



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

S.S. ON BEHALF OF M.T.,

Petitioner,

v.

**PRINCETON REGIONAL
BOARD OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 17028-18

AGENCY DKT. NO. 2019-28962

AND

S.S. ON BEHALF OF M.T.,

Petitioner,

v.

**PRINCETON PUBLIC SCHOOLS
BOARD OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 09285-19

AGENCY DKT. NO. 2019-29879

Philip Taylor, Esq., for petitioner (P. Taylor Legal, PLLC, attorneys)

Brett E.J. Gorman, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: June 10, 2020

Decided: August 3, 2020

BEFORE **JUDITH LIEBERMAN, ALJ:**

STATEMENT OF THE CASE

Petitioner, S.S., is the mother of student M.T. During the times at issue, M.T. attended high school in the Princeton Regional School District. M.T. was classified as eligible for special education services. In two due process complaints, S.S., on behalf of M.T., sought, modifications, accommodations, supports and assistive technology in the general education classroom, LRE classes, ESY, and appropriate modifications to the IEP. She seeks an Order directing the District to provide appropriate accommodations, modifications and supports in a general education setting, a finding that the District discriminated against him because of his disability, and an award of 536 hours of compensatory education and any other appropriate relief

PROCEDURAL HISTORY

Petitioner S.S. is the mother of M.T. At the time of the hearing, M.T. was an eleventh grade student at Princeton high school. On October 23, 2018, S.S. filed a due process petition in which she contended respondent denied M.T. a free appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA).¹ The matter was transmitted by the Department of Education, Office of Special Education Programs (OSEP), to the Office of Administrative Law (OAL), where it was filed on November 29, 2018, as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13. On May 9, 2019, petitioner filed a second due process petition on behalf of M.T. in which she contended respondent violated IDEA, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, the Civil Rights Act, and the New Jersey Law Against Discrimination. That matter was transmitted by OSEP to the OAL where it was filed on July 11, 2019, as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13. The matters were consolidated on July 31, 2019.

A hearing was conducted on October 7, 2019, February 10, 2020, February 18, 2020, and February 24, 2020. The final hearing date was conducted June 10, 2020, to

¹¹ M.T. was a minor at the time the October 2018, complaint was filed. He turned eighteen years old on November 29, 2019.

discuss, among other matters, the post-hearing submissions of the parties, which were received on May 20, 2020. The filing of this this decision was delayed partially due to a family emergency and also due to the COVID-19 public health emergency.

FACTUAL DISCUSSION AND FINDINGS

The parties jointly stipulated that the issues that arose prior to an August 2, 2018, settlement agreement were resolved by the agreement. Therefore, I **FIND** that the issues to be addressed in this matter are those that arose after August 2, 2018.

The following was not disputed. I therefore **FIND** the following as **FACT**:

1. M.T., whose date of birth is November 29, 2001, was found to be eligible for an IEP based on a classification of Autism, Attention Deficit Hyperactivity Disorder (ADHD) – Combined Presentation, Language Disorder, Anxiety and Auditory Processing Disorder (APD) of a severe degree. J-11 at 95.
2. M.T. attended school in Trenton during the 2015-2016 school year. He was home schooled by his mother, petitioner S.S., during the 2016-2017 school year. He transferred to the Princeton School District (District) for the 2017-2018 school year, when he was to begin ninth grade.
3. M.T. did not present behavioral issues that impacted his class placements.
4. The high school general education and resource classes did not typically utilize lecture formats. They more often used “experiential learning” formats that involved students working together in groups after the teacher summarized the classwork. Often, multiple discussions occurred simultaneously between the various groups of students.
5. M.T.’s class placements following the August 2, 2018, settlement agreement served as the “stay put” agreement.

6. Petitioner did not consent to an October 19, 2018, IEP that proposed both general education and resource room classes.
7. Petitioner did not consent to an April 25, 2019, proposed IEP that proposed exclusively resource room classes.
8. The Program of Studies for Princeton High School, 2019-2020, is a “complete guide to the possible course offerings” at the school. J-72 at 779. The following “PLUS” classes were enumerated in the catalogue: English I, for grade nine, English II, for grade ten, Algebra I, for grades nine and ten, and Algebra II, for grades nine through twelve. Id. at 791 – 798.
9. S.S. filed a complaint against the District with the United States Department of Education, Office for Civil Rights, in which she alleged discrimination against M.T. when she was not given documents in a timely manner. The Office for Civil Rights conducted an investigation and issued a report in which it found no wrongdoing by the District. J-95.

Testimony

The following is not a verbatim recitation of the testimony. Rather, it is a summary of the testimony and evidence that I found helpful to resolving the issues presented in this matter.

For respondent

Lisa Peters, was employed by the District high school as a case manager and learning disability teaching consultant (LDTC). She has worked in these capacities for fifteen years. As case manager, she works with parents and teachers to develop and implement students’ Individualized Education Plans (IEPs). As LDTC, she evaluates the provision of education to the student for whom an IEP has been prepared. She was qualified as an expert in case management and as a learning consultant.

Peters described the categories of classes available to District students. General education classes offer general education curriculum to approximately eighteen to twenty-five students per classroom. In-class support program provides the same curriculum to special education students in the general education classrooms. Up to ten special education students may be in a general education class, with the total number of students not exceeding twenty-five. The resource program classes have small group settings with a special education teacher. They cover all state-required curriculum and meet state standards but progress at a slower pace. The subjects may not be addressed with the same depth as in the other classes. The LLD program is for lower-language learners who require more support. It moves at a slower pace and the curriculum can be modified to respond to a student's needs and abilities. It addresses the same topics as the other classes' but moves at the student's pace. The autism program utilizes a different curriculum designed to meet the students' needs.

Peters was M.T.'s case manager. M.T. transferred to the Princeton School District (District) for the 2017-2018 school year, when he was to be in the *ninth* grade. He was homeschooled by S.S. during the 2016-2017 school year and attended school in Trenton during the 2015-2016 school year. When she met with Peters, S.S. provided an IEP for M.T.'s seventh grade year at Trenton and evaluations of M.T.

The IEP provided for resource program classes for language arts and literacy and in class support classes for science and social studies, as well as occupational and speech/language therapy. J-2.

A June 15, 2016, auditory processing assessment of M.T., conducted by Dr. Lorraine Sgarlato, reported that M.T. had a severe auditory processing disorder (APD) "of a severe degree." J-1. Sgarlato defined APD as "a learning disability in which an individual hears sounds but cannot process them correctly into words and language." Ibid. It can impact how listeners understand information and "affect all areas of learning, especially reading and spelling. When instruction in school relied primarily on spoken language, the individual . . . may have serious difficulty understanding the lesson or the directions." Ibid. Because M.T.'s APD "will adversely affect his educational performance and academic growth[,] he would need special education and related services. Ibid.

An October 13, 2016, neuropsychological evaluation was prepared by Michelle Humm, Ph.D. J-3. It showed that M.T.'s IQ was seventy-five, which was in the very low range, with the average IQ between ninety and 100. Id. at 38. The evaluation found that M.T. had a very strong working memory, which referred to his ability to memorize things, while he also had a problem with taking in auditory information. Ibid. Humm made several recommendations in her report. They included, "Permitting [M.T.] to record lectures as needed to review at a later time may also be helpful." Id. at 49. Peters observed that Humm did not say that recording of classes would definitely help M.T. She understood this to mean that it was not necessary for the District to provide M.T. information in this manner if it was able to do so in another way.

The Sgarlato and Humm reports indicated that M.T. had a severe auditory deficit, struggled cognitively, functioned below his peers and worked at a much slower pace. He needed supports to take in information and be successful in the classroom. He also needed to build skills because he was out of a classroom setting for a long period of time.

S.S. requested that the District evaluate M.T. The District proposed education, social, and speech and language evaluations, which S.S. approved. Peters conducted an educational evaluation of M.T. She found his skills to be, overall, in the low average range. He had difficulty with comprehension and his academic and psychological tests showed problems with processing speed. The exception was his ability to recall information he received visually; he could read information and retain it well. J-6 at 65-66. However, when information was given to M.T. auditorily, he had much more difficulty completing tasks and remembering. When tests of oral comprehension, understanding directions and sentence repetition were given auditorily, using a recording, M.T. performed at very low and exceptionally low levels. Id. at 66. M.T. needed more visual supports while working to better develop his auditory skills. Information would thus need to be provided both visually and auditorily. For example, directions would be written; notes could be provided in advance; or teachers could provide skeletal notes that could be supplemented. This would help him learn to listen, take in information, and record notes himself.

Peters explained that a general education setting moved at a faster pace and required students to comprehend much more information. Much of the classroom activity was conversation-based, rather than lecture-based. Multiple conversations occurred between students who engaged in hands-on, experiential learning. The students were expected to solve problems and interact rather than take in and memorize information via a lecture.² Students like M.T., who have low language ability and struggle with social interactions and taking in information auditorily, would have difficulty in this type of program. Recordings of classroom activity would be difficult for him to use because multiple conversations occur at the same time.

On August 16, 2017, the District conducted a speech and language evaluation of M.T. It found M.T. demonstrated “significant communication strategies” and his “receptive and expressive skills [were] significantly below that of his peers.” J-8 at 76-77. His language was “undeveloped in semantics and syntax. This leads to challenges with the application of his understanding and usage of language for social pragmatic language, as well as critical thinking.” Ibid. Speech and language therapy was recommended.

All of the reports concerning M.T. were consistent “[i]n terms of his needs in his language abilities and what he needs to be successful in the classroom” T1 72:4-8. The District determined that M.T.’s “disability affect[ed] his involvement in the general education curriculum in that he benefits from a smaller group setting, more response time, a slower pace and instruction given visually as well as verbally.” J-11 at 86.

An August 29, 2017, IEP, provided that M.T. would be in LLD classes for all four major subject areas: math, English, social studies and science. His program also

² The classes typically did not utilize lecture formats. As an example, a teacher may provide a brief summary of what students were to have read the prior evening at home; they would then discuss the material and then break out into groups. Peters observed this in M.T.’s history class, where, after the brief discussion, the students broke out into groups to prepare posters. The posters were next hung on the wall and the students visited the other students’ work, which they discussed and from which they recorded notes. There was no lecture in the class that day. In M.T.’s science class, they work in groups in a lab setting, without traditional lectures about the material. In other classes, the students work on projects such as creating PowerPoint presentations or building something. This type of “experiential learning”, which involved “small group . . . hands on learning,” occurs within the resource room as well as general education classes. T2 209:12-15.

included pull-out supplementary study skills instruction to address executive functioning issues such as time and homework management. This was necessary because he had not been in a public school for a long period of time and the District wanted to ensure they supported him fully as he transitioned back to public school. The District also provided one-on-one supplementary instruction in reading, using the Wilson Program, because S.S. asked for a multi-sensory reading program, as well as speech-language therapy and individual counseling. The counseling sessions were to help M.T. transition to public school with respect to social and related issues. Peters noted that S.S. reported that M.T. had negative social interactions at his prior public school. The District wanted a counselor available to support M.T. socially if he had concerns with respect to his interactions with other students. His health, physical education and elective classes were in the general education classrooms. J-11.

Peters explained that the program developed by the District was tailored to M.T.'s needs and that it would create a path to enable him to achieve his goal of becoming an inventor. She also noted that the plan developed for M.T. would have been necessary even if he had not had a central auditory processing disorder. The other reports concluded the programming devised by the District was necessary "because he had such low scores in the areas that would still be . . . impacting him in the classroom. His comprehension was very low. . . . [H]e still had auditory difficulties and language difficulties on the educational piece." T1 72:17 to 73:9.

