



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 3079-15

AGENCY DKT. NO. 2015 22224

D.D. AND D.D. ON BEHALF OF S.D.,

Petitioners,

v.

**WEST WINDSOR-PLAINSBORO
REGIONAL BOARD OF EDUCATION,**

Respondent.

Joseph W. Montgomery, Esq., for petitioners (Montgomery Law, LLC,
attorneys)

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

Record Closed: November 15, 2015

Decided: March 12, 2019

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

STATEMENT OF CASE

Petitioners D.D. and D.D. (petitioners or parents), on behalf of the minor child S.D., filed a petition for due process alleging that the West Windsor-Plainsboro Regional Board of Education (Board) failed to provide S.D. with a free and appropriate public education (FAPE) that is tailored to his individual needs as required by the Individuals

with Disabilities Education Act (IDEA), 20 U.S.C. § 1400-1485. Petitioners seek independent evaluations, compensatory education, and tuition reimbursement for their unilateral placement of S.D. at the Lewis School. The Board argues there is no basis for compensatory education as it at all times provided FAPE and its proposed placement at the Center School as set forth in S.D.'s individualized education program (IEP) was appropriate.

Petitioners allege that S.D. is entitled to compensatory education for the Board's failure to provide FAPE for several years. This issue will require consideration of whether the Board wrongfully denied or delayed special education evaluations.

The petition also seeks an order that the Board must reimburse petitioners for their unilateral placement of S.D. at the Lewis School as both sides agree that there is no appropriate in-district program. Last, petitioners seek an order that the Board fund an Independent Educational Evaluation (IEE), including a psychological assessment and a functional behavioral assessment (FBA) completed by a BCBA that the petitioners will select.

The Board argues that it provided FAPE and owes no compensatory education or tuition reimbursement. The Board urges this tribunal to reject the claim for an IEE due to their evaluations being thorough. The Board also argues that the proposed placement at Center School was appropriate.

PROCEDURAL HISTORY

Petitioners filed a petition for due process on January 14, 2015. After an unsuccessful mediation, the Office of Special Education Programs transmitted the case to the Office of Administrative Law where it was filed on March 3, 2015. I held hearings on June 1, 2015, June 17, 2015 and September 14 and 15, 2015. The record closed with written summations on November 5, 2015.

DISCUSSION

The following facts are undisputed and therefore I **FIND** them as **FACT**. At the time of hearing, S.D. was a fourth-grade student whose date of birth is March 19, 2006. He entered the Board's Maurice Hawk Elementary School in fall 2011 as a kindergarten student. He had some emotional difficulties transitioning into first grade in 2012 that caused S.D. to be referred to the Intervention and Referral Services team in March 2013. In May 2013, he was referred to the Child Study Team (CST). S.D. was evaluated in the following areas: Educational; Psychological, Social and Psychiatric. S.D. was diagnosed with Anxiety Disorder and classified as Emotionally Disturbed. S.D.'s parents signed S.D.'s first IEP in August 2013 for the 2013-2014 school year in which he was in second grade. The Board also developed IEPs for S.D. in May 2014, October 2014, and December 2014. That last IEP provided placement for S.D. at Center School in Somerset. S.D. attended school ten days in the fall of 2014. S.D.'s parents gave notice in February 2015 of their intent to unilaterally place S.D. at the Lewis School in Princeton. Petitioners placed S.D. in the Lewis School beginning in March 2015. Petitioners filed for due process on January 14, 2015.

TESTIMONY

The Board's Case

Cheryl Lowenbraun

Cheryl Lowenbraun testified that she has a Master of Science degree in school psychology, is certified in New Jersey as a school psychologist and has been employed by the Board for twenty-five years. She is also a case manager who writes IEPs for students. She is case manager for approximately thirty-five to forty students per year. She ensures that the CST works together to meet the child's needs. She writes IEPs with the input of her team in order to ensure the students are making meaningful educational progress. She considers herself an expert in special education programming.

Ms. Lowenbraun met S.D. as a first-grader. She knew there were issues in kindergarten and placed him in a first-grade class that would increase the chances of success. Immediately, there were behavioral and emotional issues. Ms. Lowenbraun wrote an evaluation plan for him dated October 4, 2012. (R-5.) Prior to the evaluation, there was an incident in the cafeteria where S.D. did not want to leave. The administrators, the CST, teachers and parents brainstormed with strategies and he was sent to intervention and referral services (I&RS). The parents attended the meeting. The determination that an evaluation was not warranted was because the parents wanted time to consult with an outside therapist. They determined to reconvene in early November. If the parents were not on board with an evaluation, the Board could not do it. (R-5.) She does not want to be adversarial with parents. She was fine with letting them get their own evaluation. The parents were given the name of Elliot Garson as a local therapist they thought would help.

S.D.'s teacher indicated on the I &RS form the dates and strategies discussed during parent consultations on September 27, October 16, November 19 and December 6 of 2012, along with parent consultations on January 14, February 6 and March 6 of 2013. The CST was not involved at this point, but the gym teacher and computer teacher were able to comment. The form lists how instruction has been differentiated in that S.D. was given modifications and work assignments, preferential seating next to a close friend who seems to calm him, and given time to calm down when upset. The behavior noted on the form is consistent with what she saw. (R-6.)

The parents were then invited to an initial identification and evaluation planning meeting scheduled for May 15, 2013. Ms. Lowenbraun testified that she has a draft IEP when she goes to the meeting, but it is just a draft. She tells parents that they can make changes as they go through. She must come in with something but she is always open to other opinions. (R-7.) As a result of the identification and evaluation planning meeting, the Board proposed that an evaluation was warranted to determine if the student had a disability. (R-8.) The Board ordered four evaluations as noted above. Ultimately, she recommended the classification of emotionally disturbed because it best described S.D.'s issues. She noted in the plan that S.D. has been having emotional

and behavioral difficulties all year. She furthered noted in the report it is starting to impact him academically.

The Board uses report cards as part of the evaluation. The notation "OC" means that the student is experiencing difficulty in an area. (R-9.) The comments are consistent with the reports that were in the evaluation plan. The educational evaluation took place in the summer of 2013. (R-10.) The summary notes Woodcock-Johnson scores in the average range. There is only one score under the 50th percentile. S.D. was performing at or above grade level. The evaluation noted that his moods can significantly impact his daily performance. The social assessment that took place in July 2013 noted that S.D. was very emotional and very sensitive. (R-12.) From the parent portion, Ms. Lowenbraun read that S.D.'s lack of self-confidence is impacting him at school and he gets easily frustrated if he does not think he can do something.

Ms. Lowenbraun explained the psychological evaluation she conducted in July 2013. In giving S.D. the WISC IV test, there were two sub-tests: the symbol search, in which he performed average; and the coding test, which brought his score down. He sought to make his symbols perfect, which means that he may need more time on timed tests. On the Behavior Assessment System Test, BASC-2, it showed S.D. testing "at risk" on the first three categories. However, his mother described him as average. "Average" means it is the way you expect a child to behave; "at risk" means something is starting to become an area of concern; and "clinically significant" means that something really having a negative impact on the child's functioning. The teacher marked him "clinically significant" for internalizing problems, anxiety and depression. The mother marked them all as average. Ms. Lowenbraun was surprised at the mother's notes because the mother described a child who is displaying a lot of anxiety at home. The anxieties that S.D. exhibited at home were noted in Dr. Martinson's report also. S.D.'s mother described S.D. as "at risk" under adaptive skills and social skills. S.D. had a verbal IQ in the average range and a nonverbal reasoning ability in the very superior range. His processing speed was low average. She did not see a severe discrepancy between his cognitive abilities and his educational performance. However, when S.D. is in the emotional state, he is unavailable to learn.

Ms. Lowenbraun also reviewed the psychiatric evaluation by Dr. Charles Martinson that was performed on August 8, 2013. (R-14.) She did not agree with the comment noted in the report by S.D.'s mother that staff's intervention with S.D. caused more problems. What Mrs. D. reported to Dr. Martinson about the home was also not consistent with what she reported to her that S.D. did have issues at home. The fact that it was noted that S.D. has a lot of fears was significant to educational programming. Dr. Martinson noted that S.D.'s community-based counselor should work with the parents and the teacher in order to develop a behavioral enforcement strategy to more successfully shape S.D.'s behavior in the home-based and school-based settings. Ms. Lowenbraun did not have any communication from either of the parents regarding what was happening in their private therapy, and the parents did not follow through on her efforts to get a release to talk to Dr. Garson. She believes that she asked in a parent-teacher conference for the release. Dr. Martinson suggested medication, but that would be a parent decision with which the Board would not be involved. She agreed with Dr. Martinson's classification of emotionally disturbed.

Ms. Lowenbraun also thought that an FBA was really important, and so it was put in as a possibility in the initial IEP dated August 14, 2013. (R-15.) She clarified that the draft IEP (R-16) was presented to the parents and they signed the consent forms that were presented with it. After the meeting, she took the consent form and attached it to the final IEP. (R-15.) The IEP says, "An FBA will be conducted in the fall." (R-15 at 9.) The parents approved of the IEP being implemented and consented. The FBA was not done in the fall because she understood this was an additional evaluation and, as such, the Board needed informed consent to conduct it. An FBA is conducted by observing the behaviors, interviewing people and trying to understand the pattern of behaviors.

Ms. Lowenbraun explained that if the parents had signed for the FBA on the day of the IEP meeting, August 14, 2013, the clock would have started ticking for the sixty days and they would have lost a month and only had a month to do the FBA. Because students need adjustment time in September, she did not want to base determining what they were going to do moving forward on how S.D. behaved the first few weeks of school. She thought that having it signed in September made more sense so it would give them the first two months of school to observe S.D.'s behavior rather than a small

window at the beginning of school. She handed the parents the consent form for the FBA at the meeting. (R-17 at 4.) The request for an additional assessment with her handwriting on it went into the CST folder for S.D.

Ms. Lowenbraun testified that the IEP noted that behavioral interventions are appropriate. (R-15 at 7.) It also indicated that supports will be changed if the behavior does not improve. The goals to help S.D. make progress included successfully transitioning from one activity to another with only minimal assistance and complying with teacher directives. Since she was not in the building, a guidance teacher or counselor would be there to discuss his behavior. S.D. did not have academic weaknesses. He was given school-based counseling twice monthly. S.D. had a lot more difficulties in second grade on Monday mornings and Friday afternoons, so the transition from home to school and school to home was important. She believes that S.D. achieved the transition goals because of the counseling. The progress report of S.D. notes that he achieved success in six of the goals for the 2013-2014 school year. (R-22 at 2 to 4).

When Ms. Lowenbraun realized she never received the FBA consent form back, she emailed Mrs. D. on September 6, 2013, and again on September 13, 2013, about signing the consent form. (R-18.) She wanted desperately to help S.D. and believed that the FBA would assist. It was her experience that the school psychologist works with the family and medical providers, but she did not feel that was happening.

Ms. Lowenbraun and S.D.'s parents met again on May 5, 2014. The finalized IEP was sent on June 5, 2014. (R-20.) Ms. Lowenbraun testified that she asked for medical documentation but did not get it until the parents gave her the letter from Dr. Garson dated November 2014. There were a lot of days that S.D. was fine, but there are times when he was tearful. The parents gave consent to implement the IEP on May 5, 2014. (R-20 at 16.) S.D. did well academically, but he was not where he should be socially and emotionally.

S.D. had twenty-three absences in the 2013-14 school year. Ms. Lowenbraun is not aware of the reasons that he stayed home. She thought that they could maintain

him in the school district. However, in the fall of 2014, S.D. had many more emotional outbursts. They were more frequent and more intense. The IEP noted that behavioral interventions were appropriate although she never got consent to do the FBA. It notes the teacher “avoids situations that she thinks will upset S.D.” The target behavior is that S.D. will comply with teacher directives during the school day. (R-20 at 7.) The CST added modifications including instructional assistant time. (R-20 at 8.) There were no study skills objectives because they had been achieved. As S.D.’s outbursts became more frequent, there was a request made to amend the IEP to have a shared instructional assistant with S.D. throughout the school day except during math when there are already two teachers present.

The final revised IEP was to cover October 13, 2014, to the end of the school year. (R-26.) The Board imposed a positive behavior support and safety plan to make sure S.D. was safe in the school. It did not violate any parental consent laws because there was no change to the program. She drafted it as she is qualified to do so. In the first IEP, she had wanted to use positive rewards, but Mrs. D. was not in favor. Positive supports were put in the new IEP. She clarified that ignoring S.D.’s behavior did not mean ignoring his needs.

At the last meeting on November 4, 2014, the CST felt they had exhausted all their options. Students and teachers were becoming upset at S.D.’s behavior. They wanted S.D. to be taught at his level in smaller classes. Ms. Lowenbraun asked Mrs. D. for the name of S.D.’s psychologist, but received an email asking her not to contact the psychologist. She was familiar with the Center School and knew that they did a nice job of having students make meaningful progress. The Center School said that S.D. would be grouped with students like him. The Center School is a safe place for children with emotional issues. It is one hour away from the parents’ home, but the children don’t mind it at all. The Rugby School is also an hour away. At the April 4, 2014 meeting, Mrs. D. did not agree to have records sent to Center or Rugby.

Ms. Lowenbraun testified that the Center School was good for students with a constellation of symptoms and similar behaviors to S.D. She has sent three students there and one came back to the district after three years. She knows the others are

doing well. The Center School's goal is to return them to their home district. The Center School is her favorite school for the ED classification because the staff worked hard to bring the student back to the district. She visited the Center School with Mrs. D. It was a brand new school with a state of the art occupational therapy (OT) room. The people were knowledgeable and the children happy. The visit took about an hour. For the second visit, Mr. D. brought S.D. for an intake. They spoke to Maryellen Grabowski. She thought S.D. was happy there and would be a good match. The next progress report indicated that S.D. was progressing inconsistently. (R-31.)

S.D. experienced numerous incidents of emotional distress in October 2014. The CST was getting concerned and had Mr. and Mrs. D. come to the school. Mrs. D. sent Ms. Lowenbraun an email attaching some descriptions of the behavioral problems of the students at the Center School and using those examples to say that S.D. would not fit in there. (R-28 at 9.) Mrs. D. also sent Ms. Lowenbraun an email stating that Dr. Garson's testing showed S.D. as a gifted child and she attached links to coping with that kind of child. Ms. Lowenbraun believed that his suggestions would not be appropriate in a classroom setting. After October 29, 2014, S.D.'s attendance at school was sporadic. She received consent for the FBA after Mrs. D. signed it on November 25, 2014. They were not able to start the assessment because S.D. only attended school until December 3, 2014. S.D. attended school only eight days in November. At the end of November 2014, Mrs. D. indicated S.D. would not be coming. On December 14, 2014, Mr. D. was very upset that S.D. would not go out of the house. Ms. Lowenbraun recommended the therapist, Dr. Martinson. (R-35.) On December 20, 2014, she prepared a form giving permission to discuss information with the Lewis School. She knew Mr. D. was considering the Lewis School along with Center School and Rugby School. On November 21, 2014, Mrs. D. sent an email to Ms. Lowenbraun asking for the FBA. (R-40 at 14.) Ms. Lowenbraun kept data that the distress was happening on Mondays and Fridays.

Ms. Lowenbraun has never sent any students to the Lewis School because it is not approved or accredited. Once a school is accredited it can be approved by the Department of Education. The Center School is both approved and accredited. After the IEP meeting, everything was up for discussion, nothing was predetermined. When

the final IEP issued it was only for one month because they wanted to give the new placement a chance to understand the child. They determined that the end of winter break would be a good time to transition S.D. The Lewis School is a school for language-based disabilities. There are no emotional supports. Its website says it is a language-based learning disability school. Ms. Lowenbraun testified that if S.D. needs counseling, there is a regular safe place to go. She believed that the present levels of academic achievement and functioning (PLAAF) in the IEP accurately described S.D.'s behavior. (R-2 at 5.) Mrs. Mulhall noted that "his crying is unpredictable; it can result from changes in routine, frustration, disappointment and typical academic expectations." The third-grade teacher noted that S.D. was not bringing in his homework and that he needs to better adapt to changes in his environment.

