



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 03314-19

AGENCY DKT. NO. 2019-29372

S.S. AND M.S. ON BEHALF OF H.S.,

Petitioners,

v.

HILLSBOROUGH TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Krista Lynn Haley, Esq., for petitioners (John Rue & Associates, attorneys)

Vittorio S. LaPira, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: June 18, 2020

Decided: June 25, 2020

BEFORE **SARAH G. CROWLEY, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1401-1484(a). H.S. was a resident of Hillsborough Township and was eligible for special education and related services. H.S. was eighteen years old at the time the action was filed. He was a student in the Hillsborough School District through his sophomore year of high school. In the fall of eleventh grade (2017-2018 SY) the

petitioners unilaterally placed H.S. in the Fusion Academy. H.S. was classified as autistic and was eligible for special education and related services. Music is a passion of H.S. and he is currently pursuing a degree in music in college. The petition alleges that H.S. was denied FAPE as a result of pervasive bullying by the band director and the assistant band director. Petitioners also allege deficiencies in H.S.'s IEP.

Petitioners filed a due process petition seeking reimbursement for the costs of their unilateral placement at Fusion Academy (Fusion) for the 2017-2018 and 2018-2019 school years, compensatory education, and all costs associated with this action. The petition was transmitted to the Office of Administrative Law (OAL) where it was filed on March 8, 2019. Hearings were conducted on October 4, 2019, October 11, 2019, November 6, 2019, and December 11, 2019. Closing briefs were filed by the parties on May 11, 2020, and the record closed after receipt of Exhibit R-29 on June 18, 2020.

TESTIMONY AND FINDINGS OF FACT

For respondent:

Michael Simborski is the Vice Principal at Hillsborough High School (HHS). He is responsible for addressing conflicts in the school and investigating issues that arise. He investigated a HIB complaint that was filed by H.S.'s case manager against his band teacher in the spring of 2017. He had a conversation with Dr. Colenino about H.S. and interviewed H.S. to find out more about what the issues were. It was the first time that he had met H.S. and he was a very nice kid. He asked him about what happened, and he said the teacher said he looked like a "fat slob." The statement did not have a lot of context. H.S. stated that she corrects him all the time in a mean way and told him that he was unable to read social cues.

Mr. Simborski interviewed the music teacher Jules Horan about the allegations. She said he had a uniform that everyone is supposed to wear for band and part of his uniform was missing. She has very strict rules about participation and requires students to be in full uniform. She said she had high standards and that she makes

corrections when they need to be made. He interviewed some other people about her in the classroom. One of the students that he interviewed did state that Jules corrected H.S. all the time, but there were also reports that he makes a lot of mistakes and it is disruptive to the class. The students also reported that she corrects everyone.

Suzan Radwan, Director of Special Services for the District, has a Ph.D. in Psychology. She has been at Hillsborough for four years and held similar positions in Hoboken and Newark prior to that. She got involved in this case when H.S.'s case manager reached out to her in the spring of 2017. She reached out because the parents requested evaluations in June because they wanted H.S. to attend a summer program. It is an unusual time to have a child study team meeting and to do evaluations in June, but the District was trying to accommodate the parents' request to schedule a meeting and do the evaluations as quickly as possible.

It was at this meeting that she was advised, for the first time that H.S. was suffering from anxiety and was having panic attacks. At the meeting, the parents said something about "independent evaluations", which was confusing since we never even did any of the initial evaluations. It was not clear if they were asking for independent evaluations from the District or they just wanted to use their own consultant. The parents kept delaying our efforts to schedule the evaluations. The parents came to the scheduled meeting with an advocate, and we tried to understand what they wanted. Were they evaluations for the summer program, or were they in anyway related to the IEP. We really wanted to understand what they were asking for. They never suggested any changes in the IEP and would not commit to dates for evaluations.

They later asked for the evaluations to take place elsewhere due to anxiety related to school for H.S. and then they wanted their own people to conduct their own evaluations. This all happened over the span of a month. The parents never revoked their consent, which they had provided in writing, but they never followed through with anything. It appeared that they just wanted to just pull him out and send him to another school. They never followed up to schedule the evaluations and the next thing I heard was that they served notice of a unilateral placement. We never had an opportunity to

find out what, if any issues, they had with the IEP or to conduct any additional evaluations.

