

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

**FINAL DECISION**

OAL DKT. NO. EDS 10641-14

AGENCY DKT. NO. 2015/21503

**C.S. AND S.S. ON BEHALF OF K.S.,**

Petitioners,

v.

**MONTCLAIR BOARD OF EDUCATION,**

Respondent.

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**Rebecca K. Spar**, Esq., appearing for petitioners (Cole Schotz, attorneys)

**Cherie L. Adams**, Esq., appearing for respondent (Adams, Gutierrez & Lattiboudere, attorneys)

Record Closed: September 21, 2015

Decided: May 18, 2016

BEFORE **LELAND S. MCGEE**, ALJ:

The issues in the present matter are as follows: (1) whether the school district committed a procedural violation that denied FAPE to K.S.; and (2) whether its proposed 2014-2015 school year IEP offered FAPE, or specifically, a “meaningful benefit” to K.S. given his disabilities, such that petitioners are not entitled to reimbursement of tuition and related expenses for unilateral placement at a private school without the district’s consent.

**SUMMARY OF FACTS AND PROCEDURAL HISTORY**

1. Petitioners C.S. and S.S. are K.S.'s parents. Petitioners and K.S. reside within the geographic area served by the Montclair Board of Education (district). K.S. is a nine-year-old student who is eligible to receive special education and related services under the classification category of traumatic brain injury (TBI).
2. Ruth Rohrer-Orozco (Rohrer-Orozco) is K.S.'s district case manager. She is a school psychologist and member of the Child Study Team. Rohrer-Orozco is responsible for coordinating K.S.'s services, coordinating meetings, and ensuring that reevaluations and annual review meetings are held in accordance with the required timelines. She is also responsible for maintaining K.S.'s student file.
3. Melissa Buttiglieri (Buttiglieri) is a general education teacher employed by the district. Buttiglieri was K.S.'s general education teacher for first grade during the 2013-2014 school year.
4. Lyndsay Byron (Byron) is a special education teacher employed by the district. Byron provided K.S. with in-class support in math, pullout resource support in math, and provided supplemental reading instruction to K.S. during the 2013-2014 school year when K.S. was in first grade.
5. Colleen Markham (Markham) is a special education teacher employed by the district. If K.S. were to attend the District's proposed self-contained program during the 2014-2015 school year, Markham would have been K.S.'s teacher.
6. Scott Bezsylko (Bezsylko) is the Executive Director of Winston Preparatory School. Bezsylko first learned about K.S. during the admissions process and did not meet K.S. until after K.S. was admitted to the school. Bezsylko has observed K.S.'s classroom on a weekly basis as part of his administrative duties to supervise the operations of the New Jersey Winston Preparatory School site. Bezsylko has never worked directly with K.S.
7. Jason Campbell (Campbell) is the private occupational therapist for K.S. who has regularly worked with K.S. since July 2011. He was qualified as an expert in occupational therapy.

8. Trudy Bier (Bier) is the private physical therapist who has regularly worked with K.S. since he was three months old. She testified that physical therapy is long term for K.S. Bier was qualified as an expert in physical therapy.
9. Lois Mishkin (Mishkin) is the learning disability teacher consultant (LDT-C) and speech language therapist that was hired by petitioners for the purpose of litigation based on a referral from their attorney. She was qualified as an expert LDT-C, a speech language therapist, and in treating children with brain injuries.
10. In 2010, petitioners approached district and request that the district evaluate K.S. for services. K.S. was found eligible as a Pre-School Child with a Disability and the district proposed placing him for half a day in its special education program, Developmental Learning Center (DLC), and the rest of the day at Mothers' Morning Out (J-9). Petitioners agreed with the district's proposal. However, S.S. notified the district that K.S. would no longer attend DLC and she arranged for him to attend a full day pre-k program at Mothers' Morning Out.
11. For the 2011-2012 school year, K.S. completed a kindergarten curriculum at Park Street Academy, a private school that petitioners paid for. (J-12, p. 4.) The district's psychologist observed K.S. at the Park Street Academy and reported his strengths in vocabulary, reading ability, ability to understand multi-step direction, ability to get along with other students, organizational skills, study skills, and adequate expressive and receptive communication skills. (J-4, pp. 2, 8, 9.)
12. On March 30, 2012, after S.S. reached out to the district, an Initial Evaluation Planning Meeting was held to decide whether to evaluate K.S. The team agreed to conduct psychological, social, occupational therapy, and physical therapy assessments. (R-17.) As part of the evaluation, the district accepted a report from Dr. Abba Cargan, K.S.'s treating pediatric neurologist, and from Jason Campbell, K.S.'s private occupational therapist. (J-7, J-6, J-8.)
13. On July 11, 2012, the IEP team, including petitioners met and determined that K.S. was eligible as "Other Health Impaired." (J-11.) The IEP team determined that K.S.'s needs could be met within a mainstream setting at the

- Watchung Elementary School without special education supports or accommodations. (J-12.) The IEP's only goals and objectives were to address K.S.'s physical and occupational needs. (J-12, pp. 9-12.)
14. On June 7, 2013, an annual meeting was held to prepare a new IEP. (J-14, J-15.) At the meeting, it was agreed that K.S. would receive In-Class Resource with a special education teacher for Reading/Language Arts one period per day and "Assisted Support" daily in Math.
  15. In the first two months of the 2013-2014 school year, petitioners suspected that K.S. was struggling and S.S. asked to meet with Buttiglieri who agreed that K.S.'s IEP should be amended to provide more support. (1T135:1-136:3; 3T155:9-156:9.)
  16. On November 22, 2013, the IEP team met to revise his IEP to provide for "more intensive support in math and reading, given growing concerns with his academic achievement in these areas." (J-19, p. 3.)
  17. On or around May 1, 2014, petitioners sent Rohrer-Orozco the Psychoeducation and Neuropsychological Evaluation report, authored by Dr. Jane M. Healey. (J-20, J-21; 3T179:1-6.) In addition to TBI, Dr. Healy diagnosed K.S. with the following: Cognitive Disorder-Not Otherwise Specified; Developmental Reading Disorder; Disorder of Written Language; Developmental Math Disorder; Developmental Coordination Disorder; Attention Deficit Hyperactivity Disorder-Inattentive Type; and Language Disorder Not Otherwise Specified. (J-21.) S.S. testified that once she received the report, she and C.S. began considering placing K.S. at other public schools, The Craig School, and the Winston Preparatory School. (3T197:7-20.)
  18. At the May 16, 2014, eligibility meeting, the district relied on the report in deciding to change K.S.'s classification from "Other Health Impaired" to TBI. (J-22; Rohrer 1T85:1-7.) Petitioners consented to K.S.'s change in classification on May 22, 2014. On the same day, an annual IEP review meeting was held. This meeting was attended by Buttiglieri, Byron, S. Susan Bleeker (in-class writing), Rohrer-Orozco, and petitioners. Markham, the teacher for the self-contained class was not present at this meeting. (J-23, p.

