State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
(CONSOLIDATED)

TINTON FALLS BOARD OF EDUCATION,	OAL DKT. NOS. EDS 01340-17
Petitioner,	and EDS 09479-17
v.	AGENCY DKT. NOS. 2017 25575
B.K. ON BEHALF OF C.K.,	and 2018 26597
Respondent.	

B.K. ON BEHALF OF C.K.,	OAL DKT. NOS. EDS 05040-17
Petitioner,	and EDS 09478-17
v.	AGENCY DKT. NOS. 2017 25852
TINTON FALLS BOARD OF EDUCATION,	and 2017 26516
Respondent.	

Eric L. Harrison, Esq., for Tinton Falls Board of Education (Methfessel & Werbel, attorneys)

Michael I. Inzelbuch, Esq., for B.K. o/b/o C.K.

Record Closed: January 30, 2018 Decided: March 13, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Petitioner B.K. on behalf of his daughter C.K. requested a due process hearing seeking an appropriate placement to provide C.K. with a free appropriate public education (FAPE) at her present location at the Special Children's Center (SCC) located in Lakewood. (R-14.) Petitioner also seeks reimbursement for tuition for school years 2016-2017 and 2017-2018 from the Tinton Falls Board of Education (Board or Tinton Falls) and a determination that the Board violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. and Section 504 of the Rehabilitation Act of 1973, as they apply to C.K. The Board alleges that it can provide FAPE in the least restrictive environment at Tinton Falls and that they provided FAPE based on the information they had at the time the IEPs were created. Tinton Falls filed a petition for due process on January 4, 2017, seeking a determination that B.K. and C.K. were not entitled to independent educational evaluations which were requested from their attorney. (R-3, R-2.) On March 7, 2017, petitioner B.K. on behalf of C.K. filed a petitioner seeking a determination that the IEP offered by Tinton Falls when C.K. enrolled in the School District denied her an appropriate placement and sought an order compelling the District to place C.K. at the Special Children's Center (SCC) in Lakewood, ordered reimbursement for the cost of the tuition and other relief. (R-1 and R-14.) On June 19, 2017, the petitioners filed a second petition for due process challenging an IEP offered by the District on May 26, 2017, and seeking relief similar to that set forth in their first due process petition, in addition to an award of independent evaluations. On July 3, 2017 the District filed a combined Answer and Cross-Petition seeking a determination that the petitioner should not be awarded independent educational evaluations and that the District's finalized IEP of June 21, 2017, offered a free appropriate public education to C.K. in the least restrictive environment appropriate to the student's needs.

PROCEDURAL HISTORY

The New Jersey Department of Education, Office of Special Education Programs, transferred the matters to the Office of Administrative Law (OAL) as contested cases. The undersigned entered an Order of Consolidation on December 8,

2017, in accordance with the parties' agreement that the matters should be consolidated. The OAL scheduled and held hearings on December 12 and 15, 2017. At the hearings, two witnesses presented testimony: Dr. Mary Logan Foard (C.K.'s case manager), and petitioner B.K., father of C.K. The parties provided written closing summations and briefs and the record closed on January 30, 2018.

FACTUAL DISCUSSION

The parties do not dispute that C.K., age four at the time of the hearing, is eligible for special education as "preschool disabled" and suffers from Prader-Willi Syndrome (PWS). C.K. is a multiply disabled child who is primarily diagnosed with PWS. PWS is a genetic disorder with severe hypotonia and feeding challenges. Another symptom of PWS is temperature dysregulation. In attempting to address the medical concerns, C.K., with a doctor's recommendation, was looked after to monitor her temperature.

The above constitute the main areas of concern for the proper placement of C.K. in the educational setting. C.K. was attending public school while residing in Jackson Township with her mother. The Jackson School District (Jackson) performed evaluations on C.K. in the fall of 2015. Jackson offered and created an IEP on December 18, 2015, and had an annual review of the IEP on April 19, 2016. Jackson placed C.K. in a full-day preschool disabilities class and provided PT, OT, and speech language therapy as well as ABA instruction. The April 2016 Jackson IEP had a special alert about the concern of the parent regarding C.K.'s issues with temperature regulation.

In the summer of 2016, C.K. and her sister moved in with their father in his home in Tinton Falls. C.K. was registered for school in Tinton Falls on August 29, 2016, and was referred to a Child Study Team (CST) IEP meeting, which took place on September 6, 2016. The CST accepted the evaluation reports from Jackson and accepted Jackson's IEP, with adjustments to work with Tinton Falls school schedules. At this meeting, B.K. requested the placement of C.K. at the SCC in Lakewood. Foard advised that the Tinton Falls District believed that it could implement the Jackson IEP.

On September 8, 2016, Foard emailed B.K. advising him that additional medical paperwork would be needed in order to fully explore the medical limitations for C.K. B.K. and his daughter returned to the Atchison School on September 9, 2016, at which time B.K. signed a form agreeing to have the IEP services start before fifteen calendar days had expired. B.K. stated that he signed this form based on the District's position that it had to be signed prior to touring the Atchison School. Thereafter, a tour was completed by B.K. and C.K. Later on September 9, 2016, B.K. informed the District that he was rejecting the Tinton Falls program, not sending C.K. to the Tinton Falls school on September 12, 2016, and would be unilaterally placing C.K. at SCC in Lakewood.

On September 28, 2016, B.K. wrote to Foard stating that he would be submitting a medical note to support the concerns raised by him regarding C.K.'s issues surrounding PWS. B.K. also stated in his letter that Dr. Harwood agreed that as a result of C.K.'s serious life-threatening medical condition, it is imperative that an air-conditioned environment be provided for C.K. at all times she was in school. B.K. also asked that the District reconsider placing C.K. at SCC. B.K. then confirmed the meeting for September 29, 2016. After this email, Foard then cancelled the meeting set for September 29, 2016.

In October 2016, Lorien King, a genetic counselor, and Dr. Gupta at the Prader-Willi Center in Paterson, sent a letter which stated in part "we recommend that precautions are taken to ensure that [C.K.'s] temperature is kept as stable as possible." On May 8, 2017, the attorney for the District sent a letter to B.K.'s attorney requesting two signed releases permitting an exchange of information and documentation between the District and the doctors. On May 9, 2017, Dr. Harwood and Ms. King wrote a letter which stated in part that: "we recommend that precautions are taken to ensure that [C.K.'s] temperature is kept as stable as possible. Specifically, she needs central air at all times including the classroom, gym and hallways, etc. Please feel free to contact our office with any questions or concerns."

On May 11, 2017, authorizations signed by B.K. were provided to the District's attorney. An IEP meeting took place on June 8, 2017, at which time the District offered an IEP calling for the location of C.K.'s education "to be determined" for the 2017-2018

school year. This IEP meeting was attended by several staff members from SCC. The IEP offered placement in a preschool disabled class with supports and services and related services consistent with C.K.'s program at the SCC. As the District was in possession of a medical note documenting the need for "central air at all times including the classroom, gym and hallways," the IEP quoted that note. On November 21, 2017, the District received the complete medical records for C.K. from the Prader-Willi Center.