For petitioner

Hannah McCarthy was a student at HHS. She knew H.S. and had gone to elementary school with him. She was in band and wind ensemble with him as well. She was in band class with him and saw how badly Jules Horan and Nick Clipperton treated him. She reported that Mr. Clipperton was a nasty person and is always critical. Ms. Horan is the same way. They were especially critical toward H.S. If he messed up, they would be very critical of him. If others messed up, they would say, it is ok, but when it was H.S., they would make a big deal and get angry with him. The band director had her favorites and if you were not one of them you got in trouble for things she just laughed off at others. Her attitude influenced the way others treated H.S. They would talk behind his back and laugh at him. I witnessed her hostility towards H.S. and she never provided any constructive criticism for him. I could tell how upsetting it was to H.S. and I think it made him mess up even more. She never said anything because she was scared of Ms. Horan and did not like her.

Christina Drucker is the director of Fusion Academy where H.S. attended school his junior and senior year. It is a very small school, which offers 1:1 instruction for the students. They follow New Jersey curriculum but have a non-traditional setting. Their teachers are not special education certified and it is not a therapeutic setting. She testified that H.S. was very quiet and shy and was not comfortable socially. They needed to build his academic self-esteem and they had some concerns about where he was academically. He struggled with his memory and we structured his program to help with his memory. He was a very hard worker, but he did not have very good study skills.

Ms. Drucker discussed in detail the program for H.S. his junior and senior year. The summaries of his progress were admitted into evidence and reviewed by Ms. Drucker. He also received life skills studies at Fusion to make sure he was ready for

college. They had a music studio that he used at lunch sometimes, and participated in open mic night but that was the extent of his music involvement. There was a significant change in him over the time with us. He became more comfortable socially and was doing well academically. He would go to the homework café and was around the same kids every day. His confidence improved and he was much more engaging. It is not a therapeutic school so there was no counseling component. Our teachers are New Jersey certified, but they are not special education teachers.

M.S. is H.S.'s mother. She teaches music at Hillsborough and has held many different positions over the course of seventeen years. She was not very comfortable testifying against her employer and was concerned about professional repercussions. She noticed something very different about H.S. since he was two and a half years old. He would rock and flap and after she had him tested, he was diagnosed with Asperger's syndrome and pervasive development disorder. He was classified by preschool and was in a self-contained class with other special education kids in preschool through fourth grade. After that he was mainstreamed in some classes. In fifth grade he had a 1:1 aid and had a very difficult time in math. He struggled but managed through the tenth grade. His passion was music and that kept him going.

He formed his own rock band in eighth grade and he and his friends would play together. He has a brother who was also in the District. H.S. was a drummer and singer and played the piano. He was a member of many youth ensembles and the marching band in eighth grade. He was very excited about the high school marching band, but once he got there it was difficult due to the band leader Jules Horan. They had several conversations with her to make her aware of H.S.'s needs and his IEP. He had issues with memory, and it took him longer to learn and process things. She was not very accommodating with H.S. M.S. remembered on one occasion H.S. could not find his hat and he was afraid to ask Ms. Horan about it. She finally went to her office and asked if she had seen H.S.'s hat and she responded "yes, it's been on my desk all damn week", and slammed it on the desk. He missed the sign up for a Band dinner and when I called her about it, she said "it's too late." H.S. told me that she called him a fat slob in front of everyone, and she did not think he would make that up. Other

students agreed that Mrs. Horan was mean to H.S. H.S. decided he did not want to do band anymore as he did not like the way Jules and Nick, the assistant band director treated him.

In addition to the problems in band, he was struggling in school, the strategies and techniques recommended in his IEP were not being used. They hired a tutor three or four times a week as he was not learning anything at school. They also started sending him to Dr. Mastrich for counseling. They were concerned about this progress in math and some other subjects. The District was not assisting the way they should have been consistent with his IEP. However, she conceded that she never communicated any problems with the IEP or the implementation of the IEP. She and her husband signed off on it and did not memorialize any issues they had with it. Ms. Persico had always been very responsive to any issues they had, and she never requested any change related to the IEP.

M.S. was focused on the emotional issues H.S. was having as a result of band and his problems with Ms. Horan. After he started getting anxious about band, he would go see Ms. Persico. She discussed the problems with Mrs. Persico and asked her to handle it because of her position in the school. She did not want to file a HIB complaint, so they asked Mrs. Persico to do it. Her husband also complained about how H.S. was treated but he never filed a HIB complaint. Ms. Persico filed the complaint, and they did an investigation and had a meeting with Ms. Horan about the way she treated H.S. However, they knew it was too late no matter what they decided, as H.S. no longer wanted to be in band or the wind ensemble. They made a decision to get him out of HHS because it had become a toxic environment for him.