Ms. Lowenbraun testified that the IEP was appropriate and provided education for S.D. in the least restrictive environment. She next heard from the parents on January 5, 2015. They filed for due process before S.D. came back to school. (R-1.) In January she received a letter from a pediatrician, Dr. Riggall indicating that S.D. "appears to have met criteria for a diagnosis of social phobia and anxiety only in situations of interpersonal sensitivity to criticism." (R-42.) She received the intent to place S.D. at the Lewis School around February 18, 2015.

Ms. Lowenbraun did not believe the Lewis School met S.D.'s needs although it's a lovely setting. She met with Mrs. Lewis, but had limited time for observation. There were eight students in the class she observed with S.D. They were spelling antonyms. Her report of her observations indicates S.D. is not a child with a language-based learning issue. There is no regular counseling and no one certified to do counseling. S.D. is emotionally fragile and not resilient. He started in mid-March and had three incidents, but was able to deal with them quickly. He was with seven to ten-year-old boys who were working on short vowel sounds which S.D. mastered in the first grade. S.D. was capable of more than what she saw. She told staff at the Lewis School that S.D. reads on grade level before she went to see it. She asked if the curriculum was aligned with the New Jersey core curriculum. Of greater concern was the lack of emotional support services. She believes S.D. is doing well because he is not challenged and he needs to deal with manageable doses of frustration. S.D. was later

diagnosed with an auditory processing disorder, but her testing did not indicate an auditory processing disorder. (R-52.) S.D. did not qualify for speech language services at the Lewis School. Auditory processing disorder is addressed through speech and language.

Ms. Lowenbraun testified on cross-examination that the notation that “evaluations were not warranted” in October 2012 was due to the team deferring to the parents’ desire to work with S.D. with outside therapists. An evaluation plan was offered, but the parents said they would consider it in November. They gave the parents the opportunity to pursue the other option. Most parents do not want to hear that their child has a disability. She tried to use training to convince them to pursue evaluations and gave them a copy of the law. Ms. Lowenbraun evaluated S.D. in the summer between first and second grade. She felt that the parents’ readings were different from teachers possibly because of an attempt to minimize S.D.’s problems. She recommended an FBA in the first IEP presented to the parents in August 2013. She felt that it was important that it get done. She is not at Maurice Hawk every day so it is not detrimental that a psychologist is not at the Lewis School five days a week.

The parents signed off in May 2013 for the psychological, educational, social and psychiatric evaluations. There was no FBA at that time because the team wanted to see what a psychiatrist had to say first. State law does not require that an FBA be done initially. The parents had been resistant and she wanted to get support. She knew S.D. would have transition issues in September 2013 so she thought they should wait. It would have been in S.D.’s best interest to follow-up again. She admitted to being minimally involved in S.D.’s first- grade year. The teacher collected anecdotal notes of the social and emotional difficulties S.D. was having. Her greatest concern was how sad he was. More than one time a teacher saw him stop crying when he got what he wanted. She noted there was no recommendation for an FBA in the initial identification and evaluation planning notice of May 14, 2013. She could only go with the information she had at the time. An FBA would have revealed the triggers and help predict when a mood change would occur. After determining that S.D. had low processing speed, she did not put extended time in the IEP because it was not an issue in first grade. (R-15.)

There was no standardized testing in first grade. She did not assess auditory processing because she does not do that assessment.

Ms. Lowenbraun was asked whether the sentence in the educational assessment “S.D. misheard information at times (two days/Tuesday), therefore it was beneficial to repeat information” could be indicative of auditory processing disorder. She agreed that it could be. The instructional assistant and S.D.’s teacher recorded S.D.’s behaviors. (R-23.) In counseling, Ms. Lowenbraun teaches him how to deal with getting wrong answers which often upset him. She drafted the positive behavior supports and safety plan. (R-27.) She is not a BCBA, but she had training in behavioral workshops and FBAs. She agreed there was nothing in her resume regarding it. She attributed her lack of follow-up for fifteen months to having sent several emails and then hearing nothing after that. The IEP of June 14, 2013 indicates that behavior interventions are appropriate based on observations of S.D. in the class. The parents did not want that in the IEP and there is a handwritten note indicating that the parents request that the plan be put on hold until needed. (R-16 at 6.)

The ultimate decision on program and placement is made by the team, but the draft was made up for a discussion prior to meeting with the parents. In 2014, S.D. was deteriorating and not in school, so they had to have discussions before the meeting. They would have considered any approved school. She acknowledged that the concerns of the parents are not in the IEP. The parents are legal members of the IEP team. It was noted that the parents believe Center School is not appropriate. At the December 23, 2014 IEP meeting, the parents were present but did not sign the final IEP. The signatures should be there but it is somehow not there on the final IEP. Ms. Lowenbraun did not know that the parents were working with Dr. Garson. With regard to his anxiety referenced in email from Mrs. D., she did not think to suggest a home FBA. The more S.D. did not come to school, the harder it was for him to come to school. He became more anxious. (R-33 at 16.) Ms. Lowenbraun agreed with the summary in the social evaluation indicating that S.D. began having behavioral and emotional issues in first grade and began to have meltdowns or outbursts in school. (R-12 at 5.)

Ms. Lowenbraun continued testifying on cross-examination that S.D.'s behaviors in second grade were not as concerning as they were in third grade. There were three major incidents in second grade and there was a pattern of behaviors on Fridays and Mondays in second grade. In comparing the second grade IEP with the IEP for third grade, the target behaviors are the same. There was a change made to transition S.D. to and from the weekends. It was completed in counseling but not an actual written plan. She could not reference any data to see how effective the plan was but said from her anecdotal notes, that the transition to and from weekends was not as much of a problem in third grade. The behaviors did not improve in third grade.

Comparing the October 13, 2014 IEP with the May 5, 2014 IEP, the documentation of prior interventions also remained the same. The procedures for daily collection are also the same noting that frequency and durational behavior will also be considered. She considers the anecdotal notes that she kept—the calendars—to be data. They wrote down the frequency and duration of behaviors on a calendar of each day. They did it up to November of third grade when S.D. stopped attending school. The data was showing regression. This is why an IEP was generated for Center School because the team felt they needed to look for another placement. They felt they were no longer meeting S.D.'s needs. The IEP notes that behavior interventions are appropriate. (R-26 at 7.) She felt they did the best they could with the information they had at that time. She does not recall giving the calendar to the parents but believed she showed it to them at a meeting. (R-35 at 9.) The seventy-five percent on the calendar means the number of days he was in school divided by the number of days he had some behavioral emotional difficulties. She needed to see how he was coping and that is what she was collecting. She can tell which of the episodes is crying because she has anecdotal notes that go along with the calendar. The calendar is a summary of the information, but the anecdotal records will show what the triggers were.

The parents requested incident reports over the years. She is not aware that the teacher ever provided them. (R-21 at 3.) S.D.'s mom sent an email directly to her requesting access to the incident logs. She did not provide as many as they had. When there were issues they felt were important for her to know, they made her aware of them. (R-21 at 5.) Ms. Lowenbraun agrees that there is no reason to keep behaviors

from a parent. She recalled writing that the mom was scrambling for reasons as to what was causing S.D.'s behavior.

S.D. had seven absences in the 2012-2013 school year. (R-9.) There was no IEP meeting convened to address the absences that increased by his third grade year. She did not like the mother's idea to give S.D. a coin when he had a meltdown. She thought it was giving a reward when they are behaving inappropriately but she did not consult with the BCBA. She was not clear that mom intended it to divert his attention, not reward him. They offered him opportunities to leave the room, talk to people, walk through the school and give him a safe place to sit in the room. Rewards did not have to be chocolate and coins. Mom expressed hope that the Lewis school could help S.D. express himself better verbally rather than crying. (R-12.) She recalled saying that when S.D. is in an emotional state he is unavailable to learn. He is not going to receive a meaningful educational benefit when he is not available to learn. Dr. Martinson, the psychiatrist who evaluated S.D. as part of his initial CST evaluation, noted her concerns that S.D. struggles emotionally and behaviorally in the classroom and that his moods change drastically without warning. (R-13.) It does not say that hard work sets off S.D.; however, it does note that S.D. has difficulty getting started on an assignment and when upset does not complete his work.

S.D. had issues during unstructured time, so there were goals for success during unstructured time. (R-23 at 2.) The goal was to make S.D. the kind of adult that can be resilient in the face of frustration. She was upset to see that the teacher avoids situations that she thinks will upset S.D. (R-26 at 7.) The witness noted that back in 2013, the teacher was avoiding situations she thought would upset S.D. as well. (R-15 at 7.) She agrees that doing so is a bad idea. The schools she recommended were Mercer Elementary, Rugby and Center. She acknowledged that a shorter commute would be beneficial for S.D. She did not look at public schools for S.D. She believed that the Lewis School did not have anyone there to serve as a counselor to a student on a regular basis. S.D.'s IEP in second grade gave him forty minutes a month of counseling. (R-15.) Ms. Lowenbraun said that is a minimum, but she actually saw him more than. When she realized that S.D. needed more counseling, she did not change the IEP. (R-20).

Ms. Lowenbraun testified that there was a difference between the IEP ultimately offered in August 2013 and the initial IEP in the earlier draft where a different kind of set of behavioral inventions was proposed. The draft has a behavior program where a student can earn stickers for appropriate school behavior. They were going to implement the program by the end of September after baseline data could be taken. That behavior program was placed on hold because the parents were concerned that if S.D. did not earn the sticker, he would have emotional difficulty with it. Therefore, she wrote, "Parent request put on hold until needed." (R-16 at 6.) If a parent will not sign for initial consent, the Board cannot go ahead with the IEP. They either had to drop the sentence or not have an IEP for S.D.

Regarding meetings, Ms. Lowenbraun's notes indicate that Mrs. D. requested the time for the conference on November 20, 2014. (R-35.) Mrs. Mulhall responded that she never heard back from her in response to the conference request but she is happy to meet and discuss. On November 30, Mrs. D. apologized for being unable to come on November 30 as she said she would. It was at this time that S.D. had been absent most school days in November. (R-35.) Ms. Lowenbraun authenticated her anecdotal notes regarding S.D. (R-23.) The instructional assistant was to document instances where S.D. became upset so they would know what preceded it and what happened afterwards. The teacher or the instructional assistant would write notes. When Ms. Lowenbraun met with Mrs. D., she shared information with her about what was going on in the class. The teacher would often be there too.

Ms. Lowenbraun did not feel that she needed to consult with a BCBA with regard to giving S.D. rewards because she felt she had a good understanding of the behaviors as a psychologist and did not think a BCBA would be able to see anything that she would not be able to see. She believes in her professional opinion that the Center School would allow S.D. to express his emotions in a more appropriate manner because they have supports in place and children who are facing emotional challenges like S.D. She wrote the letters to Rugby School and Center School and they were the same. She went with Mrs. D. to visit Rugby School. Rugby and Center both offered placements for S.D. She offered Center instead of Rugby because Mrs. D. had a more

positive reaction to Center School. Center School would have been her choice because she has had good results with the students that she sent there. Her job is to find the best educational placement for a student. (R-30.) Although she agrees that the Lewis School would be better in terms of being closer, she does not believe that S.D.'s social, emotional or academic needs could be as appropriately met at Lewis School. She believes the Center School could meet his educational, social, emotional and behavioral needs.

Rona Stokes

Rona Stokes testified that she has been an employee of the Center School in Somerset, New Jersey for thirty-five years. It is a school for children who experience learning and behavioral problems. She is the occupational therapy coordinator. As a certified occupational therapist, she runs a very highly specialized program in the area of sensory integration for the students at Center School. The school has a 2,000-square foot room that is equipped with state of the art equipment to provide sensory and motor stimulation from which the students can benefit. In her thirty-five years of experience at Center School she knows those students with ADD, ADHD and high spectrum autism are also experiencing sensory and processing problems. These are all students who have difficulty with regulation of their body. They are unable to sit still for very long periods of time and need breaks. Students come to the program as a group in what is called a sensory diet. They attend for about twenty minutes but they are put through a series of movements. It is a specialized system in the inner ear that responds to the pull of gravity in specialized muscle input. So when they go back to class the children are more regulated and they can sit and learn. She can help a student with emotional meltdowns because the basic underlying sensory systems not being regulated are the cause of the emotional dysregulation.

The Center School serves grades one through twelve. She has worked with students who have fallen through the cracks and they have been helped by the sensory system. She has approximately six students per grade level. There were six children in the third-grade class in 2014-2015. The students get a lot of individualized attention. They have special modifications in the classrooms called ball chairs where the children

get specialized input through deeper sensory systems. All students come with an IEP from their school district. She looks at the recommendations and looks at the child and draws a quick assessment. A social worker is assigned to the student and the student is scheduled for OT sensory breaks. Counseling is provided by the social worker. She provides group counseling then individual counseling on a scheduled basis. The goal of the school is really to send students back. The average stay is about three to four years. There are some students that are not ready to return because their emotional issues are significant and it impacts learning, but the average is three years. A determination is made every year whether the student is ready to return to district.

Ms. Stokes recalls meeting with Mrs. D. and reading S.D.'s records. When she read the records she believed the student had sensory issues underlying some of his emotional problems and he would be a good candidate for the program. She discussed with Mrs. D. the program—the neurological aspects, the behavioral aspects and academics. Mrs. D. was very interested in the academics. She knows that if there are emotional issues and dysregulation issues that are going to impact the way the student learns and how much he learns. She believes in emotional regulation. In addition, the school has the Snoezelen Room that is very relaxing and very calming. It is used if a student is feeling highly anxious and cannot focus and needs to be out of the classroom. She later had a long conversation with Mr. D. about the goals of the program. When she met with S.D., he was a very sweet student that she would like to have at Center School. However, he was very restless. When she was talking he was moving and that is a little bit of dysregulation. S.D. loved the OT room and he was ready to come there.

Ms. Stokes has done intakes with students and came to the opinion that S.D. needs could be served by the Center School. The school usually does not accept students with the lower average IQ or with significant behavioral issues that they may not be able to handle. A student who needs a more intense therapeutic placement would get an intensive OT intervention that works for regulation. She attends IEP meetings within school districts and consults with professionals like the school psychologist. She may recommend adjustments to the IEP based on what she sees in

school. In her professional opinion, S.D. would be a good fit at the Center School and it could have met his needs.

Ms. Stokes has worked with administrators from the Board for the whole thirty-five years that she has been at the Center School. She reviewed S.D.'s records before she met S.D. and his father. She recalled from reading the records that he had an average IQ and had emotional dysregulation with emotional breakdowns. She did not review incident reports; she just reviewed a couple of pages of a report generated from the records. She saw the IEP and the psychological, the educational and the social evaluations. She believes the cause of S.D.'s behaviors is sensory dysregulation and emotional dysregulation. She met with S.D. for between ten and twenty minutes for her assessment. The social worker also met with him. He interacted with the students and the teacher in a class. If S.D. has a fear of the dark, then he may not be a candidate for the Snoezelen Room.

Students like S.D. do benefit from the sensory diet program. The educational component of the OT room is visual perceptual stimulation. S.D. had trouble with abstract reasoning and that to her is called visual spacial. They do things to help with his academics. It is all integrated. She thinks that she is aware that S.D. was diagnosed with an auditory processing disorder. If he came to the school she would continue the evaluation process and if he needs speech and language, he would get it. The Center School has a social worker to do an FBA but many times the District has their own and they would send it to them. Students who often have meltdowns in regular public schools become totally different students as the Center School. The Lewis School does not have an OT program in place like the Center School. The school provides a specialized sensory input to help the brain and nervous system develop and regulate. She believes S.D. has a vestibular-based problem, meaning that there are certain receptors in the inner ear that respond to the gravitational forces and impact on muscles. If S.D. is having an emotional outburst and crying uncontrollably, they would call her and she would go right there. If she is not available then they would have a social worker talk to the student. They may bring the student upstairs for some specialized input and help him regulate. She is not concerned about S.D.'s one-hour commute to and one-hour commute from the school because they have many students

who come from way over an hour and they have their headphones or whatever keeps them comfortable.

Maryellen Grabowski

Maryellen Grabowski testified that she is the assistant director at the Center School. She has worked there thirty years but it is her second year as assistant director. She has a BA in psychology, with a minor in special education. She does not have any certifications. The Center School is a private school for the handicapped approved by the Department of Education, established since 1971. The school caters to students who have difficulty succeeding in their traditional classrooms due to learning differences, mood disorders, anxiety and school adjustment disorders. The school teaches students with average or above average intelligence that struggle in large classroom settings by using smaller classrooms, quieter environments, one-on-one instruction and more OT. At the time she testified, there were seven students in the third grade. However, the following year in the fourth-grade class there will be two classes.