It was also determined that M.T. would not take the PARCC assessment tests for math and English or the New Jersey Biology Competency Test because his disability was "severe as it prevents him from being exposed to the curriculum necessary for the test." J-11 at 95. He would instead take the alternate DLM assessment. Ibid. If he were unable to pass that assessment, he would be exempted from it "as his academic skills are low." Ibid. S.S. did not approve the August 29, 2017, IEP because she wanted M.T. to be in a general education program.

On October 6, 2017, an IEP meeting was convened to discuss S.S.'s request for general education classes. By then, M.T.'s teachers had gotten to know him and observed that he had made progress in the LLD program. His speech/language, math,

language arts and history teachers reported that he made friends and participated in class; worked well with others; and completed his homework. J-22 at 128. However, he required prompting and clarification in some areas. Ibid. The IEP advised his “disability affects his involvement in the general education curriculum in that he benefits from a smaller group setting, more response time, a slower pace and instruction given visually as well as verbally.” Ibid. He also needed to “work on building his reading, math and writing skills as these are areas in which he is functioning below grade level.” Ibid. The District thus continued to propose for LLD classes for math, English, social studies and science, pull-out academic support classes for study skills and reading instruction, speech/language therapy, individual consulting services, groups social skills and a paraprofessional group aide. P-22 at 125.

Peters explained M.T. had not been placed in a general education setting for the four “major” academic classes due to the “amount of support he needed in the classroom he was already placed in. This was confirmed by testing, teacher reports and observations. T2³ 69:19 to 70:3. General education classes were inappropriate because the curriculum would not be modified. However, in LLD and resource room classes, the curriculum could be modified and the pace of instruction could be altered. Also, single-step instructions, multiple repetitions of information and brief explanations with time for processing information “definitely exists in the resource room and LLD program. Because we’re breaking information down and a gen ed program a lot of times they’re giving multiple instructions at one time.” T1 87:24 to 88:8. It happens automatically and “constantly” in the resource room. T1 88:13. In general education classes, “the pacing is faster so while he may be able to get things repeated the class is gonna keep going on. So, it’s gonna put him behind because the pace of the class is so much faster.” T1 88:11-17. The school also implemented the Wilson reading program for M.T., which provided a multi-sensory intervention program, in accord with recommendations.

Peters explained the IEP comported with recommendations made by Humm in a second neuropsychological evaluation that she conducted on September 19, 2017,

³ T1, T2, T3 and T4 refer to the transcripts of the October 7, 2019, February 10, 2020, February 18, 2020, and February 24, 2020, hearings, respectively.

although the report had not been provided to the District until close in time to the hearing in this matter. M.T. scored well below average in most areas including processing speed, which involved fluency, for which he scored very low; listening comprehension was low; and reading comprehension was very low. J-20 at 188. The findings were consistent with M.T.'s scores on the test administered by Peters. Humm recommended "an inclusion classroom with access to a special education teacher and work modified to his skill level as well as a slower pace of instruction). If such programming is not possible or does not exist, [M.T.] would benefit from being taught in a smaller resource classroom so that he can receive individualized instruction at his skill level with a much slower pace of instruction." J-20 at 121. She added, "Listening to books on CD may be beneficial to obtain content[.] . . . [M.T.] can follow along in the book while listening to the tape, CD or digital file." Ibid.

Humm also recommended extended time for completion of classroom assignments, exams and standardized testing; that he not be penalized for spelling errors but, rather, the errors be corrected; single-step instructions and repetition of important information; accommodations to address his inattention and disorganization, including shortened instructions brief explanations with time for processing the information and multi-sensory instructions. Ibid.

Peters noted the individualized instruction recommended by Humm did not exist in a general education setting. It is available in the resource room and LLD settings where the curriculum and pace of instruction is modified in accord with the student's skill level. These programs repeat and break down information and proceed at a slower pace, unlike in general education classrooms which proceed more rapidly and provide multiple instructions and pieces of information simultaneously.

An Independent Educational Evaluation (IEE), requested by S.S. and paid for by the District, was conducted by Dr. Margaret Kay on November 28, 2017. Kay noted that M.T.'s parents wanted him to be placed in the general education setting. The IEE recommended that M.T. required significant accommodations and assistance in general education classes due to his information processing problems and deficits in attention and executive functioning. J-26.

Peters observed that the IEE recommendations were not appropriately offered in a general education setting. The skills that M.T. lacked were expected from the general education students. He required a smaller classroom setting, either LLD or resource, which would enable him to learn how to adapt if information were changed and to apply concepts across different modalities.

An IEP meeting was conducted on February 13, 2018. In response to M.T.'s parents' desire to move M.T. out of LLD classes, the District proposed changes to determine if M.T. had progressed and whether "he was able to handle the rigor of the classroom." T2 78:25 to 79:1. The District proposed a "hybrid schedule of resource room and LLD classes." J-30 at 353. The proposed classes were: LLD for science, math and English, resource room for another English class, history and biology, although he would not participate in biology lab days. He would be placed in general education for physical education and an elective. Ibid. The IEP noted, "Although the parent conveyed that she was in agreement with the proposed program through communication from her attorney, the parent did not provide consent so the course changes were not implemented." Ibid.

On February 13, 2018, S.S. wrote a letter to unnamed parties in response to the meeting that took place that day. She wrote on behalf of herself and her husband and expressed a belief that the District disregarded their concerns about M.T.'s placement, in particular, the request that he be placed in a general education setting with supports, modifications, accommodations and assistive technology. J-31. S.S. asserted that the District's treatment of M.T. was motivated by racial animus. S.S. and her husband believed they knew what was best for their son and that the District did "not care." Ibid. Peters explained that the District's determination to place M.T. in the LLD classroom was based upon the results of M.T.'s testing and that the IEP meeting was conducted in response to M.T.'s parents' request. They, along with their attorney, participated in the meeting during which the new program was proposed. She explained, "[M.T.] already has access to all notes/PowerPoints for classes either through the LMS, teacher website, or via the teacher directly. This is already in his IEP." J-34. She also wrote, "In regards to the multi-sensory approach to learning, our teachers are already providing that in their classrooms daily through the ways they present the lessons and have the students work

with the materials.” Ibid. She further noted that step-by-step instructions for in-class tasks and assignments “already happens in [M.T.’s] classes, but I will add this under the modifications section of the IEP to say, ‘Provide [M.T.] with copy of written instructions.’” Id.

Peters explained that all of M.T.’s teachers “were breaking down instructions and giving them to him one step at a time, like numbered instructions.” T2 90:18-20. Written instructions were provided “naturally in special education classes.” T2 90:24-25. The teachers “in those small group classes provide the students outlines of notes” to help develop note-taking skills. T2 92:14-17. This did not typically occur in general education classes. She would confirm with teachers that the methodologies were being implemented whenever a concern was expressed.

In the spring of 2018, M.T. took the State of New Jersey grade nine English Language Arts assessment (PARRC). He performed below grade level, having partially met expectations. J-36. This indicated he had learning difficulties, which was consistent with the findings of the prior evaluations. He was not supposed to have taken the PARRC test; however, he sat for it due to some confusion. Peters did not know if accommodations were made available to M.T. while he took the PARRC test.

An IEP for the remainder of the 2017-2018 school year and the entire 2018-2019 school year was prepared on April 26, 2018. S.S. and her husband attended the IEP meeting and agreed to the IEP that was developed. A State representative attended the meeting as a neutral party, to serve as a mediator. S.S. asked that M.T. be placed in the general education program. The District did not believe this was appropriate for M.T. The parties ultimately agreed that M.T. would be placed in both resource room and in-class support classes. For the 2018-2019 school year, the IEP provided for pull-out resource room for English and math and in-class support for science and social studies. J-39.

In-class support was offered for the 2018-2019 school year because the District was “working with the parent, trying to get [M.T.] to where they wanted him to be placed, and . . . we were trying to work with that and . . . he had made some progress so we were working on trying to get him into those classes.” T2 98:20-24. The child study team (CST)

sought to work “with the parent to try to give [M.T.] . . . a combination of a smaller setting as well as moving him into the larger setting.” T2 99:2-5. M.T. had made progress in transitioning from home schooling to public school. He worked on his reading skills using the Wilson Reading Program. He performed better in the LLD classroom. His teachers and others in the District believed it was appropriate to move him to the resource room. He still required support, particularly in English and math. A paraprofessional was added to help support M.T. in the general education setting. The paraprofessional would provide support beyond that provided by the special education teacher. The support would include writing down or repeating information for M.T., and he would also continue to receive speech-language therapy. S.S signed the IEP.

The IEP enumerated measurable and/or functional goals for M.T. They included defining unknown and multiple meaning words with minimal assistance and linking words, in order to help him write more, improve his writing and write in sequence. Short term objectives, including using context clues and narrative information, that would help him achieve the goals, were also enumerated. J-39.

The IEP provided for modifications to be implemented by the general and special education teachers. They were intended to enable M.T. to complete tasks without getting frustrated or taking too much time. Such modifications included reducing the number of assignments; modifying the length of tests and assignments; checking in with M.T. to ensure understanding; helping him edit his written work; allowing fifty-percent extra time to complete tasks, quizzes and tests; giving direct and uncomplicated directions; providing a copy of class notes and study guides; and permitting M.T. to take tests orally when he so requests. J-39 at 400. Many of these modifications would occur naturally in the special education classroom. Peters noted the modifications did not expressly require the provision of step-by-step instructions; however, there was a requirement that M.T. be given “direct and uncomplicated directions.” T2 100: 23-25. The teachers were aware of the accommodations and provided them to M.T. in the classrooms. The IEP also provided that M.T. would apply for accommodations with the College Boards. Peters believed such an application had been made by the time the IEP was prepared. The District offered tutoring over the summer in advance of M.T.’s placement in an in-class support program

because the program was above his level. The tutoring was intended to teach him some of the skills he needed to succeed in the program.

S.S. filed a due process complaint concerning the IEP. On August 2, 2018, the parties entered into a settlement agreement that provided for the following courses for the 2018-2019 school year: resource room for English II and algebra I, in-class support for United States history II and biology, and academic support. J-42, J-56. The agreement provided the District would “promptly respond to requests by the parent regarding M.T.’s educational program[,] continue the previously discussed tutoring” and “allow the mother to be in eyesight of the tutoring.” Ibid. The agreement resolved all of the claims through the date of the agreement.

Jeanette Van Houten, M.Ed., ATP, conducted an assistive technology consultation to see if M.T. needed any support with technology. Peters believed the focus of the consultation was to examine note-taking and how M.T. could best obtain information that was discussed in the classroom. Van Houten issued a Technology Plan for M.T. on August 23, 2018. M.T.’s parents wanted M.T. to be permitted to record his classes. A determination concerning the recording of M.T.’s classes was pending further discussions with Van Houten. J-89 at 940.

A meeting to discuss the recording of classes was held on September 13, 2018. M.T. and his parents attended, as did Peters and her supervisor, Crystal Riddick. J-45. Prior to the meeting, Peters discussed the proposal with the CST. It was determined that recording was inappropriate for M.T. because, due to his severe auditory processing disorder, listening without visual aids would not be useful for him and because many classes did not utilize a lecture format. On September 14, 2018, Peters sent M.T.’s parents a letter in which she summarized the meeting discussions. She wrote, “The district discussed a paraprofessional being placed in every class to take notes on Google Docs. These notes will be available to [M.T.] as they are typed in the class. [M.T.] will be able to view and review the class notes and listen to them repeatedly at his convenience.” J-46.

With respect to the use of Google Docs by a paraprofessional, M.T. would be able to access the notes “live” and would, thus, be able to add his own notes at the same time as the assistant. T2 120:4. M.T. would be able to listen to the notes at home or anywhere else, using the Google Docs program. At home, the computer could read the document to M.T. and highlight words as he read them. This enabled M.T. to see and hear the document at the same time and, thus, receive the material in a multi-sensory manner. This would enable him to retain the information, as the evaluations documented that a single informational method was insufficient for him. An assistant was placed in M.T.’s general education classroom, in accord with his IEP. Peters noted that, because the general education classes do not utilize a lecture-style format, “you’re not going to get typical notes like you would in a lecture class. It’s more conversations and gathering information and working on projects[.]” T2 123:2-6.