- 2.) Some of Dr. Healey's findings were summarized in the May 2014 IEP. (J-23, pp. 8-9.)
19. On May 28, 2014, petitioners received the final IEP for the 2014-2015 school year. (J-26; 3T189:10-16.) Petitioners had concerns about the IEP. On the same day, S.S. apprised Rohrer-Orozco via letter that she had consulted with Mishkin who recommended for K.S. to undergo additional testing. (J-24.)
20. On June 4, 2014, S.S. had a telephone conversation with Rohrer-Orozco about her concerns. After this conversation, Rohrer-Orozco sent an e-mail to Linda Mithaug, Director of Pupil Services and Jennifer Finnerty, Supervisor of Special Services setting forth S.S.'s requests to observe the proposed self-contained class and speak with the class's teacher, Markham. (J-26; 1T170:13-171:11.)
21. A Re-evaluation Planning meeting was scheduled for June 11, 2014, to discuss petitioners' request for additional testing. (J-25.) However, this meeting was cancelled because according to Rohrer-Orozco, ". . . we no longer needed it." (1T111:1-4.)
22. For the 2014-2015 school year, the district changed K.S.'s classification to TBI and proposed a new IEP placing K.S. in its self-contained K-2 class where he would have received 1 period daily of Reading, Language Arts, Math, and two periods weekly each for Science and Social Studies. He would have continued to have his 1:1 paraprofessional, two thirty-minute sessions each week of Occupational Therapy, three thirty-minute small group/individual sessions of Physical Therapy once per month, one small group/individual integrated thirty-minute session once per month, and a social skills group. (J-23, p. 27.)
23. On July 17, 2014, petitioners filed a due process petition seeking relief from the district in the form of out-of-district placement at, and reimbursement for expenses associated with placement at the Winston Preparatory School. The Winston Preparatory School is a non-profit school incorporated in New York and licensed to operate as a private school in numerous states, including New Jersey. The school operates three campuses with a total of 372

- students. The New Jersey campus began operating in September 2014. (3T8:19-9:23; 3T14:13-14.)
24. On July 25, 2014, petitioners signed an enrollment agreement for K.S. to attend the Winston Preparatory School for the 2014-2015 school year. (P-13.)
25. On August 4, 2014, petitioners notified the district via letter that they would be placing K.S. at the Winston Preparatory School, beginning September 2014, and that they would be seeking reimbursement for tuition and related expenses. (J-30.) In addition to placing K.S. at the school, petitioners arranged for him to receive private physical therapy and occupational therapy services. (3T217:22-221:18; P-9, P-10, P-11, P-12.)
26. On or about August 6, 2014, petitioners filed an Amended Petition.
27. On August 22, 2014, the New Jersey Department of Education transmitted the present matter as a contested case to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.
28. On or about September 16, 2014, a Settlement Conference was held before Judge Robert Giordano, ALJ and the parties were not able to settle the matter.
29. On October 6, 2014 a prehearing conference was held. On or about October 10, 2014, respondent answered the Amended Petition. On October 15, 2014, a Revised Prehearing Order was issued.
30. On November 22, 2014, the IEP team discussed K.S. undergoing an Educational Assessment. (J-18; 1T60:1-12.) However, petitioners told the district that they were not consenting to the test based on input from Dr. Cargan. (R-18; 1T63:18-25.) The district did not take any steps to obtain an order requiring testing (1T138:10-14).
31. Hearings were scheduled for January 16, 2015, 21 (adjourned), February 19, 2015 (adjourned), March 4, 5, 9, 2015 (all adjourned), April 13, 2015, May 19, 2015, May 22, 2015 (adjourned), August 3, 2015, and October 20, 2015 (adjourned). Post-hearing briefs were filed on September 17, and 21, 2015, respectively and the record closed.

## **DISCUSSION AND FINDINGS OF FACTS**

### **A. INITIAL REFERRAL AND REVOCATION OF CONSENT FOR SPECIAL EDUCATION SERVICES**

When K.S. was three years old, petitioners referred K.S. to respondent's Child Study Team for consideration for eligibility for special education. At that time, K.S. was evaluated and classified as eligible to receive special education and related services under the category preschool child with a disability. The district developed an individualized education program (IEP) placing K.S. in an in-district special education program. Petitioners revoked consent for K.S. to receive special education services soon after he began in the district's program. Instead of providing K.S. with the special education services he required, petitioners placed K.S. in a private preschool program and provided him with private occupational therapy and physical therapy services. Petitioners also decided to provide K.S. an additional year in his private preschool program before enrolling him in kindergarten.

### **B. RE-REFERRAL FOR SPECIAL EDUCATION SERVICES AND PROGRAMMING FOR KINDERGARTEN (2012-2013 SCHOOL YEAR)**

On March 30, 2012, an initial evaluation planning meeting was held. S.S. indicated that her primary area of concern was K.S.'s "motor skills and his ability to physically navigate the building safely." (J-3.) The District proposed conducting an educational assessment, psychological assessment, social assessment, speech assessment, occupational therapy assessment, and physical therapy assessment of K.S. On March 31, 2012, petitioners consented to the proposed evaluations and gave consent to extend the evaluation period to allow time to complete evaluations outside of school. Thereafter, petitioners advised respondent that they only wanted an occupational therapy and physical therapy evaluation performed. Respondent informed petitioners that a psychological evaluation and social assessment are required to determine eligibility for special education and related services under New Jersey regulations. Accordingly, respondent revised the initial evaluation plan to eliminate the

educational assessment and speech assessment. Petitioners provided consent for the district to conduct a psychological assessment, social assessment, occupational therapy assessment, and physical therapy assessment on May 3, 2012.

The District conducted a psychological evaluation, a physical therapy evaluation, an occupational therapy evaluation, and a social history assessment of K.S. These evaluations were used to determine K.S.'s eligibility for special education and related services and to develop an educational program for him for kindergarten. On July 11, 2012, the parties convened for an initial eligibility determination meeting to review the evaluations. Petitioners were present for the meeting. It was determined that K.S. was eligible for special education and related services under the disability category of other health impaired (OHI) based on K.S.'s medical diagnosis of intraventricular hemorrhage, ventricular shunt with repair, and hemiparesis. The eligibility determination was based upon the district's evaluations and a review of a private neurological report and private occupational therapy report provided by petitioners. The classification category of OHI was consistent with the recommendation of K.S.'s private neurologist, Dr. Abba Cargan (Cargan), that K.S. be classified as OHI. (Rohrer-Orozco T1 at T87:4-15.)

After the determination of eligibility, the District proposed an initial IEP for K.S. that was designed to address his primary areas of need – fine motor and gross motor skills. The IEP placed K.S. in the general education setting with a special education teacher to monitor his academic needs. The IEP provided an individual aide, which was requested by petitioners for safety reasons. The aide supported K.S.'s physical needs, such as using the stairs and the bathroom, and would provide assistance such as redirection during academics. At no point during K.S.'s time in the district did petitioners request that the individual aide be removed.

The IEP included related services: small group physical therapy two times per week for thirty minutes, individual physical therapy one time per week for thirty minutes each, physical therapy consultation one time per month for thirty minutes, and individual occupational therapy two times per week for thirty minutes each. The occupational

therapist and physical therapist were to consult with K.S.'s teacher. Petitioners provided written consent for the implementation of the initial IEP on August 15, 2012. Rohrer-Orozco was responsible for implementing and monitoring the implementation of the initial July 11, 2012, IEP.

Prior to K.S.'s arrival in the district's kindergarten program, the district made changes to the school building in order to accommodate K.S., as recommended by Bier. S.S. acknowledged that the district was "very gracious about making all of the changes that we needed in terms of handrails on the stairs and replacing the toilet in the classroom and those kinds of things." (S.S. T3 at T145:11-19.)

During kindergarten, K.S.'s reading skills were assessed by his kindergarten teacher, Diane Olsen (Olsen) using the developmental reading assessment (DRA). At the end of kindergarten, he was at a DRA level 4, which is where a child is expected to be at the end of kindergarten. (Rohrer-Orozco T1 at T40:24-42:24, T47:1-7.)

The service providers completed their respective section of the progress report outlining progress made on the IEP goals and objectives for the 2012-2013 school year. K.S. made progress on the goals and objectives in his IEP. S.S. acknowledged that she was "absolutely thrilled" with how K.S. had done in the District's program during kindergarten and the progress that he had made both academically and socially. (S.S. T3 at T145:23-146:15.)

**C. FIRST GRADE (2013-2014 SCHOOL YEAR)**

On June 7, 2013, teachers, related service providers, and petitioners held an annual review meeting to develop K.S.'s program for the first grade. Olsen reported that K.S. benefits from the support of an adult to redirect his attention in the areas of math and writing. The special education teacher reported that K.S. benefited from the services of his paraprofessional to keep him engaged and to redirect his attention. K.S. evidenced weaknesses with reading comprehension and in math and the team discussed whether he would benefit from the support of a special education teacher in

these areas. To address these needs, the June 2013 IEP increased K.S.'s services and provided him with in-class resource support in the general education setting for reading/language arts for first grade. (J-15, p. 16; Rohrer-Orozco T1 at T53:19-54:5.) In addition, the IEP contemplated assisted support in the general education classroom for math to be provided by a special education teacher who would go into K.S.'s general education class daily during math. The June 7, 2013, IEP continued providing K.S. with the support of an individual aide to assist him with safety and redirect his attention. (J-15, p. 17.)

