



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

**FINAL DECISION**

**K.K.-M. ON BEHALF OF R.M.,**

Petitioner,

v.

**GLOUCESTER CITY**

**BOARD OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 18461-17

AGENCY DKT. NO. 2018-27171

**(CONSOLIDATED)**

AND

**K.K.-M. ON BEHALF OF A.W.,**

Petitioner,

v.

**GLOUCESTER CITY**

**BOARD OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 18462-17

AGENCY DKT. NO. 2018-27170

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**Robert C. Thurston**, Esq., for petitioner K.K.-M. (Thurston Law Offices, LLC, attorneys)

**Victoria S. Beck**, Esq., for respondent Gloucester City Board of Education (Parker McKay, attorneys)

Record Closed: February 26, 2020

Decided: March 16, 2020

BEFORE **DAVID M. FRITCH**, ALJ:

## **STATEMENT OF THE CASE**

Pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, K.K.-M. has requested a due process hearing on behalf of two children for whom she is Kinship Legal Guardian—R.M. and A.W.—who are both classified as eligible for special education and related services under the category Other Health Impairment (OHI). K.K.-M. challenges R.M.'s May 15, 2017, Individualized Education Program (IEP) (R-57) as being based on outdated evaluations, not being designed to meet all of her needs, providing speech therapy only in an individual setting three times per week, and failing to provide transportation as a related service. In addition, K.K.-M. alleges that the Gloucester City School District (the District) failed to address R.M.'s being bullied as a result of her disability. A.W. is classified due to a diagnosis of diabetes. K.K.-M. challenges A.W.'s March 29, 2017, IEP (R-129), which she contends was made without needed re-evaluations, without adequately considering her requests for modifications for additional services and a medical plan which denied accommodations for A.W. to participate in after-school activities—specifically having a school nurse available after school—and not meeting all of her needs based on current data and assessments. In addition, A.W.'s IEP also did not provide transportation as a related service. The Gloucester City Board of Education (the Board), through its Child Study Team (CST), replies that at all times, R.M. and A.W. had IEPs that met all of their needs and the parents and guardian of the children never made any request that was not addressed by the District. In short, the Board urges this tribunal to find that R.M. and A.W. received a free and appropriate public education (FAPE).

## **PROCEDURAL HISTORY**

These matters come before the Office of Administrative Law (OAL) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., the New Jersey statutes regarding the educational rights of handicapped children, N.J.S.A. 18A:46.1, et seq., and the corresponding Federal and State regulations, 34 CFR § 300.01 et seq., and N.J.A.C. 6A:14.-1.1, et seq. The petitioner filed a petition for due process on behalf of R.M. on November 20, 2017, alleging that the Board's IEP dated May 15, 2017,

and prior IEPs, have failed to provide her a FAPE. Petitioner also alleges violations of Section 504 of the Rehabilitation Act of 1973 (“§504”), 29 U.S.C. §701 et seq., which prohibits discrimination of children with disabilities in school. She also alleges violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et seq. (ADA), the New Jersey Law Against Discrimination (NJLAD) and the “Every Student Succeeds Act” of 2015 (ESSA). Petitioner seeks a determination that R.M. is entitled to “stay put” pending not just the present matter but any subsequent appellate reviews and remands, even if the parent does not prevail on the merits. They also seek two years of compensatory education, re-evaluation, and transportation as a related service. Petitioner also filed a petition for due process on behalf of A.W. on November 20, 2017, alleging the District’s IEP of March 29, 2017, (R-129) and prior IEPs failed to provide A.W. with a FAPE, seeking an order to “stay put”, a revised IEP, re-evaluation, transportation, compensatory education and reimbursement.

On December 19, 2017, petitioner filed an answer to the petition with OSEPP. The Department of Education’s Office of Special Education transmitted the matters to the Office of Administrative Law (OAL), where they were filed on December 19, 2017.

On the first hearing date, February 1, 2018, the parties met with The Honorable Susan M. Scarola for a settlement conference that was unsuccessful. Because the matters concern the same parties and events, in the interests of efficiency and economy, the matters were consolidated and heard together. Hearings were held on August 15, 2018; September 4, 7, 10 and 26, 2018; and November 19, 2018, before The Honorable Lisa James-Beavers. Following the hearing, the petitioner filed a post-hearing brief on December 19, 2019, and the respondent filed a post-hearing brief on December 20, 2019. Following the filing of these post-hearing briefs, on December 21, 2019, Judge James-Beavers was elevated to the Superior Court and the case was assigned to the undersigned. Following the reassignment of the matter, both parties were contacted by this office to give them the opportunity to re-present any testimony they wished to be heard before the undersigned, however, both parties responded, in writing, that they did not wish to avail themselves of the opportunity to re-present testimony in this matter

before the undersigned and the record was closed upon receipt of that confirmation on February 26, 2020.

**STIPULATED FACTS – R.M.**

1. Respondent Gloucester City Board of Education (Gloucester City Public Schools or GCPS) has a principal place of business located at 520 Cumberland Street, Gloucester City, Camden County, New Jersey 08030.
2. GCPS is a public school district in the State of New Jersey.
3. GCPS receives federal funding for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 et seq.
4. GCPS is a local education agency (LEA) as that term is defined by 20 U.S.C. §§1401(19) and 34 CFR §300.28.
5. GCPS has an obligation to provide a Free Appropriate Public Education (FAPE) to children with disabilities under the IDEA.
6. R.M.'s date of birth is May 2, 2002.
7. R.M. is a child with a disability.
8. R.M. is eligible for special education and related services under the category of OHI.
9. R.M. entered GCPS as a student during the 2012-13 school year.<sup>1</sup>

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<sup>1</sup> While the parties submitted in their joint stipulation of facts that R.M. enrolled in the District during the 2012-13 school year, the undisputed documentary record indicates that R.M. first enrolled in the District in the fall of 2013. (See R-50 (noting R.M. was receiving services from the Deptford School District in the spring of 2013).)

10. R.M. and A.W. are half-siblings with the same biological mother.
11. B.W. is the birth mother of R.M.
12. R.M. has had an IEP with respondent since she entered the District in the 2012-13 school year.<sup>2</sup>
13. At all relevant times herein K.K.-M. was employed by the District as a security guard.
14. On September 11, 2015, R.M. was placed by DCPD with K.K.-M. as a resource family home.
15. On May 16, 2017, Judgment was entered in the case captioned Kinship Matter of R.M., Superior Court of New Jersey, Chancery Division–Family Part, Camden County, Docket No. FL-04-165-17 granting K.K.-M. status as Kinship Legal Guardian (KLG) over R.M.
16. R.M.’s most recent IEP at the District is dated May 15, 2017 (5/15/17 IEP).
17. R.M. is in “stay put” based on her 5/15/17 IEP.
18. R.M. has been diagnosed with a speech/language disability.
19. R.M. has been diagnosed with various adjustment disorders.
20. GCPS performed a Learning Assessment of R.M. in April 2014.
21. GCPS performed a Social Assessment of R.M. in April 2014.

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<sup>2</sup> See FN1. The record reflects that the District’s earliest IEP for R.M. was dated November 14, 2013. (R-50.)

22. GCPS performed a Collaborative Assessment of R.M. in April 2014.
23. GCPS performed a Psychological Evaluation of R.M. in April 2014.
24. GCPS performed a Speech/Language Evaluation of R.M. in April 2014.
25. GCPS performed a Psychiatric Evaluation of R.M. in April 2014.

**STIPULATED FACTS – A.W.**

1. Respondent Gloucester City Board of Education (Gloucester City Public Schools or GCPS) has a principal place of business located at 520 Cumberland Street, Gloucester City, Camden County, New Jersey 08030.
2. GCPS is a public school district in the State of New Jersey.
3. GCPS receives federal funding for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 et seq.
4. GCPS is a local education agency (LEA) as that term is defined by 20 U.S.C. §§1401(19) and 34 CFR §300.28.
5. GCPS has an obligation to provide a Free Appropriate Public Education (FAPE) to children with disabilities under the IDEA.
6. A.W.'s date of birth is January 3, 2001.
7. A.W. is a child with a disability.
8. A.W. is eligible for special education and related services under the category of OHI.

9. A.W. entered GCPS as a student during the 2012-13 school year.<sup>3</sup>
10. A.W. and R.M. are half-siblings with the same biological mother.
11. B.W. is the birth mother of A.W.
12. A.W. has had an IEP with the respondent since she entered the District in the 2012-13 school year.<sup>4</sup>
13. At all relevant times herein K.K.-M. was employed by the District as a security guard.
14. On September 11, 2015, A.W. was placed by DCPD with K.K.-M. as a resource family home.
15. On May 16, 2017, Judgment was entered in the case captioned Kinship Matter of A.W., Superior Court of New Jersey, Chancery Division–Family Part, Camden County, Docket No. FL-04-164-17 granted K.K.-M. status as Kinship Legal Guardian (KLG) over A.W.
16. A.W.’s most recent IEP at the District is dated March 29, 2017 (3/29/17 IEP).
17. A.W. is in “stay put” based on her 3/29/17 IEP.
18. A.W. has been diagnosed with asthma.

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<sup>3</sup> Although the parties’ statement of undisputed facts state that A.W. entered the District during the 2012-13 school year, the undisputed testimony on the record indicates that A.W. first entered the District in the fall of 2013. (Sept. 7, 2018, Tr. at 141:5–7; Id. at 142:4–11. See also R-90 (A.W.’s February 2014 CST referral noting that A.W. was in the Deptford School District for the 2012-13 school year); R-122 (collaborative assessment noting that A.W. was first enrolled in the District on October 2, 2013, after spending the 2012-13 school year in the Deptford School District).)

<sup>4</sup> See FN 3. The record reflects that the District’s earliest IEP for A.W. was dated November 14, 2013. (R-124.)

19. A.W. has been diagnosed with reactive attachment disorder with mixed disturbance of emotions and conduct.
20. A.W. has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).
21. A.W. is prescribed Adderall for ADHD.
22. GCPS performed a Learning Assessment of A.W. in April 2014.
23. GCPS performed a Social Assessment of A.W. in April 2014.
24. GCPS performed a Collaborative Assessment of A.W. in April 2014.
25. GCPS performed a Psychological Evaluation of A.W. in April 2014.
26. GCPS performed a Speech/Language Evaluation of A.W. in May 2014.

### **TESTIMONY**

#### **Tammie Hobbs, Case Manager**

Tammie Hobbs testified that she is a school social worker employed by the Gloucester City Board of Education since September 2001. As such, she serves as case manager performing social evaluations, overseeing the educational program of special education students, holding eligibility and annual review meetings and anything else that classified students need. She has a master's degree in social work, is licensed in Pennsylvania, and has been involved with special education and disabled students since October 1997. Based on her years of experience reviewing functional performance in classrooms, attending over 200 IEP meetings per year for twenty-one years, case managing for seventy-five to eighty students per year, she was qualified as an expert in the identification, evaluation, and classification of special education students and the development, implementation and oversight of IEPs over the objection of petitioner. She



meets with students prior to IEP meetings because their input is valuable, and it is required by the State. (August 15, 2018, Tr. at 72:2–13.)

Regarding R.M., Ms. Hobbs was her case manager for one year when R.M. was in ninth grade (2017-2018). (Id. at 69:10–16.) She reviewed R.M.'s records to determine whether evaluations were warranted. The evaluation plan dated October 25, 2013, indicated that an evaluation of speech, articulation only, was needed. (Id. at 76:17–79:7.) The speech evaluation was completed on October 28, 2013 (R-46), and R.M. was found eligible for speech services. (Id. at 80:1–2; R-72.) The November 14, 2013, IEP came out of the eligibility meeting. (R-50.) The IEP had one goal, which was to improve articulation, and called for speech/language therapy to be provided in a group session two times per week. (Id.)

R.M. also had an intervention and referral services (I&RS) action plan which is used when a teacher recognizes a student is struggling. (R-71.) R.M. was referred to the child study team (CST) on February 11, 2014. (R-27.) At an identification meeting on March 4, 2014, the CST determined that referrals for education, psychological, social, speech/language and psychiatric were needed. (R-28.)

Dr. Hewitt performed the social evaluation which noted family homelessness and relocation from Arkansas to a shelter in Camden County where she attended schools in Camden, Deptford, and then Gloucester City. (R-47.) Based on all the evaluations, R.M. was found eligible for speech/language and related services under the category of OHI regarding her anxiety and other conditions at an eligibility conference held on June 2, 2014. (R-70.)

R.M.'s follow-up IEP was dated June 18, 2014, and called for speech/language in-class support. (R-52.) The next IEP from February 2015, continued that in-class support for speech/language. (R-53.) The IEP was changed to add an accommodation for PARCC testing. (Id.; August 15, 2018, Tr. at 96:15–97:13.) The next annual review in June 2015, moved R.M. to a self-contained speech/language program (R-54), and that program was continued with R.M.'s May 2016 IEP for her eighth grade year. (R-55.) This

was due to R.M.'s emotional state and anxiety. (August 15, 2018, Tr. at 99:21–100:10.) R.M.'s foster parent was at the IEP meeting and expressed concerns about R.M. remaining in a self-contained classroom despite her good grades. (Sept. 4, 2018, Tr. at 109:16–110:10.) Tricia Roland was also there from the Department of Child Protection and Permanency (DCPP). (Aug. 15, 2018, Tr. at 102:4–103:19.)

R.M.'s evaluation plan in February 2017 continued that program. (R-56.) R.M.'s birth parent was present at that meeting along with the DCPP caseworker. (Sept. 4, 2018, Tr. at 120:1-8.) R.M.'s May 2017 annual review transitioned R.M. from the self-contained to the less restrictive supplemental support program. (R-57.)

Every three years, the CST holds an evaluation plan meeting to determine if further evaluations are warranted. Kathy Field was the case manager at that time. They determined further evaluations were not recommended. The next annual review meeting was May 15, 2017, to plan for R.M.'s ninth grade year. (R-57.) R.M.'s guardian was nervous about her transition to high school.<sup>5</sup> (Aug. 15, 2018, Tr. at 107:12–108:16.) R.M.'s guardian wanted R.M. in a less restrictive environment. (R-57.) R.M.'s report card indicated she was passing with mostly "A"s. (R-67.) When R.M. went to general education with support, which was a less restrictive program in response to her guardian's request, she began to struggle. She was passing, but not getting the same grades. (Aug. 15, 2018, Tr. at 110:21–111:5.) They used accommodations such as extended time, re-tests and having tests read aloud. (Id. at 111:6–112:17.)