The school does not take students who are aggressive or violent. When deciding whether to take a student, one concern is the student's academic functioning. Last year the school received 119 files between September 2014 and June 2015. Of those files they scheduled fifty-eight intakes and declined three of the students who were applying. Of the remaining intakes seven students that they accepted chose other placements. Therefore, forty-eight came to Center School. Her impression of S.D. at intake was that he was a very endearing little boy. He mentioned a few times that he liked the school. He was social and asked some good questions.

She recalled reviewing records sent to her from Ms. Lowenbraun, with whom she has a professional relationship only. (R-30.) The school does not give preference to any school district. After she reviews the records, a social worker reviews the records. Ms. Lowenbraun called her prior to sending the reports to tell her about S.D. without mentioning his name. Ms. Lowenbraun told her about the struggles that he was having and how the District was looking for an out-of-district placement. When the Board refers

a student to them, she trusts their opinion that we are the right place. They have five or six students from West Windsor. They may not always offer the student a placement; this is an evaluation done by Dr. Martinson. The team members conferred before making the determination that the school would be a good fit for S.D. She believes the Center School can serve a student who is performing average academically when it also serves some autistic kids and kids with ADHD. She believed S.D. would fit well in the classroom because two of the students live in the district, which is always a plus, and she felt that would be a nice match for him academically as well as socially.

The Center School follows the New Jersey core curriculum. It differentiates instruction for its students based on their IEP. A student comes in with an IEP that is used for a thirty-day period and after that thirty days the parents come in and meet with the case manager and Center School rewrites the district's IEP. The team talks about his current levels and what he is struggling with. The team recommends services such as speech and language or counseling or OT. The Center School's OT program is designed for students with the challenges that S.D. presented. It provides relaxation and regulation. In the third-grade classroom there would be a certified special education teacher and a certified assistant. In the learning studio, there is a reading specialist and two other certified teachers who are working as paraprofessionals. That is how the classwork is differentiated. The Center School would develop S.D.'s PLAAF.

S.D., with his father, went on a tour that is given by another student and saw all the fun things, the OT room, the art room and the indoor field with a track and turf. They answered the questions of the student and parents. After the tour, S.D. went with Ms. Stokes to do a brief screening. Ms. Stokes thought he would be a great candidate and do well. The school's goal is to work with whatever challenges the students have and help the student transition to the next step either back to district or college. She recalls telling Mr. D. that she hopes S.D. would come to Center School and she remembers the response of Mr. D to be "well, that would be up to his mother." She had no further discussion with the dad.

After becoming aware that S.D. was having emotional reactions thirteen out of twenty-one days when he was in school lasting from five minutes to two hours and

fifteen minutes, Ms. Grabowski said that the school would address it by having him in a smaller classroom and a quieter environment with carpeted floors. The students develop skills by gaining maturity. Students in middle school learn to regulate themselves and know how to handle feeling upset. Once the emotional piece is in place, then they can focus on learning. One of the certified social workers is a BCBA. Ms. Grabowski clarified that the only records she reviewed are what Ms. Lowenbraun sent her. (R-30.) She has no knowledge of whether S.D. already achieved that critical stage at the Lewis School. She is not prepared to say whether the Center School is more appropriate than the Lewis School. She has never visited the Lewis School. Ms. Grabowski observed S.D. for only five or six minutes when he was with his dad. She observed him for about ten minutes in the learning studio. S.D. was separated from his father during part of her observation. She recalled that the mother did not understand the connection between the OT and their program at Center School.

Petitioners' Case

Mrs. D.

Mrs. D. is the mother of S.D. who was nine years old at the time she testified. He was having behavioral issues when he attended Maurice Hawk. Mrs. D. testified that they did not reject anything at the evaluation plan meeting on October 4, 2012. (R-5.) There was no reason for testing. Mrs. D. recounted an incident in the playground at the beginning of first grade in 2012. S.D. was on top of the slide crying and other kids were trying to get him to come down. They forcefully brought him inside and he scratched the teacher's hand. The school called her. This was at the beginning of first grade in 2012. So the meeting was called with regard to that incident and the Board recommended that she take S.D. to a therapist. They gave her some names and Ms. Lowenbraun suggested Dr. Garson. She complied and took him. Also in October, S.D.'s mother or father was asked to join him on field trips as a safety precaution. (R-6.) Two years later, a field day was being held at the school outside. They suggested that she come because it can be a challenging environment and she agreed. (R-28 at 15.) The Board required her or her husband to go on every field trip. (R-28 at 16.) She had to take days off from work or send her husband or else S.D. could not go.

Mrs. D. did not know that the school kept a behavior log on S.D. until the hearing started. She had asked for it several times. Most incidents in there were not reported to her. (R-23.) Mrs. D. had requested access to S.D.'s incident log back in May 2014 so she could help in resolving any concerns. (R-21.) The teacher, Grace Penn, did not respond to her request for incidents logs.

In the IEP at the end of the first-grade year the Board wanted to institute a behavioral intervention where S.D. can earn stickers for appropriate school behavior. Mrs. D. requested that intervention be placed on hold because she thought it was inappropriate. It would reward him if he did not cry but he did not cry by choice. That was his disability. If you had a disability like not walking, would a reward make the person walk? She was afraid that it would upset him more. If he could control it, it would be different. The Board never brought in outside people to discuss his behavior. (R-16 at 6.) Mrs. D. testified that she was never asked to sign a permission to evaluate S.D. (R-6.) The Board first presented Mrs. D. with a permission to evaluate in May 2013 at the end of S.D.'s first grade year. (R-8.) The Board did not offer a FBA. Mrs. D. agreed with the explanation of why the Board was taking such action, but he had those conditions all year. This request was issued in May and no evaluations were offered previously. (R-8 at 2.) She disagreed with Ms. Lowenbraun's testimony that she never followed through with Dr. Garson. She understood that Ms. Lowenbraun was in contact with Dr. Garson. There was nothing that the school asked her to do that she did not do. The Board wanted her to come and sign the form, but she knows for sure that she gave the consent. They never sent her anything that said that they still needed her signature. She was cooperative. She never denied the school the right to conduct an FBA. If the Board had a formal plan she would have agreed.

S.D. acted similarly in first and second grades, but the behavior increased in the second grade. Third grade was his worst year. Nothing the Board did worked for him. She wanted school to give him a coin. She knew he would cry for a long time if he got upset. The coin would work only to divert his attention and break his focus on what is upsetting him and that is why she suggested it. The school never tried the method.

Mrs. D. recounted another incident where she went on a field trip with the students and she lost S.D. When she found him he was sitting with his head down crying. When she asked him what happened he said he went into a dark tunnel and got upset. He has a fear of the dark, but the teacher did not know that. When she showed him the chocolate he came out of it. The teacher said you are not supposed to give chocolate in the classroom. She wrote the email dated October 29, 2014, as a suggestion. (R-28 at 7.) She does not recall if she got a response. She requested an FBA in November 2014 because she consulted with someone who mentioned it. (R-33 at 2.) She sent an email to Ms. Lowenbraun six weeks into the third grade indicating that the psychiatric evaluation and IEP gave inaccurate recommendations. She showed the IEP to Dr. Garson to get his opinion and he was shocked about the plan to ignore S.D.'s crying. He did not agree with the school's recommendations. She communicated this to Ms. Lowenbraun. (R-33 at 9.) S.D. is sensitive and needs a nurturing environment. She believes the Board ignored her email. Dr. Garson was the psychologist that Ms. Lowenbraun suggested. She received a letter from Dr. Garson dated November 22, 2014, which she sent to the Board and handed to them at the last meeting. (R-32.) Ignoring S.D. made him feel like his teacher was angry and disliked him. She asked the school to let her observe S.D. at school. They let her observe two separate periods on two different days, but she could not find anything wrong.

The "positive behavior supports and safety plan" of October 16, 2014, was where she learned that it was part of their plan to ignore S.D. She saw this in his third-grade year. (R-27.) The school wanted her to get therapy from a psychologist who is listed under child psychology, but all her clients were adults. The psychologist was not equipped for kids. She removed consent to evaluate because she decided not to go with her. She only went one day.

S.D. is now going to the Lewis School. The admission process at Lewis was that they had to be there two-and-a-half days where he was tested thoroughly. They gave a report and after testing him they said that S.D. has an auditory processing disorder. She visited Center School and other schools suggested by the Board. Center School was the proposed placement. The Board decided before the IEP meeting and she did not agree. Before she went there, Ms. Lowenbraun said that the school is for kids like

S.D. When she went there, she was shocked. The staff said that the kinds of students were on the autism spectrum and the main thing they give is OT. S.D. had no requirement for OT. He does not have sensory issues. She felt that Ms. Lowenbraun had lied to her.

Mrs. D. feels S.D. is being challenged at Lewis. When he started there he was put in first grade for math. He is now at a sixth-grade level. He is doing very well and they have not reported any crying incidents since he went there. There was one incident in the classroom and two in the gym, but not the same as when he was at Maurice Hawk.

S.D. was hesitant to go to Maurice Hawk. He had a fear of school starting in the morning and could not sleep. She decided she would not send him anymore. Ultimately, she wanted him to return to public school. He is now excited to go to Lewis School. They had a busy summer with six extracurricular activities. He is on a sixth-grade reading level as well. She agreed that her family was in crisis. Her other son has special needs also.

On cross-examination, Mrs. D. said she did not know the purpose of the October 4, 2012, meeting. She thought it was to talk about the incident with S.D. and decide a course of action. The Board suggested that the parents consult with an outside therapist and they agreed. (R-5 at 2.) She did not agree with the handwritten sentence that, "The parents would like time to consult with an outside therapist." They gave her the name of Dr. Elliot Garson. They met with him through the first grade in the 2012-2013 school year.

Mrs. D. testified that they did not take S.D. to Dr. Garson again since spring 2013. They gave Dr. Garson the IEP and the behavior plan in order to get his opinion on a school. He said the two schools the Board recommended, Rugby and Center School, were not suitable or appropriate. He supported an out-of-district placement. In addition to providing the material to Dr. Garson, Mrs. D told him that third grade had a lot of incidents and that S.D. wants her to stay with him.

Although Ms. Mulhall did not say specifically that S.D. could not go on a field trip if she was not there, that was her understanding. (R-28 at 15-16.) She never spoke to a behaviorist or Mr. Concors about whether the token system was appropriate to reward him for not crying. She was put in touch with Mr. Concors after the first hearing in this case in June and talked to him about the need for a BCBA evaluation from the beginning. It would have helped if it was done earlier. S.D. joined the Lewis School in March 2015 and went there in the summer. When asked if she feels S.D. does not need an FBA now, she said that he does not show those behaviors now. As of the time of hearing, S.D.'s sibling has been going to the Lewis School for four years since first grade. He has dyslexia and auditory processing disorder. The Lewis School has expertise in Dyslexia. S.D.'s brother was in fifth grade at the time she testified in September 2015. She drives both S.D. and his brother for ten minutes to the Lewis School.

Mrs. D. agreed with the proposed evaluations in May 2013. However, the Board requested an additional assessment on August 14, 2013. (R-17.) Mrs. D. looked at the request for an FBA and said that she did not receive it. She does not recall Ms. Lowenbraun handing it to her at a meeting on August 14, 2013. Mrs. D. also does not recall having received an email dated September 6, 2013 at 10:26 a.m. from Ms. Lowenbraun. (R-18.) She believes she was out of the country at that time and got flooded with unwanted emails and that email got buried. She did not recall seeing the email until her counsel showed it to her. She did not recall the other email following up on the FBA either. She did not do research after seeing the emails to look at her email account. At some point she signed for the FBA. She recalled signing the request to amend the IEP dated October 13, 2014. She thinks they raised the number of hours of support. She agreed that Ms. Lowenbraun's suggestion that S.D. help pack his snack and lunch was a good idea. (R-28 at 19.) She implemented it and it was helpful.

Mrs. D. disagreed with Ms. Lowenbraun's psychological report indicating that S.D.'s social skills were below average. (R-28 at 10.) She said he was articulate, friendly, nice, and fair and attracts friends to him. She did not feel that S.D.'s behaviors in school might be impeding his social relations with other kids. She observed kids come running up and hugging S.D. saying, "We missed you." She said he still was very

popular. (R-28 at 9.) When she said she looked at the schools Center and Rugby, she meant that she researched them online.

S.D. was out of school from December 2014 to March 2015, when Mrs. D. started him at the Lewis School. She understood that S.D.'s pediatrician, Dr. Riggall, concluded that S.D. met the criteria for a diagnosis of social phobia and anxiety only in situations of interpersonal sensitivity to criticism. She understood that that was for school only. (R-42.) They stopped going to Dr. Garson because he did not take any insurance and was very expensive. S.D. did not see any outside therapist in the 2013-2014 year or the 2014-2015 school year. After S.D. left school, he attended therapy sessions with the BCBA, Dr. Theresa Taylor, in West Windsor. She treated him for anxiety. He saw her for about three months and she was helpful for managing his feelings. Their therapy began in December 2014.

Mrs. D. recalled asking for an FBA on November 21, 2014. (R-33 at 1.) She had consulted an advocate in education who gave her suggestions. She did not know what an FBA was until the advocate explained it to her. She does not believe that the Board explained it to her a year earlier. Between November 21 and early December 2014, S.D.'s situation deteriorated and he could not sleep. The school was saying they could not accommodate him. She did not want S.D. to go to the schools the Board recommended because S.D. was a delicate, gentle kid who would get upset for the slightest thing.

Mrs. D. did not observe any classes when she went to the Center School. She had to cancel a meeting on November 30, 2014, because she just started a new job. (R-35 at 10.) In the email exchange, Ms. Mulhall, stated that S.D. has been sporadic with handing in his homework and it needs to be completed every night. When she read that email, she was thinking that S.D. would not be going back to Maurice Hawk. (R-35 at 8.) She did not meet with Ms. Mulhall because she had decided not to send him back by December 1, 2014. It annoyed her that her child was crying every day and she was talking about homework.

By December 19, 2014, Mrs. D. had already mentioned being interested in sending S.D. to the Lewis School. The Lewis School had handled S.D.'s brother's anxiety issues very well. She recalls her husband sending an email and attaching a document regarding S.D.'s needs on December 19, 2014. (R-40.) She recalls consulting with Dr. Johnston, a licensed psychologist. She knows it was after December 23, 2014, because she decided to consult with a lawyer on that day. They were not considering any other school except Lewis. Dr. Johnston's report indicates that the case was referred to him on February 7, 2015. (R-52.) Mrs. D. testified her attorney referred her. When they went to see Dr. Johnston they were already considering the Lewis School and no other placements. Before the IEP was offered at a meeting on December 23, 2014, her husband had visited and based on his observations, they had decided Center School was totally inappropriate for S.D. They sought an opinion from Dr. Johnston for the due process matter. The expert opinion would validate her and her husband's feelings. The Board never offered to pay for the therapy sessions with Dr. Garson, although they recommended him because his behavior was interfering with his learning.

Mrs. D. added that the Lewis School detected what they thought was an auditory processing disorder when S.D. was evaluated and they followed up with the audiologist at Capital Health who diagnosed an auditory processing disorder in January 2015.

Mrs. D. denied that an FBA was offered before 2013. The Board did not call her, send certified mail nor did it send an email to explain why it was important for S.D. to have an FBA.

Philip Concors

Philip Concors testified that he has been in the field of Special Education and Behavior Analysis for twenty-four years. He was qualified as an expert in the area of School-Based Behavior Analysis. (P-8.)

Mr. Concors observed S.D. at Lewis on Friday, September 11, 2015. He did not talk to the parents because he likes to go in "cold." The parents' counsel introduced him

to the parents, but it did not affect his ability to testify objectively. He does evaluations that are approximately seventy-five percent for school boards and twenty-five percent for parents. He only reviews records after his observation. He testified that the purpose of an FBA is to develop a hypothesis as to what triggers certain behavior. He has performed hundreds of them in his twenty-four years, approximately six per month.

