pre-Braille skills as a preschooler. He attended a self-contained class for blind students and was mainstreamed increasingly until in fifth grade he was fully included. Janet Bernhardt was one of his teachers. He uses the Acrobat, which is one type of CCTV. It magnifies text from a distance. Compared to the CCTV, Braille is obviously faster and the speed helps the decoding. It is more fluent, efficient and much more comfortable.

Mr. Guillory is a dual reader, but for lengthy passages, Braille is more efficient for him. He demonstrated that, with the CCTV, he is more apprehensive that letters he sees may not be what is there, such as "turn" looks like "tum." He has used a CCTV at school. It is helpful for looking at charts, graphs, maps, cartoons, and short-range reading. It is just not good for longer passages. The difference between listening to

books on tape and reading in Braille is that the interaction is different. Listening is not active reading. You may be assimilating data, but not actively reading and engaged with a text. Listening is very passive, so it makes one fall asleep. Using reading skills, you are interacting. It does not surprise him that he got some words wrong when he demonstrated the use of the CCTV. The CCTV causes you to focus on each letter and it makes you guess to try to read faster. He reads in Braille for pleasure. He uses Braille to read to his kids. In using Braille, he was always able to compete with sighted peers and took honors and gifted classes.

Mr. Guillory testified that he was present to tell how Braille helped him. He noted that magnification can help alleviate visual fatigue in the short term. However, as nystagmus increases, the visual demands become too much. He learned the Nemeth Code, which is Braille code for Science and Math. It is used for the production or reading of Math and Science materials. If H.M. were to learn Braille, he would be taught the Nemeth Code. It comes intuitively for elementary school kids. It has not just numbers, but symbols for all types of Math and Physics. He can also get Braille in foreign language. In high school, he had French books in Braille. With audio, you can hear and repeat, but with Braille, you can get the spelling. Braille was not as available when he was in school as it is now. Blind students who use Braille have more error-free work because of their comfort with the Braille code. Technology has not made Braille obsolete. Technology has opened up the world of Braille access. Using Braille, he can teach students how to use the different devices effectively.

On cross-examination, Mr. Guillory testified he is a certified TVI in Louisiana. He participates in the decisions of what media to be used. There is no visual acuity cutoff for Braille. He has used print rather than Braille to teach students with visual acuity levels ranging from 20/70 to 20/200. Standardized testing may be one factor that the IEP Team might look at. Under identical conditions, someone who has acuity of 20/400 is twice as impaired as someone with acuity of 20/200. 20/200 is the legally blind threshold. If a person has stable vision and his vision is 20/40 with the monocular, the person would sort of be able to learn in print. However, testing is done in a clinical setting, which may not reflect the real world. The IEP Team must always consider the

student's future needs. The team must look at how the student's forecasted academic workload will change. Nystagmus is always a consideration regardless of a student's acuity. One cannot use a monocular for sustained reading. It is good for street signs and other ten to fifteen second uses. Nystagmus increases with fatigue and makes the eyes jump around and it gets harder to focus.

### **FINDINGS OF FACT**

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following:

Despite H.M.'s diagnoses of vision impairment, the IEP Team has believed that H.M. is doing very well based on their assessment of H.M.'s reading skills. In fourth grade, H.M. received numerical grades above ninety-three in the subjects of Social Studies, Science, Language Arts, Reading and Math and receiving grades of "A" in Computers, Art, Music, Work Habits, Health and Physical Education. Toward the end of fourth grade, H.M. tested either proficient or advance proficient in his NJASK standardized test scores.

Oceanport followed the recommendations of the CBVI, which in H.M.'s second grade year, despite H.M.'s parents' request for Braille, recommended that Braille not be provided because H.M. had functional use of his vision, was performing well in his classes and on standardized tests and should be treated as a sighted reader.

Although H.M. has ADHD, his condition is successfully controlled with medication.

Oceanport's Director of Special Education, Ms. Dunikoski, believes that Braille instruction would interfere with the provision of FAPE because it would remove H.M. from classes in which he was making educational progress, despite the fact that H.M. was already removed from the regular education classroom for Reading in a self-contained classroom since he arrived in Oceanport.

At an IEP meeting on February 18, 2009, the IEP Team discussed Ms. Sundberg's LMA of H.M., which did not mention Braille instruction despite the petitioners' demand. Petitioners expressed that instructing H.M. on Braille in a limited fashion would be inappropriate. On or about March 11, 2009, Ms. Dunikoski and Dr. McCartin informed petitioners that Oceanport contracted with the CBVI to provide pre-Braille instruction once a week for forty-five minutes without notice to them. On March 13, 2009, petitioners asked for a meeting. On March 18, 2009, petitioners spoke to Dr. McCartin and Ms. Dunikoski and expressed concern about not being involved in the decision. Ms. Sundberg had directed that instruction was to begin on March 19, 2009. Petitioners consented to the Braille lessons, but did not approve of the minimal instruction time or of the program being implemented without their participation.