On August 16, 2017, B.K. sent a letter to the District stating that he intended to enroll C.K. at the SCC for the 2017-2018 school year and requesting full reimbursement from the District and an IEP incorporating such placement. The District rejected amending the IEP in this regard. After visiting the Wall School District, it was determined that the Wall program did not fit C.K.'s needs. The District continued to look for an appropriate program with air conditioning, including Holmdel. Ultimately, Holmdel did not offer a placement for C.K. in its school.

Testimony

Dr. Mary Logan Foard

Dr. Mary Logan Foard (Dr. Foard) is a school psychologist with over forty years of experience and testified as an expert in school psychology and special education. Dr. Foard testified regarding C.K.'s registration in late August 2016 and a meeting held on September 6, 2016. Prior to this meeting, Dr. Foard received and reviewed the previous school's evaluations and IEP from Jackson. At this meeting B.K. stated that he was interested in the SCC in Lakewood. Dr. Foard replied that an out-of-district placement would be offered only in the event that the District could not meet the student's needs in the District. Dr. Foard further recalled a discussion about C.K.'s feeding issues. After review of the records from Jackson, the District's CST determined to offer an interim IEP identical to the Jackson IEP with some minor adjustments. B.K. responded that he was not yet willing to sign the IEP and Dr. Foard suggested that he visit the school and tour the classrooms which B.K. did on September 9, 2016. At this time, C.K. was in a preschool class with a ratio of one teacher and one aide for every eight students. The classroom which C.K. would receive her educational instruction has

a window air-conditioning unit. In addition, there is no air conditioning in the gym, however, gross motor work would be done in the classroom. There is air conditioning in every room where C.K. would receive services. The IEP from Jackson noted under "Concerns of the Parent, April 2016" as showing that C.K. struggles with temperature regulation. Foard stated that she believed that the District could offer comparable educational services as provided in Jackson. Tinton Falls would have her cool off by giving her water and wearing a hat. Dr. Foard stated that she had one previous student with PWS. This previous student was educated in the District's building. At the school meeting with B.K., all CST staff members were present. At this meeting B.K. did mention that he was interested in a school in Lakewood.

Based on the Jackson IEP, Tinton Falls created an "Interim IEP, Tinton Falls." They then addressed changes to the IEP to reflect how things are done in Tinton Falls. B.K. did not sign the Interim IEP as he wanted more information on it.

After C.K. went to the preschool class, B.K. and Dr. Foard went to the nurse's office, where the nurse represented that she worked with a student with PWS before and that she would work closely with staff in order to ensure that proper accommodations would be provided to C.K. At this time, both feeding and temperature regulation were discussed. The group also visited the therapy rooms, where speech, PT, and OT would be provided. The therapy rooms had their own bathrooms and air-conditioning unit. Foard was unable to remember if B.K. said anything about C.K.'s temperature regulation but he did mention his concerns about her feeding issues.

Foard stated that the classroom that C.K. would be set up in would be air conditioned by an installed window air conditioner. Foard was aware that the Atchison Elementary School did not have central air conditioning. Foard was not worried that the District would not meet C.K.'s medical needs. Foard was put on notice that they would need to adjust things to meet her needs. Foard stated that the PT, OT, and speech therapy rooms were all air conditioned. Foard did confirm that the gym at the District's school was not air conditioned. To address this, they were to provide services in the classroom. Foard did concede that the hallways did not have air conditioning. Foard said that the District did not have a lot of information about C.K.'s health risk going

outside. Foard did say that on this day, C.K.'s dietary restrictions and management of her temperature featured prominently in their discussion. They also visited the therapy rooms, both of which had a wall unit air conditioning. Foard testified that the rooms were cool when they visited. Foard did acknowledge that the school closed early on the day of the visit because they do not have central air conditioning in the building and most of the classrooms in the building do not have air conditioning. At the end of the visit, Foard had the impression that B.K. was going to send C.K. to Tinton Falls.

Thereafter, the District received a faxed letter (R-15) dated September 9, 2016, which requested placement at the Center For Education in Lakewood. The fact that Tinton Falls was dismissed early due to temperature gave him concerns with reference to C.K. temperature-related issues. B.K. requested an emergency IEP meeting on that date and that he will not be sending C.K. to the Atchison School on September 12, 2016. B.K.'s letter then advised that he was sending C.K. to the Center for Education in Lakewood and requested reimbursement. Other accommodations that would be provided was not having playground activities outside if it is very hot or hold the activities early in the morning instead of at mid-day. The District then offered September 15 to have an emergency IEP meeting. B.K. never responded to this meeting offer. B.K. did inform the District that he and C.K. met with an endocrinologist, Dr. Harwood, and that Dr. Harwood found that due to C.K.'s serious life-threatening medical condition, it was imperative that the school provide an air-conditioned environment at all times. Foard did not reconsider C.K.'s placement because she was looking for documentation from the doctor as to what the concerns were, which they did not have.

Thereafter, the District received a letter from the Prader-Willi Center at the St. Joseph's Children's Hospital, dated October 5, 2016. This letter was signed by Lorien Tambini King, a genetic counselor, and Punita Gupta, M.D. The letter stated that "For these reasons, we recommend that precautions are taken to ensure that C.K.'s temperature is kept as stable as possible." It was Foard's position that this letter confirmed what B.K. already said. The District then received a letter from B.K.'s attorney. (R-19.) This letter requested a response to the unilateral placement of C.K. Foard looked up the school where C.K. was placed, Center for Education (CFE). Foard

stated that she did not know very much about it. Foard stated that it was not her responsibility to observe C.K. at that school. Foard confirmed that CFE was an approved school. Foard had no criticisms of CFE. The letter from the attorney also requested independent evaluations of C.K. Foard stated that she felt that the CST could have re-evaluations because more than a year had passed since the last evaluations but that rather than go to an independent evaluation, they could just re-evaluate C.K. The District also sent an email to B.K. (R-20) stating that in response to the attorney's request for an IEP, the District offered a re-evaluation plan meeting for C.K. B.K. did not respond to this email. The District filed a due process petition on January 4, 2017. (R-3.) This due process petition sought a determination that IE were not warranted. Foard contacted B.K. to set up a meeting for an annual review for the IEP in March.

Foard stated that the first time that the District heard that C.K. needed to be educated in a school with central air conditioning was in May 2017. At that time the District received a different medical letter that took that position regarding air conditioning. This was different from the previous letter, which just emphasized keeping C.K. from getting overheated. The letter stated that "She needs central air at all times, including the classroom, gym and hallways." (R-28.) Foard stated that this letter required a change in perspective for C.K. This was the first time that they became aware that the District was required to think about a more globally air-conditioned building.