Reviewing the evaluation plan, Mr. Concors testified that if the CST believes that an evaluation is warranted, it should check the box that it is warranted and note the parents' concern separately. In addition to the evaluation plan, Mr. Concors reviewed the psychiatric evaluation, the behavior plan, the current IEP and the "Behavior Log." In the evaluation plan, where it says, "We will reconvene in November or earlier if the behavioral issues persist," it means that the Board should be monitoring the problem behavior and if it still occurring, then there is an urgent need to conduct an FBA and develop an intervention. However, as of May 2013, the behaviors were still continuing and the Board sought a psychiatric evaluation instead of an FBA. This surprised him because an FBA is a less restrictive procedure and a psychiatric evaluation often leads to medication. He noted that S.D.'s second-grade IEP said that an FBA will be conducted in the fall. (R-15 at 9.) That would mean that the observation would begin in September. The FBA should have been done as soon as the concerns were noted, not wait until the end of second grade. Mr. Concors stated that he would have been aggressive in trying to follow up with the parents when Mrs. D. emailed the Board that she is "out of the country due to a family emergency." He would probably follow-up with a phone call. (R-18 at 2.)

One cannot write appropriate goals in an IEP without baseline data to establish the current level of problem behavior. The December 2014 IEP has no baseline data for problem behavior. Similarly, the second-grade IEP of August 2013 has no baseline data on problem behavior. If behavior does not improve, you need a new intervention or a new set of supports. Without baseline data, one could provide an intervention that makes the behavior worse. The behavior log shows the behaviors were interfering with S.D.'s learning. (R-4 at 3.) His behaviors were socially stigmatizing and disruptive to the school environment. The fact that the behaviors, such as the forty-five minute tantrum and crying, were getting worse indicated that the interventions were not

working. (R-23.) He testified that the behaviors were disruptive to the learning environment.

S.D. also experienced anxiety about the school bus. (R-12 at 2.) Anxiety is avoidance behavior and there are interventions that would address this. An FBA would establish predictions and patterns that would address the school avoidance behavior. The fact that S.D. enjoys his peers when he is not frustrated also could be addressed in an FBA. Mr. Concors reviewed the psychiatrist's recommendation to ignore S.D.'s emotional displays. He believes that such recommendations should be avoided until an FBA is done or else the interventions could increase the problem behavior. (R-14 at 4-5.) The psychiatrist does not base his or her recommendation on actual measurements so the recommendation is unlikely to lead to effective intervention.

Mr. Concors noted that S.D. missed twenty-three days of school in second grade, which is a lot of instructional time. Mrs. D. requested an FBA on November 21, 2014. (R-33 at 2.) Mr. Concors reviewed the Positive Behavior Supports and Safety Plan and believed that the FBA should have been developed based on intervention results in February. Giving S.D. a snack, which is listed first, could reinforce the problem behavior. The plan assumes that the function of the behavior is attention seeking. He opined that the school should have conducted an FBA in the home in order to observe and capture data and analyze it. He observed S.D. at the Lewis School and he was on task seventy-eight percent of the time with no tantrums or disruptions.

On cross-examination, Mr. Concors noted that he was at the Lewis School for two hours. He reviewed documents there, but did not keep them. He believed that a district could do an FBA without parental consent if the behavior is dangerous, but he did not know specifically how consent could be bypassed. He has never worked in a public school. He was not aware that the case manager suggested an FBA in August 2013 and had not seen the email from Ms. Lowenbraun requesting consent. (R-17 and R-18.) He did not form an opinion as to whether S.D. made educational progress. However, he believes that the district waited too long to get an FBA although the district agreed that an FBA was needed in August 2013.

Mr. Concors believes that the CST should have sought the FBA in S.D.'s kindergarten year. However, he only saw anecdotal logs from S.D.'s first and second-grade years. The anxiety about the school bus in kindergarten was not itself a red flag. The July 2013 social history evaluation paragraph that talks about S.D.'s preschool and kindergarten would not be enough to indicate behavioral problems that are creating safety concerns or interrupting learning. Mr. Concors looked only at S.D.'s 2014 IEP, not the prior years. He agreed that, based on the data provided, he would not be able to render an opinion on whether S.D. made educational progress prior to December 2014.

Mr. Concors noted that, although the Board did not originally suggest that an FBA be performed in May 2013, three months later, on August 14, 2013, the Board asked for an FBA as a proposed additional assessment. (R-17.) He did not see the consent form that was ultimately signed by S.D.'s parents to do the FBA. (R-34.) He would not be able to render an opinion on the appropriateness of the Center School that was offered in the 2014 IEP. When he observed S.D. at the Lewis School, he did not determine whether S.D. was given curriculum commensurate with his grade level. S.D. was doing the same activity as the rest of the students in his nine-member class. There was no differentiation of the work. In behavior intervention, there is a technique called "demand fading" where, if the behavior function is to escape from difficult demands, those demands are decreased and then systematically increased as the behavior gets better.

Last, Mr. Concors added that S.D.'s behavioral progress is a part of his meaningful educational progress. Therefore, the behavior logs from the 2012-2013, 2013-2014 and 2014-2015 school years would indicate that he was not making meaningful educational progress because his behavior is likely to be interfering with his educational program. The strategy of the Board that the teacher avoids situations that she thinks will upset S.D. is contraindicated with behavioral treatment as it is preferable to have opportunities where the problem behavior may be occasioned in order to teach a replacement behavior.

Susan Hagstrom

Susan Hagstrom testified that she has a degree in speech and language pathology with a minor in psychology and a Master's degree in speech and language pathology with additional credits in education. She is also a teacher of the handicapped. She is employed as Director of Speech and Language Services at the Lewis School. There, a speech and language pathologist is assigned to each homeroom. She does the observations in the classrooms and gets the teacher's feedback. At the Lewis School, speech and language intervention is incorporated into their curriculum. It is Orton-Gillingham-based as well as some other proprietary methods of teaching that Mrs. Lewis has developed. She studied directly with Mrs. Lewis when she started at the Lewis School fifteen years ago.

S.D. entered the Lewis School in the middle of the 2014-2015 school year. He attended the 2015 summer program at Lewis and was attending as of September 2015. She has known him since he joined the school in March 2015. She observed that he sometimes has difficulty focusing, but he seems interested in school. He has difficulties with his executive functioning skills—that is the ability to initiate, to stop, give himself feedback, self-control, and prioritize tasks. These are things they do throughout the day at the Lewis School. He was having some difficulties with language processing and she noticed this when it came to his ability to organize things. S.D. received a speech and language survey by one of the speech and language pathologists, and he was found to be within normal limits. However, on the test for auditory processing, he was in the low part of the average range for his auditory memory for sentences and words. That means he has a deficit when he is in a classroom setting and has to remember directions given auditorily. The speech and language summary notes that S.D. is not eligible for speech services. (R-51.) He receives speech services because they are integrated into the curriculum. Teachers across the grades are adept at working on auditory processing skills, receptive and expressive language. S.D. remains on their watch list. Speech also helps you interact with people. S.D. is progressing academically at the Lewis School according to his teachers. Students come to Lewis with broken foundations and the teachers pull back to where they started to break down and then they build them back up again taking into account their areas of weakness.

S.D. tested well, but spelling seemed to be a definite area of weakness because when he was administered the nonsense words from Gillingham, it was evident that he is not able to apply spelling rules. He is using his visual memory in order to carry him through. Social skills also come under the umbrella of speech and language as do good executive functioning skills. S.D. is exposed to different levels of instruction depending on where he is. There is no cafeteria at the Lewis School so when the students have lunch they are either in the classroom or out in the common area. She witnessed that S.D. has good friends and enjoys being involved with a group.

Prior to testifying, Ms. Hagstrom looked at all the documents in S.D.'s main office file. The classroom teachers noted that he had a history of breakdowns. Since he has been at the Lewis School, the teachers reported that has only happened to him three times. Ms. Hagstrom read the notes from the observation of the staff from Maurice Hawk. (R-55.) There are no students in Lewis School without language-based learning issues because from their viewpoint, all learning is language-based. She is aware of the things that the audiologist saw in the central auditory processing evaluation and those things are not inconsistent with what a dyslexic person would exhibit.

At the Lewis School, they do not have behavior problems. Sometimes students who are having learning disabilities take on an emotional overlay as a response to not being able to deal with some of the learning problems they are having. For S.D., when she saw him in class he said one thing and wrote something else. He knew an answer, but had trouble expressing it in his words and that became a source of difficulty.

Although the staff from Maurice Hawk made it sound as though the Lewis School did not have the ability or skills or staff to take care of a behavioral issue, the staff person who deals with behavioral issues has never been called to intervene with anything regarding S.D. The team may not have known that the Lewis School had Eileen Luchi who is a trained school psychologist because she functions as the Dean. Traci Hatcher was S.D.'s classroom teacher last year. She was able to differentiate the instruction and the materials for S.D. Literacy comes within the practice of a speech and language pathologist. S.D. tested only sixty percent accuracy on the Gillingham

test, which shows that he does not have a clear phoneme grasp of the matching and that he is doing things from a visual memory. Differentiation is occurring in S.D.'s classes. For spelling, he is between grades three and four, for literature, he is grade five, and math, he is grade six. This is one of the things that the Lewis School is able to do because they do not have separate grades.

In S.D.'s class, Ms. Stevens was the senior master of learning therapist for Traci Hatcher at S.D.'s level. The Board commented "of greater concern are the lack of emotional support services for S.D. at the Lewis School." The Lewis teachers are all keen observers of the students and are able to tell when antecedent behavior occurs and they intervene before there is a negative consequence for the students. Ms. Luchi is not the only person available to provide emotional support. The classroom teachers intervene and help the child work through the process, and the students are very family oriented and take care of one another. All of the children are challenged at the school. If the Board staff came in during the process of rebuilding S.D., then they only saw a snapshot of time, but did not see the whole picture. The Board alleged that "presenting S.D. with work below his ability level may keep him from being frustrated, thereby decreasing the chance that he will react emotionally, but this will not help him make meaningful educational progress." Ms. Hagstrom disagreed that that is what was happening at the Lewis School. When S.D. knows the answer he is very impatient to give it, so if they were to dumb down things, they would totally lose S.D. He is a smart boy and he needs to be kept interested. He needs to be challenged and needs to maintain focus. She agrees with Dr. Johnston that emotional support or academic remediation has to be woven into the fabric of the school. They use the term integrated to indicate that they have high expectations for the students and that emotional support is situationally-based. (R-52.)

Ms. Hagstrom refers students for central auditory processing (CAP) evaluations if initial diagnostic testing shows an issue. A classroom teacher is also able to make a recommendation for a CAP evaluation. She viewed the one for S.D. (R-41.) She frequently has to review that type of evaluation to program for children in her role at the Lewis School. Her observation of S.D. in the classroom the week before her testimony gave some really good examples of issues listed in the evaluation. He gets distracted

by auditory sounds. He has a hard time listening with background noise and self-compensates by repeating a question to himself. The staff at the Lewis School is trained to work with children with central auditory processing disorders. They work on auditory memory and auditory discrimination, and that is where the phonemic awareness comes in with the kids. This is a weakness for S.D. They work on auditory comprehension as part of their technique with receptive and express language. When she got the report, she shared it with the speech and language pathologist and the classroom teacher. How they teach is not an isolated plan. S.D. fits into their methodology.

Ms. Hagstrom saw the evaluation report from Ms. Lowenbraun that stated that processing speed is an indication of the rapidity with which S.D. can mentally process simple routine information without making errors. At the Lewis School, they address processing speed by working on word identification and reading fluency. She has witnessed in the classroom that S.D. has difficulties in processing language. It is more of an integration deficit or weakness. The Lewis School can meet S.D.'s needs. S.D. misheard information at times and it was beneficial to repeat it. This indicates an auditory language processing difficulty. (R-10.) If the information that he misheard was sequenced-based, then they would work on sequencing with him. The Lewis School is capable of accommodating his needs in that regard. She has observed that a student's inability to properly hear a command can cause frustration that leads to emotional reactions, especially with students who may have been diagnosed as ADHD. She is familiar with sensory diets for students, but that would not be necessary for any of the students at the Lewis School. Lewis deals with the issue in class. It does not send the student out for some sensory experience. Lewis students are able to be one-on-one with the teacher or have individualized counseling. Also during their lunch time the teachers are in the classroom and they have free access to the teacher. They also keep in close touch with the families and the children.

A typical day for a student is that the kids are welcomed into a central space with their peers in the morning. They have therapy animals which are used to encourage the children to read by telling the children to read to the dogs. When they are called up to their homerooms, the students go up quietly. The students are very respectful and

know their routine. In their homerooms, they deal with the mechanics of language, which is a lot of the handwriting, reading and spelling for the first period, and then they go off to their content area levels. They know to expect to change classes and know how to keep themselves organized. The teacher makes sure that children organize all of their work, put away what needs to be put away and organize their homework for the evening. The students have a free lunch and their homeroom is their base. This was pretty much S.D.'s schedule for his 2014-2015 school year. (R-46.)

The mechanics part also includes dictations from auditory to written. There is a handwriting piece and then grammar. They do a lot with hands-on math with manipulatives. They try to make it functional so that it is brought into real life. She believes that he is in the sixth-grade level of math although he is only in the fourth grade. The higher the level of math, the more language is involved. If he experiences a hiccup, sometimes a speech and language pathologist can be called in to assist some of the kids with the language of the math. Literature is very important and they use books, novels and poetry. There is a lot of comprehension as well. Social studies is multimedia and they get immersed in the subject. This is where they do a lot of auditory processing. The students end with mechanics of language and this is where they do a lot of auditory processing and a lot of the direct executive functioning skills. S.D. also has the opportunity for electives like art and gym, which are part of his schedule. They teach the students how to deal with discomfort before the behaviors actually occur. Sara Stevens, a teacher at the Lewis School, said that S.D. seems thrilled to be there. He is always happy and smiling. (R-49.) Returning to the CAP evaluation, she noted that S.D.'s performance was outside the normal limits for the right ear, although within normal limits for the left, indicating some difficulty with auditory closure skills. It noted S.D.'s performance outside the limits for both ears for speech and noise condition, which indicated auditory difficulty. So if there was a noisy classroom or even an air conditioning on, S.D. would have a difficult time. The Lewis School is able to accommodate that.

Ms. Hagstrom admitted that she is not a certified teacher of the handicapped, but she is a licensed speech and language pathologist. Lewis follows the New Jersey core curriculum content standards. By third grade the children have learned the foundation

so they are expected to apply those skills. For many of the students at Lewis, this did not come naturally and they have to go back. In S.D.'s case, he does visual reading and visual memory, rather than being able to decode. They look at his strengths to remediate the weaknesses. She spent about forty-five minutes with S.D.'s file, but had a hard time remembering it.

S.D.'s first day was in March of 2015. She believes that testing of S.D. was done at the end of the school year 2015. She does not recall whether the file demonstrated any progress either from the beginning of the year at Maurice Hawk or from the beginning of his time at the Lewis School. She assured that there was objective evidence that S.D. is advancing academically during his time at Lewis, but she did not have it. She identified a bill from December of 2014 indicating that that is when S.D. came in for testing to determine whether or not to admit him and what his classes would look like. She recalls speaking with Ms. Hatcher over the summer and receiving information from other teachers through Ms. Stevens as head of the lower school. Ms. Hagstrom first observed him in July 2015. She observed S.D. approximately two times at twenty minutes each. More recently, last week she observed him for his mechanics of language class, which was forty-five minutes long.

The Lewis School is a school for language-based learning differences. They do not use the term disabilities. It is the Lewis School's philosophy to ready students to return to an environment where they would be among peers who do not have language-based learning differences. She believes she reviewed S.D.'s WISC scores on his education evaluation from the Board, but she does not remember them. She knows what Woodcock Johnson scores are, but has not received training in interpreting them. In looking at S.D.'s numbers, she did not see any numbers indicative of below average scores in any area. (R-10.) The Lewis School is not a school for Autistic children or children with primary behavioral issues. Lewis started as a school for students who are dyslexic and have at or above average intelligence and their difficulty is being able to integrate it and use it successfully. S.D. is scoring high, but there are some discrepancies and weak areas. They use the scores in order to plan what grade level studies he is going to be put into. To the extent that S.D. has demonstrated grade level

performance on the testing that would be attributable to whatever came before it in his life.