On March 26, 2009, spring of H.M.'s second grade year, petitioners signed an IEP indicating that "[H.M.] will receive Braille Exposure" through the CBVI in the amount of one forty-five minute period once per week. Ms. Sundberg supplemented her LMA in spring 2009 and concluded that, "Braille and print are equally valuable as media for reading and writing however, a best practices approach encourages reading and writing methods that are least restrictive for the student." She acknowledged that as H.M.'s grade level increased, the reading materials would be in smaller size and the CBVI would have to supply books in larger print. Further, H.M. would need to become more consistent in using handheld magnifiers or wearing reading glasses for materials in smaller than eighteen point font.

Although Oceanport's experts gave the opinion that if H.M. suffers from visual fatigue, his reading can be supplemented with audio devices that speak text to the reader, listening does not equate to reading and audio devices do not constitute a literacy medium.

Reading print on a CCTV takes longer because the print is enlarged making it necessary to break up sentences and making it harder to comprehend the sentences.



Zoom Text, which is also an enlargement program, makes tracking the text difficult because all of the text cannot fit on the screen.

The Woodcock-Johnson test does not test for reading stamina or sustained reading capability. Thus, it is not an effective tool for determining whether H.M. suffers from visual fatigue that impacts negatively on his learning now or determining what H.M.'s needs will be in the future. Oceanport based its decision to deny Braille instruction upon H.M.'s current progress and the availability of technology to assist with print reading. It did not assess H.M.'s future needs.

H.M. will require Braille to keep up with increasing workloads and longer reading assignments in the future. He needs to be taught Braille intensively five days per week in order to become proficient because he will be getting a late start. Tactile sensitivity decreases with age.

### **CONCLUSIONS OF LAW**

The Individuals with Disabilities Education Act (IDEA) requires states receiving federal funding under the Act, such as New Jersey, to have a policy in place that ensures that local school districts provide disabled students with a "Free Appropriate Public Education" (FAPE) designed to meet their unique needs. See 20 U.S.C.A. § 1412; N.J. Const. Art. VIII, § IV, ¶ 1; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1 et seq. In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 368, 85 L. Ed. 2d 385, 394, 105 S. Ct. 1996, 2002 (1985). A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d).

The level of program a public school district must provide to a handicapped child in order to comply with the standard of a FAPE was established by the United States

Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). In Rowley, the Court held that a disabled child has a right to “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley at 203. The Court explained that:

Implicit in the congressional purpose of providing access to a free appropriate public education is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...We therefore conclude that the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. Rowley, supra at 200-02.

### **I. Did Oceanport provide FAPE? – The Braille Presumption**

The issue in the present case is whether H.M. is being provided a free and appropriate public education in the least restrictive environment using assistive technology without the provision of Braille instruction. Petitioners argue that the Board must provide H.M. with Braille instruction in order to provide a FAPE that is individualized to meet H.M.’s unique needs and confers a meaningful educational benefit. Regarding development of an IEP, the federal statute at 20 U.S.C. 1414(d)(3)(B)iii sets forth:

(B) Consideration of special factors. The IEP Team shall—

...

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child’s reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child’s future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

The IDEA also sets forth that the IEP Team shall “consider whether the child needs assistive technology devices and services.” Id. at 1414(d)(3)(B)v.

Further, N.J.A.C. 6A:14-3.7 sets forth that Braille instruction shall be used unless the IEP determines after evaluation of the student’s reading and writing skills, and current and projected needs for instruction in Braille that such instruction is not appropriate. Petitioners refer to the above provisions as the IDEA’s “Braille Presumption” – an interpretation that seems consistent with the wording.

Petitioners contend that Oceanport’s IEP Team did not start with the presumption that the federal law requires Braille, nor did it evaluate H.M. properly. Oceanport’s witnesses, summarized by Ms. Dunikoski, testified that the decision not to provide Braille instruction was based on the CBVI’s recommendation, which noted H.M.’s functional use of vision, H.M.’s current performance in his classes and his standardized test scores. The CBVI said H.M. should be treated as a sighted reader. Because H.M. was ostensibly progressing in his reading and writing skills, Oceanport’s IEP Team did not consider providing H.M. with Braille instruction until petitioners brought the issue to their attention two years after H.M. had matriculated in Oceanport and been classified as visually impaired in 2006. Petitioners raised the issue of H.M.’s visual fatigue with the IEP Team in 2008, but Oceanport’s experts failed to test H.M. until February 2009, relying instead on their observations of H.M., his grades and standardized test scores. Oceanport and the CBVI’s failure to consider Braille instruction and test H.M. accordingly based on H.M.’s classification as visually impaired was in violation of 20 U.S.C. 1414(d)(3)(B)iii.