M.S. was in contact with Mrs. Persico in June of 2017 about having some evaluations done of H.S. in connection with his attendance at a summer music program. This District tried to schedule them, but they did not want to bring him to the District for the evaluations. They had his doctor write a note that it would be better for his emotional well being to have the testing done somewhere other than school. We had also selected someone we wanted to do the evaluation, so we just did it on our

own. She never had any other discussions with the District and unilaterally placed H.S. at Fusion Academy in the fall. They called in sick for the first few weeks of school and served their notice of unilateral placement.

James Mastrich is a general practice psychologist with emphasis on adolescent males. He was accepted as an expert in child psychology. He reported that H.S. was a very nice young man on the autism spectrum with a diagnosis of Asperger. He is earnest in his quest to do well. He was struggling and felt he was being bullied by the band teacher at school. He was scared of her and reported that she was aggressive and would curse at the students. His anxiety was through the roof. Music was an important part of H.S.'s life, so it was problematic that it was his music teacher that was causing the problems. He said she told him that he did not know social cues. He was constantly talking about his problems with Jules and it was overwhelming for him. Mrs. Persico knew and understood the issues and she was sympathetic and worked with H.S. He felt comfortable going to her. However, the counseling was not helping with his anxiety and he was considering dropping music which was crazy because it was his life. His problems with school were related to the music teacher and anxiety about school in general. It was the music program that got him anxious, but it tainted his entire experience in the school. It was at this time that he started seeing a psychiatrist and started taking medication for his anxiety. He concluded that in his expert opinion the environment at HHS was bad for H.S. and it was best to get him out of that environment.

When the parents wanted evaluations completed, he wrote a letter to the school recommending that the testing be done outside of school due to the stress and anxiety related to being at school for H.S. He continued to see H.S. in July 2017 as his junior year approached, he was very anxious about it. He had a good summer but as school neared his anxiety started to build. He continued to see H.S. through 2017. He felt the change from HHS to Fusion was good for him. It helped mostly with his emotional needs and H.S. was not as stressed out. His executive function deficit has not changed but his anxiety level was down, and he is less anxious about college and teachers being mean to him. He did not have any music instruction at Fusion as it was not part of the

curriculum. He never observed H.S. in the school environment at Hillsborough or at Fusion. He never made any recommendation to the school about how they could help him. He had no interaction with the school until he sent a letter request that the evaluations the parents requested in June of 2017 take place outside of school.

Jane M. Healy, Ph.D., was qualified as an expert in psychology, neuropsychology, and education. She has served on child study teams in other districts and does participate in such meetings and make recommendations with respect to IEPs. She was not a member of the IEP team and did not attend any meetings regarding H.S. She first evaluated H.S. in August 2017, after he completed his sophomore year at HHS. At that time, he reported difficulty with schoolwork, but most of his issues related to anxiety due to his music teacher. He loves music and it was his passion. But unfortunately, in tenth grade due to treatment by the band director, he started experiencing anxiety and suffered panic attacks during class. As a result, he decided to take some art classes instead of music in his junior year. In terms of his educational assessment, he has a significant language, learning, and memory problems. She noted a disconnect as she talked to him, and he had to be redirected. He is autistic, has ADHD, and some problems with auditory processing. He reported to her that he was very depressed when he was at HHS, and the change to Fusion was very good for him. The one on one classes were good for him. She never observed him at HHS, nor did she make any recommendations to HHS about his IEP.

She did a reassessment in 2019 prior to H.S. going to college. She spent two and a half hours with H.S. and conducted a number of tests including the WIAT, Wechler, social and emotional tests. He scored very low on most of the academic tests. He was very low on all the tests. She concluded that he continues to have learning and academic weakness especially in the areas of reading comprehension and writing. His anxiety and self-esteem problems are significantly improved, and he is excited about going to college. The report which was prepared by Dr. Healy following her evaluation of H.S. concluded that he had significant learning disabilities and made recommendation for him in college. She also concluded that he had an issue with his

self-esteem and anxiety related to his past at HHS. She recommended academic support and accommodations for college.

