State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 15728-17

AGENCY DKT. NO. 2018-26973

M.T. AND R.R. ON BEHALF OF J.R.,

Petitioners,

v.

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Respondent.

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Seth Broder, Esq. and Zachary Marshall, Esq. for petitioners (Broder Law Group, P.C., attorneys)

Joseph Castellucci, Esq., for respondent (Methfessel and Werbel, attorneys)

Record Closed: August 9, 2018 Decided: August 27, 2018

BEFORE **CATHERINE A. TUOHY**, ALJ:

STATEMENT OF THE CASE

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. s 1415, M.T. and R.R. have requested a due process hearing on behalf of their daughter, J.R.T. who is classified as eligible for special education and related services. Petitioners' dispute the District's proposed IEP and seek an out-of-district placement at the Banyon School. At issue is whether the District provided J.R.T. with a Free and Appropriate Public Education (F.A.P.E.)

PROCEDURAL HISTORY

On September 22, 2017, petitioners filed a due process petition with the Office of Special Education Policy and Procedure (OSEPP). The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on October 23, 2017 pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13. A hearing was conducted on March 13, April 17, April 19, April 23, April 24 and May 2, 2018. Closing briefs were submitted and the exhibit list was reviewed on a remaining hearing date scheduled for August 9, 2018, at which time the record closed.

FACTUAL DISCUSSIONS AND FINDINGS

Gabriella Campana, testified on behalf of the respondent. Ms. Campana has been employed as a school social worker and case manager by respondent since September 2017. She graduated from the University of Delaware with her degree in psychology in May 2015 and then received her MS in Social Work in May 2017 from Columbia University (R-78). Her current certifications include a license for social work and a school social work certificate. As a school social worker, she provides IEP based mandated counselling as well as counselling services on an as needed basis for both general education students and special education students. She also does crisis intervention and risk assessments. As a case manager, she is the point person overseeing the students IEP plan and oversees the programming as well as related services provided through the IEP. She collaborates with the teachers, the administration, other counsellors and CST members. She is familiar with the educational testing done that compares a student's achievement to their same age peers. She is trained to review the tests, but not administer the test. She has no formal training in administering the Woodcock Johnson assessment only in interpreting and reviewing the test results. She is not licensed in psychology. She is not teaching certified or special education certified. She has not conducted any educational evaluations. Ms. Campana has not prepared any reports regarding J.R.T.

Ms. Campana is familiar with the evaluation process. When a student is referred to the CST, within twenty days they are required to hold a meeting to see if evaluations are warranted. If evaluations are warranted, a determination is made as to which

evaluations should be completed. If it is an initial evaluation, there is a ninety-day window within which to complete the evaluations. If it is a re-evaluation, there is a sixty-day window to complete them. When the evaluations are completed, they are sent to the parents who have ten days to review the reports and then they come back together as a team to determine eligibility and develop the IEP. When the evaluations are completed, Ms. Campana helps analyze the tests. She conducts the social assessment by meeting with the parents and reviewing the child's developmental history from birth and including any medical, educational, social developmental concerns the parents may have. She uses a questionnaire in conducting the social assessment and estimates that she has done between ten to fifteen this year. In the course of her career, she has case managed numerous special education students, including forty from her last district and her current case load is fifty-two. When she becomes the caseworker, she reaches out to the students and parents to introduce herself, reads the records contained in the IEP files of each of the students, consults with the previous teachers and previous case managers to get a verbal report. As a case manager, she would lead the IEP meeting. When she is present as a member of the CST, she is there as the school social worker to address issues regarding socio-emotional impact or social history. Ms. Campana was accepted as an expert in school social work and as a case manager.

Ms. Campana first met J.R.T. at the beginning of the 2017 school year. Mr. Rosner is J.R.T.'s current teacher. Her initial impression of J.R.T. was that she was a very sweet, social and friendly girl. J.R.T.'s disabling condition is more academic than social. Her math and listening comprehension skills are weak. J.R.T. needs a special education class which is flexible to meet her needs, which is the language and learning disabilities class where she is currently placed. Ms. Campana obtained information from J.R.T.'s teachers and reviewed her records. She also observed her in class two or three times. J.R.T. is part of her "Circle of Friends" group and she is always able to see Ms. Campana as needed for counselling. J.R.T. has some worries and will come to talk about it and develop some coping skills. Most of the times J.R.T. will come to speak to Ms. Campana about various conflicts within her family. J.R.T. is anxious and worries a lot about what goes on at home.

Ms. Campana reviewed J.R.T.'s most recent educational evaluation dated October 19-20, 2015 that was prepared by James McIlwain, the prior case manager and LDTC (R-30). As per the evaluation criteria, he reviewed J.R.T.'s records, observed her, conducted a teacher interview, conducted a student interview and reviewed her prior testing. Mr. McIlwain administered the Woodcock Johnson Test of Achievement and Oral Language, Edition 4; The Test of Oral Language; The Test of Achievement; and Extended Achievement Test. As a case manager, these results are reviewed in developing an IEP. Ms. Campana would focus on J.R.T.'s cluster scores to see where her strength and weaknesses lie and in reviewing the subtest scores in order to develop modifications, accommodations, and goals (R-30 pages 701 -704). J.R.T. scored a standard low score in Oral Language. J.R.T. can express herself orally but has difficulty with comprehension. J.R.T. scored very low in Listening Comprehension and that is a weakness. Basic reading skills indicates J.R.T.'s ability to read words and sentences and recognize sounds. Although she scored low she has some basic reading skills. In Reading Comprehension J.R.T. scored low overall, but in reading recall she scored average so that would be a strength for her. As a case manager, this reveals that J.R.T. is able to comprehend, but not well. The Reading Fluency cluster measures the rate of J.R.T.'s reading. She scored low which indicates that she would need additional time to read through things. The importance of these tests is to drive the accommodations and modifications portion of the IEP. As far as math skills, J.R.T.'s calculation skills are very low, so that would be a weakness that would be targeted. Math problem solving is low, but not one of her major weaknesses. J.R.T. is performing overall very low in written language which evaluates how she is expressing herself. Ms. Campana focuses on the standard score "SS" column on the score report (R-30, page 706). These are J.R.T.'s scores based on standard scores of same age peers. These scores are summaries of the scores in the report. The overall summary is that J.R.T. has a lot of academic weaknesses and limited academic ability.

By letter dated October 6, 2017, Ms. Campana scheduled an annual review meeting for November 15, 2017 to review J.R.T.'s progress and IEP and to make projections for the year (R-74). The IEP dated November 15, 2017 was developed with the help of the teachers at the meeting (R-64). The mother and her advocate were present at the meeting and participated. J.R.T. was found to be continuing eligible for

special education services. She was classified as “other health impaired” in 2015 and then was classified as “specific learning disability”. This classification is a broad category used when there are discrepancies between achievement and cognitive ability in reading comprehension and math. The “Present Levels of Achievement and Functional Performance” section of the IEP takes into consideration the previous evaluations and current feedback from the teachers and input from the parents (R-64, page 1024). Academic achievement pertains to the testing and the functional performance is how J.R.T. is functioning in the classroom with the assistance from the teachers and how she is able to compensate in the classroom. The teachers provide the information for her functional performance in the classroom based on data compiled including standardized testing, classroom observations, report cards teacher reports and related services. Ms. Campana helped prepare this IEP.

Mr. Morgan the family advocate expressed concerns about J.R.T. attending a resource room class as she did not have the skills necessary to enter any proposed resource room class. Ms. Campana reviewed the summaries from the most recent psychological evaluation, educational evaluation, speech and language evaluation, OT and PT evaluation, the eligibility statement and then the teacher input (R-64, pages 1024-1026). For the most part they are consistent. For the standardized testing, J.R.T. is afforded no accommodations or assistance because they are looking to establish a baseline. Some of the modifications included were repeating and explaining directions and giving J.R.T. additional time to complete tasks. J.R.T. has consistently presented in the same manner.

J.R.T. also had an assistive technology evaluation on October 12, 2017 to explore different technology interventions that might assist her in accessing the curriculum (R-62). As a case manager this evaluation indicated that J.R.T. would benefit from the use of assisted technology such as text to speech which would allow text to be read aloud through the chrome book. This evaluation was considered when drafting J.R.T.’s IEP. J.R.T.’s academic weaknesses, especially in math was of concern. The proposed program for J.R.T. was that she remains in the LLD, mild to moderate, class for math and science, but move into a resource room for language arts (R-64, page 1040). She would continue with the related services of group and individual OT and transportation. She

would receive a PT consult to make sure she was navigating safely throughout the building. The LLD class contains students with mild to moderate language and learning disabilities. There are approximately twelve students in this class with the head teacher and three paraprofessionals. Although she is in a self- contained classroom, she has the opportunity to interact with her non-disabled peers in chorus, world language, lunch and gym.

An independent neuropsychological report was done June 26, 2017 by Joel Morgan, PhD. (R- 55). Dr. Morgan made recommendations that J.R.T. needs an educational environment that supports her strengths and accommodates her weaknesses. She needs a strong, well-integrated multisensory approach to education integrative in nature where new information is integrated throughout the day, repetitive, and provided for her in a slow pace multi-sensory instructional method (R-55, page 8963).

The IEP modifications included redirecting J.R.T.'s attention; repeating and rephrasing directions; breaking down tasks into manageable units; allowing modifications to the curriculum; using math manipulatives; and modified testing and grading. Also included were praise attempts, because J.R.T. loves to please. Also presenting topics in other ways with assistive technology was recommended, as well as including auditory input in addition to written input. A modification to help visual tracking would be to use high contrast and font modification. The use of chrome book and access to audiobooks for a multisensory approach was also recommended (R-64, page 1036).

In Ms. Campana's opinion, as J.R.T.'s case manager, this was an appropriate program since J.R.T. was progressing and that adding the assistive technology was going to be even better for her. The goals and objectives by which J.R.T. would be evaluated, four times per year, were set forth in the IEP as a means to track performance (R-64, page 1030).

The physical therapy goal was to navigate her environment safely. The reading goal specific to reading comprehension was that J.R.T. would vary her reading by not just one work from a single author and recognize the author's purpose with eighty percent accuracy. The math goal was to improve her math computation skills by multiplying two

or more digits by two or more digits with regrouping and without regrouping, with seventy percent accuracy. The science goal was problem solving, collecting and organizing data that result from experiments and identifying and making predictions that can be addressed by investigation, appropriate at her level, with eighty percent accuracy. The social studies goal is in line with the sixth-grade curriculum using effective strategies and working in smaller groups to locate information with eighty percent accuracy. The occupational therapy goal pertains to J.R.T.'s visual perceptual disorder, and the goal was to write a paragraph with the appropriate spacing, sizing and letter formation and to improve motor skills and tracking. Progress reports are done four times per year and the goals are measured with scores of "proficient", "partially proficient", and "mastered" that are reported on with an opportunity for comment. There are report cards also that are sent home to the parents. This IEP did not go into effect since there was a dispute and the parents did not sign it. After the November 15, 2017 meeting there was no additional parent input.

The IEP for the previous school year is similar to the current one and the classification is specific learning disability (R-45, page 884). Last year J.R.T. was in the LLD learning language disabilities class, mild to moderate, based upon her needs at the time. She reviewed the document although it was prepared before she was the case manager for J.R.T. The first protocol is that a draft IEP or a proposed IEP is prepared and if the parents do not agree with it amendments can be made (R-45). The parents did not request any amendments (R- 47, page 893).