Beginning in 2009, after petitioners raised the issue of Braille, Oceanport’s professionals evaluated H.M.’s reading and writing skills extensively. They assessed his needs for assistive technology and evaluated his need for appropriate reading and writing media. Oceanport relied on advice from the CBVI that Braille instruction is not appropriate for H.M. Despite Mrs. M.’s requests and subsequent expert’s reports, Oceanport never assessed H.M.’s print sustainability. Instead, Oceanport relied on the fact that H.M. was functioning in his classroom and reading proficiently, in their opinion,

to determine that he does not need Braille. No Oceanport witness ever explained why H.M. was never evaluated on his sustained reading or why the tests given H.M. were not timed in order to confirm or discount petitioners' contention that over time he cannot keep up with his sighted peers. Oceanport contends in its written summation that, in order to find that H.M. needs Braille, the fact finder would have to discredit all of their witnesses. I disagree. Petitioners do not and could not argue with H.M.'s report card grades and standardized test scores upon which Oceanport's witnesses relied in making their reports. Rather, the petitioners argue, very persuasively, that Oceanport never evaluated H.M. for the real issue concerning his visual impairment, which is the visual fatigue due to light sensitivity and nystagmus that occurs throughout the day and makes his reading speed fluctuate over the course of timed intervals. The failure of Oceanport's witnesses to do so affects the weight of their testimony and opinion.

Oceanport offered petitioners the opportunity for H.M. to be evaluated by an independent expert. Ms. Brennan, a certified TVI, performed her evaluation in December 2010. Her observations were very different from those of petitioners' experts. She described H.M. as being adept with the Acrobat despite Oceanport witnesses' admission that no one ever actually trained him to use it. Ms. Brennan recorded H.M.'s performance on the Woodcock-Johnson test as average to above average, comparable to a student performing at the 5.3 grade level when H.M. was in fourth grade at the time. She performed the fluency subtest, which had not been performed in 2009 when Ms. Clark tested H.M. in third grade. She concluded that H.M.'s passage comprehension was age-appropriate and his oral comprehension advanced. Thus, she recommended auditory learning to complement H.M.'s reading. She also said she would recommend low vision technical supports such as the Kindle, the Acrobat, and speech to text software before she would recommend Braille instruction. Ms. Brennan gave the opinion that H.M.'s wonderful approach to learning would be thwarted if he were forced to learn Braille. She concluded, without reference to H.M.'s trial with Braille, that H.M. would be looking at the Braille dots as a sighted person rather than reading by touch and he has already adjusted to the assistive tools of the slant board and the Acrobat. She concludes that it will be easier for H.M. to learn if he stays in the sighted world and uses print as his vehicle of learning.

Ms. Brennan's opinion is questionable in many aspects. First, she did not test H.M.'s sustained reading ability. Next, she recognized that H.M. needed to work on his reading comprehension, but insisted that it can be enhanced by using audio books and other auditory and computer related activities. However, as pointed out by all of petitioners' well-qualified experts, listening does not equate to reading. One does not enhance the active skill of comprehending text by passively listening, even if one is following along with the reading. Ms. Brennan's opinion is also questionable because, by the time she evaluated H.M., he had been given pre-Braille instruction in 2009; yet she did not refer to how H.M. actually learned Braille when she made the pronouncement that it will not work. According to Ms. Sundberg, H.M. did well when he was first taught Braille, yet she insisted that he will try to see the dots as a sighted person, rather than read them by touch. Not only is this comment out of line with his visual impairment, which would make it difficult for him to see the dots, looking at the dots is something that a TVI could guard against by blindfolding H.M. or placing the board under the desk, as petitioners' experts have testified. Finally, Ms. Brennan's opinion is questionable because her conclusion that H.M.'s wonderful approach to learning would be thwarted if he were taught Braille runs counter to all reports of what a motivated learner he is. Her opinion may very well be impacted by the fact that she last taught the blind and visually impaired twenty years ago. The comment that H.M. has to stay in a sighted world shows a bias against Braille because it infers that Braille is a lesser medium than the technology that she recommends. H.M. is a legally blind student who has functional vision. He can live in the sighted world learning and using Braille as an alternative reading tool, along with the assistive technology. It is more logical that doing so will enhance his learning, rather than thwart it.

Similarly, the witnesses from the CBVI on whom Oceanport relied upon to determine whether H.M. should be taught Braille, Dr. Colucci, Ms. Sundberg, and Ms. Bruno also seemed to have a bias against Braille. Although it is the CBVI's responsibility to know that the IDEA has a presumption to instruct the visually impaired in Braille, given that Oceanport relies on the CBVI's expertise in visual impairment, the CBVI never assessed H.M.'s need for Braille until after petitioners raised the issue in

2008. Although at some point, Dr. Colucci and Ms. Sundberg waived enough in their assessment of H.M.'s need for Braille that they provided it in 2009, they abruptly stopped it despite Ms. Sundberg's recognition that H.M. was learning it well. Ms. Bruno, having already been told Ms. Sundberg's opinion that H.M. should not be taught Braille, followed suit and also began working with H.M. with a presumption to not provide Braille rather than to provide it. Ms. Bruno did note that H.M. had difficulties keeping up with his computer class, but again recommended more technology as the remedy for H.M.'s inability to keep up with the class. She never recommended Braille.