For related services, the IEP included group physical therapy two times per week for thirty minutes each, individual physical therapy one time per week for thirty minutes, and individual occupational therapy two times per week for thirty minutes each. Transportation was also included. (J-15, p. 17.). Respondent recommended extended school year (ESY) programming to prevent significant skill regression in the area of physical therapy. Petitioners declined ESY, opting instead for placement of K.S. at camp. (J-15, p. 16; Rohrer-Orozco T1 at T53:3-8.)

The IEP provided accommodations and modifications that addressed K.S.'s safety, maintaining attention, working towards independence, and instructional strategies to aid K.S. during academic instruction and academic activities. (J-15, pp. 14-15; Rohrer-Orozco T1 at T53:3-8; T1 at T56:6-22.) The IEP included supports that addressed K.S.'s learning needs and executive functioning issues, including providing a chair that allows K.S.'s feet to reach the floor, providing visual supports, utilizing pictures in a narrative approach to illustrate math, using visual models and verbal prompts, and breaking down tasks into components. (J-15, pp. 14-15; S.S. T3 at T234:6-235:7.) Petitioners provided written consent for the implementation of the IEP. (J-15, p. 20.)

For the 2013-2014 school year, K.S.'s general education teacher for first grade was Buttiglieri. The special education teacher who provided push-in services for reading/language arts was Susan Bleecker (Bleecker). Language arts consists of word study, reading, and writing. For the push-in reading/language arts instruction, Buttiglieri

would teach the lesson. While the students wrote independently, Buttiglieri or Bleecker would pull a few students, including K.S., to provide extra support. (Buttiglieri T2 at T7:8-157, T11:2-5, T38:20-39:5, T52:2-3.)

Byron was the special education teacher who provided in-class support to K.S. during math. Byron implemented the modifications and accommodations set forth in K.S.'s IEP and would pull K.S. into a small group to clarify directions, help with manipulatives, and provide extra support. (Byron T2 at T61:14-62:4.)

Buttiglieri testified that K.S. was "very comfortable in the classroom which was nice and he was able to . . . build those relationships with his peers." However, she explained that K.S. struggled with comprehension; that he was easily distracted; and that it was hard for him to focus. (Buttiglieri T2 at T12:7-19.)

Despite the additional special education services put in place for first grade, K.S. continued to demonstrate difficulties. K.S.'s teachers expressed concerns with K.S.'s comprehension and math skills. Buttiglieri felt that the general education classroom was overwhelming for K.S. due to the large size and that he was having a hard time keeping up with the pace. Byron testified that she also felt that K.S. needed more support and that a smaller setting would be better for K.S. because there would be fewer distractions. (Buttiglieri T2 at T13:10-16; Byron T2 at T62:12-16.)

On November 22, 2013, the parties convened for a re-evaluation planning and IEP meeting. The District decided to hold this meeting because it became clear that K.S. required additional academic support in the classroom and that additional special education services should be added to his IEP. The District proposed amending K.S.'s IEP to provide him with more intensive support in math and reading due to growing concerns with his academic achievement in these areas. (J-19; Rohrer-Orozco T1 at T66:5-67:11.)

The amended IEP changed K.S.'s program to provide in-class support in language arts, pullout replacement for math in the resource center, and supplementary

reading instruction in the resource center in order to address his weaknesses in reading and math. Petitioners ultimately provided consent for the amended IEP on December 5, 2013; however, they expressed a concern that K.S. be held to the same standards as the general education students and follow the same curriculum. Petitioners were informed that K.S. would be following the general education curriculum, but at his own individual pace. (J-19; R-18; Byron T2 at T63:22–64:22.)

At the meeting, the District also requested parental consent to conduct an educational assessment in order to obtain information about K.S.'s academic achievement to inform programming and see if additional changes to K.S.'s program were necessary beyond what was set forth in the amended IEP developed on the same day. (J-18; Rohrer-Orozco T1 at T60:1-61:22, 137:25–138:7.)

Petitioners did not provide consent at this time for the District to conduct any educational testing of K.S. (J-18; R-18; S.S. T3 at T237:1-3.)

Byron was the special education teacher that provided pullout replacement math instruction to K.S. Initially, K.S. was the only student receiving pullout math. During the course of the school year one other student was added to the pullout instruction. Byron discussed with petitioners that she would continue to work on the general education curriculum during pullout sessions but that she would be working at K.S.'s pace. (R-18; Rohrer-Orozco T1 at T138:22–139:14; Byron T2 at T63:22–64:22.)

Byron recommended and worked with K.S. on a multisensory program called Touch Math to assist him with counting, adding, and subtracting. Byron testified that K.S. was successful using Touch Math and that it enabled him to do calculations independently. S.S. testified that Touch Math worked for K.S. and he made a lot of progress in math because of it. (Byron T2 at T65:7-23; S.S. T3 at T170:22-171:22.)

Byron was also the special education teacher who provided supplementary reading instruction to K.S. During supplementary reading instruction, K.S. worked on

being able to recall the details from small passages in sequential order and identifying fantasy versus what is real. (Byron T2 at T70:2-8.)

The December 5, 2013 IEP also reduced K.S.'s physical therapy services from three times per week to one time per week. This was in response to petitioners' concerns with the number of times K.S. was pulled out of academic classes for physical therapy. Petitioners requested a reduction in school-based physical therapy because they felt that K.S. was provided with sufficient physical therapy services privately. (J-19; Rohrer-Orozco T1 at T68:3-15.)

K.S.'s progress report from the end of first grade demonstrates that K.S. made progress in the areas of occupational therapy, physical therapy, language arts, and in mathematics. (J-28; Rohrer-Orozco T1 at T76:6-25.)

K.S.'s report card from the end of first grade also demonstrates that K.S. made progress. However, Buttiglieri explained that K.S.'s progress was inconsistent at times. (J-29; Rohrer-Orozco T1 at T78:7-80:1; Buttiglieri T2 at T33:21-34:12.)

**D. PROPOSED PROGRAM FOR SECOND GRADE (2014-2015 SCHOOL YEAR)**

On May 1, 2014, S.S. provided Rohrer-Orozco with the results of a private neuropsychological assessment conducted by Jane M. Healey, Ph.D. (Healey) in March 2014. Healey diagnosed K.S. with TBI, cognitive disorder – not otherwise specified, developmental reading disorder, disorder of written expression, developmental math disorder, developmental coordination disorder, attention deficit hyperactivity disorder – inattentive type, and language disorder not otherwise specified. (J-20; J-21.)

Healey did not recommend an out-of-district placement in her report, nor did she conclude that the district's program was inappropriate for K.S. (J-21.) When S.S. provided Healey's report, she indicated to Rohrer-Orozco that her "take away is that he needs a smaller classroom setting as well as an educator who can teach specific

strategies.” Petitioners and the district were in agreement that K.S. would benefit from a smaller classroom setting. (J-20; Rohrer-Orozco T1 at T107:24-108:20).

Prior to meeting with the district to discuss Healey’s report and develop future programming for K.S., S.S. began contacting private schools, such as the Craig School and the Community School, for possible placement. (S.S. T3 at T181:19-183:1.)

Following receipt of Healey’s report, the district convened a re-evaluation eligibility meeting and IEP meeting on May 16, 2014. The district considered Healey’s report and agreed with the recommendation that K.S.’s eligibility category should be changed from OHI to TBI as it more accurately depicts his medical condition. As such, the district determined that K.S. was eligible to receive special education and related services under the disability category of traumatic brain injury. (J-21, p. 20; J-22.)

After the eligibility determination, the parties proceeded into an IEP meeting. Buttiglieri and Byron discussed K.S.’s progress through the school year and there was a discussion of K.S.’s areas of weakness that still needed to be addressed. (Rohrer-Orozco T1 at T94:18–95:4.) Buttiglieri expressed that she felt that a smaller setting would be more beneficial for K.S. for second grade based on the high expectations and pace of the general education classroom. K.S. had difficulty working independently in first grade and his mastery of skills and concepts was inconsistent. She also explained that a smaller setting would have fewer distractions, which would be beneficial as K.S. struggled with attending. (Buttiglieri T2 at T34:10-23, T55:4-21.)