A.W. came to the Gloucester schools in the fall of 2013 as a general education student. (Sept. 7, 2018, Tr. at 141:5–7; Id. at 142:4–11.) Lisa Labree, A.W.'s case manager, told her about A.W.'s program and her recommendation for the coming year. (Aug. 15, 2018, Tr. at 69:20–70:25.) Hobbs also reviewed her records. When A.W. entered Gloucester schools, she had a "mild articulation disorder" which prompted an evaluation. (Sept. 7, 2018, Tr. at 147:6–20.) A.W.'s sixth grade teacher also observed that she was having difficulty understanding A.W.'s speech, giving further reason for an

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<sup>5</sup> The IEP documents from that meeting identify K.K.-M. as participating in this meeting. (R-57.) K.K.-M. became the legal guardian for A.W. and R.M. effective May 16, 2017.

evaluation. (Id. at 147:22–148:10.) As a result of an evaluation planning meeting (R-86) on October 25, 2013, a speech evaluation was conducted and A.W. was found eligible for speech articulation services only. (Aug. 15, 2018, Tr. at 117:22-118:10; R-68; R-124.) At that time, A.W. was found eligible for speech services three times a month for thirty minutes to improve her articulation. (Id.) As a result of a referral to the CST, another evaluation plan meeting was held on March 4, 2014, to determine if additional evaluations were warranted. (R-93.) This resulted in evaluations for educational, psychological, social and speech/language. (Id.) The eligibility report found her eligible for services under the category of Other Health Impaired for diabetes and ADHD. (R-95.) A 504 Plan for accommodation of her diabetes was placed in her IEP. (R-140; Aug. 15, 2018, Tr. at 124:1–125:2.) Her annual review placed her in an in-class support program for seventh grade and she was to continue speech therapy as a related service. (R-125; Aug. 15, 2018, Tr. at 127:19–24.)

The following year on May 29, 2015, A.W. was continued in the in-class support program, but her speech therapy was discontinued for eighth grade. (R-127; Aug. 15, 2018, Tr. at 127:19–24.) A.W. requested to be dismissed from the services at the end of seventh grade and was “noncompliant about attending sessions and refused home practice” as well as needed to deal with “a variety of health and personal issues” during this time. (Aug. 15, 2018, Tr. at 130:4–15.) A.W.’s therapist also reported at that time that A.W.’s deficits could be managed in the classroom which is the least restrictive setting (Sept. 7, 2018, Tr. at 218:11–18), and A.W. reported that she was “satisfied with her speech and no longer wanted to attend therapy.” (Sept. 7, 2018, Tr. at 218:10–18.) Based on these factors, A.W.’s request to discontinue therapy was granted. While A.W.’s parents were not present at this meeting, it is the practice of the District to always invite the child’s parents to the meetings. (Id. at 221:17–23.)

A.W.’s speech therapy was not reincorporated until May 2016 for ninth grade at her caretaker, K.K.-M.’s, request. (R-128; Sept. 7, 2018, Tr. at 249:10–250:10.) There was no parent signature on the evaluation plan meeting document. (R-137.) The DCPD worker, Tiffany, signed the document. (Id.)

When the IEP meeting for the re-evaluation was held in 2017, K.K.-M. and the DCPD worker participated by telephone. (Aug. 15, 2018, Tr. at 136:22–138:24.) The team did not make any changes. A.W.’s report cards for the year indicated that A.W. was passing in all subject areas. (R-138.) The teacher’s reports were positive and indicated that she was doing well. (R-105; R-106.) Hobbs worked closely with A.W.’s caseworker during this time. (Aug. 15, 2018, Tr. at 149:3–9.) Ms. Labbree, A.W.’s caseworker at this time, never indicated that there was ever a time when A.W.’s mother requested a change to A.W.’s program that was not made. (Id. at 149:11–14; Id. at 150:16–151:2.) K.K.-M. requested a less restrictive program at the beginning of the current school year, and that was granted. (Id.) K.K.-M. was happy with the program that was less restrictive. (Id.)

A.W. did not qualify for transportation. (Aug. 15, 2018, Tr. at 162:13–20.) Special education students qualify for transportation only if the student has “significant medical or a cognitive need for transportation” that would prevent them from safely getting to school. (Id. at 162:13–20.) The District is “primarily a walking District,” so the only general education students who qualify for transportation are those who live in a “hazardous” zone where the student has to cross a multi-lane highway or other hazardous obstacle to reach school. (Id. at 162:23–163:7.)

Hobbs further testified that she was R.M.’s case manager only last year and has never been case manager for A.W. (Id. at 176:1–12.) She began to hold meetings with special education students when the State team said that she must do so to further transition planning. Students after the age of fourteen can attend IEP meetings. (Id. at 176:13–177:18.) A “speech only” IEP is appropriate when a student is not eligible under one of the thirteen classifications, but are still eligible for speech services. (Id. at 179:8–19.)

If a teacher or other professional feels that a student is struggling, he will refer her to the Intervention and Referral Services (I&RS). (Aug. 15, 2018, Tr. at 187:7–12.) The referral will determine whether the child needs and can obtain assistance with academics. R.M. was not eligible under special education. R.M. was eligible only for speech services.

(Id. at 189:2–15.) She was aware that there were issues other than speech and that is why R.M. was referred. (Id. at 191:5–17.) The team ruled out the classification of Specific Learning Disorder (SLD) because speech does not come under it. (Id. at 213:6–22.) They ruled out communication impaired (CI) as well. (Id. at 215:20–217:7.) She noted that there were some meetings at which there is no parent signature. She knows that a parent must be invited to an IEP meeting. (Id. at 206:10–17.) There were also meetings at which the general education teacher was not present. Jennifer Williams was the case manager.

Hobbs agreed that the June 18, 2014 IEP had no signature of a parent, just R.M. (R-52.) The February 3, 2015, IEP had no signature of a parent or R.M. (R-54.) Similarly, the June 3, 2015, IEP had no signature of a parent or R.M. (R-55.) The May 23, 2016, IEP has the signature of R.M. (R-55.) She was not at that meeting. The purpose of the February 1, 2017, re-evaluation meeting was to determine if further evaluations were needed after three years. (Aug. 15, 2018, Tr. at 226:17–227:7.) Hobbs agreed that not all of R.M.'s grades were good at that time such as a 66 in English and a 77 in World History. (R-67; Aug. 15, 2018, Tr. at 229:4–231:13.) She agreed that teachers and service providers collect the data on which the IEP is based and evaluate whether the child met the goals, not the case manager. (Id. at 237:1–23.)

Although R.M.'s evaluators reported anxiety, this was not noted in her IEP from Jun 2, 2014. (Sept. 4, 2018, Tr. at 64:8–19.) R.M. became eligible for services under the category of OHI. (Id. at 66:2–4.) R.M. was receiving three ten-minute sessions of group speech therapy as well as in-class resources for Language Arts, Literacy, and Mathematics. (Id. at 78:14–22.) The therapist determines how much speech therapy is appropriate. The signature on an IEP indicates presence, not agreement. R.M. was to get special support in the general education curriculum, which is less restrictive. All students must meet the State curriculum. It is not a goal for all students to graduate at age eighteen. (Sept. 10, 2018, Tr. at 173:12–174:2.) Regarding behavior, if no challenging behaviors are exhibited in the school, the IEP team cannot address them. (Id. at 187:3–11; Id. at 188:8–12; Id. at 189:21–25.) She agreed that R.M. received substantially less speech therapy in the later IEPs.

In R.M.'s May 15, 2017, annual review (R-57), it noted that R.M.'s mother participated by telephone, and that she asked the team to consider a less restrictive placement for R.M. at that time. (Id.; Sept. 4, 2018, Tr. at 131:16–20.) R.M. was provided with continued pull-out resources to assist her in English, Algebra, World History, and Biology as well as related services of speech/language therapy three times per month for twenty-five minutes per session in an individual setting. (R-57.) At that time, R.M. was receiving “all A’s and B’s” on her most recent report card. (R-67; Sept. 4, 2018, Tr. at 163:8–14.)

R.M. had an independent speech/language evaluation performed on June 28, 2018. (R-73.) R.M. has not had a re-evaluation plan since this independent evaluation was performed. (Sept. 7, 2018, Tr. at 114:7–12.) R.M. also had an independent occupational therapy evaluation performed on June 12, 2018. (R-74.) Independent evaluations were also done for functional behavioral assessment on June 13 and 18, 2018 (R-75) and an educational evaluation on June 8 and 9, 2018. (R-76.) These independent evaluations were paid for by Gloucester public schools. (Id. at 118:15–119:9.)

### **Linda Stewart**

Stewart is a registered nurse and a certified school nurse employed by Gloucester City High School. As part of her duties, Stewart takes care of students that require medications on a daily basis for ailments such as diabetes, asthma, and attention deficit disorder (ADHD). She gives daily medications to students as well as treats and provides triage and first aid as needed on campus. She was accepted as an expert in administering medications and school nursing. Stewart is familiar with both R.M. and A.W.

In dealing with A.W.'s diabetes, she followed a diabetes management plan that was prepared by A.W.'s doctors and provided to the school by A.W.'s parent or guardian. (R-108.) At the time of this plan, A.W. had an insulin pump, but she would provide insulin to A.W. at school breakfast. A.W. was already trained and capable of performing self-

monitoring of her blood glucose levels and in self-administering insulin. (Sept. 4, 2018, Tr. at 187:4–25.) A.W. had no restrictions in her activities at school from this plan, and exercise is a key element to keeping blood sugar levels normal. (Id. at 188:7–19.)

Stewart maintained a log to keep track of medications and blood sugar monitoring. A.W. also took Albuterol for her asthma, which was given every four hours for wheezing, and Adderall, an amphetamine, which was taken daily by mouth. Adderall is a controlled substance which A.W. took every day at noon. (Sept. 7, 2018, Tr. at 9:11–10:20.) Only a school nurse or a parent can administer that medication to A.W. (Id. at 9:14–10:3.) A.W.'s diabetes required multiple daily insulin injections, and A.W. was required to maintain a carb-counting diet and needed multiple blood sugar checks and exercise to control her diabetes. A.W. had accommodations for this chronic illness, including access to the school nurse during the day to check blood sugar, take needed snacks for hyperglycemia and treat elevated blood sugars. She also had unlimited access to the lavatory and to a water bottle. (Sept. 4, 2018, Tr. at 194:1–14.) A.W.'s teachers were all aware of A.W.'s condition and accommodations. (Id. at 194:24–195:2.)

In March 2017, A.W. was given an insulin pump for her diabetes. (R-114.) The pump came with specific directions on maintenance of A.W.'s blood glucose levels and treatments for highs and lows in her glucose levels, although A.W.'s “[h]ighs or lows can be treated in school and [A.W.] should not be sent home unless ill.” (Id.) A.W. also had a treatment plan for her asthma. (R-118.)

A.W. had a sports physical on file when she was in the ninth grade. (R-148.) The physician who submitted that physical cleared A.W. to participate in all sports without restriction. (Sept. 4, 2018, Tr. at 205:16–25.) A.W. was involved in cheerleading and in the after-school homework club at school. (Sept. 7, 2018, Tr. at 19:19–24.) The school has a certified athletic trainer on duty after school to cover all sports. Because cheerleading is considered a sport, the athletic trainer was available for cheerleading. (Sept. 7, 2018, Tr. at 20:24–21:1.) The trainer is equipped with a walkie-talkie and rides

a “gator.”<sup>6</sup> The trainer is familiar with diabetes—the school has had many students over the years who had diabetes, and the trainer is familiar with insulin pumps and trained to administer glucagon as needed. (Sept. 4, 2018, Tr. at 206:9–15.) A.W. has never needed glucagon to be administered to her at school and has never had an incident other than a “low or high” that were adequately handled by the athletic trainer. (Id. at 207:2–15.) The trainer remains on campus after school until the athletes are dismissed.

A.W. has a supply kit with her that she takes to away games. (Sept. 4, 2018, Tr. at 208:2–4.) When traveling to away games or on field trips, Stewart makes sure that there is a “glucagon delegate” available and present with A.W. (Id. at 208:13–5. See also R-80.) Up until the current school year, Stewart would go with A.W. on every field trip. (Sept. 4, 2018, Tr. at 229:2-3.) The new school superintendent changed that practice, however, so that a school nurse only accompanies a student on a field trip if the student is “medically fragile” starting with the current school year.<sup>7</sup> (Id. at 229:8–10.) Now, the school reviews each child’s medical records and makes sure proper medications are given and ensures that the trip chaperones are aware of any medical issues and they make sure that there are epi-pen and glucagon delegates available as needed for the students.

A.W.’s diabetes management plan for the 2017-18 school year (P-2) indicated that A.W. was not capable of performing her own self-monitoring. This was a change from A.W.’s prior diabetes management plan (P-1), which indicated that A.W. could self-monitor and administer her own insulin. (Sept. 7, 2018, Tr. at 44:2–47:16; Id. at 71:5–13.) Because of this change, Stewart sought direction for her responsibilities regarding A.W.’s care going forward, but Stewart was not uncomfortable with the level of support A.W. had received in prior years. (Id. at 49:1–22.)

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<sup>6</sup> A “gator” is a form of utility vehicle. See John Deere, Gator™ Utility Vehicles, available at <https://www.deere.com/en/gator-utility-vehicles/>.

<sup>7</sup> Stewart defined “medically fragile” as “somebody with a tube feeding, a tracheotomy, maybe wheelchair bound with a trach or vent, something that has to have an RN with them.” (Sept. 4, 2018, Tr. at 229:16–19.)



**Student R.M.**

Student R.M. testified that she is sixteen years old. She likes school in Gloucester City where she is in the tenth grade. Her classes are Geometry, College English and Environmental Science. She has trouble speaking in class. She has speech therapy once per week, usually Wednesdays during support skills. When asked, R.M. testified that other students do not make, and have not made fun of her because of her speech. (Sept. 26, 2018, Tr. at 16:20–23.)