As Mr. Reiff, the CBVI Regional Manager, noted, the common theme of the CBVI professionals was that children want to learn like other children learn, so it is a challenge to teach them to learn Braille if they can learn traditionally by reading print. He said this while stating that the CBVI does not have a bias against Braille. However, using an Acrobat and other assistive technology devices is already not learning like other children learn. As observed by the experts, the Acrobat takes a considerable amount of space on his desk. Further, H.M. has remained in the resource room for reading since coming to Oceanport. Thus, it seems disingenuous for the CBVI to now be considered that teaching him Braille will remove him from the least restrictive environment. In light of H.M.'s history at Oceanport, LRE is not at issue. The current IEP already has H.M. pulled out for resource room. Despite no teacher or evaluator saying that H.M. was distracted or unable to focus, Mr. Reiff pointed to H.M.'s ADHD as a possible source of fatigue and lower reading speed, rather than recommending sustained reading tests to evaluate whether visual fatigue occurs. This also demonstrates a bias against Braille.

Ms. Nadler, who was also to do an independent evaluation of H.M., was actually a retired employee of the CBVI. The extent of her independence was thus questionable. She found that H.M.'s writing was substandard, but discounted that deficiency because his overall scores were average. She also failed to test H.M.'s reading stamina or print sustainability. There is also no indication that she took into account H.M.'s future needs.

Based on the foregoing, I **CONCLUDE** that 20 U.S.C. 1414(d)(3)(B)iii of the IDEA contains a presumption in favor of Braille instruction for students disabled by a visual impairment and that Oceanport violated that IDEA presumption and did not provide FAPE by not considering Braille initially, given H.M.'s albinism and nystagmus. Oceanport further violated it by not testing for H.M.'s sustained reading ability to rule out the necessity for Braille prior to assessing H.M.'s needs for assistive technology.

## **II. Did Oceanport Provide FAPE? – H.M.'s Future Needs**

As set forth above, 20 U.S.C. 1414(d)(3)(B)iii includes a mandate that the district evaluate not just a student's present need for Braille instruction, but the student's "future need" for Braille instruction. In expressing the views of the CBVI, Mr. Reiff stated that the CBVI looked only at H.M.'s performance at the time of testing. While acknowledging that, in the future, H.M. will have class work and homework with smaller print and greater reading demands, the CBVI made no recommendation to address how these demands will impact his ability to use his limited vision successfully. There were no services set forth in the IEP to address the statutory requirement that H.M.'s future needs be considered. Further, a CBVI email set forth that "shrinking resources" played a role, albeit a small one, in whether to provide H.M. with Braille instruction. In short, the CBVI failed to do what Oceanport relied on them to do, which is to help construct a program that would give H.M. meaningful educational benefit considering H.M.'s future needs.

The records of the CBVI cited Dr. Lusk's finding that H.M. tested at a reading rate of 146.3 words per minute with ninety-five percent comprehension. However, they focused on that one test and ignored the rest of her report that indicates that H.M. cannot sustain this rate for any length of time. Further, they fail to acknowledge how problematic it is that H.M. remained in the resource room for reading for second, third, fourth and fifth grades when his problem was seeing, not reading. The only reason that H.M. remained in the resource room each year is because he has trouble keeping up with the visual reading in a general education class. H.M.'s teachers acknowledge that he has no problem with the skill of reading. The U.S. Court of Appeals for the Third

Circuit has set forth that when “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.” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 567 (3d Cir. 2010). Ms. Lavalva, H.M.’s Language Arts resource room teacher, and petitioners’ experts who observed H.M. in class noted that there was not much sustained reading he was required to do in Language Arts or his other classes. Although there is insufficient information to find as fact that H.M.’s grades are inflated, Mrs. M. testified credibly that she has seen H.M.’s work compared with that of other students who have their work posted on the wall and his is much less, yet he is getting all “A”s.

At times, the testimony regarding observations of H.M. by the various witnesses seemed that they were not observing the same child. Petitioners’ expert, Dr. Trzasko, found that H.M.’s reading speed was significantly below the national average for his grade, even before he experienced visual fatigue. In observing H.M.’s classes in June 2010, Dr. Trzasko noted that H.M. was required to do reading on a limited basis throughout the day. Dr. Trzasko observed that if H.M used the Acrobat, it obscured his view of the teacher and took much of the room on his desk. Ms. Bernhardt observed H.M. being less participatory in his later classes than the morning. She concluded that this behavior was likely due to physical exhaustion secondary to visual fatigue. Dr. Lusk also found that H.M. was unable to keep up with his peers by the end of the day due to visual fatigue and questioned his ability to do homework at the end of the day.

In contrast, Ms. Sundberg of the CBVI found that when she observed H.M in language arts, he was very independent, located things in his binder, and his handwriting was very neat. She noted that the teacher was able to make things larger and bolder for H.M. using technology. Ms. Bruno, who was given Ms. Sundberg’s opinion that she did not think that H.M. needed Braille before she evaluated H.M., observed that H.M. functioned well in the classroom as a typical child. I do not discredit the observations of any of these witnesses. Rather, I believe that the inconsistent observations of H.M. are consistent with the ways that petitioners’ experts describe H.M.’s visual ability as fluctuating during the course of the day. Depending on the



lighting, sustained eye strain, type of work being performed, and teacher's instructions, H.M.'s level of participation and ability to keep pace with his peers can be impacted in different ways. Oceanport should have been concerned enough by petitioners' experts' observations to test his sustained reading ability and evaluate the extent to which his albinism causes visual fatigue that will require Braille to meet his future academic needs. If Oceanport's witnesses had tested his ability to sustain print reading, they may have concluded that Braille would level H.M.'s performance in classes throughout the day and thus level the playing field for H.M. in comparison with his peers.