Byron also recommended that K.S. receive more support and suggested that he be placed in the self-contained classroom. Byron recommended the self-contained program because a smaller class size worked best for K.S. and it would be beneficial to receive instruction for all subject areas in the same class. (Byron T2 at T72:1-13.) Petitioners and the district staff agreed that K.S. requires a smaller classroom. (S.S. T3 at T183:16-22.)

During the meeting, the district reviewed Healey's report and recommendations. Dr. Healey conducted cognitive and academic testing of K.S. As petitioners would not permit the district to conduct this type of testing in the past, this was the first time the district had access to this type of information about K.S. Healey's testing indicated weaknesses in the areas of perceptual reasoning, working memory, and processing speed. The district developed an IEP to address these issues. (J-21; Rohrer-Orozco T1 at T88:17-90:18.)

For second grade, the District proposed increasing K.S.'s services and placing him in a self-contained program for all academic areas. K.S. would receive instruction from a special education teacher in a self-contained classroom for reading, math, writing, science, and social studies. K.S. would be in the general education setting with paraprofessional support for lunch, recess, and related arts. This would provide K.S. with access to typically developing peers. (J-23, p. 27; Rohrer-Orozco T1 at T98:14-100:3.)

Rohrer-Orozco testified that the self-contained program was recommended for K.S. because it was the least restrictive environment for him. When K.S. first entered the District, he was placed in the general education setting with supports, and then was moved to a more restrictive setting when he received pullout instruction. However, even with this level of support there remained concerns with K.S. ability to keep up with the pace of instruction and increasing difficulty of the curriculum in the general education setting due to his academic weaknesses. (Rohrer-Orozco T1 at T106:3-107:12.)

The self-contained classroom proposed for K.S. would have approximately twelve students, one special education teacher, and four paraprofessionals. The students range in grade from kindergarten to second grade. (Rohrer-Orozco T1 at T100:4-13, T167:1-5.) The teacher for the proposed classroom was Markham. Markham is a certified and experienced special education teacher who has been teaching the proposed self-contained class for almost ten years. Markham has training in Orton-Gillingham and Wilson multisensory reading instruction methods. (Markham

T2 at T98:12-101:2.) Markham also has experience educating students with TBI. Markham explained how the same methods and strategies used with students with other types of disabilities have proved to be successful when educating students with TBI. (Markham T2 at T147:4-150:8.) Markham also has experience in working with students with executive-functioning issues. Markham addresses these issues in the classroom by having an organized and structured classroom routine, using visuals, and working on maintaining focus. (Markham T2 at T101:6-104:2.)

The students in the self-contained classroom are in kindergarten, first, and second grade. However, the classroom is fluid and students are grouped based on their academic needs and skill levels. Groupings change during the course of the year as students make progress. Standardized assessments and benchmark testing are used to group students for instruction. (Markham T2 at T123:17-125:14, T153:6-154:3.)

Markham utilizes a modified curriculum for kindergarten, first, and second grade. Scaffolding of instruction is used and higher level thinking activities are provided to students with greater ability. (Markham T2 at T129:15-23, T145:1-12.) The students in the self-contained classroom have similar educational needs. (Markham T2 at T152:22-153:2.)

Markham explained that everything recommended in Mishkin's report exists in her classroom, including the recommended memory techniques, visual processing strategies, and attentional strategies. (P-18, pp. 14-15; Markham T2 at T116:12-120:11.) The classroom paraprofessionals included a certified teacher and certified substitute teachers. The paraprofessionals are highly experienced and received training on working with students with multiple disabilities and their role in the classroom. (P-35; Markham T2 at T106:15-107:25; Mishkin T4 at T116:2-14.) The IEP continued to provide K.S. with an individual aide to support K.S.'s academic needs and maintain his safety within the school building. (J-23, p. 27-28.)

For related services, the IEP set forth individual/small group physical therapy for thirty minutes three times a month, integrated individual/small group physical therapy for thirty minutes one time per month, and individual integrated occupational therapy for thirty minutes one time per week. The location and frequency of physical therapy and occupational therapy were developed in collaboration with petitioners and took into account petitioners' concerns with the number of times K.S. is pulled out of academic classes for related services. (J-23, p. 28.)

The IEP also proposed providing K.S. with social skills, as recommended by Healey. Social skills would be a weekly group where K.S. would work on goals related to conversational skills and maintaining focus on the subject at hand. (J-21, p. 21, 23; J-23, p. 28; Rohrer-Orozco T1 at T102:2-14.)

The District proposed an ESY program for K.S. that would provide instruction in the areas of reading, language arts, and math. Petitioners again declined ESY because K.S. participates in a camp during the summer. (J-23, p. 27; Rohrer-Orozco T1 at T97:13-20.) Overall, the IEP set forth appropriate goals and objectives for K.S. (J-23.)

Campbell confirmed the appropriateness of the proposed goals and objectives in the area of occupational therapy. During his testimony, Campbell reviewed the proposed goals and objectives and explained that he worked on the same goals with K.S. during private occupational therapy sessions. (Campbell T4 at T21:17-22:21.)

Bier confirmed the appropriateness of the proposed goals and objectives in the area of physical therapy. Bier testified that the District's proposed goals and objectives were the very same things that she worked on with K.S. during the 2014-2015 school year during her private physical therapy sessions. (Bier T4 at T157:12-24.)

Mishkin testified that the IEP set forth appropriate accommodations and modifications for K.S. (J-23, pp. 23-25; Mishkin T4 at T122:1-17.) K.S. did not require

an out-of-district placement because there was an in-district program appropriate to meet his needs. (Rohrer-Orozco T1 at T113:10-25.)

S.S. requested the opportunity to observe the proposed self-contained class. Rohrer-Orozco contacted her supervisors concerning the request. Shortly after this request, Petitioners filed for mediation/due process. (Rohrer-Orozco T1 at T167:10-168:4, T172:4-9, S.S. T3 at T247:3-19.)

During the IEP meeting, petitioners requested additional testing in the areas of speech/language and an academic evaluation to supplement Healey's report. It was Rohrer-Orozco's understanding from S.S. that the educational testing was requested because the Craig School, one of the private schools petitioners were considering for K.S., required these assessments. (J-23, p. 7, J-24; Rohrer-Orozco T1 at T97:21-98:4, T110:20-23.) In response to the request, the district scheduled a reevaluation planning meeting for June 11, 2014. On June 4, 2014, S.S. called Rohrer-Orozco and indicated that she no longer felt a need for additional testing because the Craig School indicated that they would not need additional testing. S.S. indicated that she no longer agreed to have the district conduct the agreed upon evaluations. As such, the district never conducted educational testing of K.S. (J-25, J-26; Rohrer-Orozco T1 at T110:20-111:4; S.S. T3 at T196:12-18, T246:4-7.)

**E. UNILATERAL PLACEMENT AT WINSTON PREPARATORY SCHOOL  
(2014-2015) SCHOOL YEAR**

On August 4, 2014, S.S. sent a letter to the district indicating that K.S. was unilaterally placed at Winston Preparatory School. (J-30.) However, petitioners planned to place K.S. at Winston Preparatory School three or four months before they provided notice to the district that K.S. would be unilaterally placed there. S.S. testified that she first contacted Winston Preparatory School in late April or early May 2014. Petitioners entered into an enrollment agreement with Winston Preparatory School on July 25, 2014. (P-13; S.S. T3 at T198:8-12; Campbell T4 at T18:15-20:23.)

K.S. began attending Winston Preparatory School on September 14, 2014. Bezsylo explained that the 2014-2015 school year was the first year of operation for the New Jersey campus of Winston Preparatory School. (Bezsylo T3 at T9:7-17; S.S. T3 at T202:24-203:1.) Winston Preparatory School is registered with the State of New Jersey as an independent, private school. It is not a State-approved school for students with disabilities and there is no State oversight of the program. (Bezsylo T3 at T34:19-35:22, T98:18-23.) Winston Preparatory School does not use any common core standards. (Bezsylo T3 at T103:1-3.) Bezsylo testified that “multiple approaches” are used in a subject area based on the individual student, but there is no curriculum that is followed in any subject area for any student. (Bezsylo T3 at T109:1-22, T117:23-118:3.)