They were able to hold an IEP meeting on May 26, 2017, and they included placement in an air-conditioned building as the recommended program for the student. In fact, on May 22, 2017, the District sent a letter to CFE in order to include their input in the IEP. As such, the staff from CFE attended the IEP meeting. An IEP was generated as a result of the May 26, 2017, meeting. In the 2016-2017 school year placement, the District stated Atchison School, but for the 2017-2018 school year, the placement was to be determined. It was determined because the District had not figured out the right placement for C.K. to meet the student's medical and developmental needs.

Foard testified that the goals and objectives provided by the CFE were appropriate. The goals and objectives were consistent with what they were saying C.K. achieved. Based on everything presented at the meeting it was Foard's position that the educational services could have been provided to C.K. in a "public school" though not the Atchison School.

After making this decision regarding C.K.'s needs, the District looked for a placement in the least restrictive environment—which would be in their minds a public school including general education students. The District reached out to different districts with newer buildings that were likely to be air conditioned, including Wall and Colts Neck school districts. Foard told B.K. that they wanted to consider public school programs that could meet C.K.'s medical and educational needs. In a District's internal document (R-39) it confirms their position that "A.C. is needed in all school settings for medical reasons. Public school program will be sought first." They sought public school setting first because they always start with the least restrictive option first. They want the child in with general education students in order to facilitate general education participation.

The District contacted Colts Neck School District because they thought there was an opening in that district. However, Colts Neck received two transfer students and thus they did not have room for another student. The District also contacted Wall School District. They set up a visit in June but could not get B.K. to visit until September.

In June 2017, B.K. sent a letter to the District rejecting the IEP, requesting placement at CFE, reimbursement, and independent evaluations. (R-42.) There were two outside evaluations, dated April 26, 2017, done from the Whole Team Therapy in Lakewood. (R-22, R-23.) The documents were provided to the District's OT and PT staff for review. The District's attorney sent an email to B.K.'s attorney asking to attend an IEP meeting to discuss those evaluation and to consider a revision of the IEP. Foard received no response from the parent on this issue.

In addition, a letter was sent by Foard scheduling an IEP meeting for June 21, 2017. (R-43.) This was requested because the District had new information regarding the student. An IEP meeting was held on that date but B.K. did not attend this meeting. Based on this meeting no changes were made to the IEP.

Thereafter, B.K. sent a letter in August (R-54) stating that he is enrolling C.K. in the Lakewood School and seeks reimbursement of costs, tuition, related services, etc. In September, B.K. visited the Wall School with Cole and Foard. Wall did have an opening in their program, however, the Wall program was not educationally appropriate for C.K. It lacked a comprehensive ABA component.

The District continued to look for an appropriate placement for C.K., e.g., Holmdel. The District set up a visit to Holmdel and were advised that they had openings in their program. B.K. and Foard visited the Holmdel program on October 30, 2017. They scheduled and held an IEP meeting on November 28, 2017, with B.K. in attendance. A draft IEP was created as a result of that meeting. (R-73.) There was a discussion of placement at Holmdel at this meeting and keeping C.K. at CFE through December 2017. Thereafter, there was a final IEP. (R-74.) The day after the IEP meeting, B.K. sent a note rejecting the IEP. At one point in time, Foard received a copy of a subpoena served on Holmdel School District issued by B.K.'s attorney. (R-78.) Foard then received an email from Meryl Gill of Holmdel School District who conveyed the position that despite C.K. seeming to be a good fit in Holmdel, after further review it appears that Holmdel does not have appropriate facilities for this student and thus it could not offer a program to C.K. due to the limitations of its facility.

Foard then testified regarding seeing C.K. in a non-air-conditioned area when C.K. was at school with her dad at a back-to-school night for C.K.'s sister, K.K. K.K. was a kindergarten student at the District. This occurred in the first week of September 2017 and Foard described the school building as extremely warm. Foard stated that she ran into B.K. in the hallway when he was leaving the kindergarten room. Foard also stated that C.K. was in the cafeteria without air conditioning. Foard stated that C.K. was in that room for "over ten minutes."

It was Foard's opinion that the IEP offered to the student was appropriate based on the information possessed at the time they were issued. In addition, the IEP offered based on the information they had offered were appropriate programs in the least restrictive environment.

On cross-examination, Foard stated that FAPE requires education free and appropriate in the least restrictive environment. Foard stated that she wrote two IEPs for this student. The final IEP was created in May 2017. (R-37.) The CFE had four people attend the IEP meeting. Foard described these four people as helpful. They provided information about C.K.'s current levels of performance and providing goals and objectives. They also spoke about C.K.'s progress as part of her PLAAFP. Foard stated that they were forthcoming.

Foard stated that an IEP required a specific placement offered and that the IEP did not have such an offer. Foard acknowledged that C.K. attended CFE since September 2016. Foard never visited that school. The only exposure she had with C.K. was the tour B.K. and C.K. had in September 2016. They planned for the education for C.K. by relying on the teachers and therapists who are working on a daily basis with C.K. Foard based the IEP on information from the student's father, medical records, and SCC's staff. The second IEP stated "to be determined" as to placement. (R-48.)

Foard admitted in her testimony that the District has no placement for C.K. the next day. There was a third IEP that was dated November 28, 2017. (R-74.) The recommendation in that IEP was that C.K. should stay in SCC through January 2018. The District recommended SCC for the month of December 2017. The IEP did not state in the document that the SCC was recommended for December. Foard then stated that the recommendation was "not to move her." Foard then clarified that they recommended that C.K. stay there. Not saying that in the IEP was an oversight. In the IEP (R-74) the medical information is dated May 9, 2017. The special alert section stated: "C. is lactose intolerant. Due to her diagnosis she must follow a restricted diet. Parents have provided her food in the past, but father would like her to be able to buy lunch." It went on to state: "C. has a medically based difficulty with temperature

regulation. She requires close monitoring for hyperthermia and hypothermia. Her medical condition of Prader-Willi Syndrome also could lead to fatigue and a daily rest period if needed should be accommodated at school."

Foard stated that the District had the previous information from the Prader-Willi Center on or about October 5, 2016. There was also another IEP dated June 21, 2017, which did not reference the medical information of October 5, 2016. (R-48.) Both the letter from the Prader-Willi Center of October 5, 2016, and of May 2017 were included in the IEP of May 26, 2017. (R-37.) The medical alerts in R-37 and R-48 were identical. Foard stated that they received broad based characteristics from the earlier medical records (October 2016).

Foard admitted that she did not reach out to the Prader-Willi Center in order to get information. Foard relied on the October 5, 2016, letter from the Prader-Willi Center. Foard said that she spoke to B.K. about the daughter's temperature needs. At the meeting in September 2016 Foard asked about C.K.'s temperature needs. The first time Foard attempted to have a specific conversation about temperature control about C.K. was in May 2017.

Foard confirmed that SCC had an air-conditioned playground. Foard also admitted that she accepted the medical needs of C.K. Based on this position, the District sought an environment with central air conditioning. Foard also admitted that the Atchinson school does not have central air conditioning. Foard also admitted that Holmdel does not have central air condition in its hallways. Foard was in agreement based on the information from the doctor and the father that C.K. needs central air conditioning throughout the day in the hallways, gym, and cafeteria. The updated doctor's note does say that the child needs air conditioning in the hallways. In addition, C.K. had very low cognition levels. SCC reported to the District that C.K. was making progress at that school but that she still had significant needs.