Petitioners' visually impaired witnesses, Mr. Sexton and Mr. Guillory, explained very well the limits of assistive technology in accommodating H.M.'s future needs to access print. The Acrobat emits light, which aggravates H.M.'s light sensitivity. Magnification tools are good for reading words, but slow the reader's reading speed when trying to read sentences and comprehend text. This problem will intensify as H.M. proceeds through higher grades. Further, waiting until H.M. has a problem will hurt H.M.'s ability to learn Braille since according to petitioners' experts, tactile ability decreases with age. Based on all of the foregoing, I **CONCLUDE** that Oceanport's failure to evaluate H.M.'s sustained reading ability, or consider the petitioners' experts' evaluations if they were unwilling to do their own, was in violation of the requirement in 20 U.S.C. 1414(d)(3)(B)iii of the IDEA that H.M.'s future needs be considered in determining whether to offer Braille instruction.

### **III. Did Oceanport Provide FAPE? – The IEP**

As set forth above, the IDEA requires that a child with a disability's IEP set forth specially designed instruction and related services that are unique to that child. The IEP must contain measurable goals. See 20 U.S.C. §1414(d)(1)(A)(i). H.M.'s June 15, 2011, IEP does not contain measurable goals or objectives and is not individualized to cater to H.M.'s specific disability, which is his visual impairment. There was no dispute that H.M.'s primary disability was his visual impairment, but no goals or objectives were set forth in his IEP to address his impairment. This led Dr. Lusk to give the opinion that the IEP was literally the worst that she had ever seen. In explaining the IEP, Ms.

Dunikoski said that there need not be goals and objectives relating to blindness when a child is a sighted reader. Thus, despite the clear statutory requirement, Ms. Dunikoski was fine with the IEP providing no goals and objectives relating to H.M.'s visual impairment because he has the ability to read print. Instead, the IEP provides general goals and objectives that are irrelevant to H.M.'s disability of a visual impairment. Further, the objectives are not measurable. As testified by Dr. Lusk, there is nothing set forth by way of frequency or duration of service nor anything to set forth how progress is being made.

The IDEA requires that the focus of the IEP be on the special education services' targeting the student's disability and/or weakness, not his normal abilities or strengths. The IEP must provide "educational instruction designed to meet the disabled child's unique needs, supported by services necessary for the child to benefit from the instruction." Klein Indep. Sch. Dist. v. Hovem, 745 F.Supp. 2d 700, 749 (S.D. Tex. 2010). The IEP must include a statement of measurable goals that must meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. 20 U.S.C. §1414(d)(1)(A)(i)(II) Thus, Ms. Dunikoski's opinion that H.M. does not need goals and objectives relating to his visual impairment is in direct contravention of the IDEA and the cases interpreting it. However, she is not an expert in visual impairment, so her confusion as to what the law requires may be understandable. In contrast, it is not understandable that the CBVI, which consists of the experts in visual impairment, would not insist that the IEP contain measurable goals and objectives relating to H.M.'s unique disability. I therefore **CONCLUDE** that Oceanport has not proved by a preponderance of the credible evidence that H.M.'s IEP, with no measurable goals and objectives relating to H.M.'s visual impairment provides FAPE in the LRE as required by 20 U.S.C. §1414(d)(1)(A)(i)(II).

#### **IV. Did Oceanport Violate the Procedural Requirements of the IDEA?**

Petitioners also contend that Oceanport committed procedural violations of 20 U.S.C. 1415(b)(3) of the IDEA that denied H.M. FAPE and thwarted petitioners'

participation in the decision-making process. Petitioners contend that Braille instruction was provided to H.M. without their knowledge or consent and abruptly stopped, also without their knowledge or consent. As much as petitioners wanted H.M. to be given Braille instruction, their request was always for intensive Braille instruction as recommended by their experts so that H.M. could become proficient. No expert had ever given the opinion that one day for forty-five minutes per week would be sufficient. After the Board had contracted with the CBVI to provide the instruction in March 2009 and just days before the instruction was to start, they were given the choice of one day of Braille per week versus no Braille instruction at all. Not surprisingly, they chose the one day per week. Thus, Mrs. M. signed the "Consent to Amend IEP without Meeting" on April 8, 2009, after instruction had started. This procedure does not constitute the parents being part of the process as the IDEA requires. Further, although the contract executed in March 2009 with the CBVI was to provide Braille services to H.M. until June 30, 2009, Ms. Sundberg testified that the services stopped in May 2009. Based on the substantial credible evidence in the record, I **FIND** that the petitioners were not given the right to participate in the decision to begin providing Braille instruction at the minimum level of one forty-five minute session per week.