Winston Preparatory School begins at third grade; it does not have lower grades. K.S. was in first grade during the 2013-2014 school year and would have been entering second grade in the 2014-2015 school year. However, he became a third-grade student at Winston Preparatory School for the 2014-2015 school year. As a result, K.S. has lost one full school year of grade-level academic instruction. (P-19; Bezsylo T3 at T87:8-14.)

Mishkin engaged in correspondence with Winston Preparatory School in order to find out information for petitioners’ attorney related to the instant litigation. In her discussions with Winston Preparatory School, Mishkin noted that K.S. skipped from first grade to third grade, which is an “issue” for them. (P-19.)

Bezsylo explained that K.S.’s program at Winston Preparatory School is “predominately self-contained” and he is instructed by the same teacher all day. Similar to the district’s proposed self-contained class, students at Winston Preparatory School are grouped by their cognitive and academic profiles. K.S.’s class is comprised of students that range in age from nine to eleven years old and are considered third and fourth graders. (P-19; Bezsylo T3 at T48:7-49:13, T52:6-15.) K.S. is the only student with a TBI classification in his class at Winston Preparatory School. The other students

in his classroom have language-based and executive function-based learning problems. (Bezsyloko T3 at T103:15-18.)

At Winston Preparatory School, K.S. receives daily one-on-one instruction, known as "Focus," in his area of weakness, reading and writing. K.S.'s Focus instructor, Kristen Keely (Keely) does not have any formal education in the areas of special education or reading and does not have any teaching certifications. Rather, Keely is a social worker with a New Jersey certification in school counseling. (Bezsyloko T3 at T54:6-7, T57:2-6, T88:25 89:18, T98:14-22.)

The 2014-2015 school year was the first year that K.S.'s classroom teacher Erica Devos (Devos) worked for Winston Preparatory Schools. Devos is in the process of obtaining her teaching certificates. She was not a New Jersey certified teacher when she provided instruction to K.S. during the 2014-2015 school year. (P-28; Bezsyloko T3 at T89:19-21, T90:14-92:11.)

Winston Preparatory School does not provide any related services to its students. (Bezsyloko T3 at T107:6-13.) After K.S. began attending Winston Preparatory School, he continued receiving the same level of private occupational therapy services from Campbell that he received since he was five years old. K.S. does not receive occupational therapy during the school day at Winston Preparatory School as the school does not offer occupational therapy services. In the District's proposed program, K.S. would receive individual occupational therapy services integrated into the classroom two times per week for thirty minutes, in addition to his private therapies. (J-23 at 28; S.S. T3 at T220:9-21; Campbell T4 at T20:24-21:1, 32:4-7.)

After placement at Winston Preparatory School, K.S. continued receiving the same level of private physical therapy services from Bier that he had received since he was three months old. K.S. does not receive any physical therapy during the school day at Winston Preparatory School because it does not offer physical therapy services. In the district's proposed program, K.S. would receive individual/small group physical therapy three times per month for thirty minutes and individual/small group integrated

physical therapy one time per month for thirty minutes in addition to his private services. (J-23 at 28; Bier T4 at T156:4-13, T164:24-165.)

**F. MISHKIN OBSERVATIONS AND REPORT**

Petitioners were referred to Mishkin, and retained her to interpret Healey's report. At that time, Mishkin was aware that litigation between petitioners and the district was anticipated. (S.S. T3 at T175:19-23; Mishkin T4 at T94:23-95:3.) Upon meeting K.S. and reviewing Healey's report, K.S.'s report cards, and Child Study Team reports, Mishkin suggested that petitioners view the Craig School and the Community School, two private schools. Mishkin made this suggestion despite having no knowledge of what the district's proposed program was for K.S. (Mishkin T4 at T51:1-15, T98:2-4.)

The first time that petitioners requested that Mishkin observe the district's program was after K.S. began attending Winston Preparatory School. (Mishkin T4 at T60:17-24.) Mishkin testified that the district's program was inappropriate as compared to Winston Preparatory School because at Winston Preparatory School students were grouped by skill level, not by grade or age. However, in the district's proposed self-contained classroom, students are also grouped by skill level. Additionally, Mishkin's notes indicated that she was informed by Winston Preparatory School that there are no more than three grades within a group. This is the same as the district's proposed self-contained classroom. (Markham T2 at T123:17-125:14, T153:6-154:3; Bezsylo T3 at T80:1-25; Mishkin T4 at T106:22-107:10.)

Mishkin acknowledged that the same deficits K.S. had when he first started at Winston Preparatory School remained after attending Winston Preparatory School for an entire school year. (Mishkin T4 at T67:14-17.) She met with S.S. and K.S. in May 2015 to prepare for her testimony in this case, and was therefore recalled that K.S.'s weaknesses and issues persist. (Mishkin T4 at T67:22-23, T95:18-19.) Mishkin testified that any of the recommendations in her report could be implemented within a public school district. (Mishkin T4 at T127:15-16.)

Markham explained that the items in Mishkin's report were in place in the district's self-contained program that was proposed for K.S. in the May 2015 IEP. (Markham T2 at T116:9-120:11.) Mishkin's report was not provided to the district until after K.S. was unilaterally placed. (P-18.)

**The District has the Burden of Proof in Demonstrating that its IEP was Appropriate for K.S.**

"The issue of whether an IEP is appropriate is a question of fact." S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 271 (3d Cir. 2003); Carlisle Area Sch. v. Scott P. by and Through Bess P., 62 F.3d 520, 526 (3d Cir. 1995). The Board has the burden of proof and the burden of production to establish that it provided a FAPE to the student. N.J.S.A. 18A:46-1.1. At a due process hearing, the obligation of the parents is merely to place in issue the appropriateness of the IEP. Lascari v. Bd. of Educ., 116 N.J. 30, 46 (1989). Where the district sustains its burden of proof that it offered FAPE within the least restrictive environment, parents are not entitled to reimbursement of costs for a private school. J.R. and B.P. ex rel. D.R. v. Ridgewood Village Bd. of Educ., EDS 13890-12, Final Decision (June 12, 2014), <http://njlaw.rutgers.edu/collections/oal/>. Here, petitioners argue that the district failed to meet its burden of proof in demonstrating that its May 16, 2014, IEP was appropriate for K.S. The district argues that it proposed an appropriate IEP in the least restrictive environment.

**District's testimony:**

Generally, whenever a specialized subject matter is beyond the common knowledge of the fact-finder, expert testimony is required. See Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). While there is no authority that expert testimony is required in special education matters, without specialized knowledge about special education, the fact-finder cannot determine whether the school district sustained its burden of proof. In Oberti v. Board of Education of Clementon School District, 789 F. Supp. 1322, 1333 (D.N.J. 1992), the district court noted that the determination of the adequacy of services provided to a student requires expert testimony. In affirming the

district court, the Third Circuit, in the context of evaluating a student's placement in a least restrictive environment, noted that courts ". . . will have to rely heavily . . . on the testimony of educational experts." Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1216 (3d Cir. 1993). Similarly, in J.N. and T.N. ex rel. E.N. v. Lawrence Township Board of Education, EDS 13212-10, Final Decision (December 27, 2011), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ concluded that the school district did not provide the student with a FAPE, because while petitioner offered multiple experts who agreed that a FAPE was not provided, the school district failed to provide an expert who reviewed the IEP. In K.R. and J.R. ex rel. N.R. v. Vineland City Board of Education, EDS 2321-07, Final Decision (January 22, 2008), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ relied upon petitioners' experts to conclude that the school district failed to provide a FAPE because the student's IEPs were "meaningless" since they failed to account for specific information on the student's goals, objectives, and progress.