The District’s policy concerning use of electronic communication and recording devices (ECD) provides, “Students may use an ECD when there is a legitimate educational purpose as documented by a student’s individual education plan (IEP) or otherwise approved by the district.” J-27. Peters explained that, pursuant to the policy, a student would be permitted to record classes if there is “no way for them to access notes or whatever they need to record in another way.” T2 119:2-3. At the time of her testimony, no students were authorized to record classes.

On October 12, 2018, a new auditory processing assessment of M.T. was conducted by Dr. Lorraine Sgarlato, who also conducted the June 6, 2016, auditory processing assessment. The new report was not given to the District until close in time to the hearing in this matter. It concluded M.T. did not have an auditory processing disorder. J-50. Peters believed that, notwithstanding the report’s conclusion, it would not be appropriate for M.T. to record and relisten to classes because relistening to classes would not enable him to take in and understand the class information. This conclusion was based upon all of the other information that was available to the District concerning M.T.’s need for multi-sensory methodologies such that repetitive listening would not enable him to take in, remember and understand the information.

On October 15, 2018, S.S. sent an email to Peters in which she asked why M.T.'s teachers were not giving him step-by-step instructions. J-89 at 997. Peters explained that this was "a recurring email." T2 143:10. She discussed S.S.'s concerns with M.T.'s teachers and asked them to show her examples of what they gave to M.T. T2 143:10. She also observed M.T. in his classes and spoke with him prior to IEP meetings, as well as on a regular basis, to get his input. However, early in the 2018 school year, S.S. asked that she not meet with M.T. or attend his classes. S.S. wrote in an October 16, 2018, email, "We have informed yourself and the district that no one is to speak with our son alone without our presence" and "prior approval." P-89 at 1005.

The District found that there was a scheduling conflict that did not permit M.T.'s in-class support United States history II class. An IEP meeting was conducted on October 19, 2018. The District offered to place M.T. in an in-class support world history class. S.S., however, wanted M.T. in a general education United States history II class. The District agreed, the IEP was modified to reflect this, and modifications continued to be implemented for M.T.'s classes.

The revised October 19, 2018, IEP recorded supplementary aids and services provided to M.T. in the general education classroom: "Instructional Assistant in science, history, English, Latin, electives and health to type notes to be shared electronically with the student. Instructional Assistant will aid in the organization of notebook and agenda." J-52 at 592. Peters explained that, at the time of the IEP, M.T. had been "diagnosed with an auditory processing of severe degree by Lorraine Sgarlato . . . (8/6/2016 report)" and recommended "note-taking assistance in the classroom." Id. at 596. The IEP referenced the October 13, 2016, report issued by Humm that recommended M.T. receive outlines of class materials when there is a lecture-based format, and that he be encouraged to take brief notes. Ibid. This was different from simply recording classes or giving him notes, as a goal was to teach M.T. to take notes. The IEP also referenced the November 28, 2017, Kay report issued that indicated M.T. needed "concrete pictorial presentations, hands on learning activities." T1 130:17-19.

Thus, Peters explained, "in any lecture based format [M.T.] would benefit from receiving outlines of class materials, again visual to aid with the note taking. But he

should still be encouraged to take brief notes [because] you want to teach him how to take notes.” T1 130:10-15. Noting that students are able to remember information better when they write it down, M.T. was to receive assistance by way of “guided notes” that would help him “learn to listen for key words and writ[e] them down.” T1 130:22-3. Peters also noted that, based upon the reports, M.T. “comprehended language based information best when it’s short and specific and to the point.” Thus, the intention was to ensure he could “listen to the notes that were taken” rather than “to all the different conversations going on in a classroom.” T1 130:24 to 131:3. The “scribe” who attended class with M.T. worked with him and provided him with notes.

During the October 19, 2018, IEP meeting, S.S. told District staff that M.T. did not have a central auditory processing disorder. S.S. did not produce a report documenting this. In response, Peters asked Heidi Wolfinger, an audiologist hired by the District to review the materials and advise whether the District was providing M.T. the most appropriate resources for his needs. Wolfinger agreed that M.T. needed both visual and auditory sources of information; one alone was insufficient. On October 23, 2018, in response to S.S.’s representation that M.T. did not have a central auditory processing disorder, Peters requested permission to conduct an audiological assessment. S.S. did not consent to the District’s proposed evaluation.

In January 2019, Dr. Allison Lavene, an audiologist, conducted an audiology evaluation of M.T. The evaluation was not provided to the District until close in time to the hearing in this matter. Lavene wrote, “Although there is insufficient evidence of an auditory processing deficit, parent did report concerns regarding processing speed and comprehension of concepts.” J-59 at 631. She suggested “compensatory strategies” that could help M.T.: preferential classroom seating, assistance with note taking, tape recording class material, self-advocacy, active listening, and repetition of information. Id. at 631-632. Lavene suggested M.T. compare notes with other students at the end of each class and noted that tape recording “may prove beneficial to [M.T.] to review the material discussed after returning home from school” if there was a “particularly difficult lesson.” Id. at 631.

Peters noted that Lavene did not recommend that M.T. must record his classes. Also, it is not usually possible to determine, prior to a class, which lessons would be particularly difficult for a student. If the class placement is appropriate, however, a student should be able to access all of the information provided during the class. Resource room classes would present the materials at a level that would meet M.T.'s needs and enable him to obtain the information. The teacher would represent it in a different manner and he would have time to review the information. Also, the District's accommodation enabled M.T. to review and listen to the class material at home, by using the Google Docs program. He would then have the material available to him auditorily and visually. Although the District did not have Lavene's report, Peters believed it would not have caused the District to change its position concerning recording classes or the accommodations it provided, as they were responsive to his needs.

On February 13, 2019, a speech-language evaluation was conducted by Children's Specialized Hospital on February 13, 2019. The District was not provided the report. It showed that M.T.'s auditory comprehension skills were in the fifth percentile, which indicated "below average sentence comprehension abilities when compared to same-aged peers." J-60 at 646. Peters believed this further supported the District's programming for M.T. and its position concerning recording classes. Recordings of his classes would not help him because he is "not able to comprehend auditory information on its own." T1 144:24 to 145:13.

On April 18, 2019, Dr. Tanishia A. Williams, M.D., Ph.D., a neurodevelopmental pediatrician with Children's Specialized Hospital, issued a letter in which she wrote M.T. met "the criteria for a number of neurodevelopmental diagnoses" including central auditory processing disorder. J-61 at 663. Williams wrote M.T. had:

outgrown some of the deficits of [central auditory processing disorder] but still showed significant deficits in auditory integration and decoding. His difficulty is at the level of processing the auditory input at the level of the brain's ability to comprehend the information and use it meaningfully. He also struggles with decoding spoken language, which makes it hard for him to process oral directions. This is why rewording, simplification or directions, and explanations are so important.

[Id. at 662.]

Williams wrote that M.T. “requires step-by-step instructions in all classes. This allows him to by-pass the auditory sensory system with an alternative sense to base his directions on” Ibid. Also, “visual supports . . . are key learning tools for high-functioning students like [M.T.]” Ibid. Williams also wrote M.T. required a tape recorder to record lectures because his auditory processing deficits could cause his notes to be erroneous and he could fail to include information. Id. at 663.

Peters noted that, while an audiological evaluation was used to diagnose a central auditory processing disorder (CAPD), Williams conducted a neurodevelopmental evaluation. William did not reference which, if any, assessments she conducted. She also did not indicate that she met with M.T. and she referenced a January 31, 2019, “CAP evaluation” that had not been provided to the District. Williams was the first to suggest that tape recording was required, as opposed to potentially useful. To the extent her recommendation was based on an understanding that M.T.’s class notes would be inaccurate, this was incorrect as the District ensured his notes were correct through its accommodations. To the extent Williams suggested M.T. would benefit from listening to his recordings at home, after school, because he may struggle to understand what is spoken in class, he would continue to have this difficulty while listening to a recording. If he had limitations with respect to understanding the discussions during class, re-listening would not help because he would still need to “pull out the important facts.” T2 231:7. By giving M.T. accurate notes for each class, the District provided him what he needed to know, not excess information. By utilizing these notes, whether prepared by an aide or posted on the school’s learning system, M.T. would have the information he needed to succeed in the classroom.

Peters also noted that the recommendation contemplated that M.T. would listen to the recordings of his classes each night in addition to doing his homework. She explained that she would be “very concerned if a student was listening to five to six hours” of recordings “every night and then staying up to do homework.” T2 230:11-13. This would cause fatigue and stress, adversely impacting his emotional health.

While Williams wrote M.T. did not have a central auditory processing disorder, she nonetheless found that he had difficulties that impacted his ability to take in information auditorily. Regardless, her letter confirmed the District's conclusions about M.T.'s needs and the appropriateness of his IEP.

An annual IEP meeting was conducted April 25, 2019. M.T.'s teachers reported that he struggled in his general education and in-class resource classes. Although the teacher explained what he needed to do, he had difficulty keeping up and required a lot of extra time. He became frustrated when he did not do well. His teachers implemented the modifications in his IEP, including reducing the number of assignments he was required to complete.

M.T.'s teachers, including his general education teachers, reported his Present Levels of Academic Achievement and Functional Performance (PLAAFP). Peters included the general education comments after the IEP meeting. His resource room English teacher reported that, although M.T. "demonstrates a consistent commitment toward task completion . . . gets along and works productively with peers . . . [and] self-advocates to the teacher to gain clarification in the areas of newly introduced concepts and directions of the assignment[,]" his responses "reveal a surface level of understanding about basic plot points." J-63 at 668-669. M.T., "even with one-on-one assistance, still has difficulty with the transference of his understanding of figurative language in future assignments." Id. at 669. The teacher identified other areas in which M.T. struggled, despite receiving all of the accommodations required by his IEP. He required multiple class sessions to complete assignments and he would ask to complete in-class writing assignments as homework. The teacher enumerated nine accommodations that were "the most effective toward achieving [M.T.'s] goals in English." Ibid.

Peters explained that this showed that M.T. required one-on-one explanations in order for him to understand the subject matter. Despite that, he continued to have difficulty with higher level thinking skills. The English teacher recommended continued placement in the resource room.

M.T.'s resource room math teacher complimented his demeanor and noted he always tried his very best to stay engaged. However, he did not usually engage with other students. During the first half of the school year he reviewed pre-algebraic concepts. In April 2019, he began to learn more complex and abstract concepts. He had difficulty making connections and comparing and contrasting the concepts with appropriate mathematical vocabulary. Accommodations were utilized to assist M.T.: step-by-step instructions, repetitions, calculators and digital content. Ibid. The math teacher recommended continued placement in the resource room. Peters explained that this showed M.T. was able handle work that is spelled out for him but had difficulty connecting that work to other areas, including real world applications.

In the final IEP⁴, the math teacher added the following language to the PLAAFP:

[M.T.] is appropriately placed in the resource setting. In the most recent Continuous Diagnostic Action Plan, where a score of 1300 represents Algebra readiness, [M.T.] scored in the range of 870-1300 in numbers and operations. This again demonstrates [M.T.'s] diligence and master of the arithmetic and pre-algebraic foundational skills. In the same test, however, [M.T.] scored 790-1030 in algebra and algebraic thinking; 130-720 in fraction, 0-910 in geometry, and 200-700 in measurement. These indicators, which are significantly below 1300, illustrate the challenge [M.T.] experience when he is presented math problems that require higher order thinking skills and critical reasoning skills. It also suggest that M.T. will continue to need significant modification of his math classes.”

[J-81 at 868.]