Further, although the IEP Team added in the IEP of March 26, 2009, that "H.M. will receive Braille Exposure through the [CBVI] (1-45 minute period once a week)," Braille did not continue the following year and was stopped without an IEP meeting. Mrs. M. was told of the decision to end Braille on June 11, 2009. Once Braille was started and placed in the IEP, Oceanport violated the IDEA by stopping it without the parents' participation or consent. While Oceanport can argue that the Consent to Amend without IEP Meeting waived the starting of Braille without their input, Oceanport has no such argument with the stopping of Braille. Discontinuing Braille without petitioners' participation or consent significantly impeded petitioners' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to H.M. I therefore **CONCLUDE** that the exclusion of petitioners from the decision to terminate Braille was in violation of 20 U.S.C. 1415(f)(3)(E)(ii)(III) and they are entitled to relief.

## V. §504 of the Rehabilitation Act

Petitioners next contend that Oceanport's failure to provide Braille instruction to H.M. violated §504 of the Rehabilitation Act, 42 U.S.C. §504, which sets forth that to establish a violation, petitioners must establish that: 1) the child is disabled under the Rehabilitation Act; 2) he is otherwise qualified to participate in school activities; 3) the defendant receives federal financial assistance; and 4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. D.G. v. Somerset Hills Sch. Dist., 559 F. Supp. 2d. 484 (D.N.J. 2008). There should be no dispute that H.M. is disabled since he is classified as visually impaired. As petitioners note, H.M.'s legal blindness at 20/200 acuity meets the definition of "disability" under both §504 and the Americans with Disabilities Act. There should also be no dispute that H.M. is otherwise qualified to participate in school activities or that Oceanport receives federal financial assistance. Federal financial assistance mandates Oceanport's compliance with IDEA. That mandate is not disputed. The last prong of the test is what is at issue. Although it seems circular reasoning to say that Oceanport violated §504 because it violated the IDEA in not providing FAPE, the Third Circuit has held that there are few differences, if any, between IDEA's affirmative duty to provide FAPE and §504's negative prohibition against exclusion and discrimination. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999). By denying H.M. Braille instruction, H.M. was denied a meaningful educational benefit at the school and thus FAPE. Therefore, H.M. was excluded from full participation in and denied the benefits of the school that he attended in violation of §504.

## VI. Relief Requested

In summary, I **FIND** the opinions and conclusions of petitioners' expert witnesses to be more research and data based and supported by evaluations geared more toward H.M.'s specific disability. I **FIND** that the evaluations of petitioners' experts' tests that were designed to determine how H.M.'s speed and fluency would decrease over time were more informative and geared to the petitioners' observations of H.M. as well as his albinism and nystagmus. I **FIND** that Oceanport's bias against Braille can be inferred

from Oceanport's witnesses' statements that set forth that H.M. is better living in a sighted world and learning as other children learn. A bias can be further inferred from the fact that the record shows that neither the CBVI experts nor the professionals in Oceanport have actually tested H.M.'s sustained reading ability despite all of the petitioners' letters, emails and expert witnesses' reports acknowledging that H.M. is a sighted reader in the short term, but cannot sustain his print reading over a period of time. Oceanport discredited the petitioners' experts without ever performing their own sustained reading tests to refute their experts' findings.

Further, I **FIND** that Oceanport did not consider the future needs of H.M. and that print will get smaller with higher grades and the difficulty of reading will increase over time. I **FIND** that Oceanport did not follow the presumption of Braille in the IDEA and rather began with a presumption of H.M. being a sighted reader and used his grades and test scores to support their presumption and ignored that his visual impairment caused visual fatigue. I **FIND** assistive technology to be useful to H.M. in some academic circumstances, but no substitute for Braille just as listening is no substitute for reading. I also **FIND** that H.M.'s IEP is to address his unique disability and set forth the specific way that he should learn to gain meaningful educational benefit in measurable goals and objectives, but it did not. I therefore **CONCLUDE** that Oceanport violated the IDEA by not considering Braille at least from 2008 first before going to the special considerations of assistive technology, by not testing for H.M.'s sustained reading ability given his diagnoses of albinism and nystagmus and by not considering H.M.'s future needs and only considering his current performance in school. I further **CONCLUDE** that Oceanport did not prove by a preponderance of the credible evidence in the record that H.M.'s IEP without Braille instruction and without measurable goals and objectives geared to H.M.'s visual impairment provided H.M. with a FAPE. I further **CONCLUDE** that H.M.'s program deprived him of meaningful educational benefit and denied him FAPE in the LRE in violation of the IDEA.

Having concluded that Oceanport made both substantive and procedural violations of the IDEA in not providing H.M. with Braille instruction, I further **CONCLUDE** that the law provides that petitioners can be compensated for those violations. All of the petitioners' experts testified that H.M. is in need of intensive Braille instruction five

days per week. In addition, Dr. Lusk recognized that there was merit in Oceanport's contention that there is a place for assistive technology in H.M.'s curriculum that will help him to keep up with his peers in his classes Braille is unavailable or when the teacher projects assignments and projections on the board. Thus, she reasonably recommended that, at least initially, twenty to thirty minutes of the ninety-minute session time that H.M. is pulled out five days a week be devoted to teaching H.M. to use the Acrobat and other assistive technology devices efficiently. She gave the opinion that it was all right to delay Braille for a couple of months (six to eight weeks) to ensure print functionality, then devote that entire time to Braille instruction. Given that it is the end of the school year, Dr. Lusk's approach makes sense. The petitioners' experts were credible; however, that H.M. can receive FAPE only with immediate daily intensive Braille instruction.