The process of determining which of the parties' witnesses are more credible was addressed by ALJ Strauss in In re Giglio, State-Operated Sch. Dist. of the City of Paterson, EDU 11457-03, Initial Decision (August 9, 2004), adopted, Comm'r (September 17, 2004), <http://njlaw.rutgers.edu/collections/oal/>:

The choice of accepting or rejecting the witness' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to

circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” In re Perrone, 5 N.J. 514, 521-522 (1950). See D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). Also, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952), certif. den., 10 N.J. 316 (1952) (citation omitted).

New Jersey’s “net opinion” rule contemplates that an expert’s opinion will be based upon facts or data. R. 703. An expert’s bare conclusions, unsupported by factual evidence or other data, are inadmissible as a mere “net opinion.” State v. Townsend, 186 N.J. 473, 494-95 (2006). However, expert testimony need not be given greater weight than other evidence nor more weight than it otherwise deserves in light of common sense and experience. In re Yaccarino, 117 N.J. 175, 196 (1989). Even if an expert makes an impressive witness, the fact-finder is not obliged to accept her opinion. State v. Carpenter, 268 N.J. Super. 378, 383 (App. Div. 1993); certif. den., 135 N.J. 467 (1994).

Here, petitioners argue that the district failed to meet its burden of proof because out of the four witnesses it offered at the hearing, three were fact witnesses (Buttiglier, Byron, and Markham) who “did not attempt to claim the proposed IEP and self-contained class were appropriate . . . ” and the testimony of the fourth (Rohrer) constituted a net opinion and a legal conclusion.

### **1. Buttiglieri’s testimony:**

Melissa Buttiglieri (Buttiglieri) is a general education teacher employed by the District. Buttiglieri was K.S.’s general education teacher for first grade during the 2013-2014 school year. She testified that K.S. was “very comfortable in the classroom which was nice and he was able to . . . build those relationships with his peers.” However, she explained that K.S. struggled with comprehension, he was easily distracted, and it

was hard for him to focus. (Buttiglieri T2 at T12:7-19.) Buttiglieri explained that she felt that the general education classroom was overwhelming for K.S. due to the large size and that he was having a hard time keeping up with the pace.

## **2. Byron's testimony:**

Lyndsay Byron (Byron) is a special education teacher employed by the District. Byron provided K.S. with in-class support in math, pullout resource support in math, and provided supplemental reading instruction to K.S. during the 2013-2014 school year when K.S. was in first grade. Byron recommended and worked with K.S. on a multisensory program called Touch Math to assist him with counting, adding, and subtracting. Byron testified that K.S. was successful using Touch Math and that it enabled him to do calculations independently. S.S. testified that Touch Math worked for K.S. and he made a lot of progress in math because of it. (Byron T2 at T65:7-23; S.S. T3 at T170:22-171:22.) Byron was also the special education teacher who provided supplementary reading instruction to K.S. During supplementary reading instruction, K.S. worked on being able to recall the details from small passages in sequential order and identifying fantasy versus what is real. (Byron T2 at T70:2-8.) Byron testified that she also felt that K.S. needed more support and that a smaller setting would be better for K.S. because there would be fewer distractions. (Buttiglieri T2 at T13:10-16; Byron T2 at T62:12-16.)

## **3. Markham's testimony:**

Colleen Markham (Markham) is a special education teacher employed by the District. If K.S. were to attend the District's proposed self-contained program during the 2014-2015 school year, Markham would have been K.S.'s teacher. Markham is a certified and highly experienced special education teacher who has been teaching the proposed self-contained class for almost ten years. Markham has training in Orton-Gillingham and Wilson multisensory reading instruction methods. (Markham T2 at T98:12-101:2.) Markham also has experience educating students with TBI. Markham explained how the same methods and strategies used with students with other types of disabilities have proved to be successful when educating students with TBI. (Markham

T2 at T147:4-150:8.) Markham also has experience in working with students with executive functioning issues. Markham addresses these issues in the classroom by having an organized and structured classroom routine, using visuals, and working on maintaining focus. (Markahm T2 at T101:6-104:2.) Markham utilizes a modified curriculum for kindergarten, first, and second grade. Scaffolding of instruction is used and higher-level thinking activities are provided to students with greater ability. (Markham T2 at T129:15-23, T145:1-12.) The students in the self-contained classroom have similar educational needs. (Markahm T2 at T152:22-153:2.)

Markham explained that everything recommended in petitioners' expert's (Mishkin) report exists in her classroom, including the recommended memory techniques, visual-processing strategies, and attentional strategies. (P-18 at 14-15; Markham T2 at T116:12-120:11.) The classroom paraprofessionals included a certified teacher and certified substitute teachers. The paraprofessionals are highly experienced and received training on working with students with multiple disabilities and their role in the classroom. (P-35; Markham T2 at T106:15-107:25; Mishkin T4 at T116:2-14.) The IEP continued to provide K.S. with an individual aide to support K.S.'s academic needs and maintain his safety within the school building. (J-23 at 27-28.)

#### **4. Rohrer-Orozco's testimony:**

Ruth Rohrer-Orozco (Rohrer-Orozco) is K.S.'s District case manager. She is a school psychologist and member of the Child Study Team. Rohrer-Orozco is responsible for coordinating K.S.'s services, coordinating meetings, and ensuring that reevaluations and annual review meetings are held in accordance with the required timelines. She is also responsible for maintaining K.S.'s student file. Rohrer-Orozco was responsible for implementing and monitoring the implementation of K.S.'s IEP. She testified that the self-contained program was recommended for K.S. because it was the least restrictive environment for him. When K.S. first entered the District, he was placed in the general education setting with supports, and then was moved to a more restrictive setting when he received pullout instruction. However, even with this level of support there remained concerns with K.S. ability to keep up with the pace of

instruction and increasing difficulty of the curriculum in the general education setting due to his academic weaknesses. (Rohrer-Orozco T1 at T106:3-107:12.)

Based upon the evidence produced and the testimony presented, I **FIND** that the district demonstrated that its May 16, 2014, IEP was appropriate for K.S., and that it was an appropriate IEP in the least restrictive environment. I **FIND** that petitioners' objections related to their belief that there was a "better" option for their child in the Winston Preparatory School. However, the facts do not support their contention that the plan that was offered was inappropriate for K.S. In fact, respondent made repeated adjustments to the program to accommodate K.S.'s needs including physically modifying the school building along with accommodating the academic and therapeutic needs of K.S. Those adjustments were consistent with the expert evaluations and with the testimony of petitioner's witnesses.

### **LEGAL ANALYSIS AND DISCUSSION**

Pursuant to the Individuals with Disabilities Education Act (IDEA), U.S.C.A. §§ 1400 to 1484, federal funding for New Jersey's special education programs is contingent on the state's providing a FAPE to all age-eligible disabled students. Hendrick Hudson Central Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 695 (1982); 20 U.S.C.A. § 1412(a). Since New Jersey receives federal funding, the federal requirements are codified at N.J.S.A. 18A:46-1 to -55 and N.J.A.C. 6A:14-1.1 to-10.2. The phrase FAPE is defined in 20 U.S.C.A. § 1401(9) as 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 school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under [20 U.S.C.A. § 1414(d)].

A FAPE includes “educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” Rowley, supra, 458 U.S. at 188-89, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701. The term “special education” means “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education.” 20 U.S.C.A. § 1401(29)(A), (B).