M.T.'s general education biology teacher noted that M.T. completed his homework on time, paid attention, actively participated and worked well with other students. He had difficulty with “higher order thinking and application of concepts.” Id. at 670. He was allowed extra time, which he used to work on his assignments and assessments. He still often needed to complete his work at home. “While [M.T.] receives several accommodations/modifications, he benefits in biology most from repetition, check for understanding and a copy of class notes. He also gets modified assessments in length

⁴ The draft IEP was followed by a final IEP that included additional language.

and modified number of choices. He will continue to benefit from asking clarification questions and learning vocabulary meanings from context.” Ibid. The biology teacher recommended placement in the resource room. Peters explained, although he did not write this in his summary of M.T.’s then-present levels, he made the recommendation separately, as most teachers do prior to IEP meetings.

Peters testified that M.T.’s general education history teacher reported he struggled “a lot. . . . [He] did not understand a lot of what was going on in the classroom.” T1 177:25 to 178:3. M.T. had many questions, which the teacher would attempt to address, but M.T. often became frustrated with the teacher. The teacher recommended that the general education placement was not appropriate and that M.T. required more support. The history teacher added language to the PLAAFP section of the final IEP that was not in the draft IEP. The teacher wrote, “[M.T.] participates in a general education setting for U.S. History II. His strengths are he has had good attendance and gets along with his peers. Modifications and accommodations have not yielded student progress. His areas of need are reading comprehension, analytical skills, primary source analysis, processing, in-class participation.” J-81⁵ at 869. Peters believed this was discussed at the IEP meeting.

Peters noted that M.T. had more difficulty with “taking skills and applying them and going beyond just memorization.” T1 173:8-9. The general education classroom was “much more difficult for him. And it wasn’t appropriate. . . . He needed to be able to build the skills.” T1 173:12-17. She noted that he required additional time beyond the extra time provided for him in class to complete assessments. He “would want more time over days of time after he had already seen the assessment.” T1 174:8-9. The District ultimately gave him tests “page by page so that he wasn’t seeing the entire test at one time” T1 174:10-12. This helped to ensure he was taking the test in the proper manner, to demonstrate his learning, rather than being able to memorize the information required for the test.

Peters explained the teachers told her that M.T. struggled in the classroom. In some classes, particularly larger classes, he sat by himself and did not interact much with

⁵ The general education history teacher’s comments were not included in the draft IEP. J-63.

others. He performed better when he worked in a group setting than when he handled assignments on his own because the other students helped him with the concepts. His teachers “were constantly checking in with him, reinforcing materials, providing . . . his accommodations and modifications per the IEP. . . . They went above and beyond. They were constantly in contact. They stayed after with him. Provided him one on one instruction when needed after school or during break time[.] . . . [I]t was more than typical student would have needed.” T1 176:17 to 177:10.

The District, thus, concluded M.T. was more successful in the resource room classes and recommended resource room placements for all of M.T.’s subjects during the 2019-2020 school year. J-63. M.T.’s parents did not agree with the placement.

During the April 25, 2019, meeting, the District proposed audiological and neurological evaluations of M.T. Because the prior evaluation had been conducted some time prior and M.T.’s parents reported that he did not have a central auditory processing disorder, and did not agree with his recommended placement, the District wanted to ensure it had current data to evaluate whether he continued to have a disability. J-66. A neurological evaluation would show if M.T. had made progress. M.T.’s parents did not provide the District with the evaluation reports that they had previously received.⁶

During the 2018-2019 school year, M.T. received A grades in resource room classes and B and C grades in in-class support and general education classes. J-76. He got B and C grades because he “received a lot of support and modifications and accommodations above and beyond . . . what a student receives[.]” T1 185:5-7.⁷ Also, staff pre-taught some of the material to M.T. over the summer. This, in addition to other supports, including academic support, helped him achieve his grades.

⁶ May 1, 2019, correspondence from the Teachers’ Union advised that the April 25, 2019, meeting “had to be stopped due to incivility[.]” P-1 at 2734. Peters did not remember this with specificity and did not recall discussing it with the union president. She noted that several people attended the meeting but did not know who discussed it with the president.

⁷ His report card for the 2018-2019 school year documented the following final grades: Academic Support – A, Biology I (ICRP) - C+, English 2 - A-, U.S. History II (general education) – C, PE 10 and DE – A, Algebra I – A-, Latin I – A, Engineering Drawing – A. J-88 at 774, T2 183: 20 to 184:7.

Progress reports for the 2018-2019 school year showed that M.T. progressed in English and math in the resource room setting. In reading, he progressed satisfactorily and was expected to achieve objectives/benchmarks or progressed gradually but could still achieve the objective/benchmark. He also progressed satisfactorily in writing and with respect to many objectives/benchmarks of speaking/listening. He progressed satisfactorily and gradually in most areas of math, having achieved three math objectives/benchmarks. In science, for which he was in an in-class resource setting, he progressed gradually or inconsistently in all but three objectives/benchmarks. He progressed satisfactorily in the remaining three areas. For those that were inconsistent, it was noted that he might not achieve the objective/benchmark. T1 215:3-4; J-103.

Peters discussed a report prepared by audiologist Dr. Donna Merchant. She reviewed multiple reports and wrote a report that confirmed that the District's plan for M.T. was appropriate; that he needed a smaller group setting; and that merely recording class lessons would not help him better understand the material.

On August 7, 2019, Dr. Kay conducted another IEE of M.T. for S.S. J-86. The report was provided to the District in anticipation of the hearing in this matter. It showed that M.T. made progress in some areas but still struggled in others. The WIAT-III test results showed deficits in auditory language. With respect to sentence repetition, in which the student is asked to repeat information that was provided to him auditorily, M.T. scored seventy-five, which was "below average." Id. at 1721. The 2019 report noted that M.T. "had difficulty retaining auditory information and had trouble understanding higher-level concepts when reading. He would read and reread passages to find facts and answer factual questions but he did not extrapolate answers or make predictions and inferences easily." J-86 at 1729. M.T. "counted in his fingers through math problem-solving tasks and was a very slow writer. He was also slow to complete paper and pencil calculations and his math strategies were inefficient. His spelling was slow; he had difficulty making decisions about how words were spelled; and he made many attempts to spell words correctly." Ibid. Further, M.T. "tended to use awkward sentences and unusual phrasing.

He had problems with math and auditory memory and overloaded⁸ when sequential instructions were given. Despite these challenges, he worked very diligently and put forth excellent effort.” Ibid.

Kay recommended:

Although M.T. continues to perform significantly below expectation given his ability in math reasoning and math calculation skills and struggles with oral discourse comprehension and auditory overload in sequential listening situations, he is otherwise now performing academically commensurate with his ability and in the Average range in the areas of basic reading skills, reading fluency, reading comprehension, spelling and written expression. Therefore, special education programs and services could be curtailed for him with accommodations provided primarily in the general education classes.

[J-86 at 1734.]

When Peters tested sentence repetition, using a different test, he scored sixty-five. J-6 at 66. He, thus, made progress but was still below the level of his peers. His overall fluency score was in the very low range when Peters tested him and was in the low average range with the more recent test. Peters observed that M.T.’s problems with rote learning and higher level thinking skills, which she found in her 2017 evaluation, were not presented in the 2019 report. M.T. would have demonstrated progress even if his scores had remained the same because that would indicate he had not lost skills while he used different skill sets over time. In sum, M.T. still had deficits but was progressing. Thus, his placement in the resource room for English and math was appropriate.

Peters explained that the 2019 IEE confirmed that M.T. had difficulty with auditory information. Although Kay did not write that M.T. had an auditory processing disorder, she identified the symptoms of the disorder in the report. Kay found M.T. still struggled

⁸ “Auditory overload” referred to being overwhelmed by the information being received such that if “information is highly specific, spoken quickly, lacking contextual clue, described in unfamiliar language or presented in a noisy environment, it will be very difficult . . . to comprehend the message or follow through with instructions.” Ibid.

with discourse comprehension and auditory overload in sequential listening situations, and performed significantly below expectation with respect to math reasoning and calculation. Peters believed this confirmed that M.T. needed the slower pace offered by the resource room classes. This would enable him to take his time and “really take in information.” T1 197:8-9. The resource room would be able to “support him more than in a bigger or larger general education classroom that’s moving at a much faster pace.” T1 197:9-11. She, thus, believed that the 2019 educational evaluation supported the District’s April 2019, recommendation that M.T. be placed in resource classes for all four subject areas.

The teachers’ evaluation reports, observations of M.T. in his classrooms, and his test results showed that M.T. had made progress notwithstanding the absence of audio recordings of his classes.⁹ The accommodations directed by the IEP, including provision of a note taker who enabled M.T. to take in information visually and auditorily, helped him to progress. Peters believed the recommendation that M.T. be placed in all resource room classes was appropriate because he struggled only with in-class support classes. Despite the modifications provided for him, he had greater difficulties there than in LLD and resource classes.

Peters ceased serving as M.T.’s case manager at the end of the 2018-2019 school year, in response to S.S.’s request. She testified, in summary, that the District was able to provide necessary information to M.T. without relying upon his recording and re-listening to audio recordings of his classes. It did so by providing him with a “scribe that would type the notes into a Google [document] that would allow him to access the notes live as they’re being typed, so he can attempt to take notes as well, which is a skill we want to teach him, and then also he could listen to the notes back if he needed to at a later time” T2 200:15-21. Although neuropsychologist Humm may have opined that M.T.

⁹ On March 30, 2018, Christine Ott, MB, BCH, BAO, MPH, of Children’s Specialized Hospital, wrote a prescription for M.T. She wrote, “Due to [M.T.’s] [diagnosis] of auditory processing disorder please allow him to audio record lectures so he can listen and use them for notes and studying.” J-91. Peters did not recall having received the prescription. She noted that Ott did not appear to be an audiologist and the prescription was unaccompanied by a report or evaluation. Had she received it, it would have been insufficient on its own.

would have benefitted from listening to audio recordings of his classes, Peters relied upon the opinions of the audiologists, who evaluated how M.T. took in information auditorily.¹⁰

To the extent S.S. represented that all parties were in agreement with permitting the recording of live lectures, as she did in a September 13, 2018, email, this was inaccurate. J-89 at 957. The District did not at any time represent that it would permit M.T. to record his classes or that it believed such recording was appropriate.

Peters noted that she would speak with M.T.'s teachers each time M.T.'s parent or parents expressed concern that accommodations were not being provided. During her reviews with the teachers, she found they were implementing the IEP. However, while the parents were members of the IEP team and, thus, were entitled to voice concerns and provide feedback, they often requested specific actions or methods that were inappropriate. By way of example, S.S. requested use of a "picture prompt" method that is used with severely autistic children who were non-verbal and could not speak. T2 204:8, J-89 at 996. This methodology was inappropriate for M.T. Rather, M.T.'s teachers divided instructions into discrete steps. For example, rather than directing him to "go get your coat and then put on your shoes and then go out the door" they would provide directions concerning each step separately. T2 204:22-24. It would be different for each class, depending upon the directions. In a science lab, M.T. would be given written instructions that enumerated each individual step separately.

With respect to a period of time during which the Grammarly Application, it did not impact M.T. or the school's ability to utilize Google to take notes. T2 214:12 to 215:6.

In September 2018, Peters and S.S. discussed applying for accommodations through the College Board for when M.T. was to take the PSAT. Peters provided S.S. with a form she was required to complete to request accommodations. P-89 at 994. The District could not make the application on M.T.'s behalf without his parent's signature. On

¹⁰ Peters also noted a concern the impact of recording class sessions had on the other students. In particular, the District is concerned about the privacy of the other students, who are under eighteen years old.