**Student A.W.**

Student A.W. testified that she is seventeen years old and has a lot of friends in Gloucester City where she goes to school. She is in the eleventh grade. She likes Math and Science and would like to be a nurse or a veterinarian. She is doing well in Algebra II, but when asked what is one-half of nineteen, she answered eight. She was unable to spell arithmetic. She takes College English 3 and College History 2.

After school, she likes softball and cheerleading. However, until the school gets a nurse to be with her, she cannot participate. Recently, “they said until they get a nurse I can’t do it,” but before recently, she never had to miss any after-school activities. (Sept. 26, 2018, Tr. at 21:16–25.) A.W. has Type 1 Diabetes for which she has a pump for insulin. Her levels can spike or drop. If her levels are low, she can’t think properly.

**B.W. (biological mother)**

B.W. is the biological mother of R.M. and A.W. (Sept. 26, 2018, Tr. at 28:1–6.) B.W. testified that she also has another child, N.M, who is eleven years old and lives with her who also receives special education services from Gloucester City Schools. (Sept. 26, 2018, Tr. at 30:1–31:25.) She stated that she “know[s] that my kids had IEPs, and that they needed some services with their speech and my son obviously a little bit more, but I really don’t know too much about it.” (Sept. 26, 2018, Tr. at 32:15–20.) She completed school in Philadelphia up to the tenth grade and had an IEP and speech

therapy. She identified her ex-husband's signature on the November 14, 2013 IEP (R-50) and her signature on the June 2, 2014 (R-51) and June 18, 2014 (R-52) IEPs. She signed on R.M.'s line on the latter. She has not been to an IEP meeting since 2014 except when taken by DCPD on February 1, 2017. (R-56.) She does not recall receiving a PRISE book setting forth her parental rights but is "not a hundred percent sure she never received one." (Sept. 26, 2018, Tr. at 55:5–21.) A.W. was living with B.W.'s ex-husband when he attended the November 14, 2013, eligibility conference. (R-88.) He is not A.W.'s biological father, however, nor did he have legal custody of A.W.. (Sept. 26, 2018, Tr. at 44:19–45:1.) She never refused any testing or services offered to the girls. (Id. at 54:24–55:7.) She only talked to K.K.-M. about test results, not testing. (Id. at 55:8–16.)

B.W. further testified that she never requested evaluations or changes to the IEP. (Id. at 49:20–25.) The girls have done well in Gloucester City schools. They have friends and like it there. (Id. at 49:20–25.) She never had any issues with the girls' case managers. (Id. at 50:8–20.) She was not able to attend all the meetings and she did not attend some of the meetings because the girls were in DCPD custody. (Id. at 50:21–21:2.) She did not receive notification for these IEP meetings when the girls were living in the house with her ex-husband. (Id. at 50:21–51:2.)

### **K.K.-M. (Kinship Legal Guardian)**

K.K.-M. lives in Laurel Springs, NJ. R.M. and A.W. came to live with her after their DCPD case supervisor approached her about taking R.M. K.K.-M. talked to her husband about it. He agreed and they agreed to take her. Forty minutes later, the supervisor asked if she could also take her sister, and they agreed to take her as well. The girls came to her sometime in late September-October 2013. They were with her for a few months before a judge ordered the girls back to their parents. A little over a year later, the girls were removed from their parents by DCPD and placed back with her. She knew both girls because she worked security at the Gloucester City School District. They have been with her since September 2015. K.K.-M. was working in the high school when the girls were returned to her.

Regarding R.M., K.K.-M. did not initially realize how many problems she had. R.M. would run away and needed a lot of help. She shuts down a lot as a result of the trauma that she has experienced. There is abuse in her background. (Id. at 77:16–78:2.) She gets specialized trauma counseling through DCPD and the mobile response unit. In the fall of 2015, when the girls came back, she was working at the high school and was the girls’ foster parent. She did not receive invitations to attend IEP meetings then, although DCPD notified the school and everyone knew that she was the girls’ foster parent. (Id. at 64:17–65:6.) After she became their Kinship Legal Guardian (KLG) in May 2017, she began to receive invitations to IEP meetings.<sup>8</sup> (Id. at 65:10–16.) She knew nothing about special education. Regarding the girls’ education, “getting more testing and also giving [R.M.] more speech, that’s always been [K.K.-M.’s] number one goal.” (Id. at 95:22–24.)

Gloucester did not ask for any documents from the girls’ prior schools. She did not see the parental rights booklet, PRISE, until after she filed due process. She signed a release for the girls’ counselor to get R.M.’s records on January 13, 2016. Trisha Roland was the girls’ counselor with Oaks Integrated Care. When she received invitations to IEP meetings it was by email. (Id. at 83:1–6.) She did not recall whether documents were attached. (Id. at 83:12–84:6.) K.K.-M. attended the meeting on May 23, 2016, as the girls’ foster parent. (R-55.) She asked Roland from DCPD to come. They knew that R.M.’s academic level was not up to “par” even though she was getting “straight A’s” and wanted to see if R.M. could be moved from the self-contained class. (Sept. 26, 2018, Tr. at 92:23–93:5.) She did not feel that the academic work in the self-contained class was “on the magnitude of anything that is difficult.” (Id. at 93:8–11.) The staff believed that R.M. was not mature enough and needed another year. They also discussed speech services at the meeting. (Id. at 95:23–24.)

K.K.-M. participated by telephone in the IEP meeting of May 15, 2017. (R-57.) R.M. was present. The team did not discuss speech therapy. (Sept. 26, 2018, Tr. at

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<sup>8</sup> Although K.K.-M. testified she did not receive invitations to attend IEP meetings before becoming the girls’ legal guardian in May 2017, the record reflects that K.K.-M. attended, and participated, in IEP meetings before May 2017. (See, e.g., R-55 (documenting K.K.-M.’s participation in a May 2016 IEP meeting for R.M.); R-128 (documenting K.K.-M.’s participation in a May 2016 IEP meeting for A.W.).)

97:11–19.) She expressed that she wanted a less restrictive placement after R.M. had been in a self-contained setting two years in a row. (Id. at 99:14–24.) She wanted to see if R.M. could get “straight A’s outside of the self-contained room and to challenge her academic level and see if, you know, the self-contained was really too easy for her or not.” (Id. at 99:19–24.) K.K.-M. first received the IEP when she requested it from the case manager, Lisa Labree, in 2017. (Id. at 84:7–15.) She did not understand a lot of what they were saying at the meetings. K.K.-M. testified that “[i]n the IEP meeting they just go over a whole lot of test scores and mumbo-jumbo about where they’re heading with everything and they just—you know it doesn’t make a lot of sense, they just—I don’t understand a lot of the stuff that they’re saying.” (Id. at 101:14–21.)

Regarding A.W., K.K.-M. had to pick her up from the hospital at times due to her diabetes. DCPD put her in Cooper Hospital after September 2015. A.W. has been to the hospital about five times since then for high or low sugar. Although A.W. knows how to calculate her dose of insulin, she does not do well adding her carbohydrates and makes a lot of errors in computing. She needs to be monitored. If A.W.’s sugar is low, her ability to think is impaired and she cannot test. However, she must take tests unless she has a note from her pediatric endocrinologist. She uses a pump that tests her sugar and puts in how many carbs she has taken in. Before the pump she had a manual device with a calculator. She communicated her concerns with A.W.’s ability to manage her diabetes with the school nurse. (Id. at 69:2–15.) A.W. first received her insulin pump a year and a half ago. (Id. at 75:16–18.)

K.K.-M. participated by phone in the March 29, 2017, IEP meeting. (R-129.) She raised a question about testing at every IEP meeting in which she participated. (Sept. 26, 2018, Tr. at 103:19–12.) She obtained “scripts” from the girls’ psychiatrist, Dr. Vender, where she “wrote down that she wanted both girls tested” (id. at 109:1–6) and she gave those “scripts” to the girls’ case manager in 2015.<sup>9</sup> (Id. at 108:17–21.) Labree told her

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<sup>9</sup> K.K.-M. did not obtain legal custody of the children until May 2017. The record also reflects that the girls’ biological mother, B.W., was known to the District and continued to be actively involved in the girls’ IEP planning and development, attending IEP meetings as late as February 2017 along with caseworkers from DCPD. (See R-56.) Given that there appears to be at least some level of overlap between K.K.-M.’s involvement in the children’s education (see, e.g., R-55 (documenting K.K.-M.’s participation in a May 2016

that she could not ask for testing, even though the psychiatrist said he wanted both girls tested. (Id. at 108:10–24.) She wanted IQ testing to see where the girls were academically. (Id. at 112:14–15.) A.W. was on a fourth grade reading level in the ninth grade. (Id. at 120:20–25.) The CST said that they would do it next year. She also heard Tiffany, the DCPD worker, ask for testing. She assumed A.W. was always getting speech therapy. She verbally made a request for more speech therapy to the child study team. (Id. at 124:24–125:8.) A.W. was prescribed five milligrams of Adderall. She tried to get additional help for the girls (P-9), but she felt she had to tread lightly because she worked at the school. (Id. at 119:2–5.) A.W. was referred to a neurologist through DCPD (P-8), but this was not provided by the District. She was diagnosed with headaches, diabetes, ADHD, and dysarthria, which is slurred speech due to lack of strong facial muscles. (Sept. 26, 2018, Tr. at 140:14–142:14.)

As of December 12, 2017, no new tests had been completed. She tried for two years to get R.M. and A.W. tested. (P-17.) R.W. received passing grades in Algebra (see R-68), but did not get a passing grade on the PARCC exam for Algebra (P-19) and had to receive remedial education “for several weeks” from the school to pass into the tenth grade. (Sept. 26, 2018, Tr. at 167:13–22.) In July 2018, A.W. made a recalculation error that caused her to take ten extra units of insulin. (Id. at 171:2–15.) She passed out from low blood sugar and was taken to the emergency room. (P-20.) K.K.-M. was notified in March 2018 that there were going to be times that A.W. would have to play softball at away games without a glucagon delegate and she would have to go with her insulin pump because the JV field where A.W. plays may, at some schools, be “some distance” from the varsity field and a glucagon delegate may not be available at the JV field during the game. (Id. at 176:2–10.) K.K.-M. exchanged emails with the school nurse (P-21), Stewart, who informed her that the school’s athletic trainer would inform the trainer at any

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IEP meeting for R.M.); R-128 (documenting K.K.-M.’s participation in a May 2016 IEP meeting for A.W.) and B.W.’s, it is unclear, from the record presented, what rights, if any, the children’s biological mother retained to make educational decisions on behalf of the children during this period beyond the record documenting that she was an active participant in their IEPs until at least February 2017. (See R-56.) Pursuant to N.J.S.A. 6A:14-2.2(g), where children are in the care of a foster parent, who is not the parent of the student, and that parent retains the right to make educational decisions for the children and their whereabouts are known to the District, that parent, rather than the foster parent, is required to give consent for educational decisions on behalf of the child.

away games that A.W. would be there and that she was diabetic, and asked K.K.-M. to contact her with any questions. (Id. at 259:10–21.) K.K.-M. did not contact Stewart with any questions after receiving this email—she contacted her attorney. (Id. at 259:22–260:8.) K.K.-M. believed that there was nobody medically trained at the school in the afternoons to help A.W. and she believed that A.W. needed someone fully versed in diabetic care in the event of an emergency and should not participate if there is no glucagon delegate. In the past week, the school received a new doctor’s order for A.W. and, following receipt of this new order, the school stopped A.W.’s after school activities. (Id. at 262:17–263:24.)

K.K.-M. further testified that she filed several prior grievances against the District. She filed a grievance against the District alleging retaliation, which was dismissed. She also filed an action in federal court against the District that was dismissed on June 25, 2018. (R-23.) She was reprimanded for having students in the security office. K.K.-M. has been out of work since 2018 and has not returned since. (Sept. 26, 2018, Tr. at 191:5–19.) Prior to an email from Superintendent Vespe dated October 24, 2017, saying that she had to enroll the children in Laurel Springs (R-41) which was her then-current place of residence, she did not raise issues about the IEPs or their program or placement. (Sept. 26, 2018, Tr. at 195:11–209:6; Id. at 229:7–11.) Her requests for due process in the case of R.M. and A.W. were filed on November 11, 2017. (R-2; R-4.) She filed for emergent relief to have the girls stay in Gloucester City, however, these requests were both rejected by the Office of Special Education Policy and Procedure (OSEPP). (R-7.) K.K.-M. filed these requests because she wanted to keep the girls at their current school and wanted them to stay stable and be with their friends. (Sept. 26, 2018, Tr. at 209:2–5; id. at 228:19–229:4.) She never requested that their programs be changed in writing. (Id. at 229:4-6.) The only written request for testing she ever submitted were the “scripts” she gave to the child study team from Dr. Vender in 2015. (Id. at 227:20–228:1.) She had a good relationship with the CST until the end and they were responsive to her “[f]or the most part other than testing”. (Id. at 228:2–11.) She seeks to keep the girls in Gloucester City High School (id. at 215:14–22), despite currently residing with the girls in Laurel Springs, New Jersey. (Id. at 60:2–12.) K.K.-M. is seeking stability for the children and does not want them taken “out of that environment at this point in time after five years

or let them be with their friends.” (Nov. 19, 2018, Tr. at 52:18–29.) She is fighting for the girls because she does not want to “disrupt, you know, the stability that they’ve had for five years.” (Id. at 54:4–5.)

A.W. participates in cheerleading and softball. (Sept. 26, 2018, Tr. at 229:24–230:12.) K.K.-M. is a glucagon delegate. (Id. at 223:4–5.) Most of the time when A.W. went to the emergency room, it was not during school. (Id. at 223:6–234:11.) A.W. frequently makes mathematical errors doing her daily insulin calculations, but they do not always result in an emergency room visit. (Id. at 235:6–237:7.) Sometimes when A.W. makes calculation errors with her insulin, she can readjust in other ways such as drinking water or eating something which can avoid a trip to the emergency room. (Id. at 237:8–18.)