Ms. Persico was H.S.'s case manager in the District. She testified that she kept in close contact with the parents in the 2016-2017 school year and met with H.S. regularly. She explained that there were evaluations done of H.S. in 2011 when he was in the fourth grade. He had a psychological assessment, and educational assessment and a social assessment. In 2014, when he was in seventh grade, the child study team convened, and everyone including the parents agreed that no additional assessments were needed. The parents signed of waiver of the tri-annual evaluations and signed the IEP. The parents signed the most recent IEP and expressed no issues with his progress academically.

The December 2014 IEP provided for pull-out resource room for literacy and mathematics and in-class resource for science and math with a pull-out study skills class. The parents were in agreement and signed the IEP. H.S.'s greatest weakness was staying focused in the lessons. No one in the IEP meeting had any issues or concerns related to social, emotional, or behavior issues. The parents expressed no concerns with the IEP or the goals and objectives in the IEP. He was provided with appropriate accommodation and the parents were likewise in agreement of these accommodations to address his weaknesses. He had been doing fine academically. There was an IEP meeting on November 17, 2016 and M.S. signed the last IEP. There was a change proposed about a shared aid in math, English, science, and history in 2017 and no other changes were made or recommended. The feedback from M.S. was always positive until H.S. started having problems with the band teacher Jules Horan.

In February 2017, H.S.'s parents asked Ms. Persico to schedule an IEP meeting. Ms. Persico provided two dates in February, the 23rd and the 27th, but they never got back to her. The only complaint that they had about academics related to some missing work that he completed. There were no other complaints made by H.S.'s parents about his IEP. The main complaints occurred in March 2017, which related to H.S. having trouble in band and complaints relating to the band director and her

assistant. Mrs. Persico offered to set up a meeting between the band teacher and the parents to discuss the issues. She then observed H.S. in wind ensemble class and met with H.S. to see how he was doing on March 22, 2017. The parents were planning to get him counseling outside of school and never asked her to increase her counseling or modify the IEP in any way. Later that month, Mrs. Persico received a call from M.S. with continued concern over the criticism that H.S. was getting from Ms. Horan the band director. Eventually they requested that Ms. Persico file a HIB complaint against her which she did. M.S. did not want to file it herself because she was employed by the District. The HIB complaint was filed in April 2017. They conducted an investigation, but found the HIB was not substantiated. She was not involved in the investigation but was interviewed.

On June 6, 2017, the parents requested evaluations in connection with H.S.'s application at Berklee summer music program. The parents signed the consent form for the evaluations to be conducted. There was a child study team meeting convened on June 26, 2017, to discuss the evaluations. However, the parents never followed through with having the evaluations completed. First, they did not like the scheduling of the evaluations so close to exams, but considering they did not request them until the first week in June, it was difficult to avoid having them around the exam period. They never confirmed any of the proposed dates and in July, they sent a letter saying that they still wanted the evaluations conducted but they did not want them in the school due to anxiety related to the school. Then they said they did not want any evaluations done by the District and they were doing them themselves. We could never get them to schedule the evaluations and then they sent notice that they were unilaterally placing him out of district.

FINDINGS OF FACT

The resolution of the petitioners' claims in this matter requires that I make a credibility determination regarding the critical facts, as well as the expert testimony. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for

testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency, and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, and based on the testimony and evidence before me, I **FIND** the following as **FACT**:

1. H.S. was deemed eligible for special education services at the age of three, having been diagnosed with Autism.
2. H.S. was a student in the Hillsborough Public Schools from Kindergarten through tenth grade.
3. H.S. was a musician and has a passion for music.
4. H.S. had evaluations completed in 2011, and the tri-annual evaluations were waived in 2014.
5. The last IEP meeting was conducted on November 17, 2016. The latest IEP was signed by the parents at that time. The IEPs for the 2015-2016 and 2016-2017 school years were signed by the parents.