Ms. Hagstrom first observed S.D. four months after he started, which was July 2015. Regarding present levels of academic performance, there is no description of how S.D. performed. It is a description of course and course content. (R-50.) She has not seen any present levels of performance reports issued since the period of time covered that demonstrate S.D.'s performance in a quantitative way. She has not seen any of S.D.'s work or his grades. She has not seen any documentation of the curriculum to which S.D. is being exposed or anything that would be able to report to an outsider the intensity or complexity to which S.D. is exposed. Ms. Hagstrom testified that the teachers give teacher generated testing throughout the year. She does not have that personally nor does the school have it. She believes that there are grade books, but she does not have them. She only has conversations with the teachers who spent time with him.

Objective measurements of progress at the Lewis School would be from the tests they administer at the end of the year. They give the wide range achievement test for math and the Gates-MacGinitie test for reading comprehension. She did not have S.D.'s results from those. She noted that meaningful progress is more than just academic performance, but behavioral and emotional progress. After being shown several different instances that occurred when S.D. was at Maurice Hawk in which he got upset and cried (R-23), Ms. Hagstrom noted that the Lewis School has not seen any of those behaviors.

Ms. Hagstrom testified that the Lewis School is accredited by the New Jersey Association of Independent Schools and that is the accrediting body for many of the private schools in the area. It is internationally and nationally recognized. It became finalized the spring before she testified. The team examined everything about the school and observed the students as well. Again, the philosophy is that all learning involves language and that includes behaviors. They have had students who have been so frustrated by previous learning experiences that they have developed anger for

no reason. Once they find they are able to be successful and move on they are able to take control of their behaviors and turn out as very positive individuals.

Jaures Johnston

Jaures Johnston testified that he is a licensed psychologist in the State of Pennsylvania who currently works for the School District of Philadelphia. He has a BA and an MS in psychology. He has a certificate in school psychology from Millersville and he also has a principal's certificate, K-12. He is a certified principal in Pennsylvania. He has a PhD in school psychology and has been licensed for thirty-five years in Pennsylvania. He is primarily a school psychologist and also has a private practice in clinical psychology where he works with children and adults. He has evaluated approximately 2,000 plus students in his career. Dr. Johnston was accepted as an expert in the field of school psychology.

Dr. Johnston initially met S.D. when he met the family. He interviewed the parents for approximately an hour and then he met with S.D. by himself for forty-five minutes for a clinical interview. He did a projected personality evaluation and observed S.D. in the classroom. His role in a school district is to help to determine what assessments are given to a child. He has participated in home evaluations of a student who refuses to come to school, but it is unusual. He is familiar with FBAs and has quite frequently suggested that they be performed. A psychiatric evaluation is usually recommended after a lot of data has been gathered. If there are some emotional issues that need to be addressed, the psychiatrist is called in. An FBA can be done at any point in the evaluation process. One can actually complete an FBA without going through a formal process of referral. He defined meaningful progress as the student making progress in comparison to the baseline data that has been gathered. The initial IEP that has been developed can indicate the student's improvement at periodic intervals. He believes that out-of-district placement for a child is usually the last consideration because he is always looking for the least restrictive environment for a student. An FBA is usually one of the first steps when dealing with a student who has behavioral issues or concerns.

Dr. Johnston reviewed S.D.'s IEPs as well as the report of the school district psychiatrist. Dr. Johnston testified that when making a determination of whether to evaluate a child as part of an IEP team, he considers the child's needs first and foremost. If documentation shows that a student is not making progress, he would call an IEP meeting. He would not keep the same goals and objectives year after year if they were not working. His initial session with the parents of S.D. was for one hour. The parents impressed him as very caring, supportive and involved.

He does not recall seeing anything in the interview of the school psychologist that related to an auditory processing issue. As part of Ms. Lowenbraun's evaluation, she assessed his intellectual abilities. According to the results of the intellectual measure, the WISC-IV, S.D. was functioning within the high average range with overall ability, but there were some significant discrepancies among individual processes. His perceptual reasoning scale is 131, which is in the superior range of intellectual ability. However, his verbal comprehension is a 106. That is within the average range of intellectual ability. So there is a statistically significant difference in that it is overwhelmingly higher in terms of his perceptual reasoning than his working comprehension and working memory. Working memory is very similar to the verbal comprehension score within the average range and the red flag for him would be processing speed, which is eighty-five. That is a tremendous difference from his perceptual reasoning score. Looking at the overall evaluation, because processing speed was so significantly low, he would have wanted to look at some other subtest scores and see if there is any indication that processing might be problematic in another domain. Dr. Johnston noted the possibility of a connection between possible auditory problems and behaviors because generally behaviors reflect one's ability to understand the world around them to take that information and respond to it. If your verbal or nonverbal processing is problematic, you may not understand what the expectations are of the people who are making demands.

The parents of S.D. called him to observe the Center School because they were presented with some options and did not feel confident or competent to make the decision on their own and wanted a professional opinion. He viewed the Center School and issued a report. (R-48.) His initial observation was that the school is in an industrial complex, rather commercial-looking. He was thinking what it is like for a

young boy S.D.'s age with a degree of anxiety that is presented with what might be perceived as an overwhelmingly large place. It is also quite a distance from his home, approximately an hour. That is always a concern of his that a student has to ride a long distance to get to a place. When that is coupled with anxiety disorder, he had concerns. The building had a lot of security and that continued throughout the tour. He initially met with the secretary who got in contact with Maryellen Grabowski, the administrator who was assigned to present the tour of the school. He believes the Center School has approximately 100 students, although it can accommodate well over that many students. There were a lot of large vacant areas. Every door required a key to get in. It was a locked facility. He was a little bit concerned about the level of security. He understands that it is a necessity, but it was disconcerting to him. He met the teachers of art, physical education, commercial arts and some of the students. He met primarily older students from the high school level. They shared some of their stories about why they were at Center School and what their experiences were at their previous schools.

The school struck him as a school that was addressing students with significant emotional issues. There were four social workers available and a psychologist. When you have staff members in that capacity and a large number of them, it indicates that there are interventions taking place to address behavioral or emotional concerns. Ms. Grabowski told him that there are students that have learning disabilities, some students with autism spectrum disorder, and some with emotional disturbance. Some had sensory issues and some had issues that required occupational and physical therapy. He met the occupational therapist (OT) who talked about the program where all students participate in occupational therapy. The OT felt that all students should have a sensory diet in order to address some of their educational issues. There was an apparatus in a very large room to which she would recommend students as basically a time out room, a room for relaxation. He did not believe that would be the sole reason to select a school based on a room like that. In his work as a school psychologist, he has come across other students similar to S.D. He does not believe that a room such as that is the only way to accommodate S.D.'s needs. He is not negating the possibility that it may be beneficial for some students, and actually believes that if S.D. was the only one being removed to that room, it could be detrimental.

His concern that emerged was that S.D. as well as the other students can come in contact with the older students that may have emotional issues that go well beyond some of the younger students. Specifically, when he was ready to leave the school, there was a young man who was in the area. He was pacing back and forth and saying, "I want my f___ing bus. I want my f___ing bus now. I'm not waiting any God damn longer for my f___ing bus." In evaluating whether Center School would be a beneficial environment for S.D., he thinks this would not be good. He did not encounter anything like that in his visit to the Lewis School.

At Center School, in addition to seeing the older students there, he had the opportunity to look into the classroom, although not actually go into it. The students seemed to be on task and the teacher teaching. There were a number of individuals outside of the classroom students that were being attended to by Ms. Grabowski. She indicated that there are a number of personnel so that if a student needed a time out or if a student needed some type of transition because of an emotional issue that was occurring or needed to talk with someone, he or she could do it outside of the classroom. So there were a number of students outside the classrooms, some crying, some just talking and some looking angry. He thought because of his experience that such a population may tend to be more externally acting out whereas S.D. has internal issues and he internalizes things, so if you need that many staff members to address behavioral concerns, it means that there are behavioral concerns. Ultimately, he does not believe that, based on his observations, the Center School would be an appropriate placement for S.D.

Dr. Johnston observed the Lewis School on April 30, 2015. The Lewis School is in a residential neighborhood that sits among a community. It is a very large residence with a number of ancillary buildings that appear to be connected to the school itself. The staff members were very friendly and there were not any locked doors that he saw. The whole presentation was quite different. Also, the Lewis School is approximately fifteen minutes from S.D.'s home so the commute there would be significantly shorter. He was impressed by its level of organization and structure. They have specific times when things are done and they stick to that timeline. The teachers were impressive in that they seemed to have not just a grasp of educational theory, but a sense that the

staff was able to address almost any issue that the students have. There was not a sense that a particular specialist, such as a guidance counselor or a psychologist, would have to work with a student. Students' issues were addressed by the teacher and a teaching assistant. These individuals presented themselves as very competent. Mrs. Lewis, he understands, still works there and she has a great knowledge of students with learning difficulties. The program is structured specifically for them.

The Lewis staff indicated that a language-based educational philosophy is pervasive at the school. Emotional issues often go hand in hand with learning problems. Inability to learn properly can manifest itself in some type of behavioral issues. The Lewis staff indicated that there was differentiated instruction in that they accommodate those students in the classroom or, if necessary, move them to a next higher level. The Lewis School has a larger number of students than Center School had overall that allows for some flexibility in grouping students. At Lewis, they gather baseline data and use that data as a reference point for certain points in the school year. They differentiate the instruction and there was progress monitoring just like there would be in an IEP. In his opinion, the Lewis School is an appropriate placement for S.D., not just because of his interviews with the students or the teachers or S.D. His opinion comes from seeing S.D. and the teacher and the rest of his classmates during a relatively brief interaction.

When he witnessed S.D.'s class, S.D. was not an active participant in the classroom. The other students actively participated. There was an organization and flow to the class which was quite impressive to him. He also reviewed all the records of S.D. because he had to get to know more about S.D. in terms of what got him to the point where he was being considered for a private school. He saw that S.D. was seemingly happy, engaged and comfortable in the setting. Dr. Johnston knew from the records that in the public school setting, S.D. had numerous instances of meltdowns, crying and being upset and not being able to move onto the next activity, and he was curious to determine if anything like that was happening at the Lewis School. The teacher talked about two incidents at Lewis for the two months he was there. One incident occurred shortly after he arrived and she used the tactic of deescalating the situation that any professional of his training would use. She deescalated the crying

episode which apparently was a misinterpretation on S.D.'s part about what she was saying. There was also one other minor incident. He does not believe that he missed a day of school in the two months from the time he entered Lewis.

Dr. Johnston further testified that he was asked by the parents to provide recommendations of a placement at the time of referral, February 7, 2015. The parents did not say that they did not want to send S.D. to the Center School. They said they would like for him to give advice on whether the Center School is an appropriate place. He did voice concerns about it. He set forth in his report that while the Center School is certainly appropriate for some children, it is his professional opinion that it is not appropriate for S.D. (R-48.) He had handwritten notes reflecting his visit to the Center School on February 23, 2015. (R-53.) Therein, he indicated that seven students in the third grade class, a teacher and assistant, primary exceptionalities ASD, ADHD, dyslexia, and specific therapies for auditory processing disorder. He believes that notation was in answer to a question he posed to Ms. Grabowski. He also noted anxiety therapy, CBT meeting cognitive behavior therapy. To the right of that, he noted dialectic behavioral therapy. These are approaches within the mental health field to address student anxiety. He noted that they are designed to test a student's skills to cope with stress. Those therapies could have been appropriate for S.D. based on what he had seen of S.D. and the diagnosis of anxiety disorder. It indicates the intent to improve interpersonal relationships. His notes also set forth once a week full group counseling session for elementary school, individual counseling one time a week and once a week grade group counseling for therapist on staff.

Dr. Johnston agreed that such counseling could potentially benefit a student with a diagnosis of anxiety disorder. There was also a child psychiatrist available once a week. What appeared in his handwritten notes did not make it into either report. When asked why, he stated that the first report was briefer than the Lewis School report. He agreed that he did not provide the kind of detail in his report on the appropriateness of the Lewis School that was seen in his handwritten notes regarding his interviews and observations at the Center School. By the time he observed S.D. at the Lewis School, his parents had already placed him there. They were not in the room when he interviewed S.D., however. Although his report said that it would be understandable

that S.D. might feel intimidated and overwhelmed by the industrial-like presentation of the Center School, he did not have any evidence that S.D. felt that way. He agreed that there is a possibility that a child would take into account what a parent says to them and be influenced by it. Although he handwrote that the Center School was more of an Autism-centered school, he did not investigate that statement. It just struck him that there were students there who were Autistic. He asked in general what kind of disabilities they serviced at the school and she noted kids with learning disabilities or dyslexia, sensory issues, ADHD and emotional disturbance. He agrees with S.D.'s classification as emotionally disturbed by the psychiatrist and the clinical diagnosis of anxiety disorder.

In reviewing his interview with S.D. on February 7, 2015, he was asked to recall the context in which S.D. wrote "like Lewis School the best." Dr. Johnston believes he asked S.D., having visited both schools, which school do you like? He believes that the parents and S.D. wanted an objective opinion from him and that they were engaging him to give factual information about the two schools. He denied that S.D.'s mother sought to validate her own opinion about the Lewis School. The father did not try to sway him in any particular way, but he did say, "Here are my concerns, Dr. Johnston." He offered the report before he attended the mediation session. He understood that the parents were in litigation, but denied knowing that the parents wanted to send the child to the Lewis School and not to the Center School. His impression upon meeting the parents when they engaged him to do the report was that the school had offered and they had visited the Center School, but the dad was concerned about the school and the things they observed. The materials he reviewed are all in one document; however, he reviewed the IEP as well as Dr. Martinson's psychiatric evaluation. Dr. Johnston said earlier that S.D. internalizes things as opposed to acting out externally because of the descriptions of behaviors in the classroom: his crying episodes, his meltdowns and his inability to express himself when asked what is wrong. S.D. is not the kind of student that acts out, hits other students or runs out of the classroom. Dr. Johnston admitted that he did not see any students acting out in the classroom of the Center School. He asked about the general classification of students not the classification of students in S.D.'s specific classroom. They impressed on him that they have a lot of staff members in the Center School, which is necessary in a school that deals with

students that have acting out kinds of behaviors. He agreed that cognitive behavior therapy or dialectical therapy would be a possible intervention strategy to use if the child were internalizing behaviors, such as crying and then lashing out. Dr. Johnston did not gather data on whether S.D. was being appropriately challenged at the Lewis School. In his brief observation, he felt like the students were being challenged.

Although Dr. Johnston did not have a chance to look at the curriculum and what S.D. had mastered previously as opposed to what was being taught in the Lewis School classroom, he knows that S.D. is beyond the grade level of other third-grade students. The teachers at Lewis explained that they differentiated by saying that they are preparing to place S.D. in a classroom where he would get a greater challenge, so they would move him to a fourth-grade level if it is more appropriate for him. He did not actually see any of the work that S.D. had completed. He did not review any baseline data that was reviewed by the Lewis School staff. However, he believes they administered the wide range achievement test and the Gates-MacGinitie test. He agreed also that if S.D. was performing math on a sixth-grade level when he was in the third grade then they could not entirely attribute it to two months at the Lewis School. It would be fair to say that S.D. would not jump three grade levels from Maurice Hawk to the Lewis School in the space of two months. He has not seen any evidence of any academic progress measured at the Lewis School. In his professional opinion, the Center School would not be the choice of a placement for S.D. Taking into account the individual needs of this particular student, he believes that some children with an ED diagnosis would be fine, but S.D. would not be. He does agree that reasonably educated caring professionals could reasonably disagree over such situations.

Dr. Johnston testified that the FBA could have been completed without a formal request for an evaluation. Parents can say that they want the children evaluated or teachers can indicate that a student is having trouble and needs an evaluation. Formal evaluations are very time consuming, but an FBA can be conducted prior to any formal evaluation taking place.

In his observation, he observed some older students arguing. He did not interview the younger students. He saw five younger students being attended to by

aides or therapeutic support staff that were not teachers but were apparently assigned responsibility to intervene. He had a sense of what S.D.'s issues were prior to visiting the school from his interviews. He believes there could be general anxiety just in the nature of the learning environment. Anxiety is part of an emotionally disturbed diagnosis even though there are other conditions. Dr. Johnston did not understand the O.T.'s comment that they could address auditory processing issues by using noise filtering headphones. He never got any sense that the parents were trying to convince S.D. not to like the Center School. He also noted on the amendment consent form that Mrs. D. signed on October 13, 2014, that, "Many supports are in place to help S.D A shared instructional assistant will be with S.D. throughout the school day except during math." That document shows that the Board did attempt a one-on-one assistant before making a decision to send S.D. to an out-of-district placement.