I **CONCLUDE** that Oceanport's proposed program and placement do not provide FAPE in the LRE, nor are they designed to provide H.M. with meaningful educational benefit. I further **CONCLUDE** that Oceanport's proposed IEP does not comply with the requirements of N.J.A.C. 6A:14-1.1 et seq. or IDEA. In addition, I **CONCLUDE** that an appropriate program and placement for H.M. must include the Braille instruction and other instruction, accommodations, services, aids and modifications recommended by petitioners' experts and thus, the IEP must be reformed to include such instruction and recommendations. The petitioners' request for Braille instruction in the amount of five forty-five minute sessions per week is hereby **GRANTED**, with Dr. Lusk's caveat that, at least initially, until H.M. becomes completely proficient, half of the time be spent on teaching H.M. how to use the Acrobat and other assistive technology devices efficiently.

### **ORDER**

Based on the foregoing, I **ORDER** that H.M.'s IEP be reformed to comply with the requirements of N.J.A.C. 6A:14-1.1 et seq. and the IDEA.

I further **ORDER** that H.M.'s IEP be reformed to reflect a program and placement including Braille instruction and instruction on assistive technology devices, accommodations, services, aids and modifications as recommended by petitioners' experts and that Oceanport be required to pay for one of petitioners' experts to evaluate the reformed IEP in light of Oceanport's insistence that the IEP does not need measurable goals and objectives related to H.M.'s visual impairment.

I further **ORDER** that Oceanport provide H.M. compensatory education for three years -- the equivalent of the number of years that H.M.'s parents sought, but were denied Braille instruction for H.M., and thus, denied FAPE. This may take the form of an out of state Braille-intensive summer camp program, but since a request for such a camp was not included in the petition, I do not order such a camp at this time. The compensatory education may take the form of intensive summer tutoring or an in-state Braille-intensive summer program if one exists.

I cannot order the respondent to reimburse the petitioners for services, consultations and evaluations. Petitioners will have to seek such reimbursements pursuant to 20 U.S.C. §1415(i).

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2010) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2010). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

\_\_\_\_\_  
May 3, 2012  
DATE

\_\_\_\_\_  
LISA JAMES-BEAVERS, ALJ

cmo



**APPENDIX**  
**WITNESSES**

**For Petitioners:**

Mrs. M.  
Janet Bernhardt  
Joseph Trzasko  
Bruce Sexton  
Eric Guillory

**For Respondent:**

Robin Dunikoski  
Stacy Liu  
Diane Ames  
Megan Fales  
Darragh O'Donnell  
Joanne Lavalva  
Mary Beth Nadler  
Diana Clark  
Mary Brennan  
John Reiff  
Anne Marie Sundberg  
Margaret Bruno

**EXHIBITS**

**For Petitioners:**

P-1 Curriculum Vitae of Kelly E. Lusk, PhD  
P-2 Dr. Lusk's April 6, 2011 Dual Media Observation and Assessment Report

- P-3 2006 Hasbrouck and Tindal Oral Reading Fluency Data
- P-4 Curriculum Vitae of Janet Bernhardt
- P-5 Janet Bernhardt's July 5, 2010 Low Vision Rehabilitation Evaluation
- P-6 Janet Bernhardt's October 25-26, 2010 Observation, Learning Media Assessment & Low Vision Assessment Summary
- P-7 Curriculum Vitae of Joseph A. Trzasko, Ph.D.
- P-8 Dr. Trzasko's June 10, 2010 Observation Report
- P-9 Dr. Trzasko's March 5, 2011 Reading Assessment Report
- P-10 Information for Teachers of Students with Albinism from the National Organization for Albinism and Hypopigmentation
- P-11 March 13, 2009 letter from H.M. (parent) to Dr. McCartin
- P-12 March 24, 2009 letter from H.M. (parent) to Superintendent of Schools, Andrew Orifice
- P-13 Contract for Provision of Services between Oceanport School District and the New Jersey Commission for the Blind and Visually Impaired
- P-14 Note from Anne Marie Sundberg to H.M. (parent)
- P-15 116 to 118 of CBVI Subpoenaed Documents (see footnote below)
- P-16 Bethany Fishbein's September 20, 2010 Evaluation Letter
- P-17 Graph created by Dr. Trzasko at hearing showing H.M.'s reading speed over time