6. Other than minor issues, which related to testing, exam time, missing assignments, and an aid in certain classes, all of which were provided without reservation by the District, the parents never expressed any issues or reservations with the IEP prior to the spring of 2017.
7. In the spring of 2017, H.S. began having difficulty with the music teacher/band leader.
8. He related his struggles with the band teacher to his parents and his case manager, who met with the teacher, the parents and H.S. to ameliorate the situation. Ultimately, the case manager, per the directive from H.S.'s parents, filed a HIB complaint against the band teacher, Jules Horan.
9. At no time did the parents request any changes in the IEP to address any of the difficulty he was having in music class. The parents sought counseling for H.S. outside of school and never requested any in school counseling other than Ms. Persico, who continued to meet with H.S.
10. The parents never requested additional counseling in school, behavior plan or any other changes in the IEP.
11. A HIB complaint was filed in April, and an investigation was conducted which included interviewing H.S., the band teacher, other students, the parents and H.S.'s case manager.
12. The allegations of HIB were not substantiated and no appeal from that finding was filed.
13. In June of 2017, the parents requested evaluations, initially indicating they were needed in connection with a summer program.

14. A meeting was conducted at school on June 26, 2017, with respect to the requested evaluations.
15. At this meeting that the parents advised the District, for the first time that H.S. was suffering from anxiety and panic attacks.
16. The District attempted to schedule evaluations, but the parents declined to produce H.S. for any evaluations. Although they did not withdraw their consent, they declined to schedule any of the requested evaluations.
17. Sometime in July 2017, the parents advised the District that they wanted the evaluations conducted at an alternate site due to anxiety related to any testing in district.
18. Shortly thereafter, the parents requested “independent evaluations,” which they advised they would do on their own. No initial evaluations had been conducted, nor had the District declined to provide them.
19. The parents signed a tuition contract with Fusion Academy on July 30, 2017 and In September of 2017, the parents advised the District of their unilateral placement of H.S. in the Fusion Academy.
20. At no time prior to the unilateral placement did the parents request an IEP meeting, advise the District of any issues with the existing IEP, request changes to the IEP to attempt to resolve any of the issues related to FAPE.
21. The parents never requested an additional social and emotional program for H.S.
22. The proposed IEP provided reasonable goals and objectives that H.S. had been achieving.

23. The District's IEP was reasonably calculated to confer meaningful educational benefit on H.S.
24. The IEP did not result in a detail of FAPE.
25. The placement at Fusion Academy did not provide any additional meaningful educational benefit for H.S. There was no therapeutic component, no special education teachers or any music program that H.S. participated in at the school.

LEGAL ANALYSIS AND CONCLUSION

The Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §§ 1400-1482, provides the framework for special education in New Jersey. It is designed "to ensure that all children with disabilities have available to them free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A); see generally id. § 1400(c), (d) (describing need for, and purposes of, the IDEA). A state may qualify for federal funds under the IDEA by adopting "policies and procedures to ensure that it meets" several enumerated conditions.

This Act requires that boards of education provide students between the ages of three and twenty-one who suffer from a disability with a free appropriate public education, or FAPE. In fulfilling its FAPE obligation, the Board must develop an IEP for the student, and the IEP must be reasonably calculated to confer some educational benefit. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 192, 73 L.Ed. 2d 690, 703, 102 S.Ct. 3034 (1982) (Rowley). The Third Circuit Court of Appeals has clarified the meaning of this "educational benefit." It must be "more than trivial and must be significant" and "meaningful." Polk v. Central Susquehanna Intermediate Unit

16, 853 F.2d 171, 180 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989) (Polk); Ridgewood Board of Education v. N.E., 172 F.3d 238, 247-48 (3rd Cir. 1999) (Ridgewood). In evaluating whether a free, appropriate public education was furnished, an individual inquiry into the student's potential and educational needs must be made. Ridgewood, supra, 172 F.3d at 247. In providing a student with a FAPE, a school district must provide such related services and supports as are necessary to enable the disabled child to benefit from the education. Rowley, 458 U.S. at 188-89.

New Jersey follows the federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district "maximize the potential" of the student, but requires a school district to provide a "basic floor of opportunity." Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the child's education plan provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (citations omitted).

Although the ultimate obligation to offer a FAPE is borne by the school district, 20 U.S.C. § 1412 (1); 34 C.F.R. § 300.1(a) (2018); N.J.A.C. 6A:14-1.1(d), "[t]he IDEA contemplates a collaborative effort between the parties in the preparation of the IEP and makes available a host of procedural safeguards to counterbalance district bargaining advantages." T.P. & P.P. ex rel. J.P. v. Bernards Twp. Bd. of Educ., EDS 6476-03, Final Decision (March 12, 2004), <http://njlaw.rutgers.edu/collections/oal/>; Rowley, 458 U.S. 176. A judicially created equitable remedy has been created whereby parents can make a unilateral placement for their child if they are dissatisfied with the actions of the school district. However, this first requires that the parents meaningfully engage in the IEP process. T.P., EDS 6476-03, <http://njlaw.rutgers.edu/collections/oal/> (citing Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359 (1985); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998)). "[T]he IDEA was not

intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations.” C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 72 (3d Cir. 2010). “Parents who unilaterally change their child’s placement . . . , without the consent of state or local school officials, do so at their own financial risk.” Sch. Comm. of Burlington, 471 U.S. at 373–74.