Mr. D.

Mr. D. testified that S.D. is his youngest son. He never saw the behavioral log on his son and is disturbed that his son was going through those behaviors without his parents' knowledge. He had to pick up his son at times, but he did not know the intensity of S.D.'s behavior. Although the Board had his cell phone number and office number, no one from the school ever called or emailed him to seek an FBA for S.D. Mr. D. emailed Ms. Lowenbraun (R-40) who had been dealing with S.D.'s teachers. He mainly dealt with the principal. She called him frequently, like every day. During S.D.'s third-grade year, she had to pick up S.D. early about three or four times. His wife may have picked him up more times than that, maybe ten.

Mr. D. attended an IEP meeting for S.D. on December 23, 2014. He did not recognize the draft IEP from that meeting. He recalled though that Center School was indicated as the placement on the first page of the document. He trusted the principal and felt he had a good relationship with her. He believed that they all had one goal, which was to get S.D. out of "this mess" and find a solution. They said, "This is a draft" and "Don't worry, Mr. D. This is not the final." He signed that he attended the meeting and he thought they would talk about options, but he later realized that it was not an open discussion. They were not inclined to offer anything else. He felt sad and

frustrated and the principal then stopped the discussion recognizing they were not getting to a conclusion.

Mr. D. said that he went to visit Center School with an open mind, though. It took him an hour-and-a-half to get to the school. He described the building as a four-story office building that was not inviting for students. One must go through two security doors and then ring a bell. At that door, one shows identification and signs in. Then there is walk through a long, approximately four foot wide corridor leading to the main area of Center School. From there, one passes through some glass doors from which one can see a glass room with civil policemen. Then there is the OT room. From there, the staff took S.D. to the indoor playground on a different floor. There are elevators, but not for the students. The staircase has a very heavy self-locking door. S.D. responded by holding his hand. He saw one teenage girl who was low functioning. She was jumping up to grab something and asking for help. He then saw one of the civil policemen take her a little forcefully. He saw students coming down the stairs who were big, looking like teenagers. Mr. D. believes that the staircase is prone to be a place where S.D. might encounter some problems. He does not believe that S. would get along with the other children that he saw at the school. Most that he saw were low functioning. They did not pay attention to him being there. Only one student came close and said, "Hi."

Mr. D. described his son as "dainty" saying he is the "girly boy" in his family. He is skinny, small and soft and is very comfortable with staying around girls. His school history confirmed his description. (R-12.) He is very sensitive as well.

Mr. D. observed the Lewis School as well. It was very different. When you enter people come and open the door to the car. They take your children to the classroom and say "Good morning, Sir." He really feels welcome there. S.D. likes to go to school and goes happily every day. He does not believe that S.D. will survive at Center School because he is very fragile. He weighs fifty pounds. He cannot handle rough situations. At home, Mr. D. does not deal with him. He does not talk to him because if he talks to him, it may get worse.

S.D. received certificates of achievement for completing additional educational courses when he was missing school. (P-7.) One is for completing 1,000 math problems. The school sent home work for S.D., which he did. No one from the Board actually ever came to their home. He ultimately wants S.D. and his brother to return to the public school system and is willing to work cooperatively with the Board to ensure that can happen.

Mr. D. testified that the Board made the decision not to send S.D. back to Maurice Hawk. He visited Center School prior to the IEP meeting so he knew they were going to be recommending it. He told the principal that he did not want S.D. going to Center School. As of January 2015, S.D. was either going to Center School, which he and his wife were against, or he would go somewhere else. Between the IEP meeting December 23, 2014, and S.D.'s enrollment in Lewis in March 2015, there were holidays in which he could not talk to any school or a lawyer. Eventually, his wife found Mr. Montgomery, but he consulted other people as well trying to find out what to do, so that is why it took a little time. When he consulted with Dr. Johnston, his intent was to obtain an opinion for this legal proceeding. He was familiar with the Lewis School because one of his other sons has attended it for some time and he felt really comfortable with it.

He disagreed with Ms. Stokes' testimony that he and his son liked Center School and only his wife was against it. He did not want to say to her face that he did not like the place, so he said that he needed to go home and talk to his wife. He agrees that S.D. enjoyed the indoor playground.

FINDINGS OF FACT

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It 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). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself" in that "[i]t

must be such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Perrone, 5 N.J. 514, 522 (1950).

Ms. Lowenbraun was a credible witness who was able to support most of her testimony regarding the actions that they took to assist S.D. with documentation. Nevertheless, she and her staff failed to significantly alter IEPs after the clear signs that the actions that they were taking were inadequate.

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

S.D. began attending Board schools in kindergarten in the 2011-2012 school year. His teacher reported that he had difficulties accepting disappointments and would cry when frustrated. S.D. had behavioral issues and did not transition well from kindergarten into first grade when Ms. Lowenbraun met him. She felt he needed to be evaluated, so the parents and the CST met for an evaluation planning meeting on October 4, 2012. The parents dispute Lowenbraun’s testimony that S.D.’s parents indicated that they wanted more time to consult with an outside therapist before making the decision to evaluate. (R-5.) The Board recommended Dr. Garson and Dr. Garson met with S.D. throughout the year. (R-11.) S.D. had frequent crying spells and emotional breakdowns throughout his first-grade year, 2012-2013. Although the notes from the meeting indicate that they will reconvene in November 2012, the CST did not reconvene until May 2013. The record shows that there was continuous contact with the parents in the meantime, however. (R-6.)

In May 2013, the IEP team reconvened and the parents agreed to educational, psychological, social and psychiatric evaluations. (R-8.) Ms. Lowenbraun’s psychological evaluation of S.D. on July 8, 2013 noted that S.D.’s behavioral and emotional issues, crying and tantrums increased in the first grade and that S.D.’s abilities to sustain attention, concentrate and exert mental control are a weakness relative to his nonverbal reasoning abilities. S.D.’s nonverbal reasoning abilities were found to be in the very superior range, but verbal reasoning abilities and working memory were average and processing speed was low average. (R-11 at 7-8.)

Dr. Martinson's psychiatric evaluation concluded that S.D. had an anxiety disorder. (R-14 at 4.) Dr. Martinson recommended that S.D. continue working with his community-based counselor in order to develop strategies to better control his anxiety. He recommended cognitive behavior therapy and ignoring S.D.'s tantrums, though S.D. should be encouraged to leave the classroom and meet with the school counselor for a "time-out" until he becomes emotionally better fortified and can return to the classroom. (R-14 at 4-5.) He recommended a classification as Emotionally Disturbed, to which S.D.'s parents agreed. (R-14 at 5.)

The social assessment by Ms. Edmonds indicated that S.D. is unable to perform in the classroom and will shut down when he is not doing well emotionally. She noted that he does well academically, but is not progressing to his potential due to emotional issues. (R-12 at 5.)

Dr. Bohler-Monforte's educational evaluation set forth that Woodcock-Johnson testing noted that S.D. was performing at or above grade level in all broad academic areas. His results were average in oral language, listening comprehension, reading comprehension and silent reading. (R-10 at 5-6.) Dr. Bohler-Monforte also noted that S.D.'s moods can significantly impact his daily performance, particularly when S.D. needs to persevere with challenging tasks. (R-10 at 1.)

The initial IEP dated August 14, 2013 that resulted from the evaluations noted that behavioral interventions were appropriate. (R-15 at 7.) It indicated that S.D. would begin school-based counseling and learn coping strategies. Counseling would be individual twice monthly. The IEP provided, "If needed, he can request to meet with the guidance counselor or psychologist." (R-15 at 7.) Modifications included that "S.D. may ask for a "time out" from the classroom when upset to meet with the school counselor or case manager. (R-15 at 9.) Lowenbraun testified that this came from Dr. Martinson. It indicates, "An FBA will be conducted in the fall." (R-15 at 9.)

At the IEP meeting of August 13, 2013, Lowenbraun provided Mrs. D. with a consent form for the FBA along with the initial IEP. (R-17.) Mrs. D. returned the signed

IEP, but did not return the signed consent form for the FBA. Mrs. D. never saw it. Ms. Lowenbraun sent a follow-up email on September 6, 2013, stating that she did not receive Mrs. D.'s permission to conduct an FBA. (R-18 at 2.) A week later, on September 13, 2013, Ms. Lowenbraun spoke to Mrs. D. to remind her of the need for the signed consent form. She followed up with an email telling Mrs. D. that she placed a copy of the consent form in S.D.'s backpack and asked her to sign it and send it back to her. Mrs. D. did not respond to either email nor did she return the signed FBA consent form.

Ms. Lowenbraun counseled S.D. during his second-grade year (2013-2014) and tried to keep him from having emotional outbursts. To assist him with transitioning from one activity to another, they used a shared instructional aide during lunch, recess and writing. Ms. Lowenbraun worked with S.D. on transitioning from home to school and return. She did not get a release from S.D.'s parents to speak with Dr. Garson who was treating S.D. During S.D.'s second-grade year, he was excessively absent missing school twenty-three times. His absences impeded his progress as he is more likely to become upset upon return from an absence. S.D.'s IEP was amended in May 2014 to add an instructional aide for reading, writing, Spanish and lunch/recess with the thought that third grade would be more difficult. During this time, the school kept a log on S.D. that Mrs. D did not know about. Mrs. D. requested an incident log from S.D.'s teacher but she did not respond.

In October 2014, S.D.'s third-grade year, the CST amended S.D.'s IEP with signed parental consent to add a shared instructional assistant throughout the day, except during math, to address the more frequent outbursts that S.D. was having that were disruptive to S.D.'s learning and that of his classmates. (R-25.) By this time S.D.'s temper tantrums were more disruptive. A "Positive Behavior Supports and Safety Plan" was implemented designated a six-person support team and setting forth strategies to support S.D. emotionally. (R-27.) Mrs. D. disagreed with the school staff on how to best address S.D.'s behavior. S.D. began to be absent more frequently. In November 2014 he was absent six days and as of December 19, 2014, he had been absent twenty times and late four times. (R-35 at 9.) S.D.'s behavior regressed each year. Because S.D.'s behaviors became unmanageable, Ms. Lowenbraun proposed

consideration of an out-of-district therapeutic placement that would be better suited to handle his behaviors. The Board suggested the Center School and the Rugby School.

Before visiting either school, Mrs. D. sent an email on October 21, 2014 that the schools that Ms. Lowenbraun suggested are for children with behavioral and socializing issues. She expressed her belief that the environment would be toxic to S.D. as he is very sensitive. (R-28 at 9.)

Ms. Lowenbraun was familiar with the Center School because the Board had previously placed students there. It is a state-approved private school for the disabled that offered smaller class sizes and therapeutic supports to serve the needs of children with emotional issues. The goal was to have S.D. return to Board's schools ultimately. Ms. Lowenbraun visited the Center School with Mrs. D. at which time Ms. Lowenbraun raised the subject of an FBA. Mrs. D. consented to the FBA on November 25, 2014 (R-34), but an FBA was never completed because S.D. stopped attending Maurice Hawk in December 2014.

Ms. Lowenbraun held a staff meeting and developed a draft IEP that recommended placement at Center School with the support of weekly individual and group counseling at the IEP meeting on December 23, 2014. It was a thirty-day IEP that would be subject to revision during a meeting after thirty days in the program. Rona Stokes, OT Coordinator at Center School, provided the opinion that Center School would be good for S.D. because it uses a sensory integration approach designed for students who have trouble regulating their emotions and it has small classes. Students like S.D. who have a two hour or more commute use headphones to keep themselves calm on the ride to school. As of fall 2015, Center School's third-grade class had seven students who were taught by a certified teacher of the handicapped and a certified aide. Two of the seven students were from the Board's schools.

Ms. Grabowski testified and I **FIND** that Center School offers OT, counseling, one-on-one instruction and speech and language services so that students can cope with their individual challenges. The school was designed for students with average or

above average intelligence who struggle with social skills, emotion control or anxiety. At the time she testified, Center School's third-grade class had seven students and was taught by a certified teacher of the handicapped and a certified aide to permit differentiated instruction tailored to the needs of each student.

Mr. and Mrs. D. were not in agreement with the Center School and expressed concerns that Ms. Lowenbraun admitted were not placed in the IEP. Ms. Grabowski recalled that Mrs. D. did not understand the school's use of OT for S.D. when S.D. did not require OT as a related service. However, they did not formally reject the IEP or advise of their intentions to do so until February 18, 2015. On that date, the Board received a letter from the parents' attorney advising of their intent to place S.D. at the Lewis School and seek reimbursement from the Board. (R-44.) Mrs. D. got a report from psychologist Dr. Johnston that was meant to support their decision to send S.D. to the Lewis School.

Mrs. D. rejected the plan to ignore S.D.'s behaviors recommended by Dr. Martinson in the summer of 2013 as inappropriate and acquired the report of Dr. Garson dated November 22, 2014, which gave the opinion that "it is possible that [S.D.] feels abandoned by the adult figures in his life when he cries in school, as they ignore him when he has the most difficulty processing his thoughts and feelings. In short, the current IEP plan of action may be backfiring." (R-32.) Dr. Garson had last seen S.D. in spring 2013, which was more than sixteen months earlier. His report was based on a discussion with Mrs. D. on November 19, 2014. (R-32.)

Philip Concors, BCBA, an expert in school-based behavior analysis, observed S.D. at the Lewis School on Friday, September 11, 2015, the school day just before his testimony. School staff reported that S.D. had three minor tantrums the year before and none since school began two weeks before his testimony. Mr. Concors gave the opinion that S.D. should have received an FBA during kindergarten; however, he did not see documentation of consistent problem behaviors during S.D.'s kindergarten year to warrant the offer of an FBA prior to August 2013. Mr. Concors testified that he would have renewed the request for Mrs. D.'s consent at the beginning of the following school year if the behaviors persisted. In September 2013, Ms. Lowenbraun did renew her

request for consent. She did so again in November 2014. Based on the data he reviewed, Mr. Concors could not conclude that S.D. lost any educational benefit due to the Board mishandling S.D.'s behaviors in school.

Susan Hagstrom, Director of Speech at the Lewis School, is not certified by the State of New Jersey as a teacher of the handicapped. S.D. was tested and determined to be not eligible for speech services. However, all instruction at Lewis has a focus on speech and language. Although not qualified as an expert, she offered that S.D.'s teachers report that he is being academically challenged and is making progress.

S.D.'s father, Mr. D., became more involved with his son's education when his wife started working in the fall of 2014. He was surprised to see the behavior logs from Maurice Hawk. He did not know the extent of S.D.'s behaviors at Maurice Hawk although he would receive an occasional phone call. He did not feel that the IEP meeting of December 2014 was a discussion of an appropriate placement but rather the Board giving its reasons for placing S.D. at Center School. His visit to Center School was over an hour away from their home. He and S.D. had to pass through security check points with police officers. He thought the setting was intimidating to S.D. and that the proposed classes were too low functioning and the teachers not welcoming. He wanted S.D. and his brother to attend the Lewis School where the staff was nurturing and friendly.

Dr. Johnston was qualified as an expert in school psychology. He was introduced to Mr. and Mrs. D. by their attorney. He visited the Center School and the Lewis School at their request. He noted that the Center School was in an industrial complex approximately an hour away. He was concerned about the length of the commute and the extent of security within the building. He saw students in classrooms and students outside classrooms receiving one on one consultation, which he surmised was due to them acting out. Dr. Johnston thought that it would be problematic to send S.D. into an environment with students who act out because S.D. is one who internalizes things. While at Center School, he observed a student pacing and cursing. He gave the expert opinion that the Center School was inappropriate for S.D. because the school seemed to serve students with significant emotional issues. He was

concerned that S.D. would be adversely affected by contact with older students with significant emotional issues. However, he admitted that Center School's use of cognitive behavior therapy and dialectic behavior therapy could be appropriate for a student with anxiety disorder such as S.D. He also admitted he was not familiar with the "sensory diet" utilized by Center School staff.