Foard also testified about meeting B.K. and his daughters K.K. and C.K. at a back-to-school night. Foard confirmed that it was very warm on that evening in the school. Foard confirmed that B.K. came late to that event because Foard saw him in

the hallway. Foard stated that B.K. did sign in because she saw the sign-in sheet. Foard stated that the building was warm and not hot.

Foard also testified that C.K. was included with typical peers at SCC based on a discussion at the IEP meeting. The IEP also acknowledged that C.K. was educated in a temperature-controlled environment where her entire facility, including her class, playground, hallways, and lunch room have access to heat and central air conditioning. This environment would not have been provided in the District's school.

Foard said that she understood as of November 2017 that C.K. needed air conditioning throughout the school day. The letter she received stated that C.K. needed air conditioning in the hallways. The District was looking for a program which met those conditions. This was not noted in the IEP, which Foard characterized as an oversight.

On re-direct Foard stated that in order for C.K. to get FAPE, she needed air conditioning throughout the school. This was based on the May 2017 medical report from C.K.'s doctor.

B.K.

B.K. is the father of C.K. and is a New Jersey State Trooper as a Detective with the State Police. Toward the end of August 2016, B.K.'s two children were moved from Jackson School District to Tinton Falls School District. C.K. was registered with Tinton Falls on August 29, 2016. It was at this point that B.K. heard about SCC in Lakewood. B.K. was planning on sending his daughter to SCC in the ESY in 2016, but was unable to set up a meeting and thus did not send C.K. there over the summer or 2016.

The first IEP meeting in the District was on September 6, 2016. At this meeting, B.K. met Dr. Foard. B.K. was there with about seven people from the District. Dr. Foard advised B.K. about her role and the role of the District. They then discussed the IEP from Jackson and how the District would implement it. B.K.'s first impression of the school from Tinton Falls was that the room they were in was very warm, as it was a summer day. B.K. testified that is why he specifically brought up his concerns of C.K.'s

issue with temperature regulation. B.K. advised the District that C.K. had issues with being overheated on the school bus. B.K. stated that he told Foard that C.K. required a controlled air-conditioned environment. Foard did not advise B.K. that the District lacked air conditioning in certain areas. B.K. requested a tour of the school and the District could not accommodate him. B.K. also learned in the meeting that the District would not be able to provide transportation until the end of September. At the end of the meeting, B.K. said that he would not be signing the IEP and that he wanted to send his daughter to SCC.

In response to the question as to whether he let Foard know that C.K. needed air conditioning throughout the building, he responded: "Absolutely." Foard stated that the classroom was air conditioned. On September 8, 2016, B.K. contacted Foard to complete the registration process. B.K. also asked to visit the school in Tinton Falls. B.K. and C.K. then arrived at the school the morning of September 9, 2016. Foard presented B.K. with an IEP and stated to B.K. that he had to sign it prior to doing the tour. B.K. noticed that due to the extreme heat, C.K. was becoming irritable. B.K. and C.K. entered the classroom that C.K. would be assigned. B.K. stated that the conditions in the school were extremely hot. B.K. recalled that the doors to the school were open, but it was allowing hot air to enter the school throughout the hallways. B.K. said that the outside temperature on this date was ninety-five degrees. B.K. described the classroom as very warm as he stated that there was a "dismal" air conditioning unit in the window. Thereafter, Foard and B.K. met with the school nurse. B.K. explained to the nurse his daughter's condition. B.K. specifically told the nurse that C.K. had an issue controlling her temperature. The nurse explained that they had a former student with Prader-Willi Syndrome. B.K. advised the nurse, in response, that Prader-Willi is a spectrum and some kids have this issue and other kids do not.

B.K. stated that C.K.'s main issue is controlling her temperature. The nurse told B.K. that the District would take precautions. B.K. also went to the OT-PT room, which he also described as being warm. B.K. stated that the indoor temperature was at least eighty-five degrees. B.K. confirmed that the District closed the school early due to the indoor temperature. Foard explained to B.K. that the doors of the schools were open to pull out air for ventilation. Foard also confirmed that the gym and the cafeteria were not

air conditioned. As they walked back to the main office, B.K. noticed that C.K. was overheating. B.K. described C.K. as having red cheeks and sweating, which was unusual for her. Accordingly, B.K. carried C.K. due to her condition. After this visit, B.K. called the Prader-Willi Clinic and C.K.'s pediatrician. In addition, B.K. called SCC to set up a meeting and to explore the procedures for enrolling in that school.

On Monday, September 12, 2016, B.K. called Foard in order to set up a meeting. Foard advised that the September 12 was not good for her. Thereafter, they set up a meeting for September 29, 2016. The meeting on September 29 did not occur as Foard called B.K. or sent an email cancelling the meeting. Then B.K. wrote a letter to Foard (R-15) stating that he met with C.K.'s doctor, Dr. Harwood, from the Prader-Willi Clinic. The letter further stated that "Dr. Harwood agreed that due to C.'s life-threatening medical [condition] it is imperative that the school be able to provide air-conditioned environment at all times."

B.K. also looked at another letter from the Prader-Willi Center, dated May 9, 2017. (R-28.) This letter was produced for a settlement conference in order to address the issue as to what type of conditions C.K. would need to regulate her temperature. No one from the District asked B.K. to clarify the conditions that C.K. required. No one from the District asked B.K. to sign an authorization for medical records. Thereafter, authorizations were sent to B.K., which he signed and returned.

There was an email exchange with Ms. Cole from the District. (P-1.) The email was sent on July 27, 2017, from Cole to B.K. regarding setting up visits with other schools. B.K. responded on July 31, 2017. It was B.K.'s position that visiting schools when they are not in session was inappropriate because B.K. wanted to meet the teachers and see how the classroom operates. Cole responded by saying that school was in session during the summer in the ESY. However, based on B.K.'s position, they would seek to schedule a visit in September 2017. B.K. did visit Wall School District in September 2017. However, B.K. did not visit Colts Neck because there was no opening in the District. B.K. also visited Holmdel School District at the end of October 2017.

B.K. received a letter from John Russo, the superintendent of schools, dated May 15, 2017, which stated that the school had air conditioning in most classrooms throughout the district. Russo also advised the parents to monitor the daily forecast, dress children appropriately with lightweight clothing, and have the children hydrate. B.K. testified that the Jackson school attended by C.K. had an air-conditioned environment. Foard never asked B.K. to speak with Jackson School District about C.K.'s temperature regulation.

B.K. also testified about his attendance in September with C.K. for K.K.'s back-to-school night. B.K. stated that he, with his two daughters, arrived late. B.K. recalled that Foard passed him in the hallway. B.K. stated that it was hot on that evening. The District had fans operating in order to cool off the school and B.K. sat in front of the fan because of the heat. B.K. stated that he and his children left the meeting early because of the heat. The entire visit by B.K. lasted between five and ten minutes.