Ms. Campana is familiar with J.R.T.'s report card for marking period one and two, for the 2017-2018 school year (R-66). She was doing well, scoring eighties and nineties. J.R.T.'s progress reports for the two marking periods this year, in sixth grade from Mr. Rosner reported her as partially proficient. Partially proficient means she is moving towards her goals. The goals are directly from the IEP. She is making progress. Math goals were to improve calculation skills and she received a partially proficient. Social studies and OT she was assessed as having mastered the goals. The social emotional goals are adaptive goals as to how she gets along with her peers, which she received partially proficient. J.R.T. was partially proficient in most areas in that she was making progress (R-65). Based upon her report card and her progress report J.R.T. is making

progress. The November 15, 2017 IEP is appropriate, and the report card and progress report are accurate reflections of how J.R.T. is doing. J.R.T. has limited capabilities. Her capabilities are limited so she is only able to make so much progress. Her curriculum and her grading are modified. She is in the least restrictive environment and she is also exposed to her nondisabled peers. In general, it is important for students to be exposed to their typical peers so that they can grow socially-emotionally and understand social cues. It is especially important for J.R.T. to stay in the least restrictive environment since she is very social and outgoing. The out-of-district placement the parents are seeking have students with multiple disabilities and are cognitively impaired with severe needs. That is a most restrictive environment without any non-disabled peers. In her professional opinion, an out-of-district placement would be inappropriate for J.R.T.

J.R.T. comes to see Ms. Campana whenever she wants to talk to her. There was an increase in office visits around winter break because of family issues. Currently she believes J.R.T. is making progress although she seems distracted by familial issues. J.R.T. also meets with the guidance counsellor as well as the student assistance counsellor.

On cross-examination, Ms. Campana testified she is a member of the CST and is aware of J.R.T.'s diagnosis of specific learning disability, visual perceptual disability and ADHD. She has experience in dealing with ADHD. In developing the IEP, the relevant data considered included standardized testing, observations, report cards, teacher reports and reports from related service providers (R-64, page 1024). A standardized test is the same test given the same way. The standardized testing that was utilized in the development of the IEP was the psychological, the educational, the PARCC testing; the OT, PT, and Speech and Language evaluations. The tests are objective in that they are quantitative and measurable. The Educational Evaluation of Mr. McIlvain dated October 19-20, 2015 was used to develop J.R.T.'s IEP. J.R.T. was in fourth grade at the time of this evaluation. Prior first-grade assessments were reported (R-30, page 700). In first grade her score in oral expression was seventy-five and her score in fourth grade was eighty-six, which is an increase. J.R.T. can express herself well. Her score in listening comprehension in first grade was an eighty-two, a low average. Her score in fourth grade was a fifty-nine, which is very low and a decrease from first grade. Her

listening comprehension has regressed. She is in the point three percent. Her score in basic reading skills in first grade was a seventy-eight which was low and her score in basic reading in fourth grade was a seventy-one which is low and decreased from first to fourth. J.R.T.'s math reasoning score in first grade was a seventy-four and in the low range. In fourth grade, her math calculation score was a fifty-nine and in the point three percent. Her math facts fluency score was a sixty-three and in the point one percent. There was a further Woodcock Johnson administered as part of the neuropsychological report dated June 26, 2017 (R-55). J.R.T.'s test results in fifth grade for broad reading was a seventy-two an increase from her broad reading score in fourth grade of sixty-nine. In fourth grade her score in basic reading was seventy-one and in fifth grade it was seventy-five, so it increased. In fourth grade J.R.T.'s math score was sixty-one and in fifth grade it was a fifty-six. Her percentile rank in math in fifth grade was less than one percent (R-55, page 967). Her broad math score in fourth grade was fifty-nine and in fifth grade it was fifty-two. J.R.T.'s fifth grade report card for the academic year 2016-2017 indicated that she was progressing towards the standards in language arts literacy, math, social studies and science (R-54). However, she never met the standards.

Felicia Froimovitz testified on behalf of the respondent. She has been employed as a school psychologist on the CST for thirteen years by the District. She has her master's degree in school psychology from Teachers College of Columbia University. She received her undergraduate degree from the State University of New York at Stonybrook. She holds certifications in school psychology in New Jersey and New York and also possesses a New Jersey supervisor certificate and a certificate of eligibility as a principal (R-79). She currently case manages approximately fifty students per year. As a school psychologist she completes cognitive, social and emotional evaluations for students who have any types of disabilities. Ms. Froimovitz also provides counselling services and is a member of the crisis team. As a case manager, she writes the IEP in conjunction with the teachers, ensures the teachers are following the requirements of the IEP, and follows-up with her students to make sure their needs are being met. Ms. Froimovitz is trained to administer the Wechsler tests for cognitive assessment. She was accepted as an expert school psychologist and case manager.

Ms. Froimovitz first met J.R.T. in her kindergarten year, 2010-2011, when she became her case manager. J.R.T.'s classification was "other health impaired". J.R.T. was initially in a general education kindergarten classroom and was having difficulty accessing the curriculum without significant support from the teacher. Ms. Froimovitz' most recent evaluation of J.R.T. was done in fourth grade (R- 31). It was a re-evaluation that was conducted in 2015. Every three years there is a requirement to reassess. The assessment was done on October 29-30 and the report is dated November 9, 2015 (R-31). The functional assessment consisted of a review of the records, background information and student interview. It is a non-standardized assessment and is subjective. The standardized tests consist of the Wechsler Intelligence Sale for Children IV (WISC IV), which is an IQ test, and the Bender Visual Motor Gestalt, which is a visual motor integration test. Ms. Froimovitz starts with the Bender test because it is copying figures and usually serves as an icebreaker following the student interview, before going into the structured WISC test. If she notices any difficulties with the Bender test, she would consider whether an occupational therapy evaluation was warranted.

J.R.T.'s IQ test was sixty-eight in the two percent rank which would indicate an extremely low range of IQ (R- 31, page 716). The average IQ score is between ninety through hundred-nine. The IQ score is not supposed to change. The educational assessment is done by the learning consultant and evaluates the academics

The Woodcock Johnson is the standardized test of achievement. Every so many years a new test comes out. You cannot compare the test results a child obtains from taking the Woodcock Johnson 3 in first grade to the scores a child obtains from taking the Woodcock Johnson 4 test in fourth grade because the scores are "normed" differently by grade level. J.R.T.'s full scale IQ was in the extremely low range and her index scores were in the borderline range.

The CST, including the parents, collaboratively determine eligibility for special education and related services and the program. The eligibility determination report (R-33) found J.R.T. eligible under the classification of "Specific Learning Disability" because there was a discrepancy between her full- scale IQ score and her listening comprehension and math calculation skills. The IEP dated November 24 recommended the Learning

and/or Language Disability (LLD) class. mild to moderate, for J.R.T. which is a self - contained program for language arts, math, science and social studies and the related services to be provided were occupational and physical therapy and transportation (R-34). The LLD class if for students with communication impairments that have difficulties either in understanding language or expressing language. They are still working on the District curriculum and the common core standards but at a slower pace, in smaller groups, with a paraprofessional in the classroom assisting the teacher. The curriculum can be modified and supplemented. The modifications should be listed in the IEP but the special education teacher can add to the list. The goals and objectives are what J.R.T. is working towards in the classroom. For example, for writing J.R.T. was to be able to write a four-sentence paragraph for fourth grade. Theoretically, a child is to meet the goals and if not, they should be amended if there is something wrong and she is not meeting them. Perhaps it gets amended to a three-sentence paragraph with teacher support. Then the next objective would be a three-sentence paragraph without teacher support. Ms. Froimovitz always explains to the parents that the IEP is a "living document" and that they can meet once a month if necessary, although legally they have to meet once a year. The goals and objectives have to be measurable and criteria are set to see how the goals are being met. So, if the criteria were with seventy percent accuracy and J.R.T. submitted ten writing samples and seven of them met the goal, that goal was mastered. The evaluation procedures in the IEP are different ways that the objectives will be measured, including homework, report cards, self-evaluation, chapter and unit daily assignments, chapter and unit tests, class participation and teacher tests.

The IEP recommended that J.R.T. have PT and OT which would be continued until the professionals feel she has mastered the goals. Typically, most students do not receive OT and PT at the secondary level. At some point in upper elementary they have mastered the goals for school-based services. For physical therapy it would be whether the student can safely access their environment within the school building. For OT it is fine motor skills, whether the student can write legibly and can copy from the Board.

The parents were present at the IEP meeting and advised that J.R.T. had an appointment with a developmental eye doctor. The occupational therapist, Ms. Valdeon requested that the result of this exam be shared with the CST and Ms. R. agreed. The parents did consent to this IEP dated November 24, 2015 (R-34, page 768). Ms.

Froimovitz believed the IEP was appropriate for J.R.T. at the time it was offered, based upon the evaluations and the teacher reports and that the Language and Learning Disabilities (LLD) program was the appropriate placement.

Lunch Bunch is a program offered by the school social worker for students to meet during lunch and work on social skills. This is an additional program offered by the school to assist students who are in transition with a new teacher, new class and is open to general education students as well as special education students. Ms. R. did give permission for J.R.T. to attend the lunch bunch program September 18, 2016 when she was starting fifth grade (R-42).

An amendment to the IEP was done on August 2, 2017 (R-57) and Ms. Froimovitz attended the meeting as the case manager. She did not write the fifth grade IEP because she was not the case manager at the time. Ms. Froimovitz served as the case manager for the summer. The purpose of the August 2, 2017 IEP meeting was to discuss the receipt of an independent neuropsychological evaluation as well as the need for an adaptive technology evaluation. The CST met to consider the recommendations in the report and to address various issues including social skills and developing friendships outside the LLD classroom; adaptive living skills; the Assistive Technology evaluation; and transitioning from the elementary to the middle school. The Assistive Technology evaluation was recommended to see if something could help J.R.T. access the curriculum or assist her in providing additional support to help her become more successful. The Assistive Technology evaluation was conducted on October 12, 2017 (R-62). The students have one to one Chrome books and there are various programs such as speech to text where J.R.T. can speak into the Chrome book and it types out what she said.

The LLD program was recommended for the upcoming school year, sixth grade (R-57, page 989) with related services including group occupational therapy twice a week and transportation. Ms. Froimovitz believed this program was appropriate for J.R.T.

Ms. Froimovitz testified that a new IEP should have new goals and generally it is not appropriate to carry over goals even if the child has not mastered the goals. The District should look to see why the child has not mastered the goals.

Ms. Froimovitz reviewed the neuropsychology report of Joel Morgan dated June 26, 2017 (R-55). The WISC scores were in the range of previous evaluations, however the Behavior Assessment System for Children (BASC) scores were supposed to be scored as either "at risk" or "clinically significant" and Dr. Morgan rated J.R.T. as having "difficulty with". Also his report references both the second and third editions of the BASC which are different tests and she is uncertain which one he used. The BASC is a subjective survey done by both the parent and the child and involves answering approximately 150 true – false questions. Dr. Morgan did not indicate in his report whether all validity indexes were in the acceptable range. Dr. Morgan did conduct the Vineland -3 which yielded adaptive information which the District had not done previously.