K.K.-M. requested a change to the draft IEP when she participated by phone on May 15, 2017, and the requested change was made. When she said Ms. Labree told her that she had no right to ask for testing, K.K.-M. was a foster parent. (Id. at 241:3–12.) When she wrote that she had requested tests in a letter to Dr. Vender, she was also not the legal guardian at that time. (P-9.) She does not recall if she received a response to her letter to Dr. Vender. (Sept. 26, 2018, Tr. at 247:20–22.) She remained a foster parent until 2017. She had access to email to learn of the girls’ progress. She did not want the girls to go back to their parents. The girls were improving, according to their adoption therapist in November 2017, and were said to have improved academic ability. She believed that they should remain at their current school. (P-16.)

K.K.-M. did not know the process for requesting testing initially. (Sept. 26, 2018, Tr. at 278:1–21.) She was never told that she needed to put something in writing. (Id. at 278:4–7.) She always advocated for speech and testing for the girls (Nov. 19, 2018, Tr. at 49:24–25) although these requests are not documented in the children’s IEPs. For example, while K.K.-M. participated in the IEP session on May 15, 2017 (R-57), it documents that the only parental input was a request to consider a less-restrictive environment for R.W. (Id.) K.K.-M. never objected or sought to modify this to document

a request for additional testing, saying only that “I’ve been objecting since pretty much the beginning on stuff and its gotten me nowhere.” (Nov. 19, 2018, Tr. at 49:24–25.)

### **Rosemarie Fitzpatrick**

Rosemarie Fitzpatrick is a licensed Speech Language Pathologist employed by the Gloucester City School District. (Nov. 19, 2018, Tr. at 61:2–5.) Her job is to assess, diagnose, and treat speech, language and communication disorders. (Id. at 61:11–16.) Prior to working for the school district, Fitzpatrick worked for the Department of Children and Families where she coordinated assistive technology services for children in state-operated facilities throughout the state. (Id. at 61:21–62:8.) She is a licensed speech language pathologist and also holds a supervisor certificate which enables her to serve as a supervisor of special education and related services. (Id. at 63:12–64:3.) She has been working in the field of special education and disabled students for twenty-four years and regularly evaluates students. (Id. at 65:17–24.) She has performed too many evaluations and attended too many eligibility and IEP meetings over her career to quantify. (Id. at 65:12–66:10.) She was accepted as an expert on the field of speech and language pathology. (Id. at 66:16–24.)

Based on her review of the girls’ records, their speech/language services changed over time. (Id. at 68:11–13.) When R.M. first moved to Gloucester City, she came with a “speech only” IEP. (Id. at 68:14–16.) There was an evaluation, and re-evaluation of those services which continued over time. She started with speech-related services two times a week for twenty minutes in a group setting. (Id. at 68:18–19.) Later that year, she was subjected to a full child study team evaluation, and additional goals were added to her IEP. (Id. at 68:20–69:1.) Services were changed to three times per week, ten minutes per session. (Id. at 69:3.) After a year, R.M. was showing “limited progress” so her speech pathologist changed the delivery model to try to better meet R.M.’s needs by increasing services to six times per month for twenty-five minutes—which represents “a significant amount of therapy.” (Id. at 69:4–9.) After a year of this, there was progress on R.M.’s language goals, but R.M. still showed “limited progress” with her articulation goals, so she was “reduced down to three times a month for twenty five minutes” in an



individual setting, which has “pretty much” been the service level maintained for R.M. since. (Id. at 69:10–18.)

When A.W. came into Gloucester City, she was already receiving speech services three times a month for twenty-five to thirty minutes. (Id. at 69:22–23.) At some point, around 2015, A.W. expressed that she was satisfied with the way her speech sounded and no longer wanted services. (Id. at 69:23–70:2.) She was also tested and her language therapist felt, at that time, that her goals could be addressed in the classroom, so A.W.’s therapist discontinued her therapy services for the upcoming year (the 2015-16 school year). (Id. at 70:3–15.) At the end of 2016, A.W.’s guardian requested that A.W.’s speech therapy be reinstated, and A.W.’s therapist agreed, so A.W. was offered services three times per month for twenty-five minutes each in a group setting. (Id. at 71:20–72:13.)

For a student to be successful, they have to work toward their goals and be willing to put in the additional effort to achieve them. (Id. at 73:12–74:3.) If the student is saying they are satisfied with their speech and want to discontinue services, “you have to respect her.” (Id. at 74:3–12.) With the therapist’s assessment that A.W.’s goals could be indirectly met in the classroom, it was important for the team to take A.W.’s request to discontinue services “into account and be respectful” of her request. (Id. at 74:7–19.) Time spent in therapy is time a student has to take out of another area of classroom instruction and, when a child gets to high school level, that time is “a lot to miss.” (Id. at 79:1–14.)

The purpose of speech/language services are to “mitigate the educational impact of speech language and communication disorders.” (Id. at 81:8–10.) These services try to ensure a student’s “communication skills are adequate to meet the needs of their daily activities” including functioning in a school setting. (Id. at 81:16–24.) Students with these speech and language disorders can experience “plateauing” where, no matter how hard they are working or how effective the therapeutic approach used, they will “stop making improvement” at some point. (Id. at 83:3–7.) Fitzpatrick, based on her review of the girls’ records, discussions with their therapist, and personal observations of them, believed that

they had “plateaued.” (Id. at 85:4–11.) R.M. has been receiving speech therapy for over ten years and, even with changes in the service delivery model to give her a more intensive therapeutic approach, her gains in articulation have been “very, very minimal.” (Id. at 85:21–86:12.) Although A.W. has not received the same level of intensive therapy as R.M., she is still making the same errors she was making five years ago, indicating that A.W. has also plateaued. (Id. at 87:21–88:24.)

Reviewing the independent evaluations performed on R.M. (R-73) and A.W. (R-84), Fitzpatrick noted that R.M. scored in the eleventh percentile on receptive and twenty-fifth percentile on expressive one-word vocabulary testing. (Id. at 92:3–11.) To be classified as CI, however, you have to fall below 1.5 standard deviations or the tenth percentile to qualify. (Id. at 92:15–21.) While R.W.’s core language score was in the eighth percentile, she was still not below the tenth percentile on two tests which is the standard to be classified as CI. (Id. at 92:22-93:3.) On A.W.’s independent evaluation, the report did not include composite information that would be needed to properly evaluate if a student was classified as CI. (Id. at 94:15–23.) By only reporting subtest scores and no composite information, Fitzpatrick believed the therapist who wrote this report “chose the type of reporting that she did to, you know, help paint the picture that she wanted to paint.” (Id. at 94:25–95:2.) Based on the scaled scores for A.W., “and the fact that she was mostly average to just below average, it is unlikely if the composites were written here that she would have fallen within a disordered range” to be considered CI. (Id. at 95:2–6.)

Both R.M. and A.W. were diagnosed with dysarthria in their respective independent evaluations. (Id. at 95:18–21.) Dysarthria is a neuromotor disorder that causes weakness of the muscles necessary to produce speech. (Id. at 95:22–96:1.) The impact would be a weakening of the muscles of the face, lips, tongue, throat, and respiration which impacts the rate and melody of speech, and possibly impacts the vocal quality. (Id. at 96:1–6.) Typically, a diagnosis like that is followed up with a referral to a neurologist. (Id. at 96:14–17.) Particularly in R.W.’s case, where there is a “perceptual assessment of hyper-nasality” if she has dysarthria, there could be a weakness in her

velopharynx which speech therapy cannot correct but would require some form of surgical intervention to address. (Id. at 96:14–25.)

For R.M., the independent evaluator recommended speech therapy two times a week for sixty minutes. (Id. at 100:17–20.) Fitzpatrick believed that a “school based speech therapist would never take a student out of class twice a week for sixty minutes each” because that “is a significant amount of classroom time to miss.” (Id. at 100:11–14.) Weighing the cost-benefit of missing that amount of time, Fitzpatrick did not find this service delivery model would be able to support R.M. and that it was more appropriate to address her needs with the services as they are currently being provided to R.M. (Id. at 100:11–22; Id. at 227:11-228:22.)

The independent evaluator who performed A.W.’s evaluation recommended therapy twice a week for thirty minutes. Fitzpatrick found this recommendation a “more reasonable amount of therapy to provide,” however, she found that A.W.’s needs have been met within the one-time-a-week thirty-minute therapy sessions being currently provided. (Id. at 107:1–7.) Fitzpatrick believed that the services offered by GCPS were appropriate for R.M. and A.W. (Id. at 107:4–8.)

With respect to R.M., Fitzpatrick noted that her services were adjusted over time as R.M. was not being as successful as the therapist hoped she might be. (Id. at 108:1–5.) The therapist increased the frequency of R.M.’s services to hopefully meet R.M.’s goals and, when that did not work, she increased her to individual services for “a very protracted period of time.” (Id. at 108:14–16.) After R.M. showed “very limited progress” even at that level of “intense service,” the services were reduced. (Id. at 108:20–24.) If a child is missing class for services, and is not making progress, it is appropriate to continually assess the level of service and the benefits being delivered over time. (Id. at 109:1–5.) “[I]f you look at the whole and across time Gloucester City schools has very much looked to – has very much provided appropriate service to R[M.].” (Id. at 109:13–18.)

For A.W., she came into GCPS eligible for speech/language services, and was given the same level of service she had previously been provided with in her prior school district. (Id. at 109:21–25.) She was successful in meeting her articulation goals to the point where her therapist agreed to her request to be dismissed from therapy because her goals could be met with classroom support. (Id. at 110:1–17.) After her services were restored, they continued to work on her articulation deficits and, when new areas of deficits were found, new goals and objectives were incorporated into A.W.’s IEP. (Id. at 110:18–111:3.) For A.W., it “does appear that Gloucester City has provided appropriate services.” (Id. at 111:4–5.) Neither A.W. nor R.M. qualify to be classified as CI and, even if they had been classified as CI, there would have been no difference in the services provided. (Id. at 112:11–17.)

Fitzpatrick believed that R.M.’s articulation was her biggest problem in terms of intelligibility. (Id. at 167:16–19.) Her hyper-nasality may have the greatest impact on this, but if that is due to a velopharyngeal disfunction<sup>10</sup>, then it is not something that can be addressed with therapy—it would require a surgical intervention or use of some other kind of prosthetic device to address it. (Id. at 167:23–168:5.) If you are not seeing progress, it may be because this underlying physical issue has not been addressed. (Id. at 168:6–8.) Hearing R.M. speak, Fitzpatrick did note articulation errors, but could see how R.M. may still have difficulty being understood due to her hyper-nasality. (Id. at 169:1–6.) She questioned the diagnosis of dysarthria for R.M. because the diagnosis reported substitution errors, which are not typical of dysarthria. (Id. at 173:4–9.) If R.M. had dysarthria, Fitzpatrick would expect to see distortion errors, not substitution errors, in her speech. Hyper-nasality could be secondary to dysarthria, but could also be secondary to other disorders. (Id. at 173:4–14.)

The findings regarding A.W. in the independent evaluation are more in line with a diagnosis of dysarthria, because there are distortion errors noted. (Id. at 174:7–13.)

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<sup>10</sup> Velopharyngeal disfunction is a “generic term which describes a set of disorders resulting in the leakage of air into the nasal passages during speech production. As a result, speech samples can demonstrate hypernasality, nasal emissions, and poor intelligibility.” National Institutes of Health, Velopharyngeal Dysfunction, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3706038/>.

Hearing A.W. speak, however, Fitzpatrick was surprised by the dysarthria diagnosis. (Id. at 174:19–20.) A dysarthria diagnosis may account for the lack of continued progress, however, there was no indication of dysarthria present in any of the children’s prior records that Fitzpatrick reviewed. (Id. at 183:7–10.)

In designing services for a child, the focus is placed on working on the skills that are in deficit, regardless of the underlying reason for the deficit. (Id. at 194:2–9.) If a child has dysarthria, their IEP would focus on addressing the deficits resulting from that condition rather than addressing the underlying condition itself. (Id. at 194:17–25.) Had the girls been diagnosed with dysarthria “years ago,” their services would not have changed because they would still be focused on addressing specific goals and objectives to improve their skills rather than addressing the underlying medical condition. (Id. at 243:18–244:10.)

R.M. has a “moderate communication disorder” that Fitzpatrick believed was “more impacted by hyper-nasality.” (Id. at 201:7–9.) This did not impact her performance in school because teachers can still understand her and she actively participated in class, leading Fitzpatrick to conclude that R.M. did not have a “severe communication disorder.” (Id. at 201:16–202:2.) Fitzpatrick also believed that A.W. was “not at all” severely impaired. (Id. at 203:14–16.) A.W. had “no articulation errors” when Fitzpatrick observed her. (Id. at 203:21–22.) If a child has dysarthria, however, it would not be surprising that they could not achieve perfect speech production. (Id. at 239:9–16.)

### **FINDINGS OF FACT – R.M.**

Based upon the testimony and documentary evidence, and having had the opportunity to review the testimonial transcripts and listen to the recorded testimony of the testifying witnesses, I **FIND** the following **FACTS**:

1. After R.M. enrolled in the District in October 2013, her evaluation plan dated October 25, 2013, called for R.M. to undergo a speech evaluation for articulation issues. (Aug. 15, 2018, Tr. at 76:17–79:7.)