B.K. did authorize the release of school records to Wall and Colts Neck, dated June 8, 2017. Cole never asked to speak with C.K.'s doctors nor did she ask B.K. to sign an authorization. No one from the District ever asked for more information from C.K.'s doctors until May 2017.

B.K. testified that SCC had a lot of experience with students with Prader-Willi Syndrome. B.K. also felt as though C.K. made progress at SCC. C.K. loves going to school at SCC. B.K. drives C.K. to school every day.

On cross-examination B.K. admitted that he provided the following information to Jackson: "C. struggled with temperature regulation. It stems from a problem with her hypothalamus due to her medical diagnosis. If the back of her neck is hot she needs to be cooled down and given water. She needs to wear a hat outside." B.K. said that C.K.'s issues with her temperature were adequately addressed because there was air conditioning in the Jackson school. B.K. said that the hallways in the Jackson school were not overheated. B.K. had no concerns regarding the educational program for C.K. at the Jackson school.

When B.K. spoke to the nurse, the nurse spoke generally about taking precautions with C.K. The nurse said that she would take precautions in dealing with C.K.'s issues and that she had previous students with Prader-Willi Syndrome. B.K. stated that he did not believe that a classroom was the proper room for C.K. to have PT held.

By letter dated September 9, 2016, to Foard B.K. requested an emergency IEP meeting. (R-15.) In the letter, B.K. said that he was letting Foard know that he was sending his daughter, C.K., to SCC in Lakewood and he requested reimbursement. Thereafter, Foard emailed B.K. back on September 12, 2016, stating that she would be happy to schedule an IEP meeting to discuss B.K.'s concerns. (R-16.) There was a meeting scheduled for September 29, 2016, which was cancelled by Foard. It was B.K.'s position that the District would set up an IEP meeting after he unilaterally placed C.K. at SCC.

B.K. also received a note from Ms. King. (R-18.) This document was given to the District. In the document Ms. King and Dr. Gupta stated: "All individuals with PWS are at risk for temperature dysregulation. For these reasons we recommend that precautions are taken to ensure that C.'s temperature is kept as stable as possible." B.K. did admit that there was a difference between regulating C.K.'s temperature and controlling the temperature of a whole school. The last sentence of the document says: "We recommend that precautions are taken to ensure that C.'s temperature is kept as stable as possible." B.K. stated in an email that Dr. Harwood would be sending a note to the District. (R-16.) The letter from Dr. Harwood does not reference the need for air conditioning. (R-18.)

In the letter from Ms. King and Dr. Harwood, it states that: "Specifically, she [C] needs central air at all times, including the classroom, gym and hallways." (R-28.) This letter was dated May 9, 2017. After this letter, the District then started looking for a school districts with better air conditioning. B.K. sent an email to Foard on June 9, 2017, stating that he was not available to visit the Wall School District until June 23, 2017.

Credibility

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility 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).

In this case, petitioner argues that the Board did not provide FAPE, as it was predisposed to provide an in-district program, rather than an out-of-district program, or that C.K.'s medical concerns make her ineligible to attend an in-district school due to a lack of central air conditioning. The evidence suggests that the District agreed to place this child in an out-of-district school with more up to date air conditioning. In fact, the District made contact with three out-of-district school districts, i.e., Wall, Colts Neck, and Holmdel. For assorted reasons, each of these school districts were not appropriate or available for C.K.

The testimony of the Board's witness, Dr. Foard, is accepted as generally credible and truthful, this tribunal recognizes she is subject to a bias in supporting her judgment, and the uncertainties of repercussions from testimony that could be adverse to their employer. B.K.'s testimony is accepted as generally credible as well. B.K. clearly is a loving and well-thought-out parent who has the best interests of his daughter at heart.

The absence of central air conditioning in the District does create a sufficient reason to claim that FAPE is not provided by the Board and was basically agreed to by

Foard. Foard was in agreement that SCC was an appropriate placement for C.K. and that C.K. should have been placed out of district and made significant efforts to do so.

C.K. was a student with unique medical and educational concerns, and particular analysis was required. C.K. enrolled in SCC in September 2016 and the District knew little about this school and made no effort to observe the program, but invited and relied on staff from SCC when creating an IEP. The IEP meeting occurred in May 2017. The Board prepared the IEP in a timely manner, from the best available information provided.

FINDINGS OF FACT

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

1. B.K.'s daughter C.K., age four, has a diagnosis of Prader-Willi Syndrome. Her classification of "preschool disabled" entitles her to special education services.

2. The above diagnosis results in severe hypotonia and feeding difficulties. This condition also results in temperature dysregulation.

3. C.K. was attending public school as a preschooler while she was residing in Jackson.

4. The CST in Jackson performed evaluations prior to her turning three in the fall of 2015.

5. Jackson offered an IEP on December 18, 2015, and had a subsequent annual review IEP on April 18, 2015, and then another annual review IEP on April 19, 2016.

6. The Jackson IEPs placed C.K. in a full-day preschool disabilities class and provided PT, OT, speech language therapy, and Applied Behavioral Analysis instruction.

7. The Jackson IEP also had a "special alert" regarding C.K.'s difficulties with temperature regulation and listed the concerns of the parent regarding keeping C.K.'s temperature under control.

8. In the summer of 2016, B.K. placed C.K. at the District's school after the two children moved from living with their mother in Jackson to living with their father in Tinton Falls.

9. B.K. registered C.K. for school in Tinton Falls on August 29, 2016, when she was referred to the CST for an IEP meeting. The IEP meeting took place on September 6, 2016.

10. At the IEP meeting, the Tinton Falls school staff accepted the evaluation reports from Jackson.

11. The District attempted to implement the Jackson IEP in September 2016 based on the information it had at that time and called the IEP an "Interim IEP."

12. After attending the Tinton Falls school on September 9, 2016, B.K. became concerned about the ability of the Tinton Falls school to properly address C.K. temperature regulation issues and then placed C.K. in SCC.

13. The SCC school is completely air conditioned including the gym, cafeteria, and all classrooms.

14. On September 28, 2016, B.K. wrote Foard an email that he would be submitting a medical note to support the exact needs of his daughter.

15. In October 2016 Lorien King and Dr. Gupta wrote to the District recommending that precautions are taken to ensure that C.K.'s temperature is kept as stable as possible.

16. In a letter, dated May 6, 2017, Dr. Harwood stated that C.K. needs central air conditioning at all times including the classroom, gym, and hallways.

LEGAL ANALYSIS AND CONCLUSIONS

Petitioner's Request for Independent Educational Evaluations

Petitioner made a request to have independent evaluations completed for C.K. The Board denied this request and filed a due process complaint seeking an order denying such a request.