The recommendations that Dr. Morgan makes in his report all describes the LLD program (R-55, pages 963-964). That is the program in which J.R.T. has been placed and Ms. Froimovitz is of the opinion that it provides her with a FAPE. There are a number of things to review to determine if a child is making progress including the data the teachers gather, benchmark assessments and work samples. The student is compared to themselves since it would be unfair to compare them to another student. Ms. Froimovitz assessed J.R.T.'s IQ at sixty-eight and Dr. Morgan assessed her at sixty-five, both IQ scores being in the extremely low range. She is aware that the parents are seeking an out-of-district placement for J.R.T. and does not believe that would be appropriate, since in her experience, the out-of-district programs involve students who have significant multiple disabilities or significant behavioral issues. There are no typical developing peers in the out of district placements. The District looks at the least restrictive environment in which a child can be successful to allow for social interaction with non-disabled peers. J.R.T. is in the self-contained LLD class for academics but has her electives with non-disabled peers to allow for modeling social interaction. Ms. Froimovitz does not believe the out-of-district placement provides for any such opportunity and that such a placement may have a negative impact on J.R.T. Ms. Froimovitz recalled conducting a social skills class for the extended school year program which had a student who was a behavior problem and was loud when she got upset. J.R.T. was in the class and was upset about that student's behavior. Also, an out-of-district program may require travelling a distance and J.R.T. has always had a short bus ride from home to school.

On cross-examination, Ms. Froimovitz agreed that the standard for 'appropriate' public education would be if the student is making meaningful educational progress. This is determined by the progress they make towards their goals and objectives as evidenced by their assessments and work samples. The DRA is the assessment for reading. In the beginning of fifth grade, J.R.T 's level was forty, however there was no level indicated for the end of fifth grade and she did not know if J.R.T was assessed in the sixth grade (R-73). 'Go Math' is the math assessment tool used but Ms. Froimovitz did not review this assessment for J.R.T. because she was not the case manager. There is also an online math program called 'Digits' which does not let you advance to the next level until you complete the prior one. Ms. Froimovitz did not review any reports for J.R.T. regarding the 'Digits' program. She also did not review any of J.R.T.'s work samples.

The goals and objectives set forth in the IEP are to be mastered within the timeframe of the IEP. Mastery is considered completing the task correctly eighty percent of the time. Once a student masters the goals, the goals should change. This can be accomplished at the next IEP meeting or if the student masters the goals midyear they can be changed with the parents' consent by amendment or following an IEP meeting, whichever the parents prefer. The first category is 'Physical Therapy' and the goal is the standard "student will utilize safe, efficient and effective movement to develop and maintain a health active lifestyle. J.R.T. will develop gross motor skills in order to enable, improve participation and navigate the school environment in a safe and efficient manner" (R-64, page 1030). Under the teacher input section of the IEP there is a note by her physical therapist, Dan Gelson, dated October 11, 2017 indicating that "According to J.R.T.'s teacher she is able to safely navigate her school environment including her classroom, transitioning between classes and on the stairs. J.R.T. does not present with any gross motor limitations that appear to limit her education at this time" (R-64, page 1027). The date of the IEP meeting was November 15, 2017. It would appear that J.R.T. had already met the physical therapy goals as of the date of the IEP meeting.

Ms. Froimovitz personally evaluated J.R.T. on two occasions, when J.R.T. was in first grade and in fourth grade. She was J.R.T.'s case manager at the beginning of her kindergarten year and a brief time last summer.

The most recent progress report for J.R.T. was dated January 30, 2018 and prepared by her teacher, Mr. Rosner (R-65, page 1046-1063). Ms. Froimovitz had not seen this progress report before. Based on this progress report, Mr. Rosner indicates that J.R.T. has mastered the goal of reading more than one work by a single author in that she has completed daily, weekly activities during language arts period including readers workshop, my book and has read more than one work by a single author from the Big Nate series. Ms. Froimovitz' conclusion that J.R.T. has made meaningful progress is based upon what the teacher's progress reports indicated.

As far as an out-of-district placement, Ms. Froimovitz is aware that there are approximately hundreds of approved out-of-district placements. As a case manager she has placed students out-of-district that had significant behavioral problems or severe multiple physical disabilities. She visited the New Road school in Lakewood two years ago. She has not visited the Banyon school in at least thirteen years. Those children who attend the out-of-district placements, these are considered the least restrictive environment for those children because the placement provides them with the supports they need to be successful. It is based upon what is appropriate for that individual. J.R.T. is in a program where there can be role models for her in non-disabled peers. Her electives, Spanish, art and chorus, are general education courses.

J.R.T. has been diagnosed with ADHD and general anxiety disorder. Children with anxiety disorder may have a higher risk of self-esteem disorder, social stress and feelings of inadequacy.

As a school psychologist working with a student with an anxiety disorder, the focus would be on coping skills, how to calm down. S.E.L. (Social Emotional Learning) was not recommended to J.R.T. and the District does not have any schools that offer a full social and emotional learning curriculum.

Although you cannot compare the results of the WISC between different versions, you can compare the results of the same sub-tests between the versions. An older WISC evaluation can be used as a baseline. Ms. Froimovitz' masters in school psychology was a three-year program, whereas a typical PhD would have at least five years of training.

J.R.T. scored less than one percent in the math portion of the WISC indicating that math is a significant weakness for her, compared to her typical peers or whoever the peers were that the test was 'normed' on.

Executive functioning refers to overall functioning including working memory skills, ability to regulate emotion and self -control and organizational skills. The BASC assessment does not measure executive functioning. Ms. Froimovitz administered the WISC-4 to J.R.T. (R-31, page 716). Picture concepts was a relative strength for J.R.T. and she scored in the average range, although it was on the lower side of the average range.

On re-direct examination Ms. Froimovitz testified that the IEP was prepared by Ms. Campana, the case manager (R-64). The goals and objectives contained in the IEP are prepared by the teacher when a student is already in the program. A newly classified student's IEP's goals and objectives may be more collaborative with the CST and the teacher creating the goals. In an IEP meeting, the professionals involved are reporting on the data they have collected within their realm of expertise. The teacher would report on whether or not a student is making progress.

Although physical therapy was not required for J.R.T. the IEP required a consult model for physical therapy when previously J.R.T. had direct services. Since she had met the goals, the physical therapist recommended a consult model to keep an eye on J.R.T. even after she had mastered the physical therapy goals especially in this case where J.R.T. was moving up to a new school that was three times the size of the elementary school and with stairs. Ms. Froimovitz believed it was appropriate to keep a physical therapy goal.

The ESY (extended school year) teachers report on the progress made towards the goals and objectives in a fifth marking period. Ms. Froimovitz was briefly the case worker for J.R.T. the summer following her fifth-grade year because the neuropsychological evaluation had been received and the CST wanted to see if changes to the IEP were required based on this new report. The District was working with the parents and since Ms. Froimovitz worked the summer, she became the case manager for

J.R.T temporarily because J.R.T. was moving up to middle school for sixth grade to the Thompson school.

There also is a normal amount of anxiety for anyone transitioning from fifth to sixth grade. The IEP sets forth what the District has to provide. The District can provide other services to the student. If a student requested or needed counselling and it was not in the IEP, the District would still provide counselling to the student if needed.

IQ scores generally remain in the same range. Although Dr. Morgan's results were three points different, that is still considered within the confidence interval.

On re-cross-examination, Ms. Froimovitz testified that what is contained in the IEP is the bare minimum of what must be done. A teacher can always add to it in their discretion. Ms. Froimovitz has not collected any classroom data on J.R.T. in the past three years or reviewed any benchmarks conducted.

Joel E. Morgan, PhD testified on behalf of the petitioner. Dr. Morgan has been a psychologist for thirty years. He is licensed in the State of New Jersey. He has been in private practice since 1989 and prior to that time was employed as a psychologist at the UMDNJ Veterans Hospital in East Orange (P-12). He is a clinical neuropsychologist and primarily is engaged in rendering diagnoses and assessments, not psychotherapy. He is a "life span" psychologist so he sees children through older adults. Dr. Morgan estimates approximately two-thirds of his practice involves children and one third adults. He has been retained by school districts and parents for the purposes of conducting assessments to assist in educational programming, make diagnoses and recommendations. He has his masters in school psychology and clinical child psychology. He is board certified in clinical neuropsychology and the subspecialty pediatric neuro psychology.

A neuropsychological evaluation is a very comprehensive assessment of cognitive abilities including attention and concentration, short and long-term memory as well as screening for emotional adjustment.

Dr. Morgan was accepted as an expert in neuropsychology. He authored an expert report dated June 26, 2017 (R-55). He evaluated J.R.T. on May 11, 2017. He described

her as a sweet, pleasant, friendly, polite cooperative and engaging girl who seemed happy. She had developmental delays and had been involved in early intervention. Dr. Morgan ran a number of tests in his office. He administered the Wechlser Intelligence Scale for Children, Fifth Edition (WISC-5) test. J.R.T.'s full scale IQ was sixty-five; verbal comprehension was eighty-one; visual special index fifty-seven; fluid reasoning sixty-four; working memory sixty-nine; and processing speed was seventy-two. A full-scale IQ of sixty-five is in the extremely low range of intelligence. An average IQ is 100 and ninety through hundred-nine is considered the average range of IQ. Her verbal comprehension index of eighty-one falls into the low average range with the remainder of the scores in the low range. Dr. Morgan also administered the Woodcock Johnson IV standard test of academic achievement to J.R.T. which is the gold standard test for academic achievement. Her reading scores were in the seventies and her math scores were low in the fifties and sixties. Her verbal skills are significantly stronger than her math skills.

J.R.T. was also given the Conners Continuous Performance Test II on the computer which measures visual attention and reaction time. She scored seventy-seven percent which indicated that there was only a twenty-three percent chance that she did not have an attention problem and seventy-seven percent chance she does. The Trail Making Part A & B test is a paper and pencil test. Part A involves connecting the numbers as fast as you can and is a test of rapid eye hand coordination and visual motor attention. Part B involves connecting numbers and letters sequentially and is a multitasking test. J.R.T. performed poorly on these tests in the two percent and one percent range.

The Stroop Color and Word Test measures executive functioning and J.R.T. scored in the one percent indicating that she exhibits executive dysfunction and attention deficits. She was also given the verbal fluency for words evaluation which is another measure of executive function. Based on these tests, Dr. Morgan concluded that she exhibits symptoms of ADHD. On the vocabulary test of the Wechsler scales J.R.T. scored at the sixteen percentile which was a strength for her. On the Peabody Picture Vocabulary test, J.R.T. scored in the twenty-one percentiles for receptive vocabulary. Her comprehension is better than her expression. Language is a strength for J.R.T. On the block design test of the Wechsler scales, J.R.T. scored very low, on percent.

The matrix reasoning assessment measures the ability to understand a visual array and is an innate ability, to look at a picture and see what is missing. J.R.T. scored one percent in this test. The groove peg board test is a fine motor test which she could not do because she lacked the manual dexterity. It is a fine motor test which requires picking up a small peg and placing it in a peg board sequentially and as quickly as possible. Dr. Morgan assessed learning and memory through the Children Adolescent Memory Profile (CHAMP) test. The CHAMP test assesses short and long- term verbal and nonverbal memory. Her verbal learning was at the fifth percentile and her long-term memory was at the two percentiles for rote memorization. J.R.T. did better when she was given a paragraph to remember and scored in the thirty-seven percent and her long-term memory was at the fifth percentile which was normal. Her rote memorization was weak, but she remembered a prose passage significantly better.