The Supreme Court also held that two factual findings must be made before awarding reimbursement for the costs of a unilateral placement: (1) the school district failed to provide a FAPE to the student, and (2) the placement selected by the parents was proper. School Comm’n of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 369-70 (1985). Since the Burlington decision, its holding has been adopted by both Congress and the United States Department of Education. 20 U.S.C. §1412(a)(10)(C); 34 C.F.R. 300.403(c) (2005). It is also set forth at N.J.A.C. 6A:14-2.10(b) in that an ALJ may require the district to reimburse the parents for the cost of enrollment if the ALJ finds that the district had not made FAPE available to that student in a timely manner prior to that enrollment and that the private placement is appropriate. When a parent places a child into private school unilaterally, reimbursement may be ordered where there is compliance with standards set forth in 20 U.S.C. § 1412(a)(10)(C)(iii), which states:

The cost of reimbursement [for unilateral private-school placement] may be reduced or denied--

(l) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school,

the parents did not give written notice to the public agency of the information described in item (aa).

The pertinent New Jersey regulation, N.J.A.C. 6A:14-2.10(c), is consistent with this federal provision.

Under the facts and circumstances presented, petitioners did not act reasonably. “A commonsense understanding of the basis for the ten-day written-notice requirement is to afford the parties, in the context of a collaborative effort, an opportunity to resolve the issues of the provision of FAPE without the need for a private placement for which the District had no input.” K.S. & M.S. ex rel. A.S. v. Summit City Bd. of Educ., EDS 09012-12, Final Decision (November 5, 2012), <http://njlaw.rutgers.edu/collections/oal/>, aff’d, 2014 U.S. Dist. Lexis 102672; B.M. ex rel. M.M. v. Livingston Twp. Bd. of Educ., EDS 5503-09, Final Decision (August 5, 2009), <http://njlaw.rutgers.edu/collections/oal/> (the notice requirement is meant to give school districts the opportunity to remedy the problem and offer alternatives). The petitioners are unable to show, by way of documentary evidence, that they voiced any concerns with the IEP for the 2017–2018 school year. In fact, they signed the last IEP and but for the issues in the music class with one teacher, they expressed no concerns about the IEP, nor did they request any changes. When the parents requested evaluations in the spring of 2017, the District made every effort to accommodate and schedule them, to no avail.

The District has demonstrated by a preponderance of the credible evidence that the existing IEP was reasonably calculated to enable H.S. to make progress appropriate in light of the child's circumstances. The evidence and testimony presented by Mrs. Persico and Mrs. Radwan both of whom I found credible, as well as the school records indicate that H.S. was functioning and meeting his goals and objective. Moreover, H.S.'s parents never expressed or memorialized any issues with his IEP. When the parents reached out about anxiety related problems related to his interactions with the band instructor, the District responded, scheduled meetings, conducted a HIB investigation and attempted to schedule the evaluations that the parents requested.

The parents requested a meeting in February of 2017, and never responded to proposed dates. The District proposed meeting dates that month, but the parents did not follow up. Although the parents never followed through with this request, Mrs. Persico met with H.S. and discussed the issues he was having in band with M.S. and S.S. At the request of S.S., Mrs. Persico filed a HIB complaint, and after an investigation, it was deemed unsubstantiated. The parents then requested evaluations unrelated to the IEP and the District attempted to complete them. However, the parents never followed through with these requests. Moreover, they never requested any modifications to the IEP to address H.S.'s anxiety issues, or requested a child study team meeting. There was no prior allegation that any of the goals and objectives were not being met.