October 2, 2018, S.S. received an email advising that the PSAT was scheduled to be administered on October 10, 2018. In an October 3, 2018, email, S.S. asked about the accommodations that would be made available to M.T. as he took the PSAT. J-89 at 985 to 988. Peters replied the following day and provided S.S. with a form she should complete and sign. Once Peters received the completed and signed form, she would apply for M.T. to have fifty-percent additional time for the test. She also solicited suggestions for other accommodations from S.S. Ibid. S.S. replied with a list of nine additional accommodations, which included extended time, extra extended breaks, questions read out loud, ability to take test on a computer with extra-large print, use of a calculator, availability of food and snacks, multiple days, scribe for essays, and a different setting. Ibid. Peters replied, "Thank you for your email. I am able to apply him for the following from your list of requested accommodations as they must be ones he is currently using in his classes per his IEP per the College Board: extra time 50%, extra breaks, record answers in test booklet, small group testing, 4-function calculator, MP3 Audio (will read questions to him)." Ibid.

On October 11, 2018, Peters sent an email to S.S. in which she advised that M.T.'s case manager received the accommodations form from S.S. on October 5, 2018, and the case manager applied for accommodations through the appropriate website that same day. P-89 at 994. On October 10, 2018, at 2:10 p.m., the case manager was advised that the accommodations had been approved. Ibid. M.T. took the PSAT that day. J-49 at 574. Peters advised S.S. that the accommodations would be available to M.T. on future PSAT tests and the SAT. P-89 at 994.

Peters explained that "PLUS" classes were typically available to only general education students. While a special education student who was in a general education class could be placed in a PLUS class, they would more commonly be placed in "academic support." She had not placed any special education students in PLUS classes. T2 185:16-17.

With respect to the District's relationship with M.T.'s parents, S.S. approached the teachers frequently in a manner that was "not civil" and she did not address or treat them like professionals. T2 221:3-8. Peters did not recall when the policy had been invoked.

She did not raise the concerns about S.S. with union officials; other teachers did so. Peters addressed her concerns to her supervisor, Crystal Riddick, and her director, Micki Crisafulli. Peters was instructed to forward communications involving S.S. to the union president.

Dr. Donna M. Merchant, has a Ph.D. in audiology and has worked in the field of audiology for over thirty years. She operates a private practice in which she conducts diagnostic hearing testing, pediatric testing, hearing aids and amplification. Her practice also involves educational audiology, in which she conducts evaluations of child with hearing and auditory disorders. She also addresses auditory processing disorders. She testified as an expert in the field of audiology with specific expertise in making educational recommendations for public school districts.

Auditory processing assessments involve examining the manner in which the “central auditory nervous system manages acoustic information through the system [and] then combines with other sensory areas for understanding.” T3 12:16-20. The assessment also involves “adding language into the assessment, so there can be a differentiation between what is truly auditory processing of the signal versus an overlap of difficulty processing a message with too much language in it.” T3 12:23 to 13:2. She seeks to determine “whether or not a child truly has difficulty processing an auditory signal at a speed that they’re supposed to, versus a child who has, on a continuum, an overlap of difficulty processing an auditory message that has as a lot of language in it.” T3 14:24 to 15:3. An “issue with language” would be addressed by a speech and language therapist rather than an audiologist. T3 15:6. A “higher-order deficit or disorder,” which occurs in the brain and not the central auditory nervous system. T3 27: 10-13. With a higher-order deficit, the “receiving end . . . does not understand the information that it is getting for other reasons.” T3 27:17-19. Merchant explained that only an audiologist can diagnose a central auditory processing or other auditory disorder. A neurologist cannot make this type of diagnosis; however, a neurologist can examine “functional abilities of the auditory system.” T3 42:25.

A school-based evaluation involves examining how deficient auditory skills impact the classroom and identifying the “most appropriate auditory intervention” for the child,

“whether it’s a related service and speech therapy or whether it’s an accommodation in a classroom setting.” T3 32:6-9. This involves meeting with parents, child study teams, reviewing reports and “talk[ing] about an entire learning profile of a child.” T3 31:18-19.

In September 2019, Merchant reviewed multiple evaluations and reports concerning M.T.¹¹ She found the reports indicated a “complex constellation of deficits and functional challenges due to [M.T.’s] overlapping diagnoses.” J-99 at 2. She suggested that the 2019 report from Children’s Specialized Hospital was written by a person whose area of expertise did not correspond to the subject matter. There was not support in the auditory report for tape recording lectures. She wrote, “An auditory recording without the visual support of cues and a teacher available to clarify intended meaning may lead to more confusion rather than clarification.” J-99 at 2-3. She also noted that listening to recordings after a full day of school would likely be tiring for M.T. and would require significant focus and motivation. J-99 at 3.

M.T.’s neuropsychological evaluation found his intellectual functioning ability was in the very low range. This caused “inconsistency” in his “ability to manage information in general.” T3 44:9-11. “[I]f the auditory information is not understood because of a cognitive component, that will look like something else. And that’s why it’s important to separate them.” T3 44:14-17.

With respect to M.T.’s educational evaluation, Merchant looked for “consistency between [his] documented intellectual function and [his] actual academic output function.” T345:11-13. In M.T.’s educational evaluation, Merchant observed “consistency between the cognitive function and the difficulties academically and educationally.” T3 46:25 to 47:1. This caused her to believe “there is some type of learning disability that’s occurring aside from an auditory processing component.” T3 47:3-5. A learning disability could increase the potential for auditory information to become disrupted.

¹¹ June 6, 2016, auditory processing evaluation; October 13, 2016, neuropsychological evaluation; July 28, 2017, educational evaluation; August 7, 2017, social history report; August 16, 2017, speech-language evaluation; auditory processing evaluation dated January 16 and 31, 2019.

In reviewing speech and language evaluations, Merchant looks for whether the “child who is taking in information has the capacity in the language centers to understand the information and to use that information, regardless of the actual input.” T3 48:12-15. This will impact the nature of the auditory processing evaluation. M.T.’s speech and language evaluation highlighted “significant communication issues [and] . . . compared to his peers, language undeveloped in semantics and syntax. Challenges applying, understanding and using language.” T3 49:12-14.

Merchant identified a number of concerns with the methodology and findings of the June 6, 2016, auditory processing evaluation. The evaluation report did not contain sufficient information to determine whether M.T. has a CAPD, particularly since M.T. has a language disorder, as documented by poor performance on language-based test. Further, the evaluation report included a finding of impaired auditory discrimination, which was not the type of finding made by audiologists. Merchant explained, “We don’t test speech discrimination, we look at speech recognition. There’s a difference between recognition and discrimination of words.” T3 66:15-18. Merchant could not determine how this conclusion was reached, as there was no test that related to the finding. She believed additional testing by the audiologist was required to determine if there was an auditory acoustic processing problem or, rather, whether the problem “was specific to when language was added” because “language can potentially impact the result[.]” T3 67:24 to 68:7. There also needed to be an evaluation of any “comorbid issues” about which the report did not provide sufficient background. T3 68:24. Without more, the finding of a central auditory processing disorder was “inaccurate and misleading.” T3 68:10. Merchant thus believed the CST could not rely upon auditory processing evaluation .

With respect to the January 16 and 31, 2019, auditory processing evaluation, Merchant noted it referenced multiple higher order disorders including autism, ADHD, learning difficulty, and mixed receptive expressive language disorder. It also concluded M.T. did not have a CAPD. J-59 at 631. Given that finding, the audiologist should not have made recommendations concerning accommodations including tape recording classes. Rather, the school would be responsible to address “any academic or learning problems the child is having, because it’s not in the auditory realm.” T2 110:13-17. The

IEP team would address other learning disabilities and whether it believed recording would be appropriate based on testing other than auditory testing. The audiologist here, however, made recommendations including “tape recording class material” when M.T. has a “particularly difficult lesson.” J-59 at 631. Merchant found no basis for this recommendation in the evaluation, as there was a finding of no auditory processing disorder.

Merchant found M.T. “presented with multiple deficits or disorders that are making it more difficult or challenging for him to learn in a typical classroom setting.” T2 113:8-11. All of these deficits are “outside of auditory.” T2 113:15. She found no support for M.T. recording his classes. Noting M.T.’s documented language disorder and “challenges with the application of his understanding and usage of language for social/pragmatic language, as well as critical thinking[,]” which was referenced in his speech and language evaluation, she concluded that an “auditory recording without the visual support of cues and a teacher available to clarify intended meaning may lead to more confusion rather than clarification.” J-99. She explained:

[W]hen you are listening to any lecture, you have to be able to understand the language that’s being presented within that lecture. So if a child has difficulty with interpretation of special social cues, language, critical thinking cues, if they’re presented just with an auditory representation of someone’s lecture, if they don’t have the support of someone who’s right there who can interpret what they mean as they’re saying it to him, that could actually make it more confusing to listen to something like that again. And especially if the recording is not clear enough, that could also compromise how it sounds, and what the meaning actually is. And if you have a higher-order issue with interpretation of language, and with critical thinking, which is making those decisions and interpreting things, then you’re just listening to something you have no support for.

[T2 116:8 to 117:2.]

She further explained that the communication in a classroom is flexible and multisensory, as the teacher may adjust the information presented in response to the class discussion or students’ questions. The teacher may also interject new information

or materials as needed. Communication in a classroom is, thus, an “auditory visual combination of all that information.” T3 117:20-21. This is not reflected in an audio recording. A recording of the class lecture, without more, would be “problematic” for a student with a central auditory processing disorder. T3 77:23.

Further, a recording of a class would be of limited utility when the class does not involve a lecture format with one primary speaker. If students are clustered into several groups, it would be difficult to hear a specific discussion well and the recording would likely create more confusion. The listener would be required to employ critical thinking and memory skills to decipher who was speaking and what was said at a specific time. T3 119-120 This requires “a lot of other sensory areas to kind of work together.” T3 120:6-7. This would require M.T. to utilize skills that are “areas of weakness” and that “all contribute to the difficulty he’s having[,]” based upon what was reported in the materials Merchant reviewed. T3 120:8-13.

Merchant also noted the need for “significant focus and motivation” when reviewing recordings in this manner and the possibility that M.T. could become fatigued. “Auditory fatigue” occurs “after a full day of listening to lectures or conversations or group work . . . the auditory system is not at its peak or heightened to be able to listen as well. And when that happens, the cognitive resources . . . the areas we use to stay on task and listen and actually get the new information for understanding, that also will fade because the auditory system can’t stay stimulated and on target.” T2 120:19 to 121:8. This would occur to both students with and without a CAPD. Also, as M.T. was diagnosed with ADHD, there is a “clinical component where the system fades, and it’s difficult to stay on task and stay focused.” T2 121:19-20.

However, a document that is prepared on a computer by another person, and to which the student can add his own notes, and which can be read back to the student would provide a multisensory tool. Merchant explained:

So when there’s language components, and we’re concerned that he won’t understand the language that’s being used, then having notes, whether it’s a teacher’s outlines or written notes that can go home with him, then . . . you have a visual piece,

and then he can either read them out loud, and that helps for the auditory visual connection between the two sensory modalities. Children who have multiple things often times, for certain aspects, need multisensory input.

[T3 76:1-10.]

When she prepared her report, Merchant did not have an auditory processing assessment conducted by Dr. Sgarlato on October 12, 2018, in which Sgarlato found M.T. did not have a CAPD. J-50. She reviewed the report and found that it did not alter her conclusion about the presence of a CAPD. She noted the 2018 assessment contradicted Sgarlato's 2016 assessment and neither assessment provided sufficient information to determine if M.T. had a CAPD because their testing protocols and reports were lacking in required information.

On cross-examination, Merchant acknowledged that she did not meet with M.T. However, this was not necessary as her review was limited to examination of prior reports. Her note in her report concerning fatigue associated with listening to audio recordings, was a general statement. It was not based on a personal assessment of M.T.