The Vineland 3 test measures a students' adaptive functioning. The parent fills out the form and Dr. Morgan scores it. There are three domains on the test including communication, socialization and daily living skills. J.R.T. scored in the upper borderline range at seventy-eight percent. J.R.T. did not meet the criteria for intellectual disability because although her IQ score met the criteria, her adaptive behavior composite score was above seventy percent. To be considered intellectually disabled, which was formally referred to as mental retardation, the student would have to have both an IQ and composite adaptive behavior score below seventy.

Dr. Morgan also administered the BASC 3 test to J.R.T. and her parent. The three ranges are 'normal', 'at risk' and 'clinically significant'. He evaluated J.R.T. as 'at risk' which means she was at risk for full blown emotional disturbance. When Dr. Morgan evaluated her in May 2017, she did not have an emotional disorder, but she was at risk for developing an emotional disorder.

On June 1, 2017, as part of his preparation in developing his report, Dr. Morgan observed J.R.T. in District in her math class, because that was a significant weakness for J.R.T. and he wanted to see the instruction and how she responded to the teaching. He usually stays approximately an hour when he conducts his observations. Dr. Morgan believed the material was too difficult for J.R.T. She needs a multisensory approach with manipulatives in order to learn math.

J.R.T. has widespread cognitive impairment and they do not know why. She needs an educational program that supports her strengths and accommodates her weaknesses. Her strength in language skills can be used to help with her weaknesses in the non-verbal, visual spatial and mathematics areas. J.R.T. needs a lot of repetition throughout the school day to reinforce her difficulties with memory to help her retain information.

J.R.T. requires a school environment that also fosters social skills development with similarly disabled peers led by qualified professional who foster peer relationships, social, communication and adaptive living skills. This is very important because students with disabilities very typically have poor self-esteem. Dr. Morgan saw J.R.T. when she was eleven and now she is twelve years old and in the middle school. Neurotypical, nondisabled children would not help her develop communication skills, peer relationships, friendships or self-esteem. Dr. Morgan believes it would be detrimental to her to have a lot of daily contact with neuro typical peers who do not understand her, nor does she have the ability to understand what is going on in the normal pre-teen world where girls are boy crazy and boys are girl crazy. Dr. Morgan believed it would be detrimental to her development and overwhelm J.R.T. emotionally.

Children who have disabilities like J.R.T., low cognitive skills, can function in the world semi-independently or sometimes even independently if their adaptive functioning is improved and if their instrumental daily living skills are improved. These skills include making change, using money, cooking, preparing a shopping list. Community based instruction is important. Despite her disabilities, the goal is for J.R.T. to become as independent as possible. J.R.T. has attention problems and executive dysfunction.
She requires social skills training and adaptive living skills training.

As far as counselling services, Dr. Morgan did not recommend same when he first saw her, but things have since changed and he believes she now needs counselling in school. Dr. Morgan saw J.R.T. on April 20, 2018 in his office to discuss the suicidal ideations. He interviewed the mother and J.R.T. He has seen the ‘fit to return to school’ document (R-90).

Being in the middle school can be very problematic for a disabled child and can be emotionally overwhelming. They are vulnerable to emotional decline. Unlike most typical peers, disabled students have limited coping skills, little emotional reserve. There are aspects of middle school that are inappropriate for J.R.T. J.R.T. told Dr. Morgan that she saw an assembly about social networking and child pornography and children exposed to people on the internet who had ill intent, and this was very disturbing to her. Dr. Morgan did not believe that this was appropriate for a disabled child and that J.R.T. should not have been exposed to this presentation. The issue can be remedied by counselling and based on recent events, Dr. Morgan believes J.R.T. should be in counselling on a regular basis.

Based upon his observation of the District placement he cannot give an opinion as to whether the in-district program addresses the issues raised in his report. Dr. Morgan in his report indicated that "J. requires a specialized school placement for students who have a range of disabilities with an appropriate trained staff who are experienced in carrying out the integrated program designed to utilize her strengths and answer weaknesses and above all prepare for her secondary education in the future." He is recommending an out-of-district private placement in a specialized school (R-55, page 964). He is aware of the legal requirement that students with disabilities be educated with typical peers but sometimes it is not appropriate for a student with disabilities. He believes increased exposure to neurotypical peers would not be in J.R.T.'s best interest and would be detrimental to her mental health. The concept of least restrictive environment has to be understood on an individual basis.

The 2016 IEP for fifth grade does not address J.R.T.'s executive dysfunction and need for social skills training (R-45). The August 2 IEP for sixth grade likewise does not address J.R.T.'s executive dysfunction issues or the need for social skills training (R-57). The IEP dated November 15, 2017, also does not address the executive dysfunction and social skills issues raised by Dr. Morgan (R-64).

In Dr. Morgan's professional opinion, based upon his evaluation of J.R.T. and her subsequent visit to his office on April 20th regarding the suicidal ideations, J.R.T. requires an out-of-district placement in order to receive an appropriate education.

On cross-examination, Dr. Morgan testified he has worked for parents for more than school districts. He has testified three times before, on parents' behalf. He is not being paid to testify although he was paid to conduct the examination and write the report. He believes the school district paid two thirds and the parents one-third of the fee. He prepared an independent neuropsychological report. The report was "independent" in so far as he is not associated with the school district but is in private practice. Dr. Morgan agreed that an independent report should be free from outside influences. Dr. Morgan admitted that he often would show a draft to the retaining attorney.

Dr. Morgan produced a number of documents pursuant to a subpoena served upon him by Mr. Castellucci, including various emails between Dr. Morgan and Andrew Morgan, the parents' advocate, regarding edits to Dr. Morgan's report (R-91). Dr. Morgan had sent his original report to Mr. Morgan on June 26, 2017 (R-94). There is no recommendation for an out-of-district placement in Dr. Morgan's original report (R-94, page 1472). Mr. Morgan wanted Dr. Morgan to change his original report.

On June 28, 2017 Andrew Morgan sent Dr. Morgan an email that stated:

> "I edited the report in 3 area all in red. The first one is from the parents; the final 2 additions are for your consideration. Excellent work again!!!! I guess I am looking for a Broadway finale to have the audience on their feet. With the parents concern and my thoughts, this is ready to go to the District and my client and me." (R-93).

Mr. Morgan proposed the following addition to Dr. Morgan's report:

> "Can you end with a very strong statement that a specialized school, with staff appropriately trained to address so many disabilities would be the direction to follow as we enter the higher grades and her ability to function in post-secondary work and training." (R-92).

Dr. Morgan could not answer why his original report did not recommend an out-of-district placement, if he was so sure that was what was necessary for J.R.T. All he could say was that he agreed with Mr. Morgan's proposed change. Dr. Morgan admitted

that he could not testify as to whether the District's program was appropriate or not. Dr. Morgan admitted that the out-of-district placement was Mr. Morgan's idea.

Dr. Morgan was also of the opinion that J.R.T. should be on medication for ADHD and he was trying to get in touch with her physician, Dr. Merola. Dr. Morgan was questioned whether this was appropriate since he was conducting an independent evaluation of J.R.T. and not treating her. Dr. Morgan believed that if she were on medication for ADHD it might help her focus and improve her school performance.

Although Dr. Morgan had contact with Mr. Morgan regarding his report, he did not reach out to the District for any reason concerning the contents of his report. The only contacts between Dr. Morgan and the District were in regard to payment for the report. Dr. Morgan charged a total of $4,200 in connection with the preparation of his report. The District paid $3,100 for the report and the parents paid $1,100. Mr. Morgan made the referral of J.R.T. to Dr. Morgan. He has referred approximately two matters a year for the past seven years to Dr. Morgan. Dr. Morgan does not pay a fee for the referrals to Mr. Morgan. Mr. Morgan does not pay any monies to Dr. Morgan for the referrals. It was also brought up that on the Vineland 3 test that J.R.T.'s mother filled out that J.R.T. was extremely social and was not afraid to put herself out there. She shared and was empathetic. She could cook, handle a knife and ride a bike. Her general adaptive scores were in the high borderline range at 78 (R-107). The BASC 3 is a questionnaire filled out by the parents. J.R.T. is involved with her family in a number of activities and is happy, outgoing, curious, adventurous, good natured and has a good memory. She is social and does not have a problem relating to other children (R-108). Dr. Morgan indicated the fact that J.R.T. prefers to play with younger children is critical because it is common with developmentally disabled children that they do not play with same age peers, they relate better to younger children. The problem is not that J.R.T. is not sociable. It is that possibly other children would not appreciate her deficits or impairment and that there is a possibility that she does not really understand those children who do not have disabilities.

The IEP dated November 15, 2017 which calls for J.R.T.'s placement in the language learning disabilities, mild to moderate class is appropriate academically (R-64).

However, the program lacks social skills training, emotional support and counselling which she needs.

The April 20, 2018 'fit to return to school' evaluation by Marion Ramsey indicated that J.R.T. was experiencing stressors due to the family dynamics that impacted her emotions on the date of the incident wherein she expressed suicidal ideations after the school assembly. Dr. Morgan was aware that there was conflict in the home involving the parents and the two disabled children. J.R.T. has an older half-sister who is disabled. He agrees that distress in the family setting would be difficult for a disabled child and would contribute to her anxieties.

Dr. Morgan admitted that he never visited the middle school program to see if it was appropriate but that the IEP as written meets all of J.R.T.'s needs.

On redirect, Dr. Morgan admitted that parents when answering the various surveys do tend to portray their child in a more favorable light and the test is subjective.

As far as the difference between Dr. Morgan's initial report (R-94) and the final expert report that was exchanged (R-55) calling for an out-of-district placement, Dr. Morgan stated that the specialized program he described in his draft (R-94) was referring to an out-of-district placement although not specifically stated.

On re-cross, Dr. Morgan testified that although he did not see the middle school program at Middletown, he is familiar with middle schools and does not think the middle school environment is appropriate for J.R.T. Dr. Morgan also admitted that best practices would dictate that a report be clear and direct rather than leaving it open to interpretation as to the authors intent.

Matthew J. Rosner testified on behalf of the respondent. Mr. Rosner is a special education teacher who teaches the sixth through eighth grade LLD class at the Thompson Middle School in Middletown. He is a certified special education teacher as well as an elementary school math teacher with a specialization in grades five through eighth and has been employed by the District for nine years (R-86). He also is the fall athletic director for the middle school and coaches wrestling in the winter, and track in the spring. As a

special education teacher, he makes sure the curriculum is appropriately modified for the students he is teaching, based on their needs. Examples of modification include extending the time allowed to accomplish a task, use of larger font in text, rewording or repeating instructions, less options, reading to his students, reading aloud or at different levels. Generally, the pace of a sixth-grade curriculum would be slowed down. He generally has three or four groups within his class and they would be at three or four different levels performing the same activity. Accommodations set forth in the IEP are implemented by the teacher. The goal of special education is to help the student improve so that they do not need the same level of modifications and can move up to the general education setting. After the LLD class, there is the resource room which has twelve students and is a smaller class with a modified curriculum and a slower pace, but more than the LLD class. After the resource room, if a child improves they can be moved into the general education class with in class supports.

Mr. Rosner is familiar with J.R.T. as she was his student in fourth grade and he currently has her this year in sixth grade. She was in his LLD class and he has and had her for science, social studies, math, language arts and writing. His first impression of J.R.T. in fourth grade was that she was a very sweet individual and a hard worker but did not participate in class without a lot of assistance. She has definitely improved as far as class participation and in language arts. She has her basic group of friends that she has been with since kindergarten. J.R.T. prefers talking to adults more than her peers. She has never been a behavior problem and gets along with the students in class. She aims to please and is never resistant to her classroom work. In fourth grade on a few occasions he sent her to the case manager to discuss issues that had arisen outside the classroom. This year in sixth grade he has sent her to the student advisor counsellor to discuss some issues that were going on at home involving fighting between mother, father and sister. There are counselling services available.