Based on the foregoing, I **CONCLUDE** that parents cannot be permitted to unilaterally place a child out of district without first expressing concerns to the District and trying to resolve the issues that they have. I further **CONCLUDE** that an allegation of HIB does not entitle a parent to unilaterally place a child out of district. Based on the evidence and testimony, I **CONCLUDE** that the IEP was reasonably calculated to provide a meaningful educational benefit to H.S. I further **CONCLUDE** that the IEP did provide a meaningful educational benefit to H.S. and that the unilateral placement by the parents at Fusion was not reasonable. Accordingly, I **CONCLUDE** that reimbursement for unilateral placement and compensatory education is **DENIED**.

DECISION AND ORDER

For the reasons set forth above, it is hereby **ORDERED** that the reimbursement for the unilateral placement at Fusion Academy is **DENIED**, along with any other requests for compensatory education, fees and costs associated with this claim.

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 Programs.



June 25, 2020 _____

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

SGC/cb

APPENDIX

WITNESSES

For petitioners:

Jane M. Healy, Ph.D.
Hannah McCarthy
M.S.
James Mastrich, Ph.D.
Christine Drucker

For respondent:

Jacqueline Persico
Michael Simborski
Suzan Radwan

EXHIBITS

For petitioners:

- P-1 Not in Evidence
- P-2 Not in Evidence
- P-3 Email correspondence from M.S. to J. Foote re: assignments, dated September 14, 2016
- P-4 Email correspondence V. LaPira to S. Radwan, dated September 26, 2017
- P-5 Email correspondence P. Ruiter to S.S. re: Band Culture, dated June 9, 2017
- P-6 Email correspondence B. Smith to J. Tracy re: H.S. dated August 1, 2018
- P-7 Neuropsychological Update by Dr. Healey, dated August 19, 2019
- P-8 Letter from Dr. Asma Mian to Ms. Mr. and Mrs. Strunk, dated September 1, 2019
- P-9 Psyc. Ed. and Neuropsych. update dated September 2, 2019.

- P-10 H.S. Final Transcript from Fusion Academy, dated July 3, 2019
- P-11 Fusion Payment Log from September 1, 2017 to September 11, 2017, including miscellaneous receipts
- P-12 Report of Affinity Checking Account No. *0502 (9/1/2017 – 6/30/2018) re: Payments to HRC, dated September 15, 2019
- P-13 Credit Card Statement, with NJPAC Payment Confirmation, dated October 16, 2018
- P-14 Not in Evidence
- P-15 Not in Evidence
- P-16 Healy C.V.
- P-17 James L. Mastrich, Jr. Curricula Vitae
- P-18 Board of Education Policy
- P-19 Not in Evidence

For respondent:

- R-1 Email from Persico to S. re: [no subject], dated January 26, 2017
- R-2 Email exchange between J. Persico, M.S., and H.S. re: Midterm Exams today; re: [H] and mid terms today; re: Need to finish mid term; Fwd: mid term review packet, dated January 30 – February 1, 2017
- R-3 Email exchange between J. Persico, M.S. and S.S. re: [no subject], dated February 10, 13, 15, 2017
- R-4 Email from D. Depirri to H.S.'s teachers re: H.S. IEP Review, dated February 13, 2017
- R-5 Not in Evidence
- R-6 Email exchange between J. Foote, S.S. and J. Persico re: [HS], dated February 24 – March 1, 2017
- R-7 Email from J. Persico to H.S. re: [no subject], dated March 16, 2017
- R-8 Email from S.S. to J. Haran re: [H], dated April 3, 2017
- R-9 Email exchange between J. Haran and J. Persico re: HS, dated April 3, 2017
- R-10 Not in Evidence

- R-11 Email exchange between J. Persico, M.S. and S.S. re: Meeting, dated April 7, 2017
- R-12 Not in Evidence
- R-13 Voicemail and email exchange between S.S. and M. Simborski re: [H.S.] sings & performs The Beatles "A Day In The Life" on all . . . , dated April 26 – 27, 2017
- R-14 Not in Evidence
- R-15 Email exchange between M.S., J. Persico and K. Cifuentes re: Follow up, dated May 4 – 5, 2017
- R-16 Not in Evidence
- R-17 Not in Evidence
- R-18 Email exchange between M.S., S.S. and J. Persico re: Next Year, dated May 10, 2017
- R-19 Not in Evidence
- R-20 Not in Evidence
- R-21 Not in Evidence
- R-22 Emails from J. Persico to S. Radwan Fwd: Re-Evaluation Planning Meeting, dated June 12 – 14, 2017
- R-23 Email from S. Radwan to M.S. re: Meeting, date June 27, 2017
- R-24 Emails from J. Tracey to M.S. and S.S. and S. Radwan, dated July 21, August 3, 17, 2017
- R-25 Email from M.S. and S. Radwan re: Letter in regards to [H.S.], dated August 31, 2017
- R-26 Email from S. Radwan to J. Warshaw re: [s] v. Hillsborough, dated September 19, 2017
- R-27 Emails from V. LaPira to S. Radwan FW: Hillsborough/[H.S], dated September 26, 2017
- R-28 Not in Evidence
- R-29 Recording of meeting with the District on June 26, 2017