Merchant was also not provided the September 19, 2017, addendum to neuropsychological evaluation, and the November 28, 2017, and August 7, 2019, independent educational evaluations. Noting that she is not a learning consultant, she would have reviewed the IEEs for consistency in their testing methods and findings. She noted that the November 28, 2017, IEE reported that a battery of neuropsychological tests revealed several serious impairments. She acknowledged, however, that she is familiar with but not an expert in autism. A neuro-developmental pediatrician or neurologist is the appropriate expert to address autism.

Merchant noted that the January 2019 evaluation of M.T.'s auditory processing indicated normal function. Consequently, there was not a basis for the audiologist to make recommendations. If Merchant were to test a client and obtain normal results, she would refer the client to an appropriate specialist, as there would be no further action required with respect to auditory issues.

Merchant clarified that, when she referenced a “scribe” for students, she referred to a person who records notes for students, which she has recommended for clients. To the extent she’s aware of a pen-like device, she’s familiar with a “live-scribe pen” that is often used by college students. She has not recommended this to any of her clients. It could potentially be helpful, depending upon the student and his auditory integration difficulties. M.T. did not have an auditory integration problem.

For petitioner

S.S. is the petitioner and M.T.’s mother. After graduating from college, she served in the military for six years, after which she was honorably discharged. She earned a masters’ degrees in health services administration and Master of Science in Nursing, with a focus on working as a Family Nurse Practitioner. She obtained these degrees between 2006 and 2017. She has been licensed as a Registered Nurse since 2006. As a Family Nurse Practitioner, she has seen and diagnosed patients with ADHD and autism.

M.T. was eighteen years old and in the eleventh grade at Princeton High School at the time of the hearing. He wanted to be a mechanical engineer and participated in several extracurricular activities including the Scouts, where he is working toward becoming an Eagle Scout, and taekwondo, where he has earned a first degree black belt. He is also a senior acolyte in the family’s church and a member of Kappa Nights, a fraternal organization.

M.T. was diagnosed with autism toward the end of 2014. He is “on the spectrum” and “high functioning.” T3 191:22. His autism is mild and while he is not limited with respect to what he can do, he needs to be “given steps for his brain to function.” T3 192:14-15. He sometimes requires things to be repeated to him “over and over again” because he has difficulty understanding “the nuances of the English language.” T3 193 20-25. Repetition also helps him to understand abstract subjects like geometry. He is also socially awkward and has dyscalculia, dysgraphia, dyslexia, ADHD and anxiety. ADHD impacts his ability to focus. He may be preoccupied with another subject or have difficulty concentrating when there is unrelated noise in the background. M.T. “no longer

has the central auditory processing disorder, but he has deficits with regards to his decoding and encoding issues[.]” T3 191:25 to 192:4.

In the winter of 2014, a psychologist at Children’s Specialized Hospital diagnosed M.T. as being on the autism spectrum and recommended he attend a public school rather than private school. He attended school in Trenton, where he was eligible for special education. His English and math classes were in the resource room while science and social studies were in the in-class resource program (“ICRP”). The latter two courses were taught in the general education classroom with an additional teacher. M.T. earned A grades in the resource room classes and C grades in the ICRP classes. He was “pretty much an A-B student.” T3 209:18-19.

M.T., “already inward,” became more anxious after he was removed from the private school and transferred to Trenton. T3 197:17 He had negative and dangerous experiences with the other students at Trenton and became scared of school. S.S. ultimately removed M.T. out of Trenton when he was in seventh grade, about to enter eighth grade. Beginning in September 2016, she homeschooled him. S.S. used books provided by a teacher and she developed curricula. She had homeschooled M.T. for approximately ten months when her family moved to Princeton. They believed the Princeton School District would have the resources required to meet M.T.’s needs.

On June 6, 2016, audiologist Lorraine Sgarlato conducted an auditory processing assessment of M.T. In her report, Sgarlato recommended “direct interventions” including “auditory therapy.” J-1 at 27. She also recommended a “multi-sensory program for reading, writing and comprehension.” J-1 at 28. She identified potential programs and noted, “[t]hese programs are most effective when administered one-on-one and in an intensive manner (1-2 hours per say, 4-5 times per week).” Ibid.

On October 13, 2016, Dr. Michelle Humm conducted a neuropsychological evaluation of M.T. She recommended that, “should he re-enter a traditional school environment, [he] should continue to receive special education services via an IEP under the classification of Autism.” J-3 at 48. She also recommended he receive “outlines of class material prior to class to minimize the need for extensive note-taking, and he should

be encouraged to take brief notes throughout lecture-based classes in order to increase engagement in the task.” Id. at 49. Humm also wrote that permitting [M.T.] to “record lectures as needed to review at a later time may also be helpful.” Ibid.

S.S. believed M.T. would benefit from recording because his class notes may have been incomplete. By listening to a recording of the class, he could better understand the information and capture information that he may have missed. With repetition, he would also be better able to remember that information.

On July 7, 2017, prior to M.T. starting at the District high school, S.S. asked the District to evaluate M.T. for special education services. J-4. The District conducted an evaluation and determined he was eligible for special education services. It proposed LLD classes, which S.S. believed was inappropriately restrictive. M.T. had not previously been in such a restrictive class setting. S.S. wanted him in general education classrooms, with accommodations and modifications, because he intended to go to college and become a mechanical engineer. Also, he was entering the ninth grade, which S.S. believed was a “formative year,” and that he would be limited with respect to the classes he could take in subsequent years. T3 217:16. Also, “[c]olleges start looking in the ninth grade year.” T3 217:21-22. She expressed her concerns to Peters and asked that the District implement a formal reading program to help M.T. with English. J-12.

A meeting was convened in response to S.S.’s letter. They discussed the evaluation results and the proposed program, including a multi-sensory reading program. It was determined that the reading program would be provided to M.T. with a caveat that the District would review his progress and evaluate whether he still needed the program. In a letter sent after the meeting, Peters wrote that they agreed that M.T. would remain in the proposed classes for three weeks, after which they would “reconvene to review his progress and gather teacher feedback/data.” J-16. A “multi-sensory reading program” would be initiated, after S.S. consented to a class schedule change, and it would continue during the first marking period, when it would be evaluated. Ibid.

On September 15, 2017, S.S. wrote to Peters to confirm that she agreed with a change that resulted in removal of a Spanish class from M.T.’s schedule and the addition

of the Wilson reading program. S.S. believed M.T. needed to focus on mastering English before he studied foreign languages. S.S. reiterated her belief that general education classes, with accommodations and modification, were most appropriate for M.T. and, thus, she continued to disagree with the placement proposed in his IEP. She also requested “SMART goals be placed in his IEP so that we will know what he must meet to be able to be proficient or even master to be able to move onward and thereby show that he is meeting the standards set forth in his IEP.” J-18.

In October, the District began to use the Wilson reading program that S.S. had requested for M.T. M.T. completed the entire program before the end of the school year and performed very well.

Dr. Humm issued an addendum report on September 19, 2017. She recommended M.T. be provided with “single-step instructions multiple times” and that “important information [should] be repeated multiple times.” J-20 at 121. S.S. agreed with this recommendation because, given his autism diagnosis, M.T. requires repetition. Humm also recommended “multi-sensory instructional techniques . . . (e.g., seeing it, hearing it, observing/modeling).” Ibid. S.S. sent Humm’s report to Peters, and possibly Riddick, by email. She did not recall the precise date she provided the report but recalled that it was in 2017, “whenever she did it, we then turned and emailed it to her.” T3 225:14-16.

On October 6, 2017, S.S. requested an independent educational evaluation of M.T. She did not agree with the IEP recommendations, particularly placement in LLD classes, and she believed the “District did not assess him in all areas of his disability.” J-21.

An October 6, 2017, IEP again proposed LLD classes. J-22. S.S. continued to disagree with this. She did not expressly approve or disapprove of the proposed IEP. However, believing that her signature was required for M.T. to be eligible for accommodations and modifications, S.S., signed a “Consent to Implement Initial IEP” form and wrote, “I consent to my son needing services.” J-23. S.S. told Peters, “I’m still not in agreement with your placement but I am consenting that he needs services.” T3 229:16-8.

On November 16, 2017, S.S. wrote a letter to District personnel in which she reiterated that M.T. was inappropriately placed in LLD classes and to advise that he had been bullied and had been the victim of race-based discrimination. She asserted that teachers bullied him about his writing in a personal journal and one teacher “snatched” it out of his hand, read it and refused to return it to him. He was also singled out and treated different than other students who did similar things. J-24. The incidents caused M.T.’s anxiety to worsen and he became frustrated.

On November 28, 2017, in response to S.S.’s request, an independent educational evaluation (IEE) was conducted by Dr. Margaret Kay. Kay wrote, “Because of [M.T.’s] “inadequate problem-solving skills and associated organizational difficulties with novel material, it may be difficult for [him] at times to benefit from instruction.” J-26 at 183. She, thus, recommended “verbal steps in a repetitive and redundant manner.” Ibid. Kay also wrote that M.T. “exhibits difficulty forming generalizations from one situation to another. Not only does he need to be taught specific skills in a step-by-step fashion, but transitioning these skills or generalizing them into other areas will need to be addressed in an identical manner.” Ibid. S.S. agreed with these recommendations.

On December 27, 2017, S.S. sent an email to Peters and Crisafulli in which she expressed concern about an incident that involved M.T. A teacher accused him of engaging in an inappropriate conversation. M.T. had been singled out and when another child was to blame. S.S. noted that M.T. was the only black student in the class. S.S. wrote, “I have requested before that no one speaks to our son without our presence He gets extremely anxious, scared, and will have emotional breakdowns, which he had today when he came home from school.” Ibid. She added that, had the teacher “pull[ed] him aside with our presence we would have gotten to the bottom of the situation.” Ibid (emphasis in original).

An IEP meeting was held on February 13, 2018. S.S. and her attorney attended the meeting. This was the first time she was represented by an attorney. The February 13, 2018, IEP recommended a “hybrid schedule” of LLD and resource room classes for M.T. J-30 at 353. She agreed to the IEP because she thought it would place him in the

ICRP classes. She did not understand that resource room classes were not general education classes. Even though she repeatedly expressed that she wanted him in general education classes, no one explained that the resource room was not general education. S.S. subsequently discovered this through her own research.

On February 15, 2018, S.S.'s attorney wrote to counsel for the District, requesting resource room for science and social studies, an extra resource English class, and continuation of the Wilson reading program. J-89 at 914. S.S. agreed with this request because she believed it concerned general education. S.S. recalled that M.T. did not begin resource room classes until approximately April 2018.

On March 22, 2018, S.S. filed a complaint with the New Jersey Department of Education, Office of Special Education Programs, because the District had not made the changes to M.T.'s schedule such that he would be removed from LLD classes. J-35.

On March 30, 2018, Dr. Christina Ott, M.T.'s pediatrician, wrote a prescription that provided, "Due to [M.T.'s] diagnosis of auditory processing disorder, please allow him to audio record lectures so he can listen and use them for notes and studying." J-91. S.S. explained that Dr. Ott is a "developmental pediatrician" who understood that recordings would benefit M.T. T3 248:1.

On April 16, 2018, S.S. asked Peters, by email, about the accommodations that would be provided to M.T. when he took the PARRC test. J-89 at 932. Peters replied that M.T. would take the DLM test rather than the PARRC test and that his IEP did not provide for accommodations for the DLM test. Ibid. S.S. understood that the DLM test was an alternative test for students who were not in the mainstream.

A facilitated IEP meeting was conducted on April 26, 2018. The IEP of that date addressed the remainder of the 2017-2018 school year and the 2018-2019 school year. J-39. S.S. explained that it provided for retaining the same classes that were discussed in February. She agreed to it because she thought it was general education. M.T. did not begin to take these classes until April 30, 2018.