J.R.T. does lack some social skills when she is with age appropriate peers, for instance eating with her mouth open at lunch while talking with peers. She can function academically with modifications such as extra time, prompts, repeating and reinforcing concepts.

J.R.T. comes into homeroom at 8:00 a.m. and unpacks her bookbag independently, puts it in her locker which she has a key for and takes out her google chrome book which all sixth through eighth graders have throughout the school day and can take home with them. They begin math class with basic repetition of math operations. J.R.T. shows more consistency with adding, subtracting and multiplying then she does with division. When she has difficulty with division she is given a modification such as a calculator. They are currently working on fractions. They have guided group activities where they are given a menu and have to figure out what to buy, adding the items for the cost, making change. They have done Burger King, McDonalds, Taco Bell, and Chick-fil-A which all involve building life skills. Another class activity is charts and schedules and how to read and understand various schedules such as T.V., train, airport and class schedules. They also do a pocket match activity which involves working with coins as manipulatives which are organized in a cupcake tray and doing subtraction. The last activity in math period is always the dream box program for reinforcement of math skills. Once they finish the dream box program the students can work out of their math binder which involves basic repetition of math skills. The math class is eighty minutes long.

Mr. Rosner then has J.R.T. for language arts. They first go over the skill of the week which is currently ‘analogies’. He explains what it is, they go over examples as a class. Mr. Rosner may give them an ‘exit card’ which is a question they answer to make sure they understood the lesson. The class then goes into readers workshop where the students pick a story at their reading level and read it and complete various questions about vocabulary, important parts of the story and sequencing. J.R.T. is currently reading the “Katie and the Cupcake Adventure”. The class then has guided groups for language arts. This week they are working on informational text and the students have to highlight pieces of information in the text. They also do a ‘goose-chasing’ activity for decoding purposes. Mr. Rosner puts sets of words throughout the building and the student takes their activity sheet and finds the sets of words at various places throughout the building and fills in the appropriate word listed on their sheet. Initially, J.R.T. needed a paraprofessional to assist her and now she does this activity independently. The last activity they work on in language arts is picture writing prompts where they have a picture and they have to answer questions regarding the picture and then create a story out of the picture. If the student finishes that, they can go on to the “No Red Ink” program which

is a grammar program or work on their keyboarding skills. The language arts class follows the curriculum with modifications made for J.R.T. After language arts, J.R.T. has electives and lunch and Mr. Rosner has her again from 1:11 until 2:36. The electives are mixed classes with general education students as well as special education students. At 1:11 Mr. Rosner has J.R.T. for science. He explained that science is done for the third and fourth marking periods and social studies was done for the first and second marking periods. On Monday he will introduce ten pictures connected to the topic, show a video on the topic and the students have to answer which pictures are what in the video. Then Mr. Rosner gives them the official list of what they are going to be quizzed on in two weeks. After they watch the video they will do an activity which is informative, and the students have to answer questions about it. Tuesday they will be introduced to eight vocabulary words connected to the topic, watch a video and review the vocabulary words and do a word search on the topic for exposure purposes. Wednesday they will usually do a graph or chart connected to the topic. They are doing earth structure at present, so the elements found on earth, percentages of same all have to be figured out. The students will research it on their google chromes. Thursday they will review and reinforce the skill they are working on and Friday is usually the quiz if it is a quiz week. Every two weeks is a science quiz. Depending on their level in the class, some students are just quizzed on five pictures out of the ten and nothing else. Some students will be quizzed on the pictures and the vocabulary. Other students like J.R.T. will be quizzed on everything plus additional questions inserted using the video brain pop to answer.

Language arts is a strength for J.R.T. whereas math is her weakest of the four subjects Mr. Rosner teaches her. Mr. Rosner met with J.R.T.'s mother at back to school night in fourth grade as well as this year in sixth grade. In fourth grade he kept all of the parents updated via weekly email as to what was going on in school (R-27). J.R.T.'s mother has contacted him in the past and he is available by telephone and email to speak to the parents.

The fourth grade IEP meeting for J.R.T. was September 15, 2015. Mr. Rosner participated as J.R.T.'s special education teacher for the LLD class. However, since the school year had just started he had not had time to evaluate her current levels of performance set forth in the September 15, 2015 IEP (R-25). The goals and objectives set forth in the September 15, 2015 IEP were carried from the previous IEP for 2014-

2015. He followed J.R.T.'s IEP in providing instruction to her. She also received speech, physical and occupational therapy from the various professionals who provide same. The accommodations listed in the IEP were implemented in Mr. Rosner's classroom (R-25, page 620). However, if J.R.T. did not need to use manipulatives he would not give them to her. (R-33)

Another IEP meeting was requested by the parents and a new IEP dated November 24, 2015 (R-34) was drafted. Mr. Rosner drafted the present levels of academic achievement and functional performance since he had J.R.T. in his class for a few months by this time (R-34, page 750). Basically, Mr. Rosner provides a current update and what is going on in the classroom. The goals and objectives listed in the November 24, 2015 IEP (R-34, page 756) are the same as in the previous IEP, except for the science goals. The science goals listed in the previous IEP regarding the food groups was not part of fourth grade curriculum.

Mr. Rosner indicated J.R.T. made improvement in fourth grade and was able to participate in her educational program. She currently is in sixth grade, which is middle school and that is the youngest grade of middle school so there are no younger children present during her school day.

Progress reports are provided to the parents after each marking period. Mr. Rosner measures a student's progress by taking data in the form of daily assignments, classroom unit tests, class participation and teacher tests. The progress reports for J.R.T. for reading indicate that she was partially proficient across the marking periods. (R-39, page 810). Mr. Rosner explained that J.R.T. does the work but needs additional prompting and is not consistent. She is however making progress otherwise he would have indicated that she was "not proficient". "Mastered" means she could perform the skill at seventy percent accuracy. He has definitely noticed attention issues in sixth grade. Mr. Rosner testified that J.R.T. made progress throughout the course of the school year which is reflected in the narratives he prepared on the progress reports (R-39).

J.R.T.'s report card for the 2015-2016 school year indicated that she was progressing towards the standard (R-37, page 776). The progress report basically

elaborates on the grades and they are consistent that she is showing progress but has not mastered the goals.

Another IEP meeting was held on August 2, 2017 after fifth grade and prior to J.R.T.'s sixth grade year (R-57). Mr. Rosner was not present for this meeting as he was not her fifth-grade teacher. He was given the document in so far as he had to implement the IEP for J.R.T.'s sixth grade year. The program called for the self-contained LLD mild/moderate special classroom and J.R.T. received a modified sixth-grade curriculum (R-57, page 989). The modifications included in the IEP are: redirect attention; allow additional time for processing to respond; rephrase and repeat directions; breakdown tasks into manageable tasks; slower pacing of instruction (R-57, page 985). The fifth-grade special education teacher prepared the PLAAFP. The goals and objectives are not the same from the fourth grade.

J.R.T. is currently doing well and participating and progressing in her current sixth grade program. The progress reports for the 2017-2018, sixth grade school year for the second marking period indicate J.R.T. is doing well. She has mastered her goal of reading one work by a single author and she is picking smaller text from other authors every day that she is in the classroom. She has read different texts in the 'Big Nate' series (R-65, page 1049). J.R.T. retains the language arts skills throughout the year. She is doing the readers workshop; she is illustrating; she is writing paragraphs; she is using the words she is supposed to be using; and she is working independently. Math is still one of her weaknesses. She is fine with basic math facts, but division is still difficult for her. However, when math skills are employed more as a life skill, such as a 'spend it' program at Toys r Us, J.R.T. can do it independently. J.R.T. is generally doing very well with the sixth-grade curriculum, although math is hard for her. Her sixth grade report card indicates that she received a ninety-eight in chorus the second marking period (up from ninety-four in the first marking period); ninety-one in Spanish (up from a ninety); ninety-two in language arts for both marking periods; eighty-nine in math (up from an eighty-five); she received a 100 in gym for the first marking period and a 100 for health in the second marking period; 100 in study skills for both marking periods; and she went down one point in social studies from a ninety to an eighty-nine (R-66). These grades are an accurate indicator of her progress and over all she is doing very well.

An IEP dated November 15, 2017 was not implemented because the parents did not agree to it (R-64). In this IEP, Mr. Rosner had recommended that J.R.T. be placed in the resource room for language arts since she was higher functioning than some of the other students in the LLD class. It is a higher level than the LLD class in that it moves at a quicker pace and is an indication that J.R.T. is making progress. Mr. Rosner believed that the program set forth in the most recent IEP provides J.R.T. with a free and appropriate public education. At this point he would also recommend J.R.T. to have pull out science and social studies in the resource room because she is higher functioning and at the top of Mr. Rosner's sixth grade LLD class and that she actually studies the work she brings home. J.R.T. needs to be challenged in the classroom and he believes the resource room for language arts, science and social studies would be the least restrictive environment for her.

On cross-examination, Mr. Rosner admitted that accommodations set forth in the IEP are to be followed. J.R.T. uses manipulatives, but they have decreased, for example, she was using the calculator for addition and subtraction in the beginning of the year and now she only uses the calculator for division and multiplication.

J.R.T. needs to be tested at her actual functioning level. Mr. Rosner did lessons at the beginning of the sixth-grade year to see what level she was at. Midway through the second marking period they started on the 'Digits' program which is the sixth- grade curriculum. Her assessments are based on daily assignments and tests that he gives. Her progress is measured based upon her previous performance. She is only compared to herself. Mr. Rosner modifies the digit program for J.R.T. The work samples do not include any assessments for the Digits program (R-72).

Mr. Rosner recalled that the only mention of a daily living skill the parents brought up was J.R.T. learning to ride a bicycle in fourth grade and inquired if she bought a bike for the school could they teach J.R.T. to ride it. This was not permitted for various reasons. Mr. Rosner explained that the students were taken to the mall in December to buy Christmas gifts and buy food at the food court as part of a math life skills trip. No data was taken on this instruction. Mr. Rosner teaches a life skills class where the students

make grocery lists, plan menus and make various food items. They also go over job applications, filling out a resume and interview skills. J.R.T. takes Spanish as an elective instead of the life skills course.

Transition planning for a student with an IEP generally begins midway through seventh grade into eighth grade before they go to high school.

The Google Chromebook is a universal modification that helps all students. An assistive technology evaluation was done by Mr. Balitti, a speech and language pathologist, on October 12, 2017 and the IEP meeting was November 24, 2017. J.R.T. has tools on the computer that assist her in her assignments such as increasing the size of the font. Mr. Rosner does not disagree with the assistive technology report but believes it is not necessary to implement all of it in her program, for example, J.R.T. does not need her text 'masked' as she reads (R-62). The purpose of special education is to wean the students off the modifications.

J.R.T.'s weakest subject is math however she is making progress in math (R-65). The "Dream Box" math program produces reports however there are none indicating J.R.T. is making progress since she is given a modified curriculum. All of J.R.T.'s progress is measured by Mr. Rosner's tests and evaluations and no standardized test could be pointed to in support of J.R.T. making progress in math. J.R.T. is using 'Raz Kids' in reading which was developed for students' grade kindergarten through fifth because J.R.T. is not reading at a sixth-grade reading level but around a third or fourth grade reading level. Raz Kids is a program that gives access to level text to read. The "I Ready" program would report that J is not reading at a sixth-grade reading level.