Dr. Johnston, who was qualified as an expert in school psychology, was impressed with the teacher at the Lewis School who told him that students have access to differentiated instruction, but he did not witness differentiated instruction for S.D. S.D. had been at the Lewis School for two months when he observed. He did not see evidence of academic progress at the Lewis School. The Center School staff explained the school's use of cognitive behavior therapy and dialectic behavior therapy and how they could be appropriate for a student with anxiety disorder. He concluded that Center School was an inappropriate placement for S.D. because of his anxiety, the length of the commute and the security within the building.

LEGAL DISCUSSION

The IDEA is designed to assure that disabled children may access a FAPE that is tailored to their specific needs. 20 U.S.C. § 1400(c). To further this goal, the state regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to N.J.A.C. 6A:14-10.2, make local school districts responsible for "the location, identification, evaluation, determination of eligibility, development of an individualized education program and the provision of a [FAPE] to students with disabilities." N.J.A.C. 6A:14-1.3.

In determining whether a student is eligible for special education services, a school district must conduct an initial evaluation, which "shall consist of a multi-disciplinary assessment in all areas of suspected disability." N.J.A.C. 6A:14-3.4(f). The evaluation shall "[i]nclude a functional assessment of academic performance and, where appropriate, a functional behavioral assessment," or FBA.¹ N.J.A.C. 6A:14-

¹ While the term "functional behavioral assessment" is not defined under state or federal law, one administrative tribunal explained in a special education matter that:

3.4(f)(4). If, upon completion of the evaluation, the school district, with input from the child's parents, determines that the child is eligible for special education services, the school district, again with input from the child's parents, shall develop and implement an IEP. N.J.A.C. 6A:14-3.4(e), N.J.A.C. 6A:14-3.5(a); N.J.A.C. 6A:14-3.7(a).

An IEP is the primary vehicle for providing students with a FAPE. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010). In developing an IEP, the IEP or child study team, which includes district staff members and the child's parents, shall consider such factors as "the strengths of the student and the concerns of the parents for enhancing the education of their child," "the academic, developmental and functional needs of the student," "the results of the initial evaluation or most recent evaluation of the student," and, "[i]n the case of a student whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions and supports to address that behavior." N.J.A.C. 6A:14-3.7(c).

An IEP is a written statement that explains how a FAPE will be provided to the child. 20 U.S.C. § 1414(d)(1)(A)(i). The IEP must contain such information as a specific statement of the student's current performance levels, the student's short-term and long-term goals, the proposed educational services, and criteria for evaluating the student's progress. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(VII). The school district must then

[t]he purpose of a [FBA] is to isolate a target behavior and to develop a hypothesis regarding the function of the target behavior. A target behavior is one that interferes with a student's ability to progress in the curriculum and to achieve the student's IEP goals. Once the target behavior is identified and the hypothesis developed, a Positive Behavior Intervention Plan can be prepared to address the target behavior with strategies and interventions, if necessary, or the target behavior can be addressed using a more informal approach.

A FBA is based on information collected over an extended period of time relating to a student's behavior in school and other settings [and includes] teacher observations; . . . interviews with persons involved in the student's school activities; information gathered from the student's parents; and data collected in the classroom regarding antecedent/behavior/consequence, the magnitude of behavior, the frequency of the behavior, the duration of behavior, the time of day the behavior occurs, and the activity in which the student is engaging or supposed to engage when the behavior is exhibited.

[Broward Cnty. Sch. Bd., 110 LRP 38160, (SEA FL May 7, 2010).]

review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C. § 1414(d)(4)(A)(i).

A school district satisfies the FAPE requirement when the district provides an IEP that is “reasonably calculated to enable the child to receive educational benefits.” Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-207 (1982). While “an IEP need not maximize the potential of a disabled student, it must provide ‘meaningful’ access to education and confer ‘some educational benefit’ upon the child for whom it is designed.” Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir.1999) (citing Rowley, 458 U.S. at 192, 200).

A school district must also educate disabled students in the “least restrictive environment,” or LRE. N.J.A.C. 6A:14-4.2. The LRE “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). Thus, “[s]pecial classes, separate schooling or other removal of a student with a disability from the student’s general education class occurs only when the nature or severity of the educational disability is such that education in the student’s general education class with the use of appropriate supplementary aids and services cannot be achieved satisfactorily.” N.J.A.C. 6A:14-4.2(a)(2). If a child must attend a separate school, the school district must ensure that “[p]lacement is provided in appropriate educational settings as close to home as possible.” N.J.A.C. 6A:14-4.2(a)(6). And a school district must consider “[t]he potentially beneficial or harmful effects which a placement may have on the student with disabilities or the other students in the class.” N.J.A.C. 6A:14-4.2(a)(8).

Parents may request a due process hearing before an Administrative Law Judge (ALJ) if they believe a school district has denied their child a FAPE. N.J.A.C. 6A:14-2.7(a). A due process request “shall be filed within two years of the date the party knew or should have known about the alleged action that forms the basis for the due process petition.” N.J.A.C. 6A:14-2.7(a)(1).

The school district bears the burden of proof and the burden of production at a due process hearing regarding the provision of FAPE. N.J.S.A. 18A:46-1.1. After the hearing, the ALJ's decision "shall be made on substantive grounds based on a determination of whether the child received a [FAPE]." N.J.A.C. 6A:14-2.7(k). If a parent alleges a procedural violation of the IDEA, an ALJ "may decide that the student did not receive a FAPE only if any procedural inadequacies: (1) impeded the student's right to a FAPE (2) significantly impeded the student's opportunity to participate in the decision-making process regarding the provision of FAPE; or (3) caused a deprivation of educational benefits." *Ibid*; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007) (citing 20 U.S.C. § 1415(f)(3)(E)(ii)); C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 66-67 (3d Cir. 2010). The ALJ's decision is final. N.J.A.C. 6A:14-2.7(l).

There are several available remedies for a school district's substantive and procedural violations of the IDEA. An ALJ may order a school district to pay for an independent evaluation of a child. N.J.A.C. 6A:14-2.5(c)(7). Another available remedy for IDEA violations is compensatory education, which is meant to "replace educational services the child should have received in the first place" and "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 717-718 (3d Cir. 2010) (quoting Reid v. Dist. of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005)). The "right to compensatory education accrues when the school district knows or should know that the student is receiving an inappropriate education," such that "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996). Finally, if the parents had unilaterally placed their child in a private school, an ALJ "may require the district to reimburse the parents for the cost of that enrollment if the [ALJ] finds that the district had not made a [FAPE] available to that student in a timely manner prior to that enrollment and that the private placement is appropriate." N.J.A.C. 6A:14-2.10(b).

I. The parents' claims for compensatory education due to the Board's failure to provide S.D. with FAPE.

The parents claim that the Board failed to provide S.D. with FAPE from the 2011-2012 school year, when S.D. was in kindergarten, through the 2014-2015 school year, when S.D. disenrolled from the school district and enrolled at the Lewis School. The parents seek compensatory education for this entire period as a remedy for the Board's alleged denial of FAPE.

As an initial matter, the parents' FAPE claims are limited by the IDEA's statute of limitations. Under state and federal law, a due process request "shall be filed within two years of the date the party knew or should have known about the alleged action that forms the basis for the due process petition." N.J.A.C. 6A:14-2.7(a)(1); 20 U.S.C. § 1415(f)(3)(C). However, an ALJ may extend the two-year filing period if (1) "[a] district board of education specifically misrepresented to the parent that the subject matter of the dispute was resolved to the satisfaction of the parent" or (2) "[t]he district board of education withheld information that was required by law to be provided to the parent." N.J.A.C. 6A:14-2.7(a)(1)(i) and (ii); 20 U.S.C. § 1415(f)(3)(D)(i) and (ii). Here, the parents filed for due process on January 14, 2015. They have failed to argue that they did not have knowledge about the Board's alleged denial of FAPE at an earlier date, and they have not raised the issue of the applicability of either exception to the statute of limitations to their due process petition. Therefore, I **CONCLUDE** that under IDEA's two-year statute of limitations, the parents' FAPE claims are limited to any violations occurring on or after January 14, 2013.

The question thus becomes whether and to what extent the Board deprived S.D. of FAPE on or after January 14, 2013, and whether and to what extent S.D. is entitled to compensatory education as a result of any such deprivation. The parents argue that the Board committed substantive and procedural violations that resulted in a denial of FAPE because the Board "failed to promptly identify S.D. as a student with a disability, failed to identify the full extent of S.D.'s unique needs, and failed to implement an appropriate IEP, considering the continued lack of behavioral progress, regression, and lack of proper assessment/evaluation." Post-Hearing Brief, p. 20.

Initial Evaluation and August 2013 IEP

Under the IDEA, a school district has “child-find” obligations “with respect to the location and referral of students who may have a disability due to physical, sensory, emotional, communication, cognitive or social difficulties.” N.J.A.C. 6A:14-3.3(a). The record shows that the parents met with a child study team on October 4, 2012, to discuss whether S.D. should be evaluated for eligibility for special education services due to behavioral problems. However, the group determined that an evaluation was not warranted. According to notes from that meeting, “[p]arents would like time to consult with an outside therapist and to try school strategies before considering an evaluation . . . We will reconvene in November, or earlier if behavioral issues persist.”

The record further shows that the Board met with the parents in November 2012 and agreed that S.D. would “continue to see therapist” and that the Board would “continue to monitor progress.” The Board continued to consult with the parents about S.D.’s behavioral issues throughout the 2012-2013 school year and provided S.D. with intervention and referral services.²

Finally, in May 2013, the Board met again with the parents to determine the need for a special education evaluation. As a result of that meeting, the Board and the parents agreed that an evaluation was necessary, and that S.D. would undergo educational, psychological, psychiatric, and social history assessments to determine his eligibility for special education services. After those assessments, which took place over the summer of 2013, S.D. was classified as eligible for special education services under the category of “emotionally disturbed” and his child study team devised an IEP for him in August 2013.

These facts do not support the parents’ claims that the Board “failed to promptly identify S.D. as a student with a disability.” Instead, the record shows that the Board tried to evaluate S.D. for special education services as early as October 2012, but that

² Under N.J.A.C. 6A:16-8.1(a), “[d]istrict boards of education shall establish and implement in each school building in which general education students are served a coordinated system for planning and delivering intervention and referral services designed to assist students who are experiencing learning, behavior, or health difficulties, and to assist staff who have difficulties in addressing students’ learning, behavior, or health needs.”

the parents did not consent to an evaluation at that time. The Board continued to consult with the parents about S.D.'s behavioral issues, provided him with intervention and referral services to monitor his behavior, evaluated him for special education services after the parents consented in May 2013, determined that he was eligible for special education services, and devised an IEP in August 2013. Thus, I **CONCLUDE** that the Board did not violate its child-find obligations by failing to promptly identify S.D. as a student with a disability.

The parents next contend that the August 2013 IEP was inappropriate and that, as a result, the Board denied S.D. FAPE during the 2013-2014 school year. The parents' claim is largely premised on the fact that the Board did not conduct an FBA of S.D. in developing his first IEP. However, "the IDEA and its implementing regulations do not require that a school use a [FBA] when initially testing students for suspected disabilities," only that "the component testing mechanisms [of an evaluation] must be determined on a case-by-case basis depending on the suspected disability and the student's needs." D.K. v. Abington Sch. Dist., 696 F.3d 233, 251, n. 7 (3d Cir. 2012) (citing 20 U.S.C. § 1414(b)(2)(A)-(C); 34 C.F.R. § 300.304(b)(1)-(3)). Moreover, the "[f]ailure to conduct an FBA . . . does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior." D.K., 696 F.3d at 251; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 (2d Cir. 2013).

Here, the Board evaluated S.D. using assessments that accounted for his suspected disability and needs and, based on that evaluation, devised an IEP that adequately identified S.D.'s behavioral impediments and implemented strategies to address S.D.'s behavior. First, the Board appropriately selected assessments based on S.D.'s suspected behavioral disability. According to the evaluation plan developed for S.D. in May 2013, the Board chose educational, psychological, social history, and psychiatric assessments to determine S.D.'s eligibility for special education services because "[S.D.] has been having emotional and behavioral difficulties all year," "[w]hen he is upset, he shuts down and becomes oppositional," and his behavioral and emotional issues were "starting to impact him academically." Those assessments

confirmed S.D.'s suspected behavioral disability and resulted in his classification as eligible for special education services as "emotionally disturbed."

Based on those assessments, the Board was able to devise an IEP that was reasonably calculated to enable S.D. to receive educational benefits by identifying S.D.'s behavioral issues and implementing strategies to address those issues. Those strategies included "school based counseling" to "learn coping strategies such as self-talk, counting to 10, deep breathes [sic], accessing assistance, etc.," and having teachers "fill out charts to look at antecedent conditions, behaviors and consequences" and "[t]he frequency and duration of the behavior," and the IEP noted that "[t]he supports will be changed if the behavior is extinguished." The IEP also included modifications to "present alternatives to negative behavior" and allow S.D. to "ask for a 'time out from the classroom when upset to meet with the school counselor or case manager." Finally, the August 2013 IEP included such supplementary services as a "shared instructional assistant during lunch/recess and writing." Importantly, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date," Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993). I **CONCLUDE** that, based on S.D.'s assessments, the August 2013 IEP was reasonably calculated to enable him to receive educational benefits by addressing his behavioral difficulties. The absence of an FBA prior to the development and implementation of the August 2013 IEP does not render that IEP inappropriate.

And while the parents also take issue with the fact that the August 2013 IEP notes that "[a]n FBA will be conducted in the fall," but one was never conducted, the record shows that the Board tried unsuccessfully to obtain parental consent on a couple of occasions in September 2013. Ms. Lowenbraun credibly testified that she thought an FBA was important, but that she did not have the parents sign an FBA consent form at the August 2013 IEP meeting because she wanted to give S.D. time to adjust to school in September and observe his behaviors before conducting an FBA. Then, in September, Ms. Lowenbraun attempted to get parental consent to conduct an FBA.

On September 3, 2013, S.D.'s mother notified Ms. Lowenbraun that the family would be out of the country and that S.D. would be absent from school on September 4th and 6th. On September 6th, Ms. Lowenbraun emailed S.D.'s mother to thank her for letting her know. She also stated that "I did not receive your permission to conduct an [FBA]. We had discussed this at the meeting and I told you that this assessment will help us determine the functional [sic] of [S.D.'s] behavior so that we can come up with additional strategies. If you would like to go ahead with the FBA I need you to sign and return the consent form."

While S.D.'s mother testified that she did not see this email from Ms. Lowenbraun, Ms. Lowenbraun emailed S.D. again on September 13, 2013, seeking consent for an FBA. Specifically, Ms. Lowenbraun wrote, "[i]t was good speaking with you today. Please look in [S.D.'s] backpack today for the envelope with your name on it. Inside is the permission to conduct the [FBA] we spoke about. Please sign the last page and send it back to me." S.D.'s mother may not have recalled receiving these emails, but the emails indicate that Ms. Lowenbraun also spoke with her in person about the FBA and provided her with an FBA consent form in September. Under the IDEA, "[p]arental consent . . . is required for an FBA conducted as an individual evaluation or reevaluation," Letter to Christiansen, 48 IDELR 161 (OSEP 2007), and it would have been reasonable for Ms. Lowenbraun to assume that, after several unsuccessful attempts to get parental consent for an FBA, S.D.'s mother did not want to consent to an FBA at that time. Thus, I **CONCLUDE** that the Board also did not act unreasonably in failing to conduct an FBA as indicated in the August 2013 IEP.

May 2014 IEP

Although the August 2013 IEP was appropriate, and the Board is not liable for the fact that an FBA was not administered in the fall of 2013, the next issue is whether subsequent IEPs were reasonably calculated to provide S.D. with FAPE. The documents and testimony reveal that, during the 2013-2014 school year, S.D.'s behavioral incidents increased and he was excessively absent from school. S.D.'s mother testified that S.D. had anxiety about going to school, and Ms. Lowenbraun testified that S.D.'s absences impeded his progress because he was more likely to get

upset upon his return. While the May 2014 IEP included a plan to help S.D. transition back to school after the weekend or from other absences, this is about the only change from S.D.'s August 2013 IEP even though S.D. continued to have significant behavioral issues while at school and experienced anxiety about attending school. Ms. Lowenbraun could have, but did not, revisit the idea of an FBA with S.D.'s parents at the May 2014 IEP meeting in order to try to adequately address S.D.'s persistent behavioral issues. It was clear that the behavioral strategies in the August 2013 IEP were ultimately unsuccessful, and yet the Board provided S.D. with essentially the same IEP for the 2014-2015 school year.