The disabled student’s Individualized Education Plan (IEP) is the “‘centerpiece’ of the IDEA’s system for delivering education to disabled children.” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); See 20 U.S.C.A. § 1412(a)(4). “An IEP consists of a specific statement of a student’s present abilities, goals for improvement of the student’s abilities, services designed to meet those goals, and a timetable for reaching the goals by way of the services.” Holmes ex rel. Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 589 (3d Cir. 2000) ((citing 20 U.S.C.A. § 1401(a)(20)). The IEP team consists of the student’s parents and teachers, a curriculum specialist or representative from the local school district, and, if requested, a person with special knowledge or expertise regarding the student. See 20 U.S.C.A. § 1414(d)(1)(B). A FAPE provides a disabled student access to a “meaningful” education. Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. For example, in Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-84 (3d Cir. 1988), the Third Circuit noted that that the IDEA “calls for more than a trivial educational benefit” and requires a satisfactory IEP to provide “significant learning,” and it must confer a “meaningful benefit” And “[w]hen students display considerable intellectual potential, the IDEA requires a great deal more than a negligible [benefit].” Id. at 182. Courts have consistently held that “at a minimum, ‘[t]he IEP must be reasonably calculated to enable the child to receive meaningful educational benefits’ in light of the student’s intellectual potential.” Chambers v. Sch. Dist. of Philadelphia Bd. of Educ., 587 F.3d 176, 182 (3d Cir. 2009) (quoting Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004)). Moreover, there is no bright-line rule to determine the amount of benefit required of an appropriate IEP, and a “student-by-student analysis that

carefully considers the student's individual abilities" is required." Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 248 (3d Cir. 1999). Thus, the appropriateness of an IEP is determined with an analysis that carefully considers the student's individual abilities. Ibid.

In addition to the appropriateness of the IEP, the student must be educated in the least restrictive environment. 20 U.S.C.A. § 1412(5)(B); 34 C.F.R. § 300.550 to-300.556. "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, supra, at 535. Unless the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, students must be educated with students not disabled. Oberti, supra, 995 F.2d at 1213. Here, petitioner alleges both a procedural violation and a substantive violation.

I **CONCLUDED** that the district offered an "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."

## **II. Procedural violation:**

### **a. Violation of N.J.A.C. 6A:14-4.1(k).**

A due process challenge can allege substantive and/or procedural violations of the IDEA. If a party files a petition on substantive grounds, the Administrative Law Judge (ALJ) must determine whether the student received a FAPE. N.J.A.C. 6A:14-2.7(k). If a party alleges a procedural violation, an ALJ may decide that a student did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) caused a deprivation of educational benefits. Ibid. N.J.A.C. 6A:14-4.1(k) provides as follows:

The district board of education shall provide the parent with the opportunity to observe the proposed educational placement, including the general education setting, special class programs and out-of-district placements in a program operated by another district board of education or a private school placement, prior to implementation of the IEP.

Here, petitioners argue that the district failed to allow them an opportunity to participate in the decision-making process regarding the provision of a FAPE to K.S. by failing to allow them to observe the proposed placement and to talk with Markham about her experience with students with TBI.

S.S. requested the opportunity to observe the proposed self-contained class. Rohrer-Orozco contacted her supervisors concerning the request. Shortly after this request, petitioners filed for mediation/due process. (Rohrer-Orozco T1 at T167:10-168:4, T172:4-9, S.S. T3 at T247:3-19.) Rohrer-Orozco was asked a series of questions as to whether she was told that the parents could not set up an observation or meet with Markham. (1T167:17-175:1.) The answer was that she did not receive “clearance” to authorize either. She also testified that she did not have any other information at the IEP meeting, other than it could include up to twelve students in grades K-2. (1T166:15-25.) It is clear that the petitioners had a limited time in which to conduct the observation, meet with Markham, and/or file their due process petition. It is not clear that respondent took affirmative action that “significantly impeded” their opportunity. There are allegations that petitioners’ failed to follow up on their request and that respondent failed to “reach out to them” to arrange for an observation even after the petition was filed.

I am not persuaded that respondent took affirmative action to significantly impede the opportunity for petitioners to observe the proposed self-contained class. Therefore I **CONCLUDE** that did not violate petitioners’ procedural due process rights.

### **III. Substantive Violations:**

**a. Reimbursement for tuition and related expenses for placing K.S. at the Winston Preparatory School.**

In New Jersey, the issue of reimbursement for unilateral placements by parents is governed by N.J.A.C. 6A:14-2.10 which provides as follows:

(a) Except as provided in N.J.A.C. 6A:14-6.1(a), the district board of education shall not be required to pay for the cost of education, including special education and related services, of a student with a disability if the district made available a free, appropriate public education and the parents elected to enroll the student in a nonpublic school, an early childhood program, or an approved private school for students with disabilities.

(b) If the parents of a student with a disability, who previously received special education and related services from the district of residence, enroll the student in a nonpublic school, an early childhood program, or approved private school for students with disabilities without the consent of or referral by the district board of education, an administrative law judge may require the district to reimburse the parents for the cost of that enrollment if the administrative law judge finds that the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a court of competent jurisdiction or an administrative law judge according to N.J.A.C. 6A:14-6.5 for placements in unapproved schools, even if it does not meet the standards that apply to the education provided by the district board of education.

(c) The parents must provide notice to the district board of education of their concerns and their intent to enroll their child in a nonpublic school at public expense. The cost of reimbursement described in (b) above may be reduced or denied:

1. If at the most recent IEP meeting that the parents attended prior to the removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the IEP proposed by the district;

2. At least 10 business days (including any holidays that occur on a business day) prior to the removal of the student

from the public school, the parents did not give written notice to the district board of education of their concerns or intent to enroll their child in a nonpublic school;

3. If prior to the parents' removal of the student from the public school, the district proposed a reevaluation of the student and provided notice according to N.J.A.C. 6A:14-2.3(g) and (h) but the parents did not make the student available for such evaluation; or

4. Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(d) The cost of the reimbursement for enrollment in a nonpublic school shall not be reduced or denied if the parents failed to provide the required notice described in (c)(1) and (2) above if the conditions in (d)(3) and (4) below are met, and, at the discretion of a court or an administrative law judge, may not be reduced if the conditions in (d)(1) and (2) below are found to exist:

1. The parent is illiterate and cannot write in English;

2. Compliance with the notice requirement in (c)(1) and (2) above would likely result in physical or serious emotional harm to the student;

3. The school prevented the parent from providing such notice; or

4. The parent had not received written notice according to N.J.A.C. 6A:14-2.3(e) and (f) of the notice requirement that is specified in (c)(1) and (2) above.

[Emphasis added.]

Parents who unilaterally change their child's placement during the pendency of IDEA review proceedings, without the consent of state or local school officials, do so at their own financial risk. Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284, 293 (1993). Under the Florence standard, reimbursement is appropriate if (1) the court determines the student's IEP is inappropriate and (2) the student demonstrates that the private placement he seeks is proper. Ibid. A private placement may be proper if it is appropriate and provided in the least restrictive educational environment. See Oberti, supra, 995 F.2d at 1213. To

meet the Florence standard, a disabled student is not required to demonstrate that he cannot be educated in a public setting. Here, petitioners disagree with the district's proposed IEP plan to transition K.S. back into district-placement. They argue that K.S. should be placed in an out-of-district at the Winston Preparatory School.

I **CONCLUDE** that district made a free, appropriate public education available to K.S. I **CONCLUDE** that petitioners have not demonstrated that the previously approved or the proposed IEP's were inappropriate or that the private placement is proper. The evidence shows that the placement does not incorporate any of the standard common core curriculum in its program for K.S. Further, K.S.'s teacher does not hold any of the teaching certifications held by the instructors proposed in the IEP. Petitioners continue to provide additional services privately; some of which were proposed in the IEP.

Lois Mishkin is the learning disability teacher consultant and speech language therapist that petitioners hired for the purpose of litigation based on a referral from their attorney. She was qualified as an expert LDT-C, a speech language therapist, and in treating children with brain injuries. She testified that the IEP set forth appropriate accommodations and modifications for K.S. (J-23 at 23-25; Mishkin T4 at T122:1-17.)

Mishkin testified that the District's program was inappropriate as compared to Winston Preparatory School because at Winston Preparatory School students were grouped by skill level, not by grade or age. However, in the District's proposed self-contained classroom, students are also grouped by skill level. Additionally, Mishkin's notes indicated that she was informed by Winston Preparatory School that there are no more than three grades within a group. This is the same as the District's proposed self-contained classroom. (Markham T2 at T123:17-125:14, T153:6-154:3; Bezsyloko T3 at T80:1-25; Mishkin T4 at T106:22-107:10.)

Mishkin acknowledged that the same deficits K.S. had when he first started at Winston Preparatory School remained after attending Winston Preparatory School for an entire school year. (Mishkin T4 at T67:14-17.) Mishkin testified that any of the recommendations in her report could be implemented within a public school district. (Mishkin T4 at T127:15-16.)