The proposed IEP of November 2017 contained goals and objectives for English language proficiency that he developed but since this IEP was challenged the goals never went into effect. They were for the 2018-2019 school year. The goals Mr. Rosner was going off were for the 2017-2018 school year. The objectives for next year were appropriate for J.R.T.

No objectives were included to address J.R.T.'s weakness in solving larger digit problems. Multiplying two-digit numbers by two-digit numbers was listed as a goal although not specifically stated as a goal to address her weakness in solving multistep problems, it nevertheless is a multistep problem.

J.R.T. is inattentive in class on occasion and has been diagnosed with ADHD. J.R.T. has verbalized to the school counselor the reasons she is distracted. Mr. Rosner does not keep data on how often J.R.T. is outside of his classroom.

J.R.T.'s report card for the fifth-grade school year indicates that J.R.T. did not master any of the standards (R-54, page 856). It was determined at the IEP meeting in August that she would be entering sixth grade in an appropriate program.

On re-direct examination, Mr. Rosner indicated that prompting, redirecting, repeating and rephrasing are more accommodations and modifications and would appear in that portion of the IEP and not in the goals and objective part of the IEP. Mr. Rosner was not at the August 2017 IEP meeting. He was at the November 15, 2017 IEP meeting but that one was rejected (R-64). The November 15, 2017 IEP did address the assistive technology evaluation (R-64, page 1027). J.R.T. does well in class with technology as her google chrome already has numerous features including text to speech options, highlighting and enlarging the font. J.R.T. never asked Mr. Rosner for help using her chrome book, nor did her parents.

On re-cross-examination, Mr. Rosner admitted that the IEP in place must be followed by the District. The Read and Write program, access to audio books, and "BookShare" were recommended by the assistive technology evaluation and included in the proposed IEP (R-64, page 1027). Mr. Rosner used alternative options that were similar. The proposed IEP was not amended to include the substitutions and the parents were not advised that Mr. Rosner was using alternative programs.

On re-direct examination it was pointed out that the November 2017 IEP (R-64) was never implemented and is in fact the IEP that is in dispute.

Wendy McNeill testified on behalf of the petitioner. She is the principal of the elementary school and director of both the elementary and high school program at Banyon School. Ms. McNeill possesses certifications for pre-school, elementary K–8, teacher of students with disabilities, LDTC, supervisor and principal (P-14). The Banyon School is a State of New Jersey, Department of Education approved private school for students with disabilities, located in Fairfield, New Jersey. They focus on students who have language-based learning difficulties, such as dyslexia, apraxia of speech, significant receptive or expressive language problems and also have difficulty learning to read or learning typical language arts literacy skills in a traditional educational setting. The Banyon program relies on research-based strategies a focus on two important premises: small group instruction and multi-sensory education. They select curriculum supported by solid research such as Wilson Reading, Lindamood-Bell programming and Orton-Gillingham principles and strategies and employ highly qualified teachers.

They have all types of students including those who have low IQ's, suffer from anxiety and ADHD. They provide community-based instruction and a life skills program. The occupational therapist, school counselor, social worker and speech pathologist does a weekly life skills lesson that culminates in a community-based instruction trip. Likewise, they go to restaurants, the post office, the library and Target to work on functional skills.

The Banyon school also offers a multi-sensory approach to math instruction and they use various programs including 'touch math' 'Lindamood-Bell's On Cloud Nine" and "Singapore Math". The curriculum at Banyon is aligned with the New Jersey state standards.

Assessments are used to guide instruction. Every child upon entry to the program is administered the Woodcock Reading Mastery Test. The reading teachers administer the DRA and the Wilson Assessment of Decoding and Encoding (WADE) test to measure student progress.

They are currently using Michele Garcia Winters Social Thinking Curriculum which is a very structured and well-developed sequence of teaching social skills. The Banyon school also offers extra-curricular activities on Fridays for one hour called the activity

period. One Friday a month they have a STEAM activity. They also have sport teams such as basketball, kickball and bowling where they meet other similar school students for friendly competition.

Thirty-five sending districts send students to Banyon by way of buses and vans. Some students travel a half hour and some one hour and fifteen minutes to get to the school. Banyon is located in Fairfield, New Jersey.

There are no general education students at Banyon. The students range from learning disabled, average to above average IQ to those with significant cognitive deficits.

Banyon offers counselling services to its students. They have a full-time psychologist and a full-time social worker who work with the students and are readily available for individual counselling and also lead the social skills class.

On cross-examination, Ms. McNeill testified that Banyon is a private, non -profit school with fifty-four students currently attending at an annual tuition of $55,256.40. They do have children return to their districts if and when they are ready. She admitted that if a students' needs could be met within the District, the first choice was to educate the student in the District.

Children are not grouped by grade, but by ability level within a three-grade span. Children usually come to Banyon because they are not performing at grade level.

Ms. McNeill did meet J.R.T. in July 2017 when she visited for a tour. She estimates that J.R.T. spent approximately four hours there that day. They did an initial, informal screening. The reading teacher had J.R.T. read from "Raz Kids" as a starting point. J.R.T. participated in a small reading group of children. The reading specialist felt that they could work with J.R.T. and that she would be a good fit in their program and was a similar profile to some of the other students. Likewise, the speech and language pathologist felt J.R.T. would be of a similar profile to some of their other students.

Some of their students have dyscalculia and struggle with math and Banyon has specialized math programs that address these issues with an equal emphasis as reading. They do not accept children with behavioral issues such as acting out or aggressive or destructive behavior. They can address anxiety and do it very well.

R.R., J.R.T.'s mother, testified on behalf of the petitioners. She is a part-time librarian at Monmouth University. She grew up in Middletown and has lived there her entire life. J.R.T. is twelve years old and acts like a typical tween but is immature for her age. She can be moody, impulsive and silly. J.R.T. is lonely and does not have any friends although she is social. She has class-mates, but she is the only girl in her class. She has cognitive delays and can be obsessive. J.R.T. has a difficult time carrying on a conversation after the initial greeting. She sometimes asks inappropriate questions, or she will ask the same question repeatedly. She mimics what she hears so R.R. has to be careful what she says in front of J.R.T.

J.R.T. is anxious and picks her thumb. She cannot sit still when she is anxious and constantly moves around in her chair to calm down. J.R.T. has a twenty-five-year-old half-sister who has Asperger's syndrome, but is very high functioning. She attended Mercyhurst College and lives and works at home.

J.R.T. had early intervention services at home until she was three years of age and attended the pre-school program for two years at the New Monmouth School. Her pre-school teacher recommended J.R.T. for the LLD class but the CST determined she was not eligible for services and J.R.T. was placed in a general education kindergarten class.

J.R.T. had Mr. Rosner in fourth grade, who would update the parents as to her progress, but never contacted them with any great concerns he had regarding J.R.T. At the end of the fourth-grade year, they had a picnic and Mr. Rosner advised that he was moving to the middle school. Mr. Rosner had told the parents that J.R.T. had such a good year that she would probably not be in his class when she got to middle school. They were very happy to hear that J.R.T. was doing so well.

J.R.T. did not meet the math expectations for the PARCC testing. When J.R.T. got to fifth grade, she told her parents she dropped a level in math and a little while later advised them that she had dropped down another level in math. At the IEP meeting in fifth grade, R.R. asked for a math tutor or for homework to be given to J.R.T. but was told they were not a 'homework district'. R.R. said rarely did J.R.T. bring home any homework in any of her core subjects, yet homework was always listed as an evaluation tool as to J.R.T.'s progress. Math is J.R.T.'s weakness and estimates that she is probably on a second-grade math level. The other day, R.R. asked J.R.T. to give her one dollar from her coin purse and J.R.T. gave her fifty cents. She does not know the value of the different coins and cannot make change. J.R.T. can read but R.R. does not know if she really comprehends what she is reading, but she does not think J.R.T. enjoys reading. R.R. tries to get JR.T. to read every day.

J.R.T. has minimal cooking skills. She can turn on the stove, crack an egg, add milk stir it and pour it into the pan and take it out of the pan and she can boil water, add pasta and stir it, but R.R. supervises her. J.R.T. loves to play with younger children and is more comfortable with them. She does not have any friends even in the disabled class because some of them are more disabled than J.R.T. and it is difficult to have a get together. She does not have any non-disabled friends either.

R.R. does see the work J.R.T. brings home, but it appears to be very low level, although she admits that she is not an expert. This past report card J.R.T. made the high honor roll but R.R. believes J.R.T. is given work that is too low level. R.R. believes J.R.T. is merely regurgitating information without understanding it and building upon it. R.R. will ask her for math facts and she cannot accurately answer without counting on her fingers. J.R.T. needs to be constantly reviewing her math facts, yet no homework comes home to reinforce those math facts. R.R. feels that J.R.T. is not progressing and that some of the classwork from language arts that comes home is misspelled, lacks punctuation and contains incorrect grammar. No corrections had been made. R.R. is concerned that J.R.T. is just being moved along through the educational system and not making real progress. J.R.T. will be entering seventh grade and her math is at a second-grade level and her language arts are at a third-grade level.

R.R. said they are looking at the Banyon school for an out-of-district placement because the classes are small and J.R.T. would almost have a one on one instructor. Her current class has twelve students and she is the only girl and there are three to five grades in the class and there is a lot going on which may be confusing for J.R.T. The Banyon school is more structured and R.R. was impressed with their reading programs. They also do more activities in the community and have guest speakers, especially in science.

R.R. admitted that the home environment is stressful with two disabled children, however she believed J.R.T.'s anxiety was more related to her lack of friendships. Also, other children who have on occasion acted out in class cause J.R.T. stress.

On cross-examination, R.R. stated that she believes a combination of not getting enough homework and not getting homework that meets R.R.'s expectations was preventing J.R.T. from progressing and actually causing J.R.T. to regress. When she sees J.R.T.'s report card and she is getting one-hundred in math or an eighty-nine in language arts, although it looks great, J.R.T. is not doing fifth or sixth grade level work and she believes J.R.T. has actually regressed this year in math, language arts and her handwriting skills. Numerous emails between J.R.T.'s fifth grade teacher, Ms. Pastore and R.R. do not mention any concerns regarding regression (R-43). Classwork from fifth grade math indicate J.R.T. was working on multiplication properties (R-72). R.R. stated that J.R.T. could not do this level of work now and that she brings home addition and subtraction problems with very little multiplication. She did not address the regression issue with Mr. Rosner because she did not know whether it was appropriate to discuss it with him during the litigation.

R.R. also believes she failed J.R.T. in some way by not following up and making sure J.R.T. continued receiving speech therapy, occupational therapy and in general not contacting the school regarding J.R.T.'s school work.

J.R.T. interacts with girls in gym and in lunch but after the school day or on weekends she does not have any friends to hang out with. She does not blame Middletown for J.R.T.'s lack of friends. R.R. would like J.R.T. to develop friendships with

non-disabled peers but since it has not happened to date, she believes it is unlikely. She does hope that J.R.T. makes friends if she goes to Banyon but believes the individualized instruction she would receive would benefit her educationally.

On re-direct, R.R. sent an email dated March 8, 2015 to Mr. McIlvain requesting the IEP be revised so that they could have daily progress reports from the teachers (R-14). A September 1, 2015 email between Mr. McIlvain and Mr. Dunn that R.R. was not copied in on references the parents had concerns regarding how much communication would be received from the teacher, how much homework would be assigned, OT services and tutoring (R-22). This email was sent in advance of the IEP meeting.