**For Respondent:**

- R-1 July 27, 2006 Registration Form
- R-2 2007-2011 Progress Reports
- R-3 2009-2011 Report Cards
- R-4 January 2009 Cognitive Ability Test Results
- R-5 May 2009 NJ PASS Results
- R-6 August 19, 2010 NJ ASK Report
- R-7 2010-2011 (Grade Four) Writing Samples
- R-8 Coloring Samples
- R-9 Fall 2008 Report of Anne Marie Sundberg, NJ Commission for the Blind

and Visually Impaired

- R-10 October 23, 2007 and February 23, 2009 Notes of Commission for the Blind and Visually Impaired Case Worker Patricia Lyons
- R-11 2008-2009 Learning Media Assessment by Anne Marie Sundberg, New Jersey Commission for the Blind and Visually Impaired
- R-12 March 26, 2009 IEP
- R-13 April 8, 2009 Letter and Enclosure of H.M. (parent)
- R-14 April 21, 2009 Parental Notice and Consent
- R-15 April 24, 2009 Request for Parental Participation in a Meeting, Acknowledgement
- R-16 May 5, 2009 IEP Sign-In Sheet and "Parental Notice Following IEP Review when the IEP is not used as Notice" form
- R-17 Spring 2009 Learning Media Assessment of Marybeth Nadler
- R-18 May 8, 2009 Case Notes of Patricia Lyons, Commission for the Blind and Visually Impaired
- R-19 May 18, 2009 Letter of Petitioners' Counsel, Nancy Joanne Bunn
- R-20 June 11, 2009 "Parental Notice following a Reevaluation Planning Meeting"; Parental Consent
- R-21 June 11, 2009 IEP
- R-22 May 18, 2009 Assistive Technology Assessment Summary and Recommendations of Jill Roddy
- R-23 June 3, 2009 Low Vision Evaluation of Bethany Fishbein
- R-24 June 30, 2009 Education Services Report of Anne Marie Sundberg
- R-25 July 13, 2009 Cover Letter and Request for Parental Participation in a Meeting
- R-26 July 16, 2009 Letter and Parental Consent of H.M. (parent)
- R-27 July 20, 2009 Report of Sandra Fields Kuhn, Doctor of Audiology
- R-28 July 24, 2009 Educational Evaluation of Diana Clark, LDT-C
- R-29 August 12, 2009 Psychological Evaluation of Dr. Donna McCartin
- R-30 May 13, 2009 Speech-Language Evaluation of Megan D. Fales
- R-31 August 5, 2009 Occupational Therapy Reevaluation of Diane Ames
- R-32 August 4, 2009 Letter of Nancy Joanne Bunn

- R-33 September 7, 2009 Letter of Nancy Joanne Bunn
- R-34 September 14, 2009 Request for Parental Participation in a Meeting, Acknowledgement
- R-35 September 24, 2009 Re-Determination of Eligibility Form
- R-36 September 24, 2009 IEP
- R-37 October 1, 2009 Requisition Form of Kindle DX
- R-38 November 24, 2009 Letter of Case Manager Dr. Donna McCartin to NJ Commission for the Blind and Visually Impaired
- R-39 November 19, 2009 Request for Parental Participation in a Meeting, Acknowledgement
- R-40 December 2, 2009 Report of Anne Marie Sundberg, NJ Commission for CBVI, Attached Visual Efficiency Scale Materials
- R-41 December 3, 2009 IEP
- R-42 December 9, 2010 Independent Evaluation of Mary Brennan, LDT-C
- R-43 Woodcock–Johnson III Summary and Score Report and Normative Update Tests of Achievement Reports
- R-44 January 29, 2010 Letter from NJ Commission for the Blind and Visually Impaired with “FAQs: Provision of Educational Materials for Blind and Visually Impaired Students”
- R-45 March 16, 2010 Letter of R. Armen McOmber to Petitioners’ Counsel
- R-46 May 12, 2010 IEP
- R-47 June 3, 2010 Letter of R. Armen McOmber to Petitioners’ Counsel
- R-48 September 14, 2010 IEP
- R-49 January 6, 2011 Letter of Petitioners’ Counsel to R. Armen McOmber
- R-50 January 19, 2010 Letter of R. Armen McOmber to Petitioners’ Counsel
- R-51 June 15, 2011 IEP
- R-52 NJCBVI Educational Services Report for 2010-2011 School Year
- R-53 2011 NJ ASK Student Roster
- R-54 Curriculum Vitae of Robin D. Dunikoski
- R-55 Independent Learning Evaluator for H.M.
- R-56 NJ Assessment of Skills and Knowledge Individual Student Report
- R-57 Curriculum Vitae of Stacy Liu, LSW

- R-58 Curriculum Vitae of Megan D. Fales
- R-59 Curriculum Vitae of Mary Beth Nadler
- R-60 Curriculum Vitae of Diana Clark
- R-61 Curriculum Vitae of Mary Margaret Brennan
- R-63<sup>3</sup> 613-620
- R-64 023-025
- R-65 026-027
- R-66 004-007
- R-67 020-022
- R-68 033-035
- R-69 102
- R-70 158-161
- R-71 152-153
- R-72 994-998
- R-73 999-1022
- R-74 231
- R-75 232

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<sup>3</sup> These page numbers reference exhibits from the documents subpoenaed from the CBVI all initially named R-62 for identification.