N.J.A.C. 6A:14-2.5(c) provides that a parent has the right to have an independent educational evaluation when the parent disagrees with an evaluation conducted by the school district, unless the district files a petition for due process and demonstrates that its evaluation is appropriate. N.J.A.C. 6A:14-2.5(c) states:

> (c) . . . A parent may request an independent evaluation if there is disagreement with any assessment conducted as part of an initial evaluation or a reevaluation provided by a district board of education. . . . .
>
> 1. Such independent evaluation(s) shall be provided at no cost to the parent unless the school district initiates a due process hearing to show that its evaluation is appropriate and a final determination to that effect is made following the hearing,
>
> i. Upon receipt of the parental request, the school district shall provide the parent with information about where an independent evaluation may be obtained and the criteria for independent evaluations according to (c)2 and 3 below. In addition, the school district shall take steps to ensure that the independent evaluation is provided without undue delay; or

> ii. Not later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request the due process hearing.
>
> 2. Any independent evaluation purchased at public expense shall:
>
> i. Be conducted according to N.J.A.C. 6A:14-3.4; and
>
> ii. Be obtained from another public school district, educational services commission, jointure commission, a clinic or agency approved under N.J.A.C. 6A:14-5, or private practitioner, who is appropriately certified and/or licensed, where a license is required.

In this case, there is no dispute that C.K. received a complete set of educational evaluations from the Jackson CST in the fall of 2015. The Tinton Falls CST accepted those evaluations upon C.K.'s enrollment in the Tinton Falls School District.

The only witness who testified regarding the quality of the evaluations with credibility and as an expert was Dr. Foard. Dr. Foard stated that the Jackson evaluations were accurate and were combined with the progress reports from SCC. It was Dr. Foard's position that no further formal evaluations were necessary for C.K.

On balance, the petitioner presented no credible evidence at the hearing to support his position that independent educational evaluations were needed. Based on the above, the evidence presented at the hearings support the District's position that the demand for independent evaluations made by the petitioner should be denied. I, therefore, **CONCLUDE** that the due process petition filed by the District requesting a denial of the petitioner's demand for such evaluations should be affirmed. The petitioner's demand for independent evaluations should be denied.

IEPs and Providing FAPE to C.K.

The IDEA provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982). One of purposes of the IDEA is "to ensure that all children with

disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public-school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court has construed the FAPE mandate to require the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at 203. New Jersey follows the federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." The Rowley standard the United States Supreme Court recently questioned in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____ (2017), March 22, 2017, 15-287 cert. from 10th Circ. Ct. of Appeals, the Supreme Court remanded the case for further proceedings consistent with its decision. The Supreme Court determined that a school district must show a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his (the student's) circumstances. This standard does not appear applicable here, as the IEP proposed sets forth a comparative educational experience to the one C.K. is presently receiving.

Toward this end, an IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C. § 1414(d)(2) and (4); N.J.A.C. 6A:14-3.7. A complete IEP must contain a detailed statement of annual goals and objectives. N.J.A.C. 6A:14-3.7(e)(2). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general-education curriculum and "be measurable" so both parents and educational personnel can be apprised of "the expected level of achievement attendant to each goal." Ibid. Further, such "measurable annual goals shall include benchmarks or short-term objectives" related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The New

Jersey Supreme Court has recognized that "[w]ithout an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP." Lascari, 116 N.J. at 48.

In this matter, the appropriateness of the IEP must be judged against the information supplied to it or available at the time the IEP is offered. "The measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not some later date . . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." Carlisle Area Sch. v. Scott P. ex rel. Bess P., 62 F.3d 520, 535 (3rd Cir. 1995), amended (Oct. 24, 1995); Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3rd Cir. 1993).

In late August 2016, C.K. moved in with her father residing in Tinton Falls. The CST conducted a meeting and reviewed the evaluations and the two IEPs, which were created while C.K. was at the school in Jackson. It was Tinton Falls position that it could implement the IEP of April 2016 with only minor adjustments. The information supplied by B.K. and provided in the Jackson IEP expressed that C.K. had difficulties with temperature regulation and expressed that reasonable steps could be taken in order to address those temperature issues. Dr. Foard stated that she felt that Tinton Falls could implement all of the accommodations provided by Jackson in the IEP. There was no confirmation in the Jackson IEP stating that C.K. needed to be in an air-conditioned environment at all times. In addition, B.K. did not provide any additional documentation (from medical personnel) which stated that C.K. required to be in an air-conditioned environment at all times until May 2017. Dr. Foard did testify that the IEP of September 6, 2016, was appropriate.

Based on the above, I **CONCLUDE** that the IEP created by the District on September 6, 2016, was appropriate based on the information supplied to it by the Jackson School District and B.K. and was provided a FAPE in the LRE. However, the lack of information needed to call into question a FAPE to be provided to C.K. was more than adequately addressed based on the Prader-Willi Center's medical note of May 9, 2017, which clearly stated that C.K. "needs central air at all times including the

classroom, gym and hallways." (R-28.) Dr. Foard acknowledged the receipt of this document and did not question its validity in her testimony. In fact, much to her credit, Dr. Foard made significant efforts to find an air-conditioned educational environment for C.K., including schools in Wall, Colts Neck, and Holmdel. All of these out-of-school districts turned out to be not available for various reasons; none of which was disputed by the parties.

Parents who withdraw their child from public school and unilaterally place the child in a private placement while challenging the IEP may be entitled to reimbursement if the administrative law judge (ALJ) finds that the school district's proposed IEP was inappropriate and that the parents' unilateral placement was proper. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993); Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359, 370 (1985). More particularly, an ALJ may require the district to reimburse the parents for the cost of that enrollment if "the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and . . . the private placement is appropriate." N.J.A.C. 6A:14-2.10(b); see 20 U.S.C. § 1412(a)(10)(C)(ii). However, parents who unilaterally withdraw their child from public school and place the child in a private school without consent from the school district "do so at their own financial risk." Burlington, 471 U.S. at 374. If it is ultimately determined that the program proposed by the district affords the child with a FAPE, then the parents are barred from recovering reimbursement of tuition and related expenses. Ibid. A court may reduce or deny reimbursement costs based on the parent's unreasonable behavior during the IEP process. 20 U.S.C. § 1412(a)(10)(C)(iii).

The issue here is whether the Board provided C.K. with FAPE. I **CONCLUDE** that the Board attempted to provide FAPE to C.K. in the LRE based on the information it had in September 2016. However, the updated medical information the District received in May 2017 confirmed that it was unable to provide a FAPE to C.K. as of May 2017. The inability of the District's school (Atchison) to provide the proper fully climate controlled environment confirms its inability to provide a FAPE. To her credit, Dr. Foard admitted to same during her testimony. I admire Dr. Foard's forthcoming testimony and her numerous attempts to find an out-of-district school that could provide for C.K.'s medical and educational needs.

The inability to provide for a student's health requirements can deny that student a FAPE. G.B. and D.B. ex rel. A.B. v. New York City Dep't of Educ., 145 F.Supp. 3d 230 (2015), 331 Ed. Law Rep. 114. In the G.B. case the court found that where the Department of Education failed to place the student in a fully climate controlled environment it failed to provide the student with a FAPE. As the IEP makes no provision for putting the child in a controlled environment and being carefully monitored, it accordingly denied the child a FAPE. Id. at 253-54. The question of whether C.K. was provided with FAPE by the District covers the school year as of May 2017 and the current year of 2017-2018 school year until the present.