Credibility is the value a fact finder assigns to the testimony of a witness, and it contemplates an overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super 282, 287 (App. Div. 1958).

R.R., J.R.T.'s mother testified credibly, however, she is not a special education teacher. It would appear that her complaints regarding J.R.T.'s educational progress are based upon her belief that since J.R.T. is in sixth almost seventh grade, her work should be closer to that grade level, when in fact, J.R.T. may not be capable of performing at grade level due to her cognitive impairment. This is not to say she has not progressed or that she has not received meaningful educational benefit in light of her circumstances. The education professionals all testified that J.R.T. is compared only to herself in gauging academic progress, because it would be unfair to compare her to anyone else. R.R.'s claims that J.R.T. has 'regressed' also do not take into account that J.R.T. may be pre-

occupied with family issues that contribute to her anxiety or that J.R.T. may benefit from medication to treat her ADHD which may be hampering her educational performance. Also, R.R. never reached out to Mr. Rosner regarding any of her concerns during J.R.T.'s sixth grade year when she knew his contact information and had previously dealt with him as J.R.T.'s fourth grade teacher.

Dr. Morgan could not give an opinion as to whether the in-district program was appropriate or not or whether it addressed the issues raised in his report. Dr. Morgan stated that the IEP dated November 15, 2017 was appropriate academically but that it lacked the social skills training and emotional support and counselling which J.R.T. needs. Dr. Morgan's recommendation that J.R.T. required an out-of-district placement was not contained in the first draft of his report and only ended up in his final report at the suggestion of Mr. Andy Morgan, the parent advocate who emailed Dr. Morgan various edits he wished included in the final report, including the recommendation for an out-of-district placement. I **DEEM** Dr. Morgan's testimony recommending an out-of-district placement not credible.

Dr. Morgan testified he never visited the Thompson Middle School yet opined that the middle school environment would be detrimental to J.R.T.'s mental health and overwhelm her emotionally. Neurotypical, nondisabled children would not help her develop communication skills, peer relationships, friendships or self-esteem. This is contrary to the other testimony in this case that J.R.T. is highly social and outgoing and the legal requirement in special education that disabled children be educated to the extent possible with their non-disabled peers to allow for modeling social interaction. I **DEEM** Dr. Morgan's testimony in this regard not credible.

Mr. Rosner testified as to a typical day teaching his sixth grade LLD class. He is a certified special education teacher as well as an elementary school math teacher with a specialization in grades five through eight. He provided an overview of the topics currently being taught and the manner in which the instruction was delivered. He described the multisensory approaches he utilizes. He discussed the various modifications and accommodations employed in special education and its purpose. As a special education teacher, he makes sure the curriculum is appropriately modified for his

students based on their individual needs. Mr. Rosner has been J.R.T.'s special education teacher for two years and is familiar with J.R.T.'s strengths and weaknesses as well as her academic progress. I **DEEM** his testimony to be highly credible.

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

J.R.T**.** is a sweet, social, friendly girl who works hard in school, is not a discipline problem and gets along well with her classmates. She has been diagnosed with ADHD, general anxiety disorder and cognitive impairment. At the time of the hearing, J.R.T. was not prescribed any medication for ADHD.

J.R.T. had received early intervention services and special education and related services in the District since preschool and has been in the LLD program throughout her academic career. Her triennial re-evaluations took place in October 2015, while she was a fourth-grade student in Mr. Rosner's LLD class. At the time of the re-evaluations, J.R.T. was receiving Occupational Therapy, Physical Therapy and Speech/Language Therapy as related services (R-25).

The Occupational Therapy Re-Evaluation conducted by Stephanie Valdeon found that J.R.T. presented with moderate limitations in fine motor coordination, grasp patterns, graphomotor skills and visual perceptual skills, which directly affect her academic performance. (R-25)

The Speech/Language re-evaluation conducted by Jena Terranova found that J.R.T.'s articulation skills were within normal limits and vocal parameters for quality, pitch and intensity were within normal limits, although volume was noted to be reduced at times. Standardized assessments were used to assess receptive and expressive language ability as well as vocabulary skills. Her composite language score on the CELF-4 fell within the average range. Subtests indicated strengths in the areas of recalling sentences and word classes. Receptive vocabulary skills fell within the average range as assessed on the CREVT-2 (R-28).

The Physical Therapy Re-Evaluation by Jennifer Santaniello found that J.R.T.'s gross motor skills (locomotion and object control) were in the below average range, however her locomotion skills alone placed her in the average category (R-29).

An Educational Evaluation was conducted by James McIlvain, LDTC on October 19 and October 20, 2015 as part of the triennial reevaluation. The results from the Woodcock Johnson IV Selected Tests of Achievement revealed that J.R.T.'s overall level of broad achievement was very low; her level of academic applications knowledge was within the very low range; and her academic skills and academic fluency with academic tasks were both within the very low range. Compared to others at her age level, J.R.T.'s standard scores were in the low average range for oral expression; in the low range for basic reading skills, reading comprehension extended, and math problem solving; and in the very low range for listening comprehension, reading fluency, math calculation skills and written expression (R-30).

The WISC-IV was used to assess J.R.T.'s cognitive ability. The test was administered by the school psychologist, Felicia Froimovitz, as part of the triennial Psychological re-evaluation. J.R.T. earned a full-scale IQ of sixty-eight which is in the two percent rank which places her in the extremely low range of cognitive functioning (R-31).

Following the re-evaluations, the IEP team, including the parents, met on November 24, 2015 and collaboratively concluded that J.R.T. remained eligible for special education and related services based on an eligibility category of Specific Learning Disability, with a severe discrepancy between her full-scale IQ and her listening comprehension and math calculation skills (R-33).

An IEP dated November 24, 2015 was prepared and consented to by petitioners and implemented by the District for the 2015-2016 school year. Mr. Rosner, J.R.T.'s fourth grade LLD teacher prepared the Present Levels of Academic Achievement and Functional Performance (PLAAFP) section (R-34, page 750-751). The recommended placement was the LLD program which is a self- contained program for language arts,

math, science and social studies and the related services to be provided were occupational and physical therapy and transportation (R-34). J.R.T. was in the general education setting for her electives, gym and lunch.

Mr. Rosner indicated that when he first had J.R.T. in fourth grade she was very sweet and a hard worker but did not participate in class without a lot of assistance. She definitely improved in class participation and language arts. She had her basic group of friends that she had been with since kindergarten, however she preferred talking to adults more than her peers. She was never a behavior problem and got along with her classmates. She aims to please and was never resistant to her classroom work. On a few occasions he had to refer J.R.T. to her case manager to discuss issues that had arisen outside the classroom. J.R.T. made improvement in fourth grade and was able to participate in her educational program. J.R.T.'s fourth grade report card indicated that she was progressing towards the standards (R-37).

In September 2016 at the start of fifth grade, J.R.T. attended the Lunch Bunch program offered by the school social worker for students to meet during lunch and work on social skills. This is an additional program offered by the school to assist students who are in transition with a new teacher, new class and it is open to general education as well as special education students.

An independent neuropsychological report was done June 26, 2017 by Joel Morgan, PhD. (R- 55). Dr. Morgan made recommendations that J.R.T. needs an educational environment that supports her strengths and accommodates her weaknesses. She needs a strong, well-integrated multisensory approach to education integrative in nature, where new information is integrated throughout the day, repetitive, rehearsed and provided in a slow pace multi-sensory instructional method. (R-55, page 0964). This recommendation of the type of program necessary for J.R.T. is consistent with the educational program provided in the LLD class.

The first draft of Dr. Morgan's report did not contain the recommendation for an out-of-district placement in a specialized school (R-94). Dr. Morgan changed his report based on emails received from the parent advocate, Andrew Morgan (R-91,92, and 93).

An IEP meeting was convened on August 2, 2017 to discuss the Independent Neuropsychological Evaluation of Dr. Joel Morgan that the District had received as well as J.R.T.'s parents' concern regarding her adaptive living skills, social skills and need for assistive technology. The District agreed to conduct an Assistive Technology Evaluation for J.R.T. The "Circle of Friends" program at the middle school which included both special and general education students was discussed as being appropriate for J.R.T. to assist in developing social skills (R-57).

Ms. Campana is the school social worker and has been J.R.T.'s case manager since September 2017. J.R.T. is part of her "Circle of Friends" group. Ms. Campana is available to J.R.T. as needed for counselling. J.R.T. has some worries and will come to Ms. Campana to talk about it and develop coping skills. Most of the time J.R.T. will come to speak to Ms. Campana about family conflicts. J.R.T. is anxious and worries about what goes on at home. J.R.T. also meets with the guidance counsellor as well as the student assistance counsellor.

An Assistive Technology Evaluation was conducted on October 12, 2017 to explore different technology interventions that might assist J.R.T. in accessing the curriculum (R-62). The recommendations from the evaluation were added to the accommodations/modifications section of the November 15, 2017 IEP (R-64, page 1036).

J.R.T. was in Mr. Rosner's sixth grade class at the Thompson Middle School for the 2017-2018 academic year in the LLD, mild to moderate, class and receiving special education and related services under the eligibility category of "Specific Learning Disabled". The LLD class is a special education class that is flexible to meet J.R.T.'s needs. The LLD class is an educational environment that supports her strengths and accommodates her weaknesses. It is a strong, well-integrated multisensory approach to education integrative in nature where new information is integrated throughout the day, repetitive and rehearsed and provided for her in a slow pace, multi-sensory, instructional method.

An IEP annual review meeting was convened on November 15, 2017 to review J.R.T.'s progress and make projections for the upcoming year. The recommended placement for the 2018-2019 year was that J.R.T. remain in the LLD class for math, science and social studies, but that she transitions to the resource room for language arts since she had made progress in this area of study and the resource room was a less restrictive environment (R-64, page 1040). J.R.T. has the opportunity to interact with her non-disabled peers in chorus, world language, lunch and gym. It is important for students to be exposed to their typical peers so that they can grow socially-emotionally and understand social cues. Mr. Rosner completed the PLAAFP for math, language arts, social studies and social emotional behavior (R-64, pages 1026-1027). J.R.T. was doing well participating and progressing in her current sixth grade program. The progress reports for the 2017-2018, sixth grade school year for the second marking period indicate J.R.T. was doing well. She had mastered her goal of reading one work by a single author and she was picking smaller text from other authors every day that she was in the classroom. She has read different texts in the 'Big Nate' series (R-65, page 1049). J.R.T. has retained the language arts skills throughout the year. She was doing the readers workshop; illustrating; writing paragraphs; using the words she is supposed to be using; and she is working independently. Math is still one of her weaknesses. She is fine with basic math facts, but division is still difficult for her. However, when math skills are employed more as a life skill, such as a 'spend it' program at Toys r Us, J.R.T. can do it independently. J.R.T. was generally doing very well with the sixth- grade curriculum, although math is hard for her. Her sixth grade report card indicates that she received a ninety-eight in chorus the second marking period (up from 94 in the first marking period); ninety-one in Spanish (up from a ninety); ninety-two in language arts for both marking periods; eighty-nine in math (up from an eighty-five); she received a 100 in gym for the first marking period and a 100 for health in the second marking period; 100 in study skills for both marking periods; and she went down one point in social studies from a ninety to an eighty-nine (R-66). These grades are an accurate indicator of her progress and over all she is doing very well.