I **CONCLUDE** that respondent has met its burden of proof. I therefore **CONCLUDE** that petitioners are not entitled to the reimbursement of the costs associated with their unilateral placement of K.S. in the Winston Preparatory School because the proofs submitted fail to establish the necessary elements for such relief under the law. Specifically, respondent has met its burden of proof that it provided and offered FAPE.

**ORDER**

For the foregoing reasons, petitioners' request for relief is **DENIED**.

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

May 18, 2016 \_\_\_\_\_

DATE

\_\_\_\_\_  
**LELAND S. McGEE, ALJ**

Date Received at Agency

\_\_\_\_\_  
May 18, 2016

Date Mailed to Parties:

\_\_\_\_\_

lr

**APPENDIX**

**Witnesses**

**For Petitioner:**

Jason Campbell  
Trudy Bier  
Scott Bezsylo  
Lois Mishkin

**For Respondent:**

Ruth Rohrer-Orozco  
Colleen Markham  
Lyndsay Byron  
Melissa Buttiglieri

**Exhibits**

**Joint:**

- J-1 K.S. Meeting Notice dated March 23, 2012
- J-2 Letter from Dana Gellis to S.S. enclosing evaluation plan dated April 2, 2012
- J-3 Initial Evaluation Plan dated March 30, 2012
- J-4 Confidential Psychological Evaluation by Katrina Whitman dated June 21, 2012
- J-5 Physical Therapy Observation/Consultation by Jolene Jurkovic dated June 1, 2012
- J-6 Pediatric Occupational Therapy Update by Jason Campbell dated June 2012
- J-7 Report by Dr. Abba L. Cargan, Pediatric Neurologist dated June 7, 2012
- J-8 Occupational Therapy Report by Cathryn Derham dated June 2012
- J-9 Social History by Gail Derivan dated July 2012
- J-10 Letter from Dana Gellis to S.S. Classification Conference Notice dated June 26, 2012

- J-11 Initial Eligibility Determination dated July 11, 2012
- J-12 Initial IEP dated July 11, 2012
- J-13 Initial IEP letter from Dana Gellis to S.S. dated July 31, 2012
- J-14 Letter from Ruth Rohrer to S.S. re: Annual Review/Reevaluation Meeting Notice dated March 6, 2013
- J-15 Annual Review IEP June 7, 2013
- J-16 Letter from Ruth Rohrer to S.S. enclosing 2013-2014 IEP dated June 29, 2013
- J-17 Progress Report for goals in June 2013 IEP - 1<sup>st</sup> Marking Period
- J-18 Evaluation Plan dated November 22, 2013
- J-19 Amended IEP dated December 5, 2013
- J-20 Email from S.S. to Ruth Rohrer enclosing Jane Healey, Ph.D.'s Report May 1, 2014
- J-21 Psychoeducational and Neuropsychological Evaluation by Jane Healey, Ph.D. dated March 2014
- J-22 Reevaluation Eligibility Determination dated May 16, 2014
- J-23 Annual Review IEP dated May 16, 2014
- J-24 Letter from S.S. to Ruth Rohrer requesting additional testing dated May 28, 2014
- J-25 Letter from Ruth Rohrer to S.S. dated May 30, 2014
- J-26 Email from Ruth Rohrer to Linda Mithaug, Rebecca Ross, Jennifer Finnerty dated June 4, 2014
- J-27 Notes of telephone conversation with S.S. dated June 4, 2014
- J-28 Progress Report for 3 marking periods 2013-2014
- J-29 Report Card 2013-2014
- J-30 Letter from S.S. to District notifying are placing Winston Preparatory School and seeking reimbursement dated August 4, 2014

For Petitioner:

- P-1 S.S.'s notes from meeting with Dr. Healey
- P-2 S.S.'s notes of IEP meeting dated May 2014
- P-3 Medical Background for K.S.
- P-4 Tuition Statement dated December 8, 2014

- P-5 E-mail from S.S. with mileage for transportation through December 11, 2014, and December 18, 2014
- P-6 Letter/Report from Dr. Abba L. Cargan dated December 1, 2014
- P-7 Physical Therapy Assessment by Trudy F. Bier, P.T. dated January 10, 2013
- P-8 Physical Therapy Assessment by Trudy F. Bier, P.T. dated May 2014
- P-9 Physical Therapy Update Report by Trudy F. Bier dated January 2015
- P-10 Pediatric Occupational Therapy Update dated January 2015
- P-11 Invoices for Occupational Therapy services dated September through December 2014
- P-12 Invoices for Physical Therapy Services dated September through December 2014
- P-13 Winston Preparatory School Enrollment Agreement for 2014-2015 School Year dated July 25, 2014
- P-14 Winston Preparatory School Progress Report for K.S. dated November 2014
- P-15 Certificate of Accreditation granted to The Winston Preparatory School
- P-16 Letter from Mark W. Lauria Ph.D., NYS AIS to Scott Bezsylo, Executive Director, Winston Preparatory School dated May 29, 2014
- P-17 C.V. of Lois Mishkin, M.A. CCC/LDTC
- P-18 Lois Mishkin's December 12, 2014 Report and December 12, 2014
- P-19 E-mail from Erica Piche to Lois Mishkin dated January 5, 2015
- P-20 C.V. of Jane M. Healey, Ph.D.
- P-21 Email from Kristyn Keely to S.S. re: what (you) are doing in Focus Sessions, October 2014
- P-22 WIT 2 Interim Math Assessment dated April 13, 2015
- P-23 Credentials of Scott Bezsylo, M.A. Executive Director; Greg Koehlert, Head of School; Erica Piche, Director of Admissions, Undated
- P-24 Winston Preparatory School Brochure, Undated
- P-25 Winston Preparatory School's "Continuous Feedback System: Individualized by Design" dated May 3, 2015
- P-26 Science Behind What Winston Preparatory School Does dated May 4, 2015
- P-27 Meet Winston Preparatory School Students dated May 4, 2015

- P-28 Credentials of teachers working with K.S. at Winston Preparatory School, Undated
- P-29 Winston Preparatory School Report Card - Fall 2014
- P-30 Winston Preparatory School Progress Report dated March 10, 2015
- P-31 Working Samples from Winston Preparatory School
  - A. Alphabet Sequencing
  - B. Decoding work highlighting progression from symbol-sound relationship to syllable types
  - C. Comprehension Activities
  - D. Math Activities 2014-2015
- P-32 Winston Preparatory WIAT III Assessment dated May 2015
- P-33 Writing Sample (Dictated) dated May 11, 2015
- P-34 Comparison 5/15 WIAT with Dr. Jane Healey's Assessment dated May 11, 2015
- P-35 Lois Mishkin's notes from her Watchung School Observation dated October 9, 2014
- P-36 Winston Preparatory School Progress Report dated June 29, 2015

For Respondent:

- R-1 Progress Report 2012-2013 School Year
- R-2 DRA2 Level 4 Assessment dated March 11, 2013
- R-3 DRA2 Level 6 Assessment dated June 6, 2013
- R-4 DRA2 Level 4 Assessment dated June 6, 2013
- R-5 DRA2 Level 6 Assessment dated October 22, 2013
- R-6 DRA2 Level 10 Assessment dated February 10, 2014
- R-7 DRA2 Level 14 Assessment dated May 13, 2014
- R-8 DRA2 Level 12 Assessment dated May 16, 2014
- R-9 DRA2 Level 8 Assessment dated May 27, 2014
- R-10 First Grade Math Assessments
- R-11 Teacher Recording Sheet for First Grade Sight Words
- R-12 First Grade ELA Inventory
- R-13 First Grade Reading and Writing Units 1-3 Assessment
- R-14 Credentials of District Staff

- R-15 Report Card 2012-2013 School Year
- R-16 Letter from Katrina Whitman dated April 5, 2012
- R-17 Revised Initial Evaluation Plan with Signed Consent dated May 3, 2012
- R-18 E-mails between Ruth Rohrer and Petitioners dated December 5, 2013, and  
December 21, 2013
- R-19 Ruth Rohrer's Notes