The position of the District that C.K.'s medical needs were not proven based on the applicability of the residuum rule I find not to be supported in this case. Based on the admissions by the District's own wittiness, i.e. Dr. Foard, wherein she stated that based on the medical information received by C.K.'s doctor in May 2017 and the information supplied from B.K., it was clear that C.K. required a school environment with complete central air conditioning. This explains why Foard stated that as of the date of the hearing, the District had no placement for C.K. either in district or out of district. Foard also stated that she was accepting of the fact that C.K. should remain at SCC at that time for her educational needs. It further explains the District's motivation to find an out-of-district placement in a school with central air conditioning.

I **CONCLUDE** that the Board did not provide FAPE in the LRE to C.K. in the month of May 2017 IEP because those IEPs did not have the capacity to address C.K.'s educational and medical needs for which they received medical documentation. I further **CONCLUDE** that petitioner is entitled to reimbursement for amounts expended beginning May 9, 2017, and until the present date.

The Burden of Proof Rests with the School District

As a recipient of federal funds under the IDEA, 20 U.S.C. § 1400 et seq., the State of New Jersey has a policy that assures all children with disabilities the right to a FAPE. 20 U.S.C. § 1412. The responsibility to provide FAPE, including special

education and related services, rests with the local public-school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.; N.J.A.C. 6A:14-1.1(d). In accordance with N.J.S.A. 18A:46-1.1, the burden of proving that FAPE has been offered likewise rests with the school personnel. The District will have satisfied the requirements of law by providing A.G. with personalized instruction and sufficient support services "as are necessary to permit [him] 'to benefit from the instruction.'" G.B. and D.B. obo J.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009) (citing Rowley, 458 U.S. at 189; D.S., 602 F.3d 553).

On January 14, 2008, New Jersey adopted legislation that placed the burden of proof and the burden of production in special education matters with the respective school district, regardless of which party seeks relief. N.J.S.A. 18A:46-1.1. This statute has not been revoked, modified, or found to be preempted by federal law. Accordingly, I **CONCLUDE** that the District has the burden of proof regarding the petition at issue.

When a school district fails to ensure that a FAPE is being provided, as was determined in this case, parents have the right to unilaterally place their child in a private school and receive reimbursement from the school district for tuition. Burlington, 471 U.S. at 370-71; N.J.A.C. 6A:14-2.10(b). Reimbursement, however, is never required if a school district offered the disabled student a FAPE. N.J.A.C. 6A:14-2.10(a).

Once a forum holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief." Burlington, 471 U.S. at 374, and the court enjoys "broad discretion" in so doing. Id. at 369. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Ibid.

The United States Supreme Court held in a unanimous 1993 decision that, when a public school provides an inappropriate education to a classified child, courts may order reimbursement to those parents who unilaterally place their child in a private

school, even if the private school does not meet certain criteria. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). In other words, parents are not held to the same standard as local education agencies in making out-of-district placements. Ibid.

It is clear that B.K. is a caring and thoughtful parent who has C.K.'s best interests at heart. Neither the text of the IDEA nor its legislative history imposes a "requirement that the private school be approved by the state in parent placement reimbursement cases." Florence, 510 U.S. at 11. To the contrary, the Court of Appeals concluded that the IDEA's state-approval requirement applies only when a child is placed in a private school by public school officials. N.J.A.C. 6A:14-2.10(b)

In addition, the IDEA includes a mainstreaming requirement requiring education in the "least restrictive environment." See 20 U.S.C. § 1412(a)(5)(A). 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 (1996). Federal courts have adopted a two-part test for determining whether a school district complies with the statutory preference for the least restrictive environment. The first step is to determine whether the local school can educate the child in a regular classroom with the use of supplementary aids and services. Only if it is determined that the child cannot be educated in the regular classroom with supplementary aids and services does it then become necessary to consider out-of-district placements. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1215 (3d Cir. 1993).

The Third Circuit provided further instruction on the definition of meaningful benefit when it found that the benefit must be meaningful in light of the student's potential; to fulfill this mandate, the student's capabilities as to both "type and amount of learning" must be analyzed. Ridgewood, 172 F.3d at 248. "When students display considerable intellectual potential, IDEA requires a great deal more than a negligible

[benefit]." Id. at 247 (quoting Polk, 853 F.2d at 182). When analyzing whether an IEP confers a meaningful benefit, "adequate consideration [must be given] to . . . [the] intellectual potential" of the individual student to determine if that child is receiving a FAPE. Ridgewood, 172 F.3d at 248. 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. Ibid. There must be a degree, intensity, and quality of special education and related services adequate to provide an educational benefit to the individual child. Egg Harbor Twp. Bd. of Educ. v. S.O., 19 I.D.E.L.R. 15, 17 (D.N.J. 1992).

Finally, the New Jersey Administrative Code requires certain prerequisites be fulfilled before an Administrative Law Judge can require the school district to reimburse parents for the unilateral placement of their child in a school. N.J.A.C. 6A:14-2.10(b) requires that:

> 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, . . . or approved private school for the disabled without the consent of or referral by the district board of education, an ALJ may require the district to reimburse the parents for the cost of that enrollment if the ALJ finds that (1) the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and (2) that the private placement is appropriate.

A parental placement may be found to be appropriate even if it does not meet the state standards that apply to education provided by the SEA or LEAs. 3 C.F.R. § 300.148. In this case the District's sole witness, Dr. Foard, agreed to two important issues: 1) that Tinton Falls was not the proper educational environment for C.K.; and 2) that to the best of her knowledge SCC was the proper school for C.K. at this point.

> Accordingly, the courts recognize that parents who are compelled to unilaterally place their child [as in this case] by necessity to do so without the expertise and input of school professionals that is contemplated by a truly collaborative IEP process. The courts recognize that under these circumstances, parents essentially do the best they can. Accordingly, when a public-school system has defaulted on

> its obligations under the IDEA, a private school placement is proper under the Act (IDEA) if the education provided by the private school is reasonably calculated to enable the child to received educational benefits.
>
> [K.B. and D.B. ex rel. L.B. v. The Morris Sch. Dist., EDS 15435-12, Final Decision (Nov. 2013), http://njlaw.rutgers.edu/collections/oal (citing Florence, 510 U.S. at 15).]

See L.M. v. Evesham Twp. Bd. of Educ., 25 F. Supp. 2d 290 (D.N.J. 2003); T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 581 (3d Cir. 2000).]

There was quite a bit of testimony from B.K. that C.K. was making significant progress at the SCC. Issues regarding the complete air conditioning at SCC and the overall environment at SCC support the fact that C.K. was being properly educated at the SCC.