2. R.M.'s speech evaluation was completed on October 28, 2013. (R-46.)
3. Based on the results of R.M.'s October 28, 2013, speech evaluation, an IEP eligibility conference was held on November 14, 2013. (R-72.)
4. R.M. was deemed eligible for speech/language services to improve her articulation. (R-72.)
5. On November 14, 2013, an IEP was developed for R.M. (R-50.) This IEP had one goal, to improve R.M.'s articulation, and called for speech/language therapy to be provided in a group session two times per week for twenty minutes. (Id.)
6. R.M.'s biological mother's ex-husband attended the November 14, 2013, IEP session and signed R.M.'s IEP as her "parent." (R-50; Sept. 26, 2018, Tr. at 34:16–35:2.)
7. R.M. was referred for an I&RS action plan in November 2013, due to concerns about Math, Reading, and Writing Skills. (R-71.) R.M. was referred to the CST on February 11, 2014. (R-27.) The CST made referrals for educational, psychological, psychiatric, and speech/language testing. (R-28.)
8. Based on the results of these evaluations, an IEP eligibility conference was held on June 4, 2014. (R-70.) At that time, R.M. was found eligible for speech/language and related services under the category of OHI due to her anxiety and other conditions. (Id.) R.M.'s biological mother, B.W., participated in this IEP meeting. (Sept. 26, 2018, Tr. at 35:16–36:7.)
9. An IEP dated June 2, 2014, was developed to deliver special education services to R.M. (R-52.) That IEP kept R.M. in her current classroom with in-class support for the remainder of the school year, but started her in an in-class resource setting starting in September 2014. (Id.) R.M.'s biological mother, B.W., participated in this IEP meeting and signed the IEP. (Sept. 26, 2018, Tr. at 35:8–15.)
10. R.M.'s next IEP (R-53) dated February 3, 2015, continued R.M.'s in-class support for speech/language and provided speech therapy three times a week for ten minutes in

a group session. (Id.) That IEP also added accommodations for PARCC testing. (Aug. 15, 2018, Tr. at 96:15–97:13.)

11. R.M.'s next annual review was held on June 3, 2015. (R-54.) That IEP moved R.M. to a self-contained speech/language program, as well as provided speech therapy six times per month for twenty-five minutes in an individualized setting. (Id.) This program was continued with R.M.'s May 23, 2016, IEP (R-55) for her eighth-grade year. R.M.'s foster parent, K.K.-M., and a representative of DCPD were in attendance at this IEP meeting. (Id.) At the IEP meeting, K.K.-M. expressed concern about R.M. remaining in a self-contained classroom despite her good grades. (Id.) To accommodate this concern, the plan called for R.M. to be informally evaluated after the first semester to determine if R.M. could handle an in-class resource class. (Id.)

12. R.M.'s evaluation plan in February 2017 continued this program. (R-56.) Both R.M.'s biological mother and DCPD caseworker were present at this evaluation meeting. (Sept. 4, 2018, Tr. at 120:1–8.)

13. R.M.'s May 2017 annual review transitioned her from the self-contained to the less-restrictive supplemental support program. (R-57.) K.K.-M. participated in this annual review by telephone. (Id.) R.M. was also receiving speech/language therapy three times a month for twenty-five minutes in an individual setting under this IEP. (Id.)

14. Fitzpatrick, the speech/language pathologist for the District, testified that, based on her review of R.M.'s records and discussions with her therapist, and her personal observations of R.M., she believed that R.M. had "plateaued" with her speech therapy. (Nov. 19, 2018, Tr. at 85:4–11.) When a student has "plateaued," Fitzpatrick opined that no matter how hard the student works or how effective the therapy method being used, students will stop making improvements at some point. (Id. at 83:3–7.) R.M. has been receiving speech therapy for over ten years from the District and, even with changes in the service delivery model to give her a more intensive therapeutic approach, R.M.'s gains in articulation have been "very, very minimal." (Id. at 85:21–86:12.)

15. R.M.'s biological mother, B.W., never requested additional evaluations or any changes to R.M.'s IEPs. (Sept. 26, 2018, Tr. at 49:20–25.)

16. K.K.-M. obtained legal guardianship over R.M. on May 16, 2017. See K.K. o/b/o A.W. and R.M. v. Gloucester City Board of Education, EDS-8360-18 and EDS-8361-18, Final Decision, (June 7, 2019). K.K.-M. was, at that time, no longer a resident of Gloucester City and, as of that date, the District was no longer responsible for providing R.M. with a FAPE. Id. See also K.K.-M. obo A.W. and R.M. v. Board of Educ. of the City of Gloucester City, Camden County, 2020 N.J. Super. LEXIS 30, (App. Div. March 10, 2020).

17. K.K.-M. testified that she orally requested additional testing be done on R.M. when she was interviewed in March 2017 for R.M.'s May 2017 IEP. (Sept. 26, 2018, Tr. at 150:2–6.)

a. K.K.-M. also testified that she provided “scripts” from the girls’ treating psychiatrist requesting additional testing for R.M. and A.W. to the CST sometime in 2015. (Id. at 108:17–21.) K.K.-M. testified that these “scripts” sought “learning evaluation, IQ testing, et cetera” for each of the girls. (Id. at 155:15–20.)

b. It is not documented on any of the IEPs that K.K.-M. ever requested additional evaluations for R.M. that were not given by the District. (Sept. 10, 2018, Tr. at 150:2–6.)

18. The District retained R.M. as an enrolled student through the end of the 2018-19 school year. K.K. o/b/o A.W. and R.M. v. Gloucester City Board of Education, EDS-08360-19 and EDS-08838-19, Final Order, (November 27, 2019).

19. Pursuant to an order by The Honorable Lisa James-Beavers on May 9, 2019, the District disenrolled R.M. on July 2, 2019. K.K. o/b/o A.W. and R.M. v. Gloucester City Board of Education, EDS-18461-17 and EDS-18462-17, Order on Emergent Motion to Stay (May 9, 2019).

20. Pursuant to an Order dated April 17, 2018, by The Honorable Lisa James-Beavers, the District was ordered to pay for Independent Educational Evaluations (IEEs) for R.M. K.K. o/b/o R.M. and A.W. v. Gloucester City Board of Education, EDS-18461-17 and EDS-18462-17, Order Granting Request for Evaluations and Adjourning the Hearing



(April 17, 2018). This order was to provide the following IEEs for R.M. at the District's expense: educational evaluation, social assessment, speech/language evaluation, psychiatric evaluation, functional behavioral assessment, and occupational therapy evaluation. (Id.)

21. These IEEs were completed in June 2018. (See R-73, R-74, R-75, and R-76.)

22. These IEEs made no recommendations to change R.M.'s educational program or identified any areas of deficit that were not addressed in R.M.'s prior IEPs. (Sept. 10, 2018, Tr. at 111:15–21.)

a. R.M.'s scores on the speech/language IEE did not qualify R.M. to be classified as CI. (Nov. 19, 2018, Tr. at 92:22–93:3.)

23. R.M.'s speech/language IEE diagnosed her with dysarthria, a neuromotor disorder that causes weakness in the muscles necessary to produce speech. (Nov. 19, 2018, Tr. at 95:18–96:1.)

a. Fitzpatrick, the only testifying expert on speech/language pathology, testified that R.M. was identified with a "perceptual assessment of hyper-nasality" which, if she has dysarthria, may indicate a weakness in her velopharynx which cannot be corrected by speech therapy, but rather requires surgical intervention to address. (Id. at 96:14–25.)

b. Although Fitzpatrick questioned the accuracy of the IEE diagnosis of dysarthria for R.M. (Id. at 173:4–9) she believed that, if the diagnosis is correct, it may explain why R.M. was not experiencing progress from her speech therapy because there were underlying physical issues that have not been addressed which contribute to her continued hyper-nasality. (Id. at 168:6–8.) There was no indication of dysarthria, however, present in any of R.M.'s prior records that Fitzpatrick reviewed. (Id. at 183:7–10.)

c. Fitzpatrick opined that, if R.M. has dysarthria, her IEP would remain focused on working on the skills that have been identified to be in deficit, regardless of the underlying reason for those deficits. (Id. at 194:2–9.) Had R.M. been diagnosed

with dysarthria “years ago,” it would not have changed the appropriate services offered by the District since those services are focused on improving the student’s skills and objectives and not addressing underlying medical conditions. (Id. at 243:18–244:10.)

24. R.M.’s speech/language IEE recommended speech therapy two times a week for sixty minutes. (Id. at 100:17–20.)

a. Fitzpatrick, as the only testifying expert on speech/language pathology, testified that this recommendation is inappropriate as the proposed therapy time is a “significant amount of classroom time to miss” and felt that R.M.’s current services are more appropriate for R.M. (Id. at 100:11-22; Id. at 227:11–228:22.)

25. R.M. did not receive transportation to/from school as part of her IEPs.

a. Hobbs testified that R.M. did not qualify for transportation which is given to special education students only where the student has a “significant medical or a cognitive need for transportation” that would prevent them from getting safely to school. (Aug. 15, 2018, Tr. at 162:13–20.)

b. During her time as a resource parent, K.K.-M. drove both children to school with her because she was also working at the school during this time. (Sept. 26, 2018, Tr. at 190:9–191:15.)

26. The petitioner asserts that, sometime prior to January 13, 2016, R.M. alleged that she was being bullied at school. (P-14.) K.K.-M. testified that R.M. told her that a “kid” at school was “making fun of her and the way she speaks.” (Sept. 26, 2018, Tr. at 144:22-24.)

a. This allegation was investigated by the District who notified K.K.-M. on February 16, 2016, that their investigation did not find that R.M. was the target of HIB. (P-15.)

b. K.K.-M. challenged the District's assessment of the HIB allegation, calling the District's assessment "bull" in her testimony. (Sept. 26, 2018, Tr. at 146:20–22.)

c. K.K.-M. supported her disagreement with the District's assessment by testifying that she knew from talking to "one kid who is friends with the one was making fun of her" and they told her "yes, he actually is doing it." (Id. at 147:9–11.)

d. R.M. testified that the other students at school do not and have never made fun of her because of her speech. (Sept. 26, 2018, Tr. at 16:20–23.)

### **FINDINGS OF FACT – A.W.**

Based upon the testimony and documentary evidence, and having had the opportunity to review the testimonial transcripts and listen to the recorded testimony of the testifying witnesses, I **FIND** the following **FACTS**:

1. A.W. entered the Gloucester City schools in the fall of 2013 as a general education student. (Sept. 7, 2018, Tr. at 141:5–7.)

2. Upon entry into the District, A.W. had a "mild articulation disorder" which prompted an evaluation. (Id. at 147:6–20.)

3. As a result of an evaluation planning meeting (R-86) on October 25, 2013, a speech evaluation was conducted and A.W. was found eligible for speech articulation services only. (Aug. 15, 2018, Tr. at 117:22–118:10; R-124.) At that time, A.W. was provided with speech therapy three times a month for thirty minutes for articulation. (Id.)

4. A.W.'s CST held an evaluation meeting on March 4, 2014, to determine if additional evaluations were needed (R-93) and educational, psychological, social, and speech/language evaluations were conducted. (Id.) The eligibility report found A.W. eligible for services under the category of OHI for diabetes and ADHD. (R-95.) Her annual review placed her in an in-class support program for the seventh grade and

continued her speech therapy as a related service. (R-125; Aug. 15, 2018, Tr. at 127:19–24.)

5. A.W. was continued in the in-class support, but her speech therapy was discontinued when she entered the eighth grade. (R-127; Aug. 15, 2018, Tr. at 127:19–24.) This request was granted by the District because:

a. A.W. requested that she be dismissed from the speech therapy services at the end of the seventh grade and “was noncompliant about attending sessions and refused home practice” as well as needed to deal with “a variety of health and personal issues” during this time. (Aug. 15, 2018, Tr. at 130:4–15.)

b. A.W.’s therapist also reported at that time that A.W.’s deficits could be managed in a classroom, which is the least-restrictive setting, and that A.W. was “satisfied with her speech and no longer wanted to attend therapy.” (Sept. 7, 2018, Tr. at 218:10–18.)

6. A.W.’s speech therapy was reincorporated into her IEP for the ninth grade at K.K.-M.’s request, with A.W.’s therapist’s concurrence, at A.W.’s annual review meeting on May 23, 2016. (R-128; Sept. 7, 2017, Tr. at 249:10–250:10.) At that time, A.W. was given speech therapy three times per month for twenty-five minutes in a group setting. (R-128.)

7. At A.W.’s re-evaluation meeting on March 29, 2017, K.K.-M. and her DCPD caseworker both participated by telephone. (Aug. 15, 2018, Tr. at 136:22–138:24.) A.W.’s speech therapy services were continued at this meeting. (R-129.)

8. A.W.’s biological mother, B.W., never requested additional evaluations or any changes to A.W.’s IEPs. (Sept. 26, 2018, Tr. at 49:20–25.)

9. K.K.-M. obtained legal guardianship over R.M. on May 16, 2017. See K.K. o/b/o A.W. and R.M. v. Gloucester City Board of Education, EDS-8360-18 and EDS-8361-18, Final Decision (June 7, 2019). K.K.-M. was, at that time, no longer a resident of Gloucester City and, as of that date, the District was no longer responsible for providing

A.W. with a FAPE. Id. See also K.K.-M. obo A.W. and R.M. v. Board of Educ. of the City of Gloucester City, 2020 N.J. Super. LEXIS 30, (App. Div. March 10, 2020).

10. K.K.-M. testified that she orally requested additional testing be done on A.W. when she participated in A.W.'s March 29, 2017, IEP meeting. (Sept. 26, 2018, Tr. at 102:10–103:16.)

a. K.K.-M. also testified that she provided “scripts” from the girls’ treating psychiatrist requesting additional testing for R.M. and A.W. to the CST sometime in 2015. (Id. at 108:17–21.) K.K.-M. testified that these “scripts” sought “learning evaluation, IQ testing, et cetera” for each of the girls. (Id. at 155:15–20.)

b. It is not documented on any of the IEPs that K.K.-M. ever requested additional evaluations for A.W. that were not given by the District. (Sept. 10, 2018, Tr. at 150:2–6.)

11. A.W. did not receive transportation to/from school as part of her IEPs.

a. Hobbs testified that A.W. did not qualify for transportation which is given to special education students only where the student has a “significant medical or a cognitive need for transportation” that would prevent them from getting safely to school. (Aug. 15, 2018, Tr. at 162:13–20.)

b. During her time as a resource parent, K.K.-M. drove both children to school with her because she was also working at the school during this time. (Sept. 26, 2018, Tr. at 190:9–191:15.)

12. A.W. also has a diabetes management plan on file with the school that was prepared by A.W.’s doctors. (See R-108.) According to A.W.’s diabetes management plan dated August 18, 2016, A.W. was capable of performing blood glucose testing, carbohydrate counting, calculating correct insulin, and drawing and injecting the appropriate dose of insulin independently. (Id.) A.W.’s diabetes management plan for the 2017-18 school year changed and indicated that A.W. was no longer capable of doing self-monitoring. (P-2.)