Mr. Rosner recommended that J.R.T. be placed in the resource room for language arts since she was higher functioning than some of the other students in the LLD class. It is a higher level than the LLD class in that it moves at a quicker pace. This is an

indication that J.R.T. is making progress. Mr. Rosner believed that the program set forth in the most recent IEP provides J.R.T. with a free and appropriate public education. At the present time, he would also recommend J.R.T. to have pull out science and social studies in the resource room because she is higher functioning and at the top of Mr. Rosner's sixth grade LLD class. She actually studies the work she brings home. J.R.T. needs to be challenged in the classroom and he believes the resource room for language arts, science and social studies would be the least restrictive environment for her.

J.R.T. is tested at her actual functioning level. Her assessments are based on daily assignments and tests that Mr. Rosner gives. Her progress is measured based upon her previous performance. She is only compared to herself.

Transition planning for a student with an IEP generally begins midway through seventh grade into eighth grade before they go to high school. Mr. Rosner teaches a life skills class where the students make grocery lists, plan menus and make various food items. They also go over job applications, filling out a resume and interview skills. J.R.T. takes Spanish as an elective instead of the life skills course.

LEGAL ANALYSIS

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482. One purpose of the Act, among others, is to ensure that all children with disabilities have available to them a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.A. § 1400(d)(1)(A). This "free appropriate public education" is known as FAPE. In short, the Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C.A. § 1401(9). 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). A FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the State involved; and d) are

provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d).

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, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). An IEP should be developed with the participation of parents and members of a district board of education's child study team who have participated in the evaluation of the child's eligibility for special education and related services. N.J.A.C. 6A:14-3.7(b). The IEP team should consider the strengths of the student and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluations of the student; the student's language and communications needs; and the student's need for assistive technology devices and services. The IEP establishes the rationale for the pupil's educational placement, serves as the basis for program implementation, and complies with the mandates set forth in N.J.A.C. 6A:14-1.1 to -10.2.

The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, supra, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701.

The Act did not, however, impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. In

support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (DC 1972). Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043-44, 73 L. Ed. 2d at 703. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, supra, 458 U.S. at 192–93, 102 S. Ct. at 3043–44, 73 L. Ed. 2d at 703–04.
In addition, the Court noted that available funds need only be expended "equitably" so that no child is entirely excluded. Rowley, supra, 458 U.S. at 193, 102 S. Ct. at 3044, 73 L. Ed. 2d at 704, n.15. Indeed, the Court commented that "the furnishing of every special service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go." Rowley, supra, 458 U.S. at 199, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. Therefore, the inquiry is whether the IEP is "reasonably calculated" to enable the child to receive educational benefits. Rowley, supra, 458 U.S. at 206–07, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

The Board will have satisfied the requirements of law by providing J.R.T. with personalized instruction and sufficient support services "as are necessary to permit [her] 'to benefit' from the instruction." G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671 (D.N.J. Feb. 27, 2009) (citing Rowley, supra, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701). The IDEA does not require the Board to maximize J.R.T.'s potential or provide her the best education possible. Instead, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). But an IEP must provide meaningful access to education and confer some educational benefit upon the child. Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. To meets its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. (2017);137 S.Ct. 988; 197 LEd 2d 335.

The educational opportunities provided by a public-school system will differ from student to student, based upon the "myriad of factors that might affect a particular

student's ability to assimilate information presented in the classroom." Rowley, supra, 458 U.S. at 198, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry, and that "[i]t is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variation in between." Rowley, supra, 458 U.S. at 202, 102 S. Ct. at 3049, 73 L. Ed. 2d at 709.

The LLD program that J.R.T. is in, is the type of program that was recommended by Dr. Morgan, that is, an educational environment that supports her strengths and accommodates her weaknesses, a strong, well-integrated multisensory approach to education integrative in nature, where new information is integrated throughout the day, repetitive, rehearsed and provided in a slow pace multi-sensory instructional method. (R-55, page 0964). This recommendation of the type of program necessary for J.R.T. is consistent with the educational program provided to J.R.T.in the District LLD class. J.R.T. also receives emotional support and counselling in the District. Although a formal transition program does not take place until seventh grade for students with an IEP, J.R.T. has the opportunity to participate in life skills classes offered by the District.

J.R.T. has limited capabilities. Her curriculum and grading are modified. Her progress is measured against her prior performance. J.R.T. is progressing as is evidenced by her report cards and progress reports. The November 15, 2017 IEP proposed by the District offered J.R.T. a free and appropriate public education with the opportunity for meaningful educational benefit and progress appropriate in light of J.R.T.'s circumstances, within the least restrictive environment.

I **CONCLUDE** that the program offered J.R.T. by the District constituted FAPE as that term is defined by law. A review of the evidence reveals that J.R.T. progressed in her educational program, and that the child study team adjusted her program in an ongoing effort to personalize her instruction and address her educational needs. School personnel testified convincingly as to J.R.T.'s progress, and the burden of proof and production rests with the Board. N.J.S.A. 18A:46-1.1

The IDEA also includes a mainstreaming requirement requiring education in the "least restrictive environment." 20 U.S.C.A. § 1412(a)(5) mandates that

> [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilitates, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school setting as least restrictive, to enrollment in a residential private school as most restrictive. 34 C.F.R. § 300.115 (2015); N.J.A.C. 6A:14-4.3. Federal regulations further require that placement must be "as close as possible to the child's home." 34 C.F.R. § 300.116(b)(3) (2015); N.J.A.C. 6A:14-4.2; Oberti v. Clementon Bd. of Educ., 789 F. Supp. 1322 (D.N.J. 1992).

Courts in this Circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. "The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom., Scott P. v. Carlisle Area Sch. Dist., 517 U.S. 1135, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996).

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

A.W. v. Highland Park Bd. of Educ., 108 Fed. Appx. 731, 734 (3d Cir. 2004). The District bears the burden of proof by the preponderance of the competent and credible evidence that it has provided a FAPE to J.R.T. in the least restrictive environment. N.J.S.A. 18A:46 -1.1.

The District in this case has proven by a preponderance of the competent and credible evidence that the IEP proposed by the district offered J.R.T. a free and appropriate education with the opportunity for meaningful educational benefit appropriate in light of J.R.T.'s circumstances, within the least restrictive environment. To the extent that I have concluded that the district has provided a FAPE to J.R.T., the appropriateness of a placement at the Banyon school is irrelevant.

ORDER

Based upon the foregoing, the petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2017). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

August 27, 2018 _____

DATE **CATHERINE A. TUOHY**, ALJ

Date Received at Agency August 27, 2018 (emailed)

Date Mailed to Parties: _____

/mel

APPENDIX

WITNESSES

For Petitioner:

Joel Morgan, PhD.
Wendy McNeill, Principal of the Banyon elementary school
R.R., Mother of J.R.

For Respondent:

Gabriella Campana, School social worker and case manager
Felicia Froimovitz, School psychologist
Matthew Rosner, J.R.T.'s fourth and sixth grade special education teacher

EXHIBITS

Joint

J-16 IEP November 1, 2010 (twenty-three pages)

For Petitioner:

P-3 NJ DOE Grade 3 Assessment Report 2014-2015 (four pages)
P-4 NJ DOE Grade 4 Assessment Report 2015-2016 (four pages)
P-7 Rose Mary Merola, MD letter dated March 22, 2017 with enclosures (five pages)
P-10 i-Ready Student Profile Report dated November 14, 2017 (two pages)

P-12 Curriculum Vitae of Joel Morgan, PhD. (fifteen pages)

P-14 Resume of Wendy McNeill (three pages)

For Respondents:

R-1 OAL Decision Approving Settlement dated May 26, 2017 and Settlement Agreement (nine pages)
R-5 Educational Assessment 5/9/13 by Eileen Soler (nine pages)
R-6 Speech/Language Evaluation Report May 14, 2013 by Mary Kurta (five pages)
R-14 various emails in March 2015, regarding meeting dates (eight pages)
R-22 email between James Mcilvain and Mr. Dunn dated September 1, 2015
R-25 IEP dated September 15, 2015 (twenty pages)
R-26 Occupational Therapy Re-Evaluation by Stephanie Valdeon 9/30/15 (six pages)
R-27 Various emails between Mr. Rosner and parents during fourth grade year, 2015-2016 (fifty pages)
R-28 Speech/Language Evaluation by Jena Terranova, October 2015 (four pages)
R-29 Physical Therapy Re-Evaluation by Jennifer Santaniello, October 24, 2015 (four pages)
R-30 Educational Evaluation dated October 19-20, 2015, by James McIvain (thirteen pages)
R-31 Psychological Evaluation 11/9/15 Felicia Froimovitz (nine pages)
R-33 Eligibility Determination Report (seven pages)
R-34 IEP November 24, 2015 (twenty-eight pages)
R-37 Fourth Grade Report Card, 2015-2016 (two pages)
R-39 Progress Reports, Goals and Objectives, Modifications and Supports 2016-2017 (fifty-two pages)
R-42 Permission Slip 9/18/16 for Lunch Bunch
R-43 Various emails from fifth grade between Ms. Pastore and R.R. (ten pages)
R-45 Proposed Draft IEP November 16, 2016 (sixteen pages)
R-47 IEP November 16, 2016 (eighteen pages)

R-54 Report card for fifth grade 2016-2017 (two pages)

R-55 Neuropsychological Report by Joel Morgan, PhD., dated June 26, 2017 (ten pages)

R-57 Amendment to IEP dated August 2, 2017 (nineteen pages)

R-58 August 8, 2017 letter from Felicia Froimovitz to R.R. and M.T (two pages)

R-62 Assistive Technology Evaluation October 12, 2017 (eleven pages)

R-64 IEP dated November 15, 2017 (twenty-three pages)

R-65 Progress Reports for sixth grade (eighteen pages)

R-66 Report card for 2017-2018

R-72 Classwork and homework assignments fifth grade, pages 1089-1210 (132 pages)

R-73 DRA2 Student Record

R-74 Invitation to Meeting dated October 6, 2017, with attachments (forty-nine pages)

R-78 Gabriella Campana resume (four pages)

R-79 Felicia Froimovitz Resume (seven pages)

R-86 Matthew J Rosner Resume (four pages)

R-90 Fit to Return to School Evaluation (two pages)

R-91 Emails, pages 1441-1443 between Dr. Morgan and Mr. Castellucci regarding edits (three pages)

R-92 Joel E. Morgan, PhD. Report with proposed changes (six pages)

R-93 June 28, 2017 email from Andy Morgan to Dr. Morgan regarding edits to the report

R-94 April 20, 2018 email from Dr. Morgan to Mr. Castellucci enclosing the first draft of his report and a copy of the first draft of his report (seven pages)

R-95 Emails, pages 1477-1480 (four pages)

R-96 Emails, pages 1484-1486 (three pages)

R-97 Emails, pages 1500-1504 (five pages)

R-98 Emails, pages 1505-1509 (five pages)

R-99 Emails, pages 1514-1517 (four pages)

R-100 Email page 1553

R-101 Emails, pages 1555-1559 (five pages)

R-102 Emails, pages 1560-1568 (nine pages)

R-103 Emails, pages 1582-1586 (five pages)

R-104 Emails, pages 1587-1589 (three pages)

R-105 Emails, pages 1590-1594(five pages)

R-106 Emails pages 1595-1596 (two pages)

R-107 Vineland – 3 Parent Form (twelve pages)

R-108 BASC3 (twelve pages)