The placement will be acceptable if the education provided by the private school is reasonably calculated to enable the child to receive education benefits. Florence, 510 U.S. at 11. Based on the evidence presented at the hearing, it is clear that the SCC provided such educational benefits to C.K. as was agreed by the District's witness. Furthermore, in fact, Dr. Foard stated at the hearing that the District would reimburse B.K. for the costs of C.K.'s education at SCC through January 2018. It is clear that the teachers at the SCC are providing a reasonable educational environment for C.K. which address C.K.'s educational, medical issues and needs. As such, I **CONCLUDE** that the SCC was reasonably calculated to enable C.K. to receive educational benefits.

In sum, I **CONCLUDE** that the District has met its burden of proof that the IEP proposed by the District in September 2016 for the 2016-2017 school year was designed to confer a meaningful educational benefit to C.K. in the least restrictive environment based on the information supplied to it at that time. However, it failed to meet its burden for the IEP proposed by the District in June 2017. I **CONCLUDE** that an out-of-district placement is necessary for C.K. to receive FAPE effective May 2017.

ORDER

It is hereby **ORDERED** that petitioner's claim for private placement for C.K. at SCC is **GRANTED**, effective May 9, 2017.

It is further **ORDERED** that petitioner's claim for reimbursement for tuition at SCC as of May 2017 and school year 2017-2018 is **GRANTED**.

It is further **ORDERED** that the petitioner's claim for independent evaluations is **DENIED** and the District's claim to deny the petitioner's demand for independent evaluations if **GRANTED**.

For the reasons set forth above, it is **ORDERED** that the petitioners:

a) be reimbursed for C.K.'s tuition at SCC starting May 9, 2017;
b) the District develop an IEP for C.K. at the SCC for the 2017-2018 school year; and
c) the District to provide C.K. with transportation to and from SCC for the 2017-2018 school year.

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.

March 13, 2018
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency

Date Mailed to Parties:
jb

APPENDIX

WITNESSES

For Petitioner:

B.K.

For Respondent:

Mary Logan Foard, Ph.D.

LIST OF EXHIBITS

For Petitioner:

P-1 Email chain (July 2017 to December 12, 2017)

P-2 Email dated September 29, 2016

P-3 Email dated September 8, 2016

P-4 Email chain (September 2016)

For Respondent:

R-1 Petitioner's Petition for Due Process dated June 19, 2017

R-2 District's Answer and Cross-Petition dated July 3, 2017

R-3 Board's Petition for Due Process dated January 14, 2017

R-4 Petitioner's Petition for Due Process dated March 7, 2017

R-5 Board's Answer dated March 22, 2017

R-6 Physical Therapy Evaluation on October 23, 2015

R-7 Occupational Therapy Evaluation on October 25, 2015

R-8 Speech and Language Assessment dated November 9, 2015

R-9 Social Assessment dated November 23, 2015

R-10 Battelle Developmental Inventory dated December 14, 2015

R-11 IEP (Jackson Township) dated December 18, 2015

R-12 IEP (Jackson Township) dated April 19, 2016

R-13 Interim IEP dated April 19, 2016

R-14 Acceptance/Rejection of Reports / IEP dated September 6, 2016

R-15 Unilateral Placement Letter dated September 9, 2016

R-16 Email

R-17 Letter from Elizabeth Cole to C.K. dated September 29, 2016

R-18 Letter from The Prader-Willi Center to “To Whom It May Concern” dated October 5, 2016

R-19 Letter from Michael I. Inzelbuch, Esq., to Mary Logan Foard, Ph.D., dated December 15, 2016

R-20 Email dated December 21, 2016

R-21 Letter from Mary Logan Foard, Ph.D., to C.K. dated March 22, 2017

R-22 Occupational Therapy Initial Evaluation dated April 26, 2017

R-23 Physical Therapy Initial Evaluation dated April 26, 2017

R-24 Letter from Michael I. Inzelbuch, Esq., to Mary Logan Foard, Ph.D., dated April 28, 2017

R-25 Email

R-26 Letter from Eric L. Harrison, Esq., to Michael I. Inzelbuch, Esq., dated May 8, 2017

R-27 Letter from Mary Logan Foard, Ph.D., to C.K. dated May 8, 2017

R-28 Letter from The Prader-Willi Center to “To Whom It May Concern” dated May 9, 2017

R-29 Emails

R-30 Letter from Eric L. Harrison, Esq., to Michael I. Inzelbuch, Esq., dated May 16, 2017

R-31 Email

R-32 Letter from Superintendent John P. Russo to parents dated May 15, 2017

R-33 Letter from Eric L. Harrison, Esq., to Michael I. Inzelbuch, Esq., dated May 19, 2017

R-34 Letter from Mary Logan Foard, Ph.D., to B.K. dated May 22, 2017

R-35 Draft IEP dated May 26,2017

R-36 Unilateral Placement documents

R-37 IEPs

R-38 Records release form dated June 8, 2017

R-39 Annual Review Meeting dated June 9, 2017

R-40 Email

R-41 Email

R-42 Letter from B.K. to Mary Logan Foard, Ph.D., dated June 14, 2017

R-43 IEP Invitation dated June 15, 2017

R-44 Letter from Eric L. Harrison, Esq., to Michael I. Inzelbuch, Esq., dated June 16, 2017

R-45 Email

R-46 Email

R-47 IEP Revision Meeting dated June 21, 2017

R-48 IEP dated June 21, 2017

R-49 Letter from Eric L. Harrison, Esq., to Michael I. Inzelbuch, Esq., dated July 11, 2017

R-50 Email

R-51 Report by Stacia T. Bryant dated July 25, 2017

R-52 Email

R-53 Letter from Elizabeth Cole to B.K. dated July 27, 2017

R-54 Letter from B.K. to Roni Kellner dated August 16, 2017

R-55 Letter from Elizabeth Cole to B.K. dated August 21, 2017

R-56 Email

R-57 Letter from Mary Logan Foard, Ph.D., to B.K. dated October 31, 2017

R-58 Records from St. Joseph's Children's Hospital Prader-Willi Center

R-59 Letter from Michael Inzelbuch, Esq., to Mary Logan Foard, Ph.D., dated November 24, 2017

R-60 Email

R-61 CV and certifications – Stacia Bryant

R-62 CV and certifications – Elizabeth Cole

R-63 CV and certifications – Mary Logan Foard, Ph.D.

R-64 CV and certifications – Beth Snyder

R-65 CV and certifications – Kathleen Rogers

R-66 CV and certifications – Adam Stroever

R-67 Case manager notes

R-68 Email

R-69 Email

R-70 Email

R-71 OPRA Request dated November 22, 2017

R-72 IEP

R-73 Draft IEP dated November 28, 2017

R-74 Final IEP dated November 28, 2017

R-75 Letter from B.K. to Mary Logan Foard, Ph.D. (undated but received November 29, 2017)

R-76 Email

R-77 Case manager notes

R-78 Email

R-79 Email

R-80 Email

R-81 Letter from B.K. to “To Whom It May Concern” dated November 30, 2017