13. A.W.'s diabetes required her to administer multiple daily insulin injections, follow a carb-counting diet, and required multiple blood sugar checks and exercise to control her condition.

14. A.W. had accommodations in her IEP for her diabetes, including access to the school nurse during the day to allow her to check her blood sugar, take needed snacks for hyperglycemia and to treat elevated blood sugars, and unlimited access to the lavatory and a water bottle. (Sept. 4, 2018, Tr. at 194:1–14.) A.W.'s teachers were all aware of A.W.'s medical condition and accommodations. (Id. at 194:24–195:2.)

15. A.W. did not have any restrictions on her activities according to the terms of her diabetes management plan. (Id. at 188:7–19.)

16. A.W. also took Albuterol for her asthma, which was given every four hours for wheezing.

17. A.W. also took Adderall, an amphetamine for her ADHD.

18. A.W. had a sports physical that was on file when she was in the ninth grade. (R-148.) The physician submitting that physical cleared A.W. to participate in all school sports without restriction. (Sept. 4, 2018, Tr. at 205:16–25.)

19. Until recently, A.W. participated in cheerleading and softball. (Sept. 26, 2018, Tr. at 229:24–230:12.)

20. A.W. sometimes makes errors in doing her insulin calculations, but these do not always result in an emergency room visit. (Id. at 235:6–237:7.) Sometimes, these errors require A.W. to readjust her insulin in other ways such as drinking water or eating something which can avoid a trip to the emergency room. (Id. at 237:8–18.)

21. A.W.'s school has a certified athletic trainer who is on-duty after school to cover all sports, including cheerleading. That trainer is familiar with diabetes, and is familiar with the operation of insulin pumps and trained to administer glucagon to students as needed. (Sept. 4, 2018, Tr. at 206:9–15.) The trainer remains on campus after school until the athletes are dismissed.

22. A.W. has never needed glucagon to be administered to her at school and has never had an incident other than a glucose “low or high” that were handled by the athletic trainer. (Id. at 207:2–15.)

23. In March 2017, A.W. was given an insulin pump for her diabetes. (See R-114.) The diabetes management plan that was given with that pump instructed that A.W.’s “[h]igh and low glucose levels can be treated in school” and that A.W. should not “be sent home unless ill.” (Id.)

24. A.W. has a supply kit that she takes with her to away games. (Id. at 208:2–4.) Until the 2018-19 school year, the school nurse, Stewart, has always accompanied A.W. to away games and on field trips. (Sept. 4, 2018, Tr. at 229:8–10.)

a. The District changed the practice of having a school nurse accompany to away games and field trips with the 2018-19 school year—having the school nurse accompany students on field trips only where students are “medically fragile.” (Id. at 229:8–10.) Now, the school arranges for the proper medications to be given and ensures that trip chaperones are aware of any medical issues and that there is a trained glucagon delegate available as needed for field trips.

b. In February 16, 2017, A.W.’s doctor wrote a letter stating that A.W. should have access to “the school nurse at any time during the school day.” (R-111.)

c. In March 2018, the District notified K.K.-M. that there were going to be times that A.W. would have to play softball at away games without a glucagon delegate and she would have to go with her insulin pump because the JV field where A.W. plays may, at some schools, be “some distance” from the varsity field and a glucagon delegate may not be available at the JV field during the game. (Sept. 26, 2018, Tr. at 176:2–10.)

d. K.K.-M. received an email from Stewart, the school nurse, in March 2019 (P-21), which informed her that the school’s athletic trainer would inform the trainer at any away games that A.W. would be there and that she was diabetic, and asked K.K.-M. to contact her with any questions. (Sept. 26, 2018, Tr. at 259:10–21.)

e. K.K.-M. did not contact Stewart with any questions after receiving this email—she contacted her attorney. (Id. at 259:22–260:8.)

f. K.K.-M. believed that there was nobody medically trained at the school in the afternoons to help A.W. She believed that A.W. needed someone fully versed in diabetic care in the event of an emergency and should not participate if there is no glucagon delegate. Sometime in September 2018, A.W.'s school received a new doctor's order for A.W. and, following receipt of this new order, the school stopped A.W.'s after school activities. (Id. at 262:17–263:24.)

g. A.W. testified on September 26, 2018, that, other than recently, she never had to miss any after school activities. (Id. at 21:23–25.)

25. The District retained A.W. as an enrolled student through the end of the 2018-19 school year. K.K. o/b/o A.W. and R.M. v. Gloucester City Board of Education, EDS-08360-19 and EDS-08838-19, Final Order (November 27, 2019).

26. Pursuant to an order by The Honorable Lisa James-Beavers on May 9, 2019, the District disenrolled A.W. on July 2, 2019. K.K. o/b/o A.W. and R.M. v. Gloucester City Board of Education, EDS-18461-17 and EDS-18462-17, Order on Emergent Motion to Stay (May 9, 2019).

27. Pursuant to an order dated April 17, 2018, by The Honorable Lisa James-Beavers, the District was ordered to pay for Independent Educational Evaluations (IEEs) for A.W. K.K. o/b/o R.M. and A.W. v. Gloucester City Board of Education, EDS-18461-17 and EDS-18462-17, Order Granting Request for Evaluations and Adjourning the Hearing (April 17, 2018). This order was to provide the following IEEs for A.W. at the District's expense: educational evaluation, speech/language evaluation, and psychiatric evaluation. (Id.)

28. These IEEs were completed in June 2018. (See R-84, and R-85.)

29. These IEEs made no recommendations to change A.W.'s educational program or identified any areas of deficit that were not addressed in A.W.'s prior IEPs. (Sept. 10, 2018, Tr. at 111:22–25.)



a. A.W.'s speech/language IEE did not report composite information necessary to evaluate whether A.W. should be classified as CI, however, based on A.W.'s scaled scores, Fitzpatrick testified that it would be "unlikely" that A.W.'s unreported composite scores would have fallen within a disordered range to consider A.W. as CI. (Nov. 19, 2018, Tr. at 95:2–6.)

30. A.W.'s speech/language IEE diagnosed her with dysarthria, a neuromotor disorder that causes weakness in the muscles necessary to produce speech. (Nov. 19, 2018, Tr. at 95:18–96:1.)

a. Fitzpatrick, the only testifying expert on speech/language pathology, testified that A.W.'s IEE showed that some distortion errors were noted in the evaluation, which is more in line with a diagnosis of dysarthria (id. at 174:7–13), but she was surprised to hear the dysarthria diagnosis after having heard A.W. speak. (id. at 174:19–20.)

b. There was no indication of dysarthria present in any of A.W.'s prior records that Fitzpatrick reviewed. (id. at 183:7–10.)

c. Fitzpatrick opined that, if A.W. has dysarthria, her IEP would remain focused on working on the skills that have been identified to be in deficit, regardless of the underlying reason for those deficits. (id. at 194:2–9.) Had A.W. been diagnosed with dysarthria "years ago," it would not have changed the appropriate services offered by the District since those services are focused on improving the student's skills and objectives and not addressing underlying medical conditions. (id. at 243:18–244:10.)

31. A.W.'s speech/language IEE recommended speech therapy two times a week for thirty minutes. (id. at 100:17–20.)

a. Fitzpatrick, as the only testifying expert on speech/language pathology testified that A.W. was "not at all" severely impaired and exhibited no articulation errors when she observed her. (id. at 203:14–22.)

b. Fitzpatrick testified that the IEE's recommendation for A.W. was a "more reasonable amount of therapy to provide" than the IEE's recommendation for R.M., however, Fitzpatrick believed that A.W.'s needs "have been met with the one time a week thirty minutes" the District was currently providing. (Id. at 106:25–107:3.)

### **CONCLUSIONS OF LAW**

**The petitioner's allegations regarding an alleged Harassment Intimidation and Bullying (HIB) incident involving R.M. are without factual support on this record and beyond the jurisdiction of this tribunal.**

The petitioner asserts that, sometime prior to January 13, 2016, R.M. reported that she was being bullied at school and reported that she was a target of HIB. (P-14; P-15.) The alleged incident was that a "kid" was "making fun of [R.M.] and the way she speaks. (Sept. 26, 2018, Tr. at 144:22–24.) These allegations were investigated by the District who notified K.K.-M. on February 16, 2016, that they did not find that R.M. was a target of HIB. (P-15.) K.K.-M., in her testimony, asserted that the District's assessment on this matter "was bull." (Sept. 26, 2018, Tr. at 146:20-22.) K.K.-M. supported her assessment by stating that she knew from talking to "one kid who is friends with the one who was making fun of [R.M.]" who told her, "yes, he actually is doing it." (Id. at 147:9-11.)

K.K.-M.'s testimony on this issue constitutes hearsay within hearsay, relaying information she heard from an unidentified "kid" who was relaying what he was told by the also unidentified alleged perpetrator of the HIB. While, under the Uniform Administrative Rules, hearsay evidence is admissible in hearings of contested cases, N.J.A.C. 1:1-15.5(a), some legally competent evidence must nonetheless exist to support each finding of fact. N.J.A.C. 1:1-15.5(b). Weston v. State of New Jersey, 60 N.J. 36, 51 (1972) ("a fact finding or legal determination cannot be based upon hearsay alone"). On this record, K.K.-M.'s testimony is not only unsupported by any legally competent evidence on the record, it is directly contradicted by the testimony of R.M., who was the target of the alleged incident and the only testifying witness capable of offering a first-hand account regarding the alleged HIB. R.M. testified that other students do not, and

have never, made fun of her because of her speech—directly contradicting the testimony of K.K.-M. and leaving K.K.-M.’s claim on this issue without any legally competent evidence to support it on this record. (Sept. 26, 2018, Tr. at 16:20–23.)

More problematic for this claim, however, is this tribunal’s lack of jurisdiction over the issue as it is presented in the present matter. Pursuant to N.J.S.A. 18A:37-15, each school district must adopt a policy that prevents HIB and provides for prompt responses to any alleged HIB incident. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation by a school anti-bullying specialist, and the results of the investigation must be reported to the superintendent of schools, who may take certain remedial actions. N.J.S.A. 18A:37-15(b)(6). School officials must also inform the parents or guardians of students involved of the results of their investigation. N.J.S.A. 18A:37-15(b)(6)(d). After receiving these results, a parent or guardian may request a hearing before the board of education. N.J.S.A. 18A:37-15(b)(6)(d). The board of education may, following a hearing, affirm, reject or modify the superintendent’s HIB decision. N.J.S.A. 18A:37-15(b)(6)(e). Parents of students who are otherwise aggrieved by the board of education’s determination are entitled to appeal the board’s decision to the Commissioner of Education no later than ninety days after the board issued the decision. Id.

K.K.-M. received the District’s decision regarding its investigation into R.M.’s HIB allegations in February 2016. (P-15.) Rather than appeal this decision for a hearing to the Board of Education, as required under N.J.S.A. 18A:37-15(d), and appealing any adverse decision of the Board to the Commissioner of Education, pursuant to N.J.S.A. 18A:37-15(e), the petitioner is attempting to directly appeal an adverse investigation result from R.M.’s school in the present matter. The present matter was filed with the State Director of the Office of Special Education Programs (OSEP), who exercises jurisdiction over complaints regarding the provision of special education and related services and who has authority to issue a final decision on those complaints. N.J.A.C. 6A:14-9.2. Jurisdiction over hearings regarding HIB determinations by schools lies first with the resident board of education and then, upon appeal, with the Commissioner. See N.J.S.A. 18A:37-15(d)-(e). A final decision reached by OSEP under the provisions set forth in

N.J.A.C. 6A:14-9.2 cannot be appealed to the Commissioner. Bd. of Education of the Lenape Reg'l High School District v. New Jersey Department of Education Office of Special Education Programs, 399 N.J.Super. 595, 606 (App.Div. 2008). The finality of the decisions respectively reached by OSEP and the OAL is “consistent with the State’s adoption of legislation implementing IDEA . . . and with the State Board’s statutory authority to adopt regulations necessary to implement the school laws.” Id. at 604.

Because the OAL is not a court, but a tribunal designated to hear disputes transmitted from state agencies, it derives its jurisdiction from the transmitting agency. Although “[t]he judge may render any ruling or order necessary to decide any matter presented to him or her which is within the jurisdiction of the transmitting agency conducting the hearing” N.J.A.C. 1:1-14.6, the OAL shall not “receive, hear or consider any pleadings, motion papers, or documents of any kind” relating to matters beyond its limited jurisdiction. N.J.A.C. 1:1-3.2. Since this tribunal’s jurisdiction is derived from the transmitting agency, the lack of jurisdiction of OSEP to decide appeals of HIB investigations by a school and the absence of any avenue of appeal of this decision to the Commissioner who has jurisdiction over HIB appeals, precludes this tribunal from exercising such jurisdiction in a case transmitted by the OSEP and not the Commissioner. L.K. and A.K. obo L.K. v. Northern Burlington County Regional Board of Education, EDU-6071-12, Initial Decision (January 27, 2014), adopted, Comm’r (March 21, 2014) <http://lawlibrary.rutgers.edu/oal/search.html>. Accordingly, I **CONCLUDE** that this tribunal lacks jurisdiction to determine whether R.M. was the target of HIB contrary to the school’s February 16, 2016, determination that she was not.

**There is no evidence on this record to support the petitioner’s assertion that A.W. was denied the benefits of a FAPE due to a failure of the respondent to properly address her medical needs in her IEPs.**

The petitioner claims that the respondent “failed to properly address the medical needs of A.W. in her IEPs.” (Pet. Br. at 60.) Specifically, the petitioner alleges that A.W. requires “a nurse for field trips or after-school activities to ensure the safe administration of A.W.’s medication or to maintain her blood sugar levels.” (Id. at 44.) The lack of an

available nurse for after-school activities and for field trips has “resulted in A.W. missing field trips and numerous after-school activities.” (Ibid.)