For the 2018-2019 school year, the IEP provided for ICRP, general education, classes for social studies and science. Ibid. The IEP enumerated modifications including provision of class notes, modification of the number of choices on tests and quizzes, provision of a word bank for fill-in-blank questions, and breaking down larger tasks into smaller tasks. J-39. S.S. believed none of the modifications was provided, based upon M.T.'s reports to her. M.T. "couldn't provide me with notes he was being given ahead of time before something was being taught." T3 253:19-21. M.T.'s tutor told S.S. how teachers should modify class content and believed this was not being done. S.S. did not agree to the IEP's proposal concerning M.T.'s other classes. She explained that "we agreed with the resource room, thinking it was general ed. But we questioned why he was being kept in the duplicate classes."

A technology consultation was discussed during the facilitated IEP. Also discussed was M.T.'s recording of classes, including how it could be accomplished. While the District expressed concern about the privacy of other students, S.S. provided a court decision that held that there is no privacy interest in the public school and New Jersey law permits one person to make recordings.

On June 13, 2018, S.S. filed a request for a due process hearing. J-41. On August 2, 2018, S.S. and the District entered into a settlement agreement that provided for resource room classes for English and math, general education for U.S. History II and biology, and academic support. J-42. The settlement agreement also provided that the "District will promptly respond to requests by the parent regarding M.T.'s educational program." Ibid. The agreement also provided that the District would continue the previously agreed-upon tutoring and S.S. would be permitted to be "in eyesight of the tutoring." Ibid.

S.S. was asked to attend a meeting to discuss her request that M.T. be permitted to record classes. She met with Peters, Riddick and a CST member on September 13, 2018. J-45. The District personnel advised they intended to get a scribe to prepare notes for M.T. The notes would be uploaded so he could listen to them. S.S. did not agree to this.

During the meeting, they agreed that recording was appropriate and that they would discuss how to implement it. She sent an email to Peters, Riddick and Crisafulli in which she wrote, "We are all in agreement that recording of the **live lectures** would be of great benefit for [M.T.] The issue is how to best facilitate that. Over the summer Ms. Van Houten proposed having someone in the class writing down the notes and then putting them onto the computer for him to play back later. Well, that is duplicating the notes that he will already be getting in the PDF from his teachers and thereby defeating the purpose of **live capturing** of lectures." J-89 at 957 (emphasis in original). S.S. requested and received the District's policy concerning recording classes. It permitted recording when it was provided for in a student's educational plan.

M.T.'s history class was also discussed during the September meeting. It was originally planned that he would take U.S. History II in the ICRP class. However, it was later discovered that the class was unavailable. Optional courses were offered and S.S. determined he would take U.S. History II in a general education class with the assistance of a paraprofessional who would take notes and upload them so that M.T. could listen to them later.

On September 14, 2018, Peters sent S.S. a letter in which she summarized the meeting. She wrote that the District discussed during the meeting that "a paraprofessional would be placed in every class to take notes on Google Docs. These notes will be available to [M.T.] as they are typed in the class. M.T. will be able to view and review the class notes and listen to them repeatedly at his convenience." J-46. S.S. said a paraprofessional was not placed in all of M.T.'s classes. She did not recall that he received notes for any classes other than history. S.S. considered those notes to be inadequate. They were "just thoughts that she was putting down. And he said that her spelling was off many times. And it looks like just her writing down stuff that was on the board." T3 270:11-14. M.T. required notes that were "[s]tep-by-step written detailed instructions." T3 271:1

On September 24, 2018, S.S. wrote to Peters to advise that provisions of the IEP had not been provided to M.T. because he was not given step-by-step instructions for his classes or notes in advance of classes. J-89 at 979. She was aware of the omissions

because she asked M.T. and looked through his materials. S.S. was unaware of what Peters did in response to the communication. S.S. believed M.T. continued to not receive the instructions and notes. In April 2019, the history teacher started to give M.T. “modified content” and the science teacher eliminated two choices from multiple choice answer options. T3 272:14-19. The length of tests were not modified and notes were “still an issue.” T3 272:10-11. He was told to get the notes himself from LMS, a District website. This was a lot of extra work for a student with so many issues. Also, the website was not always useful as teachers did not always post or update information.

On September 28, 2018, S.S. sent an email to Peters in which she wrote that M.T. was “having a difficult time in U.S. History II and science.” J-89 at 983. Ibid. She wrote that two items in his IEP were not being followed: adjusting number of items student is expected to complete and allowing fifty percent extra time for task completion. She reiterated that he required information to be provided in advance, with detailed, step-by-step instructions.

S.S. completed a required form for accommodations for the PSAT. The accommodations were not provided when M.T. took the test because the request was submitted late.

On October 12, 2018, Sgarlato reevaluated M.T.’s auditory processing skills. Sgarlato concluded M.T. no longer had a CAPD. J-50 at 1390. S.S. believed the interactive metronome program helped improve M.T.’s processing time. He still had deficits with coding and decoding, which meant he had some difficulty with processing the English language and continued to interpret information literally. With time, he is able to decipher information and he began taking medication to assist with this. T4 10:13-20. S.S. observed that he responded to her and others more quickly and better followed directions.

On October 15, 2018, based on M.T.’s reports to her, S.S. advised Peters that M.T. was not being given detailed, step-by-step instructions. He continued to have difficulty with history and science, which involve a lot of detailed information. The teachers for those classes gave M.T. the same instructions they gave to another student. S.S.

included in her email examples of appropriate set-by-step instructions. J-89 at 996. On October 16, 2018, S.S. advised Peters that M.T.'s Grammarly app was not synching within Google Docs on M.T.'s Chromebook, which the school provided. J-89 at 1000. Grammarly was an IEP accommodation that was to help him with writing. Consequently, M.T. had to pull his work out of his Chromebook and use his home computer to access Grammarly. S.S. was not aware whether the problem had been corrected.

On October 16, 2018, S.S. informed Peters that "no one is to meet with our son without our presence and prior approval." J-89 at 1005. S.S. explained that, when M.T. was in ninth grade, Peters directed him, without his parents present, to take the PARRC test, even though he was supposed to take the test. M.T. is "respectful of adults" and complies with their instructions. T4 16:3. S.S. was also concerned about conversations with M.T. outside of her or her husband's presence because they involve pulling him out of class, which causes him concern and confusion.

On October 17, 2018, M.T.'s social studies teacher sent an email to S.S. in which he asked her to remind M.T. that he was to take a U.S. History test after school. In response, S.S. asked about the nature of the test, its subject matter, whether M.T. had a detailed study guide for it, and whether it was a shortened test. J-89 at 1006. She explained that M.T. had not received detailed study guides; the content was not being modified; he did not receive any material in advance; and the aide's notes were "not notes." T4 18:14. She knew this because she asked M.T. to show her what he had and "there wasn't anything there." T4 18:18. She did not recall if M.T. received a study guide in response to her October 17, 2018, email. M.T. did not receive any modified material until April 2019.

A facilitated IEP meeting was conducted on October 19, 2018. S.S., M.T. and M.T.'s father attended the meeting. S.S. submitted a letter dated October 19, 2018, that she wanted included in full in his IEP. She explained how M.T. learned and how they could best collaborate with the District, the same issued she previously relayed to the District. J-53. The facilitator, who arrived late, spoke with District representatives without them present. S.S., M.T. and M.T.'s father learned that M.T. had been administered the PARRC test, about which the parents were previously unaware. They understood that

he was not to take the test. Peters asked M.T. if he recalled when she told him he would take the test. S.S. replied that Peters should not speak to M.T. because he could be manipulated.

During the meeting, the CST proposed general education classes for all but M.T.'s math and English courses, for which he would be in pull-out resource classes. J-52. S.S. agreed "as long as they put in an appropriate support for him, someone that would be there to help him with notes, someone who would be there . . . acting as the special ed teacher in the classroom." T4 20:25 to 21:4. S.S. requested that M.T. be permitted to record his classes. J-52 at 596. The IEP provided that, in response to this request, the District proposed that a paraprofessional "be placed in each class (with the exception of gym and math) to take notes on a laptop in Google Docs which will be readily available to M.T. both auditorily and visually." J-52 at 596.

The District requested consent to conduct an additional hearing assessment of M.T. S.S. did not consent. She reported that another evaluation had been conducted and it determined he did not have a CAPD and she was in the process of getting additional evaluations. Also, she did not want evaluators who were affiliated with the District. She wanted the evaluators to be individuals who knew M.T. and would evaluate him independently.

Peters and Riddick previously discussed with S.S. the use of a classroom aide who would take notes. M.T. would be able to listen to the notes later. This occurred in September. Van Houten had recommended this over the summer and S.S. rejected it. She believed the computer voice, which would read the notes, was more difficult for M.T. to understand. She insisted that recordings of classes would provide him with the nuances inherent in actual voices. S.S. refused the offer.

The IEP noted that Heidi Wolfinger, M.Ed., CCC-A/SLP, C.E.D., an educational audiologist for the District, reviewed Sgarlato's auditory processing evaluation and made several recommendations. J-52 at 596. S.S. was unaware of Wolfinger's review and had not been provided a copy of her report. She was given a copy of the report at the IEP meeting.

S.S. did not sign the IEP consent form.¹² She did not consent to the IEP because they did not discuss all necessary subjects during the meeting. She wanted to meet again to ensure that everything was fully discussed. In October 2018, she filed a due process complaint because M.T. had not received the accommodations, modifications and support he required. J-55 at 608.

In January 2019, Dr. Tanishia Williams, of Children's Specialized Hospital prescribed medication for M.T. and ordered an audiological evaluation, which was conducted on January 16, 2019. Audiologist Lavene found "insufficient evidence of an auditory processing disorder" and recommended tape recording "particularly difficult lesson[s]." J-59 at 631. S.S. agreed that M.T. would benefit from tape recording. Van Houten had recommended an application that would work in conjunction with the recording; however, it was not implemented. S.S. provided the January 16, 2019, audiological evaluation to the CST but did not recall when this occurred.

S.S. enrolled M.T. in a summer geometry course at the Hun School so he could be eligible for a pre-engineering program. She did this because he did not get the support he needed from the District and his high school counselor tried to steer him toward classes he did not want to take. He wanted other classes that were of interest to him and necessary for him to study engineering. He completed the Hun geometry class and earned a B grade. The Hun School issued a Summer Academic Program Progress Report dated July 24, 2019. M.T. achieved a grade of eight-six out of 100 in geometry. He was always prepared for class and worked hard; he completed ninety-eight percent of his homework; his average test grade was seventy-six percent; and his work was described as "excellent." J-69 at 742. His final grade was 84.09 percent. J-70 at 744. The District ultimately awarded M.T. credit for the class and he was able to take Algebra II. S.S. believed that, absent her intervention, M.T. would have been unable to pursue his desired program.

¹² On December 4, 2018, S.S. wrote on the consent form, "No I do not agree with this IEP. I only received the IEP last week, November 23, 2018." J-52 at 599.

S.S. obtained a February 13, 2019, speech language evaluation of M.T. from Children's Specialized Hospital. J-60. S.S. understood that the evaluation found "his pragmatic language, his learning and knowing of the nuances of the English language wasn't strong and that his brain runs very quickly." When given step by step instructions, "he got it." T4 48:11-17. The evaluator recommended speech therapy once per week, sixty minutes per session, for three months "to improve pragmatic language skills and provide parent training on strategies that should be implemented in the home and community for generalization of skills." J-60 at 649. M.T. received private speech therapy in response to this report. It sought to help M.T. understand the social aspects of language and to learn how to ask for clarifications when he did not understand.

On April 18, 2019, Dr. Williams supplied an updated report. Williams wrote that M.T. has

Social deficits due to his diagnosis of high-functioning [autism spectrum disorder]. Even individuals with higher functioning ASD still struggle with social skills and social communication. He requires social supports to help him not only to understand socially appropriate interactions at an age-appropriate level, but also social communication skills as well. These social concerns are a major part of the benefit of continuing [M.T.'s] placement in an inclusion setting with general education with appropriate supports as detailed throughout this letter[.]