Under the IDEA, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Although S.D. is a bright child who made some progress academically during the 2013-2014, his behavioral issues impeded him from making progress appropriate in light of his circumstances. Certainly, a child who is excessively absent from school and who throws excessive tantrums while in school is not available for learning. Thus, because the May 2014 IEP was substantially the same as the August 2013 IEP despite S.D.'s persistent behavioral problems during the 2013-2014 school year, I **CONCLUDE** that the May 2014 IEP was not reasonably calculated to provide S.D. with meaningful access to education.

October 2014 IEP

The amended IEP the Board offered in October 2014 also failed to provide S.D. with FAPE. The record shows that the Board determined that a change needed to be made to S.D.'s IEP in October 2014 because "[h]is outbursts have been more frequent than they were at the beginning of the year, and at times longer in duration" and "[h]is outbursts can be disruptive to his own learning and to the learning of his classmates." While S.D.'s mother consented to an amendment, the only change was "[a] shared instructional assistant . . . throughout the school day except during math." The amended IEP did include a "Positive Behavior Supports & Safety Plan," but again, the Board neglected to ask for parental consent for an FBA in advance of the IEP amendment, and instead took a piecemeal approach to addressing S.D.'s continued behavioral issues even though the Board acknowledged that his emotional outbursts

were disrupting his own education and his classmates' education. As such, I **CONCLUDE** that the amended October 2014 IEP was also not reasonably calculated to provide S.D. with FAPE.

December 2014 IEP

I also **CONCLUDE** that the December 2014 IEP also failed to provide S.D. with FAPE because, through that IEP, the Board offered S.D. an inappropriate out-of-district placement at the Center School in Somerset. At the hearing, several witnesses testified about the appropriateness of the Center School. Ms. Lowenbraun testified that she had experience with the Center School because other district students had gone there, and she thought the Center School could provide the supports and services to meet S.D.'s educational, social, emotional, and behavioral needs. Ms. Stokes testified that she believed S.D. had sensory issues underlying his emotional difficulties, and that the Center School could provide S.D. with specialized sensory input services to help regulate his emotions. She also testified that she was not concerned about any negative effect a long commute to and from the school would have on S.D. because he could wear headphones for comfort. And Ms. Grabowski testified that the Center School teaches students with average to above average intelligence like S.D., but who struggle with larger class sizes, by offering smaller class sizes, quieter environments, one-on-one instruction, and occupational therapy.

However, there were also witnesses who testified about the inappropriateness of the Center School for S.D. S.D.'s father testified that it took over an hour to get to the Center School from their home, and that the school is located in an imposing, four-story building with security features that could intimidate S.D. Dr. Johnston echoed S.D.'s father's concerns about how the physical features of the school building could exacerbate S.D.'s anxiety, and added that the long commute could also present problems in light of S.D.'s anxiety disorder. Dr. Johnston also thought the school was inappropriate for S.D. because the school seemed to serve students with more significant emotional issues than S.D. and he was concerned that S.D. would be adversely affected by contact with older students with significant emotional issues. However, he admitted that Center School's use of cognitive behavior therapy and

dialectic behavior therapy could be appropriate for a student with anxiety disorder such as S.D.

While there is evidence that the Center School could offer certain services that could address S.D.'s behavioral issues, the Center School is not an appropriate placement for S.D. because such placement offends the IDEA's LRE requirement. Under this requirement, a school district must ensure that "[p]lacement is provided in appropriate educational settings as close to home as possible" and that "[a] full continuum of alternative placements . . . is available to meet the needs of students with disabilities for special education and related services." N.J.A.C. 6A:14-4.2(a). Alternative placements could include "[a] special education program in another local school district," "[a] New Jersey approved private school for students with disabilities or an out-of-State school for students with disabilities," or "[a]n accredited nonpublic school which is not specifically approved for the education of students with disabilities[.]" N.J.A.C. 6A:14-4.3(b). Based on S.D.'s anxiety issues with school attendance and the long commute S.D. would have to make each day to attend the Center School, the Center School is inappropriate for S.D. and the Board should have considered other placements closer to S.D.'s home. As such, the Center School is an inappropriate placement for S.D. and the Board failed to offer FAPE through the December 2014 IEP that placed him at the Center School.

In light of the above, I **CONCLUDE** that the Board denied S.D. FAPE during the 2013-2014 and 2014-2015 school years by failing to provide him with appropriate IEPs and, as a result, S.D. is entitled to compensatory education for a period equal to this period of deprivation, which started when the Board offered the May 5, 2014 IEP and ended with S.D.'s disenrollment from the Board's schools.

II. The parents' claim for tuition reimbursement for their unilateral placement of S.D. at the Lewis School.

Having determined that the December 2014 IEP placing S.D. at the Center School was inappropriate, the next inquiry is whether the Lewis School was an appropriate placement for S.D. such that the parents are entitled to tuition reimbursement for their unilateral placement of S.D. at that school.

While “the school district bears the burden of proving the appropriateness of the IEP it has proposed,” “[p]arents seeking reimbursement for a private placement bear the burden of demonstrating that the private placement is appropriate, even if the proposal in the IEP is inappropriate.” Carlisle, 62 F.3d at 533; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 (2d Cir. 2006) (citing M.S. v. Yonkers Bd. of Educ., 231 F.3d 96, 104 (2d Cir. 2000)). To satisfy this burden, “[a]n appropriate private placement need not meet state education standards or requirements,” such that “[f]or example, a private placement need not provide certified special education teachers or an IEP for the disabled student.” Frank G., 459 F.3d at 364 (citing Florence County Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 14 (1993)). Instead, “the issue turns on whether a placement – public or private – is ‘reasonably calculated to enable the child to receive educational benefits.’” Ibid.

As the Second Circuit Court of Appeals has explained:

No one factor is necessarily dispositive in determining whether parents' unilateral placement is ‘reasonably calculated to enable the child to receive educational benefits.’ Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides ‘educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.’

[Id. at 364-5 (quoting Rowley, 458 U.S. at 188-9, 207; citing Knable v. Bexley City Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); M.S., 231 F.3d at 105).

Here, the parents have met their burden of showing that the Lewis School is appropriate for S.D. While Ms. Lowenbraun testified that she did not think the Lewis School could address S.D.'s social, emotional, or educational needs, other testimony supports the conclusion that the Lewis School has provided S.D. with meaningful access to education. S.D.'s mother noted that S.D. had anxiety about attending school while at Maurice Hawk, but was excited to go to Lewis School and that his behavioral issues at Lewis School had significantly decreased when compared to his time at Maurice Hawk. She also testified that the Lewis School is only ten minutes from their home.

Ms. Hagstrom, the Lewis School's Director of Speech and Language Services, confirmed that S.D. had only a few behavioral incidents at school. She also noted that a central auditory processing evaluation performed on S.D. in January 2015 revealed deficits in auditory memory for sentences and words, but explained that Lewis School is designed for students with language-based learning difficulties and its teachers are trained to address auditory processing deficits like S.D.'s by working with students on auditory memory and auditory discrimination. Ms. Hagstrom also testified that the school has a trained school psychologist on staff, but that person has never had to respond to any behavioral incidents involving S.D. She also testified that one-on-one instruction and individualized counseling is available at Lewis School. Finally, while Ms. Hagstrom did not provide any objective evidence of S.D.'s academic progress such as grades or test scores, she and S.D.'s mother testified that S.D. was above grade level in both math and reading.

The totality of circumstances indicates that the Lewis School is an appropriate placement for S.D. Most important is a dearth of behavioral incidents while at the school. While at the time of the hearing, S.D. had attended the school for a few months, testimony revealed that he had only had three emotional outbursts, whereas such incidents regularly occurred while he was at Maurice Hawk. However, Ms. Hagstrom testified that the Lewis School is prepared to address any behavioral problems with S.D.

if and when they arise. Also significant is that the Lewis School identified a potential issue S.D. had with auditory processing, had this deficit confirmed through an outside evaluation, and has addressed this issue while S.D. has attended the school. As Ms. Hagstrom recognized, a student's inability to properly hear commands can lead to frustration and emotional or behavioral reactions. S.D.'s mother also testified that the Lewis School is close to their home and that S.D. is excited about going to the school. Finally, while the parents have not offered any objective evidence of academic progress like grades and tests, Ms. Hagstrom and S.D.'s mother testified that S.D. was at a sixth-grade level for math and reading while in the fourth grade. In light of all this, I **CONCLUDE** that the parents have shown that the Lewis School is an appropriate placement for S.D. and that they are entitled to tuition reimbursement for S.D.'s attendance at the Lewis School.³

Importantly, "an administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make the child's enrollment at the private school her 'then-current educational placement' for purposes of the stay-put rule." M.R. v. Ridley Sch. Dist., 744 F.3d 112, 119 (3d Cir. 2014). Thereafter, "the move to private school is no longer the parents' unilateral action, and the child is entitled to 'stay put' at the private school for the duration of the dispute resolution proceedings." Ibid. Moreover, "the school district is obliged to fund a private placement if it was either the educational setting prescribed by the current IEP or is subsequently designated by a hearing officer or administrative appeal official as the appropriate setting to meet a child's needs." Ibid. As a result, I further **CONCLUDE** that the parents are entitled to tuition reimbursement from the start of S.D.'s attendance at the Lewis School in March 2015 through the date of this decision.

III. The parents' claims for an IEE and reimbursement for Dr. Johnston's fees.

Finally, the parents seek (1) a publicly-funded IEE that includes a psychological assessment and an FBA and (2) reimbursement for Dr. Johnston's fees. Before directly addressing these claims, it is important to note that several years have passed since

³ Tuition reimbursement is also appropriate because it appears that the parents abided by the notice requirements for unilateral placement under N.J.A.C. 6A:14-2.10.

both S.D.'s initial evaluation in 2013 and his disenrollment from the Board's schools in 2015. N.J.A.C. 6A:14-3.8(a) requires that "[w]ithin three years of the previous classification, a multi-disciplinary reevaluation shall be completed to determine whether the student continues to be a student with a disability." N.J.A.C. 6A:14-3.8(b) further requires that "[a]s part of any reevaluation . . . [t]he IEP team shall review existing evaluation data on the student" and, "[o]n the basis of that review, and input from the student's parents, the IEP team shall identify what additional data, if any, are needed to determine" if "the student continues to have a disability;" "[t]he present levels of academic achievement and functional performance and educational and related developmental needs of the student;" "[w]hether the student needs special education and related services, and the academic, developmental, functional and behavioral needs of the student and how they should appropriately be addressed in the student's IEP;" and, "[w]hether any additions or modifications to the special education and related services are needed to enable the student with a disability to meet annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum."

In light of these requirements, and because S.D. most likely has not been reevaluated in more than three years and another school year is coming to an end, S.D.'s IEP team, which includes S.D.'s parents, shall reconvene to develop a reevaluation plan in accordance with N.J.A.C. 6A:14-3.8 and, if he remains eligible for special education services, develop a new IEP for S.D.

In addition, I **CONCLUDE** that the above legal conclusions regarding the parents' FAPE claims support the parents' claim for an IEE of S.D. at public expense. Therefore, prior to the development of any new IEP, the Board shall, without delay, provide for an IEE of S.D. as follows: (1) the Board shall provide the parents with a list of three independent evaluators for each of the following assessments: (a) psychological assessment (b) FBA and (c) a central auditory processing evaluation; (2) the three listed FBA evaluators shall be board certified behavior analysts (BCBAs); (3) the parents may choose one evaluator from the list of three evaluators for each assessment; and (4) the cost of the three assessments shall be borne by the Board.

While the parents are entitled to an IEE at public expense, I **CONCLUDE** that they are not entitled to reimbursement for Dr. Johnston's fees. Dr. Johnston conducted his observations and produced his report after the parents filed their due process request in January 2015. As such, the costs of Dr. Johnson's services are appropriately characterized as expert fees. However, the United States Supreme Court has held that "the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants." Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 300 (2006). Therefore, I **CONCLUDE** that the parents' claim for reimbursement for Dr. Johnston's fees is denied.

ORDER

For the foregoing reasons, I **ORDER** that the Board provide compensatory education to S.D. for the period from when the Board offered the May 5, 2014 IEP to S.D.'s disenrollment from the Board's schools. I further **ORDER** that the Board reimburse the parents for the costs of S.D.'s attendance at the Lewis School from the date of his enrollment to the date of this decision. I further **ORDER** that the Board, in conjunction with the parents, reevaluate S.D. pursuant to N.J.A.C. 6A:14-3.8, and that the Board provide at public expense an IEE that includes psychological, FBA, and central auditory processing assessments as described above. If S.D. remains eligible for special education services, the Board, in conjunction with the parents, shall develop a new IEP for S.D. Finally, I **ORDER** that the parents' request for reimbursement for Dr. Johnston's fees is denied.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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 (2018). 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 12, 2019

DATE



LISA JAMES-BEAVERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency _____

Date Mailed to Parties: _____

/caa

APPENDIX

WITNESSES

For Petitioner:

Mrs. D.
Philip Concors, BCBA
Susan Hagstrom
Juares P. Johnston, Jr. Ph.D.
Mr. D.

For Respondent:

Cheryl Lowenbraun
Rona Stokes
Mary Ellen Grabowski

EXHIBITS

For Petitioner:

P-8 Curriculum Vitae—Philip Concors

For Respondent:⁴

R-1 Due process petition, dated January 2, 2015
R-2 IEP, dated December 23, 2014
R-3 Draft IEP with notes, dated December 23, 2014
R-4 Behavioral incidents log, dated September 2012 to April 2013

⁴ The non-sequential numbering of exhibits reflects the fact that numerous pre-marked exhibits were neither identified nor offered into evidence.

- R-5 Evaluation Plan, dated October 4, 2012
- R-6 I&RS teacher data collection forms, dated March 21, 2013, and April 3, 2013
- R-7 Invitation for initial identification and evaluation planning meeting, dated May 6, 2013
- R-8 Initial identification and evaluation planning notice proposing psychiatric evaluation with signed consent form, dated May 14, 2013
- R-9 2012-2013 report card
- R-11 Psychological evaluation by Cheryl Lowenbraun, dated July 8, 2013
- R-12 Social history evaluation by Melanie Edmonds, dated July 8, 2013
- R-13 Records re: evaluations performed in July and August 2013
- R-14 Psychiatric evaluation by Charles Martinson, dated August 8, 2013
- R-15 Signed initial IEP, dated August 14, 2013
- R-16 Draft initial IEP with notes not signed by parent, dated August 14, 2013
- R-17 Request for additional assessment (FBA), dated August 14, 2013
- R-18 Correspondence re: IEP, request for consent to FBA, September 1013
- R-20 IEP with cover letter, dated May 5, 2014
- R-21 E-mails re: meeting with parent, S.D.'s progress, April – May 2014
- R-22 Progress report for IEP goals and objectives, dated June 16, 2014
- R-23 S.D.'s behavioral incidents log for 2014-2015
- R-25 Request to amend IEP signed by parent, dated October 13, 2014
- R-26 IEP, dated October 13, 2014
- R-27 Behavior support plan, October 16, 2014
- R-28 E-mails re: meeting with parent, S.D.'s behavior and attention issues, October-November 2014
- R-29 Permission to release information forms and meeting sign-in sheet, dated November 4, 2014
- R-30 Letter from CM to Rugby School and Center School, dated November 20, 2014
- R-31 Progress report for IEP goals and objectives, dated November 20, 2014
- R-34 Signed consent for FBA, dated November 25, 2014
- R-35 E-mails re: placement, meetings to discuss progress and placement, December 2014

- R-39 Permission to discuss information form, December 20, 2014
- R-40 E-mails re: FBA and recent meetings, January 2015
- R-42 Letter from Dr. Riggall re: diagnoses, January 23, 2015
- R-44 Unilateral placement notice, February 18, 2015
- R-49 Letter from Lewis homeroom teacher Sarah Stevens re: S.D.'s transition,
March 18, 2015
- R-51 Lewis speech/language survey summary report, dated April 6, 2015
- R-52 Psychological report by Dr. Johnston with appendix, dated April 30, 2015
- R-55 Center School intake documents
- R-57 Curriculum Vitae—Cheryl Lowenbraun