The inability to provide for a student’s health requirements can be found to deny that student a FAPE. G.B. and D.B. ex rel. A.B. v. New York City Dep’t of Educ., 145 F.Supp. 3d 230 (S.D.N.Y. 2015). On the record presented, however, the District provided a school nurse to accompany A.W. to away games and on field trips prior to the 2018-19 school year. (Sept. 4, 2018, Tr. at 229:8–10.) K.K.-M. testified that A.W. did not have an issue with a lack of nursing resources at school until September 2018, nearly a year after the current petition was filed, when the school received new orders from her doctor regarding A.W.’s diabetes. (Sept. 26, 2018, Tr. at 262:17–263:24.) Only after receiving these new orders from her doctor, did the school stop A.W.’s participation in after-school activities. (Id.)

A.W.’s IEP that is the subject of the challenge in the present matter, however, is dated March 29, 2017. (R-129.) This is a year and a half before A.W.’s revised diabetes management plan for the 2017-18 school year (P-2) indicated that A.W. was not capable of performing her own self-monitoring and before new doctor’s orders were given to the school sometime in fall 2018 which prompted them to stop A.W.’s participation in after-school activities. In evaluating the appropriateness of an IEP, however, Courts are not permitted to engage in “Monday morning quarterbacking” and second guess the decisions of a school district with information “to which it could not possibly have had access at the time it made those decisions.” Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993); Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3d Cir. 1995). Changes to A.W.’s medical condition and needs from the 2017-18 school year are not relevant to determining the appropriateness of her IEP provisions created in March 2017. Further, A.W. testified in her September 2018 testimony that, until recently, she had never missed any after-school activities due to her medical condition. (Sept. 26, 2018, Tr. at 21:23–25.) It is also clear that A.W. was no longer a resident of the Gloucester City school district after May 16, 2017, and the District was no longer responsible for providing A.W. with a FAPE after that date. K.K. o/b/o A.W. and R.M. v. Gloucester City Board of Education, EDS-8360-18 and EDS-8361-18, Final Decision (June 7, 2019). See also

K.K.-M. obo A.W. and R.M. v. Board of Educ. of the City of Gloucester City, 2020 N.J. Super. LEXIS 30, (App. Div. March 10, 2020).

It has not been factually alleged in the testimony on this record that the District failed to provide adequate accommodations for A.W.'s medical condition until nearly a year after the present petition was filed, and over a year after A.W. was no longer a resident of the District and the District's obligation to provide A.W. with a FAPE had lapsed. The allegation is further based on a change to A.W.'s medical condition which was not known to the District until a year and a half after the challenged IEP was created. I **CONCLUDE**, therefore, that these claims that the District failed to adequately accommodate A.W.'s medical conditions and, by doing so, denied A.W. the benefits of a FAPE are without merit.

**There is no evidence on this record to support the petitioner's claim that A.W. and R.M. were entitled to transportation services as part of their IEPs.**

The petitioner claims that "transportation of a child with a disability to and from school is 'a related service' under IDEA and must be included in a child's IEP." (Pet. Br. at 12–23.) Transportation services may be provided to special needs students as a related service, "when required for the student to benefit from the educational program." N.J.A.C. 6A:14-3.9(a)(7). Hobbs testified that the District is "primarily a walking District" where most students walk to and from school. (Aug. 15, 2018, Tr. at 162:13–20.) K.K.-M. testified that she drove the girls to school each day because she also worked at the school. (Sept. 26, 2018, Tr. at 190:9–191:15.) Neither A.W. nor R.M.'s IEPs called for transportation services, there is nothing on this record to indicate that A.W. and R.M.'s parent or guardian ever made a request for transportation services, and there is nothing presented on the current record which demonstrates a need for those services for the children "to benefit from the educational program" they were receiving in the District. Accordingly, I **CONCLUDE** that the petitioner's claim that transportation services were required to be offered as a related service in A.W. and R.M.'s IEPs is without merit.

**The Respondent has met its burden to demonstrate that A.W. and R.M. were not denied a FAPE.**

The Individuals with Disabilities Education Act (IDEA) provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982). One of purposes of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. §1400(d)(1)(A). To qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the State have available to them a FAPE through a uniquely tailored individualized education program (IEP) in the least restrictive environment. 20 U.S.C. §§1401(9)(D), 1412(a)(1); Honig v. Doe, 484 U.S. 305, 338 (1988). The responsibility to provide a FAPE rests with the local public school district, which bears the burden of proving that a FAPE has been offered. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d); N.J.S.A. 18A:46-1.1; see also G.S. v. Cranbury Twp. Bd. of Educ., 2011 U.S. Dist. LEXIS 44933, \*6 (D.N.J. 2011) (New Jersey uniquely places the burden of proof and production on the school district).

Federal law is complied with when a local school board provides a handicapped child with a personalized education program and enough support services to confer some educational benefits on the child. Rowley, 458 U.S. at 179. In Rowley, the Court determined that although the Act mandates that states provide a certain level of education, it does not require states to provide services that necessarily maximize a disabled child’s potential. Instead, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995). “[A]lthough the IEP must provide the student with a ‘basic floor of opportunity,’ it does not have to provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” Ridley School District v. M.R., 680 F.3d 260, 269 (3d Cir. 2012). Hence, while the state must provide an education that offers significant learning, it need not “maximize the potential of every handicapped child.” Ibid. A court reviewing an IEP must determine whether it is “reasonable, not whether the court regards it as ideal.”

Andrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 998, 999 (2017). “A program need not and cannot guarantee a student’s academic progress.” S.C. v. Oxford Area Sch. Dist., 2018 U.S. App. LEXIS 31086, \*6 (3rd Cir. 2018) (citing Andrew F., 137 S. Ct. at 999). Hence, the IEP must be “judged prospectively so that any lack of progress under a particular IEP . . . does not render that IEP inappropriate.” Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 (3rd Cir. 1995).

While our courts have consistently held that the IDEA does not mandate an optimal level of services, an IEP must provide meaningful access to education, and confer some educational benefit upon the child. Rowley, 458 U.S. at 192. In order to be appropriate, the educational benefit conferred must be more than trivial. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999).

The educational opportunities provided by a public school system will differ from student to student, based upon the “myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.” Rowley, 458 U.S. at 198. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry, and that “[i]t is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variation in-between.” Id. at 202.

In New Jersey, a parent or school district may request a due-process hearing “when there is a disagreement regarding identification, evaluation, re-evaluation, classification, educational placement, the provision of [FAPE], or disciplinary action.” N.J.A.C. 6A:14-2.7(a). In such a hearing, “the school district shall have the burden of proof and the burden of production.” N.J.S.A. 18A:46-1.1. The hearing is conducted by an administrative law judge (ALJ), whose 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 result in substantive harm, such that a procedural violation: (1) impeded the student’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding



the provision of a 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). The FAPE requirement is not “a bad faith or egregious circumstances standard,” Ridgewood, 172 F.3d at 249, and, therefore, is not “abridged because the [school] district’s behavior did not rise to the level of slothfulness or bad faith.” Ibid. (quoting M.C. ex rel. J.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 389, 397 (3rd Cir. 1996)). In the present matter, the petitioner alleges both substantive and procedural violations of IDEA.

When A.W. first enrolled with the District in 2013, she was a general education student (Sept. 7, 2018, Tr. at 141:5–7), but had been previously diagnosed with a mild articulation disorder from her prior school district which prompted the District to conduct an evaluation. (Id. at 147:6–20.) A.W.’s sixth grade teacher also noted difficulty in understanding A.W.’s speech, giving the District further reason to evaluate A.W. (Id. at 147:6–20.) Following the District’s evaluation, A.W. was found to have deficits in speech articulation, and the District provided her with speech articulation services to address this deficit. (R-124.) Those services were provided in the form of speech/language services three times a month for thirty minutes to help A.W. improve her articulation. (Id.) In 2014, A.W.’s IEP was revised to incorporate accommodations for her diagnosis with diabetes. (R-140.) A.W.’s speech/language services continued until she had requested they be discontinued in 2015 as A.W. was entering the eighth grade. (R-127.) At that time, A.W. expressed her satisfaction with her speech, was noncompliant with her speech sessions, and her therapist felt that her deficits could be managed in the less-restrictive classroom setting. (Aug. 15, 2018, Tr. at 130:4–15; Sept. 7, 2018, Tr. at 218:10–18.) These services were reinstated in May 2016 at the request of K.K.-M. (R-128.)

R.M. was first enrolled in the District in 2013, and she came to the District with a “speech-only” IEP. (Nov. 19, 2018, Tr. at 68:11–13.) R.M.’s speech/language services were continued upon transferring to the District, and the District’s evaluation plan called for R.M. to be evaluated for speech articulation issues. (Aug. 15, 2018, Tr. at 76:17–79:7.) After a speech evaluation was performed in October 2013 (R-46), an IEP eligibility

conference was held, and R.M. was deemed eligible for speech/language services to improve her articulation. (R-72.) An IEP was developed for R.M. to provide speech/language therapy designed to improve her articulation. (R-50.) Over time, R.M.'s therapy was adjusted and, in 2017, R.M.'s annual review transitioned R.M. from the self-contained to a less restrictive supplemental support program to meet the request of K.K.-M. for a less-restrictive program. (R-54; R-57.)

The only testifying expert on speech and language pathology, Fitzpatrick, testified that, upon her review of the girls' records, she believed that they had "plateaued" with their speech/language therapy, where a person with a speech/language disorder can stop showing measurable improvement regardless of how hard they are working or the effectiveness of the therapeutic approach used. (Nov. 19, 2018, Tr. at 83:3–7.) R.M. had been receiving speech therapy for over ten years and, even with the changes in the service delivery model to increase the intensity of the therapy over time, she was making "very, very, minimal" gains with her articulation. (Id. at 85:21–86:12.) A.W. has not received the same intensity of therapy as R.M., but she was observed making the same errors she was making five years ago, indicating that her progress with speech therapy has also "plateaued." (Id. at 87:21–88:44.) Fitzpatrick concluded that her review of the girls' records indicated to her that, looking "at the whole and across time Gloucester City schools has very much looked to—has very much provided appropriate service to R.[M.]" (id. at 109:13–18) and, with respect to A.W., it appeared to her that "Gloucester City has provided appropriate services." (Id. at 111:4–5.)

The petitioner challenges Fitzpatrick's conclusion on the grounds that the respondent did not conduct adequate evaluations and testing of the children (Resp. Br. at 54), did not adequately ensure the attendance of the children's parents at IEP meetings (id. at 55), never provided any psychological counseling or social skills therapy (id. at 58), impeded B.W. and K.K.-M.'s opportunity to participate in the decision-making process for the children, and "caused a serious deprivation of educational benefits to A.W. and R.M." (Id. at 60.)

Over the course of the children's time with the District, both their biological mother, B.W., and their resource parent, K.K.-M., were directly involved in their education and in the IEP process. The girls' biological mother, B.W., participated in their IEP development (see, e.g., R-51, R-52, R-57) and testified that she never requested any evaluations or changes to the girls' IEPs (Sept. 26, 2018, Tr. at 49:20–25), had no issues with the girls' case managers (id. at 50:8–20), and was pleased with the progress the girls had made in Gloucester City schools. (Id. at 50:8–20.)

K.K.-M. has had the girls with her since 2015. (Sept. 26, 2018, Tr. at 62:5–7.) It is documented that K.K.-M. was a regular participant in the girls' IEP meetings. (See, e.g., R-54, R-55, R-57, R-129.) The record also reflects that the girls' biological mother, B.W., continued to be actively involved in the girls' IEP planning and development, attending IEP meetings as late as February 2017 along with caseworkers from DCPD (see R-56) providing some level of overlap between K.K.-M.'s involvement in the children's education. (See, e.g., R-55 (documenting K.K.-M.'s participation in a May 2016 IEP meeting for R.M.); R-128 (documenting K.K.-M.'s participation in a May 2016 IEP meeting for A.W.); and R-56 (documenting B.W.'s participation in a February 2017 IEP meeting for the girls).) Where it is documented that K.K.-M. sought to make changes to the girls' IEPs, the District promptly responded to those requests. (See R-128 (the District granting K.K.-M.'s request to reincorporate speech therapy for A.W.); R-54 (the District accommodating request of K.K.-M. to evaluate R.M. for in-class resource class rather than self-contained classroom instruction). Although it is not documented in any of the extensive documentation provided, K.K.-M. avers that she continually sought additional testing on both girls from the District and advocated for more speech services. (Nov. 19, 2018, Tr. at 49:24–25.)

The petitioner asserts that the girls were denied FAPE by the District's failure to conduct new evaluations despite K.K.-M.'s claim she regularly requested additional testing. Whether or not these requests were properly made, a child's entitlement to special education is not dependent on the parents' vigilance; rather, it is the school district's responsibility "to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly." M.C., 81 F.3d at 397. The appropriate focus,

therefore, is on whether the failure of the District to conduct additional testing on the children resulted in their being denied a proper FAPE. Both A.W. and R.M. were subjected to a battery of Independent Educational Evaluations (IEEs) in June 2018, following the entry of an order by The Honorable Lisa James-Beavers in April 2018. K.K. o/b/o A.W. and R.M. v. Gloucester City Board of Education, EDS-18461-17 and EDS-18462-17, Order Granting Request for Evaluations and Adjourning the Hearing (April 17, 2018). R.M. received an independent education evaluation, social assessment, speech/language evaluation, psychiatric evaluation, functional behavioral assessment, and occupational therapy evaluation. (See R-73, R-74, R-75, and R-76.) A.W. received an independent educational evaluation, speech/language evaluation, and psychiatric evaluation. (See R-84 and R-85.)

The petitioner, in her briefing, avers that these IEEs “evidence substantial deficiencies in numerous areas.” (Pet. Br. at 59.) The only expert testimony presented to assess these evaluations, however, concluded that these IEEs did not recommend any substantive changes to the children’s programs nor did they identify any areas of deficit that were not being addressed in the children’s prior IEPs. (Sept. 10, 2018, Tr. at 111:15–112:4.) Further, neither of the speech/language IEEs presented testing results which would otherwise qualify either child to be classified as CI. (Id. at 92:22–93:3; 95:2–6.)