Joint:

- J-1 2011 Assessments

- J-2 2014 Reevaluation Waiver
- J-3 2014-2015 IEP (8th and 9th Grade)
- J-4 2015-2016 IEP (9th and 10th Grade)
- J-5 2015-2016 Report Card (9th Grade)
- J-6 2015-2016 Progress Reports
- J-7 2016-2017 IEP (10th and 11th Grade)
- J-8 Email exchange between J. Haran and D. Depirri re: HS Annual Review, dated October 26 and November 15, 2016
- J-9 Email exchange between S.S. and J. Haran re: [H.S.], dated November 23 and 27, 2016
- J-10 Email exchange between J. Persico and M.S. re: [no subject], dated November 29, 2016
- J-11 Email exchange between J. Haran and S.S. re: [H.S.], dated December 20, 2016
- J-12 Email from S.S. to J. Haran re: [H.S.], dated December 21, 2016
- J-13 Email from J. Persico to J. Haran re: [no subject], dated December 21, 2016
- J-14 Email from S.S. to J. Haran re: [H], dated December 22, 2016
- J-15 Email exchange re: [H] and re: Reader for H.S., dated January 17, 18, and 26, 2017
- J-16 Email exchange between Persico and various teachers re: extra time, class performance re: Confidential H.S. dated January 20 and 23, 2017
- J-17 Email exchange between J. Persico and S.S. re: Message from [S.S. (phone number)], dated January 24 and 25, 2017
- J-18 Email exchange between J. Persico and S.S. and M.S. re: [H], dated January 25, 2017
- J-19 Email exchange between J. Persico and S.S. re: [H] and band, dated March 10, 2017
- J-20 Email J. Persico to S.S. and M.S. re: [no subject], dated March 22, 2017
- J-21 Email to S.S. to J. Persico re: [no subject], dated March 24, 2017
- J-22 Email M.S. to J. Persico re: [H], dated April 2, 2017
- J-23 HIB Referral, dated April 3, 2017

- J-24 M. Simborski investigation/meeting writeup, dated January 2018
- J-25 Email from M.S. to J. Persico, J. Persico and M. Simborski dated April 4, 2017
- J-26 Email exchange between J. Persico and P. Colantino, dated April 4, 2017
- J-27 Email from S.S. to J. Haran, and J. Haran to J. Persico re: [H], dated April 4, 2017
- J-28 Email from M. Simborski to J. Haran re: HS, dated April 6, 2017
- J-29 Email exchanges confirming meeting re: Meeting tomorrow, dated April 19, 2017
- J-30 Meeting sign-in sheet, dated April 20, 2017
- J-31 Email from J. Persico to M. Simborski and J. Haran re: [no subject], dated April 20, 2017
- J-32 IEP Amendment, dated May 10, 2017
- J-33 Email exchange between J. Persico and M.S. re: Next year, dated May 10, 2017
- J-34 Email re: Voicemail Follow Up, dated May 26, 2017
- J-35 Signed evaluation plan, dated June 5, 2017
- J-36 Emails re: evaluation of H.S., re: Re-Evaluation Planning Meeting (and various June 2017 meeting invitations sent by J. Persico for meeting following IEE request and IEE request), dated June 2017
- J-37 Progress Reports 2016-2017
- J-38 Dr. Mian Letter, dated July 1, 2017
- J-39 Dr. Mastrich Letter, dated July 3, 2017
- J-40 Email S. Radwan to M. Simborski re: H.S., dated September 15, 2017
- J-41 Letter from J. Warshaw to V. LaPira with attachments, dated September 13, 2017
- J-42 Dr. Healy's Report (unsigned, with received dated October 18, 2017)
- J-43 High School Transcript
- J-44 Dr. Mian Letter, dated November 16, 2017
- J-45 J. Tracy Observation Report, dated May 20, 2019
- J-46 Fax from District