The speech/language IEEs also diagnosed both A.W. and R.M. with dysarthria. (Id. at 95:18–21.) This medical diagnosis, presented in a report without accompanying testimony would be objectionable under N.J.R.E. 808, but was admitted pursuant to N.J.A.C. 1:1-15.1(c). See New Jersey Division of Child Protection and Permanency v. N.T., 445 N.J. Super. 478, 501 (App. Div. 2016) (quoting New Jersey Division of Youth and Family Services v. B.M., 413 N.J. Super. 118, 130 (App. Div. 2010) and New Jersey Division of Youth and Family Services v. M.G., 427 N.J. Super. 154, 174 (App. Div. 2012)) (excluding expert reports offered without the opportunity for the other party to cross-examine the expert). See also Konop v. Rosen, 425 N.J. Super. 391, 405 (App. Div. 2012) (noting inadmissibility of opinions embedded in medical reports where declarant is not produced as a witness at trial); Nowacki v. Community Medical Center, 279 N.J. Super. 276, 282-83 (App. Div. 1995) (medical opinions in hospital records are inadmissible where

opponent is deprived of opportunity to cross-examine declarant on basis for diagnosis or cause of condition in question). Fitzpatrick, the sole expert testimony presented in this matter, questioned the accuracy of the dysarthria diagnosis contained in the girls' IEEs. (Sept. 10, 2018, Tr. at 173:4–9; Id. at 174:19–20.) While this diagnosis may provide some insight into why the girls are making limited progress with speech therapy services (id. at 168:6–8; id. 183:7–10), Fitzpatrick's testimony made clear that this diagnosis, even if it was accurate and had been made years earlier, would not have changed the appropriateness of the goals and services provided in the girls' IEPs because the IEPs focus on addressing the deficits that may impact a child's education and not the underlying medical condition which may be the cause of the observed deficits. (Id. at 194:2–25; Id. at 243:16–244:10.)

For A.W., her speech/language IEE made a recommendation that she continue speech therapy two times a week for thirty minutes. (Nov. 19, 2018, Tr. at 100:17–20.) This is an increase from A.W.'s latest IEP, which provided A.W. with speech therapy three times per month for twenty-five minutes. (R-129.) Fitzpatrick testified that A.W. was "not at all" severely impaired and exhibited no articulation errors when she observed her. (Id. at 203:14–22.) Given the length of time that A.W. has been receiving speech therapy, the apparent "plateauing" of A.W. in terms of the benefits A.W. is receiving from her continued speech therapy, and the possibility that there are underlying and unaddressed medical problems, namely dysarthria, which will not be addressed with additional therapy, Fitzpatrick believed that A.W.'s needs have been appropriately met with the level of therapy that A.W. has been receiving. (Id. at 106:25–107:3.)

For R.M., her speech/language IEE made a recommendation that she receive speech therapy two times a week for sixty minutes. (Id. at 100:17–20.) This proposed amount is compared to R.M.'s latest IEP provided R.M. with speech therapy three times per month for twenty-five minutes. (R-57.) Fitzpatrick found this proposed amount of therapy to be excessive in light of the amount of classroom time R.M. would miss to attend therapy at this intensity. (Nov. 19, 2018, Tr. at 100:11–22.) Particularly in light of Fitzpatrick's assessment that R.M.'s hyper-nasality appears to have the greatest impact on her speech intelligibility and, if this is due to an underlying medical problem such as a

velopharyngeal disfunction, this is not something addressed with speech therapy but rather by surgical intervention or use of a prosthetic device, coupled with the amount of speech therapy R.M. has already received which, at this point, is showing “very, very minimal” improvements (id. at 85:21–86:2), Fitzpatrick concluded that the IEE’s recommendation to increase R.M.’s speech therapy inappropriate. (Id. at 96:14–25; Id. at 167:23–168:5.)

I **CONCLUDE** that the District has proved by a fair preponderance of the credible evidence that it provided A.W. and R.M. with a FAPE for the years 2013–17 and did not impede A.W. and R.M.’s rights to a FAPE, impede the girls’ parent or guardian’s opportunity to participate in the decision-making process regarding the provision of a FAPE, or otherwise deprive them of an educational benefit.

**ORDER**

Accordingly, it is **ORDERED** that petitioner’s due-process petition be and is hereby **DISMISSED**.

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

March 16, 2020 \_\_\_\_\_

DATE

  
\_\_\_\_\_  
**DAVID M. FRITCH, ALJ**

Date Received at Agency:

\_\_\_\_\_

Date Sent to Parties:

\_\_\_\_\_

/dw

**APPENDIX**

**WITNESSES**

**For Petitioner:**

R.M.  
A.W.  
B.W.  
K.K.-M.

**For Respondent:**

Tamie Hobbs  
Linda Stewart  
Rosemarie Fitzpatrick

**EXHIBITS**

**For Petitioner:**

- P-8 A.W. AMB Referral to Cooper Pediatric Neurology, Outpatient, November 23, 2016
- P-9 K.K.-M. Letter to Dr. Vender, May 26, 2016
- P-10 K.K.-M. Letter to DiCamillo 2015
- P-11 Twin Oaks Community Services, Childrens Mobile Response, Family Safety Plan, R.M., November 17, 2014
- P-12 Twin Oaks Community Services, Childrens Mobile Response, Family Safety Plan, A.W., November 17, 2014\
- P-13 Jaya Ganesh M.D., Consult to Plastic Surgery, Outpatient Referral, R.W., November 28, 2016



- P-14 Letter to K.K.-M. from Sean P. Gordon, Principal, Gloucester City Public School on bullying R.M., February 12, 2016
- P-15 District Letter on Harassment, Intimidation & Bullying, February 12, 2016
- P-16 Lisa DiPietro, M.S. – Adoption Therapist, Letter, November 14, 2017
- P-17 Lydia A. Vender, D.O. FACN, Letter, December 12, 2017
- P-18 K.K.-M. handwritten note, March 6, 2018
- P-19 NJ Testing Letter, July 2, 2018
- P-20 Kennedy Health System, Stratford, Emergency Record, July 22, 2018
- P-21 Linda Stewart, RN, BSN, CSN, email, March 27, 2018
- P-22 Camden County Partnership for Children, Crisis Plan Worksheet, June 24, 2016
- P-23 Letter of commendation to Dr. Dennis Vespe, Superintendent, Gloucester City Public Schools, September 25, 2017
- P-24 NJDOE PRISE Booklet

For Respondent:

- R-1 Email from K.K.-M. to Dennis Vespe, November 1, 2017
- R-2 Parental Request for Mediation/Due Process Hearing–K.K.-M. on behalf of R.M. v. Gloucester City Public Schools, November 11, 2017
- R-3 Request for Emergent Relief, November 11, 2017
- R-4 Parental Request for Mediation/Due Process Hearing–K.K.-M. on behalf of A.W. v. Gloucester City Public Schools, November 11, 2017
- R-6 Return of Emergent Relief/Due Process Hearing from OSEPP–K.K.-M. on behalf of A.W. v. Gloucester City Board of Education, November 13, 2017
- R-7 Return of Emergent Relief/Due Process Hearing from OSEPP–K.K.-M. on behalf of R.M. v. Gloucester City Board of Education, November 13, 2017
- R-8 District Court Complaint, November 13, 2017
- R-10 Order Denying Motion for Temporary Restraining Order, November 16, 2017
- R-11 Parental Request for Mediation/Due Process Hearing–K.K.-M. on behalf of A.W., November 19, 2017

- R-12 Parental Request for Mediation/Due Process Hearing–K.K.-M. on behalf of R.M., November 19, 2017
- R-13 Preliminary Notice of Ineligibility from Dennis Vespe to K.K.-M., December 13, 2017
- R-22 Order to Close Case, June 25, 2018
- R-23 Robert B. Kugler, United State District Judge, Opinion, June 25, 2018
- R-24 R.M., Educational Summary, September 5, 2017
- R-25 R.M., Pupil Status Review/Evaluation Plan, October 25, 2013
- R-26 R.M., Eligibility Conference Report, November 14, 2013
- R-27 R.M., Referral to CST, February 11, 2014
- R-28 R.M., Evaluation Plan, March 4, 2014
- R-31 R.M., Progress Report from Speech/Language Specialist, April 25, 2016
- R-32 R.M., Notification of IEP Meeting, May 9, 2016
- R-37 R.M., Pupil Status Review/Evaluation Plan, February 1, 2017
- R-41 Invitation, October 24, 2017
- R-46 R.M., Speech Evaluation, October 28, 2013
- R-47 R.M., Psychiatric Evaluation, Joseph C. Hewitt, D.O., April 2, 2014
- R-50 R.M., IEP, November 14, 2013
- R-51 R.M., IEP, June 2, 2014
- R-52 R.M., IEP Annual Review, June 18, 2014
- R-53 R.M., IEP, February 3, 2015
- R-54 R.M., IEP Annual Review, June 3, 2015
- R-55 R.M., IEP, May 23, 2016
- R-56 R.M., IEP Re-evaluation, February 1, 2017
- R-57 R.M., IEP, May 15, 2017
- R-58 R.M., NJ ASK Spring 2013 Individual Student Report
- R-59 R.M., NJ ASK Spring 2014 Individual Student Report
- R-60 R.M., NJ ASK Science Report May 2017
- R-61 R.M., NJDOE Grade 6 Assessment Report 2014-2015–English/Language Arts/Literacy
- R-62 R.M., NJDOE Grade 6 Assessment Report 2014-2015–Mathematics
- R-63 R.M., NJDOE Grade 7 Assessment Report 2015-2016–Mathematics

- R-64 R.M., NJDOE Grade 7 Assessment Report 2015-2016–English/Language Arts/Literacy
- R-65 R.M., NJDOE Grade 8 Assessment Report 2016-2017–English/Language Arts/Literacy
- R-66 R.M., NJDOE Grade 8 Assessment Report 2016-2017–Mathematics
- R-67 R.M., Report Card, February 2, 2017
- R-68 R.M., Report Card, November 14, 2017
- R-70 R.M., Eligibility Conference Report, June 2, 2014
- R-71 R.M., I&RS Action Plan, November 27, 2013
- R-72 R.M., Eligibility Conference Report, November 14, 2013
- R-73 R.M., Speech/Language Evaluation–Rizza Miro Lemonakis, M.A., CCC-SLP June 28, 2018
- R-74 R.M., Occupational Therapy Evaluation–Marni Ehrlich, OTR/L 46TROO256300, June 12, 2018
- R-75 R.M., Functional Behavioral Assessment–Christen Russell, MS, BCBA, June 18, 2018
- R-76 R.M., Educational Evaluation–Donna M. Lewis, Ed.S. LDT/C, July 14, 2018
- R-80 A.W., Emails regarding Glucagon Delegate and Softball, March 27, 2018
- R-84 A.W., Speech/Language Evaluation–Rizza Miro Lemonakis, M.A., CCC-SLP, June 28, 2018
- R-85 A.W., Educational Evaluation, June 8 and June 9, 2018
- R-86 A.W., Identification Meeting/Evaluation Plan, October 25, 2013
- R-88 A.W., Eligibility Conference Report, November 14, 2013
- R-90 A.W., Referral to CST, February 9, 2014
- R-92 Written Consent to Conduct Evaluation/Assessment, March 14, 2014
- R-93 A.W., Evaluation Plan, March 4, 2014
- R-95 A.W., Eligibility Conference Report, June 2, 2014
- R-98 A.W., Notice to A.W. of IEP Meeting, May 15, 2015
- R-99 A.W., Notice to Biological Mother of IEP Meeting, May 15, 2015
- R-105 Letter, June 13, 2016
- R-106 Letter, June 15, 2016

- R-108 A.W., Cooper Children's Regional Hospital, Diabetes Medical Management Plan, April 15, 2013
- R-109 A.W., Cooper University Hospital, After Visit Summary, August 18, 2016
- R-111 A.W., Letter from Diane A. DiFazio, APN at The Cooper Health System, regarding accommodations for diabetes, February 16, 2017
- R-112 A.W., Letter from Diane A. DiFazio, APN at The Cooper Health System, regarding accommodations for diabetes, February 16, 2017, with handwritten notes
- R-114 A.W., Cooper Children's Regional Hospital Report "For Student with an Insulin Pump" March 29, 2017
- R-115 A.W., Eligibility Conference Report, March 29, 2017
- R-116 A.W., Identification Meeting/Evaluation Plan, March 29, 2017 Meeting
- R-118 A.W., Asthma Treatment Plan—Physician's Orders Effective August 29, 2017
- R-122 A.W., Collaborative Assessment, April 9, April 10, and April 28, 2014
- R-123 A.W., Speech and Language Evaluation, April 25 and May 12, 2013
- R-124 A.W., IEP, November 14, 2013
- R-125 A.W., IEP, June 2, 2014
- R-126 A.W., Annual IEP Review, June 18, 2014
- R-127 A.W., IEP, May 29, 2015
- R-128 A.W., IEP, May 23, 2016
- R-129 A.W., IEP, March 29, 2017
- R-130 A.W., NJ ASK—Spring 2013 Individual Student Report
- R-131 A.W., NJ ASK—Spring 2014 Individual Student Report
- R-132 A.W., NJ ASK Science Individual Student Report, May 2016
- R-133 A.W., NJ DOE English/Language Arts/Literacy Grade 7 Assessment Report, 2014-2015
- R-134 A.W., NJDOE Grade 8 Math, Mathematics Assessment Report, 2015-2016
- R-135 A.W., NJDOE Algebra I, Mathematics Assessment Report, 2016-2017
- R-136 A.W., PSAT 8/9 Your Score Report, Fall 2016
- R-137 A.W., Re-evaluation Review, March 29, 2017
- R-138 A.W., Report Card, February 1, 2017
- R-139 A.W., Report Card, November 14, 2017

- R-141 A.W., Insulin log, 2014
- R-142 A.W., Glucose Monitoring Record, 2015
- R-143 A.W., Medication Form for Adderall, August 29, 2017
- R-145 A.W., Preparticipation Physical Evaluation Form, June 15, 2017
- R-146 A.W., Medication Administration Record, 2016-2017 School Year
- R-147 A.W., Glucose Monitoring Record, 2017
- R-148 A.W., Preparticipation Physical Evaluation Form, November 3, 2016
- R-149 A.W., Glucose Monitoring Record, 2016
- R-154 Resume of Linda J. Stewart, School Nurse
- R-155 Resume of Rosemarie D. Fitzpatrick, MS, CCC-SLP, Speech Therapist