[J-61 at 661.]

S.S. explained that M.T. needed to be able to observe how children without his disability functioned and reacted to each other and to other circumstances. M.T. was unable to do this in the LLD and resource classrooms, where he reported he was not challenged.

Williams concluded that M.T. needed step-by-step instructions in all of his classes. She wrote, "This allows him to bypass the auditory sensory system with an alternative sense to base his directions on. Individuals with autism are highly visual in their processing, so visual supports including directions, pictures, and explanatory figures are key learning tools for high-functioning students like [M.T.]" J-61 at 662. S.S. agreed that

M.T. required step-by-step directions. However, she reviewed a set of instructions M.T. had been given by his biology teacher and found them to be insufficient. “It was instructions but they weren’t step by step for his particular learning style, how he works.” T4 57:17-19. She added that appropriate instructions take “out a lot of the guess work, and it takes out a lot of him missing important information, that if they just give him the step by step, he doesn’t have to decode anything and figure out what it was that’s being asked of him.” T4 58:4-8. S.S. further critiqued the appropriateness of the resource classrooms, as she believed they utilized reproduced documents rather than books; the students were left to self-regulate their work; they were “spoken down to[;]” and “there was nothing concrete to say that he was being prepared for college.” T4 55:20-22.

Williams also recommended M.T. record his classes:

[M.T.] requires a tape recorder, as he requires the ability to record lectures for future review as written notes could be erroneous due to his auditory processing deficits, which remained detectable during his neurodevelopmental evaluation, and as stated above, his auditory integration and decoding were still deficient in his auditory processing evaluation. He also requires the tape recorder to be used in class and with his homework as he struggles with writing in a timely manner as regards to his diagnosis. Without a tape recorder, he will miss some of what would be written if he did not have one.

[J-61 at 663.]

S.S. agreed that tape recording was needed because the class notes that were prepared by the classroom aide were not detailed. The aide only copied the information that was on the blackboard and told M.T. he needed to study that information. Consequently, M.T. recorded his own notes. Given his deficits, he missed what the teacher said and was unable to complete his homework and other assignments. Recordings of the classes in which lectures were given would fill the gaps.

A draft IEP, dated April 25, 2019, recommended resource room classes for English, math, science and social studies for the 2019-2020 school year. J-63 at 664. S.S. was told that M.T.’s teachers thought he should be in the resource room, despite his

good grades. She was told she could not ask the teachers questions about this. She felt as if she, her husband and M.T. were not members of the IEP team. She felt as if there was a backlash whenever they advocated on behalf of M.T. The meeting ended early when Peters screamed that S.S. could not speak. S.S. believed the District did not want to hear from them and described their working relationship with the District as “virtually non-existent because nothing our son has done academically speaks to them, no report that we have provided them with means anything to them.” T4 65:6-9. M.T. was “never” given the tools and supports he needed to be successful. He would have received better grades in general education biology and history with appropriate supports. Everything he did receive was obtained in response to S.S. and her husband’s efforts, including filing due process complaints. T4:66:2-6.

S.S. filed a second due process complaint after the April 25, 2019, IEP meeting. She also filed a complaint against Peters, asserting she was uncivil. S.S. received the April 25, 2019, IEP by way of an Open Public Records Act request.

Dr. Kay conducted an IEE on August 7, 2019. S.S. believed Kay observed that M.T. had improved and would benefit from a general education curriculum. J-86. S.S. did not entirely agree with Kay’s following finding:

Although M.T. continues to perform significantly below expectation given his ability in math reasoning and math calculation skills and struggles with oral discourse comprehension and auditory overload in sequential listening situations, he is otherwise now performing academically commensurate with his ability and in the Average range in the areas of basic reading skills, reading fluency, reading comprehension, spelling and written expression. Therefore, special education programs and services could be curtailed for him with accommodations provided primarily in the general education classes.

[J-86 at 1734.]

While S.S. agreed with Kay’s statement that M.T. has improved, she disagreed with other aspects of the report. S.S. explained:

With all the testing that our son has been given, and one of the accommodations that he's been afforded is extra time, he requires that extended time. He has definitely improved. I believe he's above average, but he's given tests to where he has to perform with a certain time frame. So his anxiety may come in and he's trying to perform, and if he's doing average, I think given the extended time period, he would be doing even better.

[T4 70:23 – 71:6.]

S.S. believed that M.T. should be in general education classes with supports. She explained:

I've always agreed gen ed as far as if he's given the appropriate supports, but I also feel he does well in math if he's given the supports that he needs, which is the extended time. Case and point, he did well in the geometry class. He was given the double time and the other support. I was his support person over the summer. So I gave [him] detailed written examples of every single problem that he encountered over the summer, and they allowed him to use his study packet when he went in and he did well[.]”

[T4 71:18 – 72:3.]

S.S. also agreed with Kay that M.T.'s large assignments should be broken into several small tasks; that he should be given the teacher's prepared notes and study guides prior to lecture-oriented classes; that he should use a “Live Scribe Smart Pen in class to facilitate note taking[.]” J-86 at 1737. S.S. explained that, while she not familiar with the Live Scribe Smart Pen, it would enable M.T. to record lectures while he takes notes and to highlight information he does not understand. Given his “dysgraphia, his hand will get tired taking all the notes and then he's concentrating on the notes, not concentrating on the lecture.” T4 78:17-19. S.S. believed this was necessary for M.T. because he will not always be able to rely upon another person taking notes for him.

S.S. disagreed with Merchant's conclusion that an “[a]uditory recording without the visual support of cues and teacher available to clarify intended meaning may lead to more confusion rather than clarification.” J-99. M.T. has independently conducted Internet

research on subjects for which he needed more information and utilizes other tools. He demonstrated to S.S. that he is capable of clarifying things he does not understand and, if not, he can ask his tutor or S.S.

On cross-examination, S.S. explained that she paid a tutor to help M.T. with his geometry class and SAT preparation. The tutoring sessions were three times per week, one hour per session. He continued to work with the tutor during the 2019-2020 school year. The tutor worked with M.T. and two of his siblings on Sundays for two to three hours.

S.S. clarified on cross-examination that she was able to determine that the District did not provide all required modifications because she reviewed the work that M.T. brought home. She did not observe his classrooms and, thus, could not assess the provision of modifications that occurred only in the classroom such as preferential seating and queuing to ensure M.T. was paying attention. She could not gauge this based on the work that M.T. brought home.

S.S. acknowledged that the sample step-by-step instructions she provided to the District were not appropriate for high school students. She found the example online and knew that it was for younger children. She did not intend to request that the District use picture-based instructions for M.T.

S.S. acknowledged that Nipurna Shah, M.T.'s guidance counselor, advised S.S. about the pre-engineering program that M.T. wanted to attend. Shah advised that it was a twelfth grade Career Prep program and, thus, M.T. could not participate as he was then in the tenth grade. She advised S.S. that he could apply for the shared time high school program, not Career Prep, the following school year. Shah also advised that the physics class, about which S.S. inquired, would not enable M.T. to enroll in the Career Prep program. J-89 at 1008. S.S. asserted that Shah's advice that M.T. could apply for the architectural/engineering design program was inappropriate because M.T. did not want that program. S.S. acknowledged that, as of the time of the hearing, M.T. had applied for and was accepted for the twelfth grade Career Prep program that he wanted.

S.S. was asked, on cross-examination, if she knew the difference between a self-contained classroom and a resource classroom. When M.T. attended school in Trenton, she understood the pullout resource room was the same as general education but moved at a slower pace than general education. She believed that, if M.T. were in a general education classroom, the curriculum could remain the same as for all of the other students in his class but the manner in which was to be presented to M.T. could be modified. By way of example, she believed it would be appropriate to modify the words used such that the new words were at M.T.'s level.

On cross-examination, S.S. also acknowledged she had been advocating for recording of classes prior to the August 2, 2018, settlement agreement that resolved all claims through the date of the agreement.

With respect to Merchant's opinion concerning the difficulties associated with recording classes, S.S. believed M.T. could clarify anything that was unclear or missing from the notes by asking for clarification about the subjects discussed during any recording. While some of the multi-sensory aspects of the class, such as hand gesturing, would not be present on a recording, the "intonation or the inflection of the voice" would be on the recording. T4 163:11. When asked how the recording would be useful if a teacher were to point to written material on a blackboard, S.S. replied, "that means she's not teaching properly, because if you want me to understand something, you're going to insure that I'm hearing it and you're not just putting it on the board and then discussing it. It has to be something that's out there that I can concretely go back to." T4 163:23 to 164:3.

S.S. was asked about the amount of time M.T. would spend if he were to listen to recordings of his classes. S.S. explained that he would listen only to the portions of the recordings he did not understand. She was next asked how he would know which were the parts he did not adequately understand if he did not understand them during class. S.S. replied that "that's where the step-by-step written detailed instructions come in." T4 166:15-16.

S.S. reiterated that she believed M.T. was not provided the accommodations in his IEP because he showed her the notes he received from his aide. The aide merely “copies down what the teacher wrote down. They were not detailed notes.” T4 171:25 to 172:1. The notes were also not updated on the teacher’s website, LMS. She also believed an aide was not placed in every classroom.

S.S. believed that she and her husband were not treated as true members of M.T.’s IEP team. Their insights and contributions, which were based on their specialized knowledge of her son, were not properly considered. The CST members did not have this degree of knowledge about or understanding of M.T.

S.S. wanted M.T. to be placed in PLUS English and Math classes. She believed M.T. was inappropriately denied this opportunity, which could have been offered to special education students.

Michelle Humm, testified as an expert in neuropsychology and autism on behalf of petitioner. She has been a neuropsychologist for ten years and has worked as a clinical neuropsychologist for NeurAbilities Healthcare for five years. She had conducted hundreds of neuropsychological evaluations, which frequently included recommendations concerning educational placement. She conducts evaluations for approximately fifty autistic individuals per year. Individuals with autism have deficits in socialization and social communication as well as restrictive and repetitive behaviors and interests. When conducting evaluations, she relies upon prior records, the parents’ history, results from the tests she administers, and her observations during the sessions.

When she conducted the October 2016, evaluation of M.T., Humm did not have an understanding of Princeton High School’s special education programs. She was familiar with the programs as described in the school’s 2019-2020 Program of Studies. J-72. In-class resource programs placed students with IEPs into classrooms with students who did not have IEPs. Accommodations were provided to the students with IEPs and the curriculum was modified for them. The pullout resource replacement program is a smaller class for only students with IEPs. Accommodations are provided, the curriculum is modified and the class proceeds at a slower pace. LLD appeared to be

a program for students who required greater support than that which was available in the other programs.

Humm conducted four evaluations of M.T. She evaluated M.T. in 2016 and 2017 and saw him most recently in September and October 2019. The 2016 evaluation was a comprehensive neuropsychological evaluation, which focused on his cognition. In 2017, she conducted a psychoeducational evaluation that focused on academics. She was aware that M.T. aspired to work in the field of mechanical engineering.

Humm reviewed Sgarlato's June 6, 2016, auditory processing assessment (J-1). She was not "intimately familiar" with Sgarlato's finding that M.T. had an auditory processing disorder of a severe degree because neuropsychologists and psychologists do not make this type of diagnosis. T4 184:22. She understood that a person with this condition struggled with processing auditory information. People with autism or ADHD can also exhibit these problems. She noted that because individuals with autism, ADHD and dyslexia have overlapping features, it can be difficult to distinguish between autism or ADHD and an auditory processing disorder. Different professionals often ascribe a different disorder to the same set of symptoms.

As part of Humm's first evaluation of M.T., conducted October 13, 2016, she administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), which she described as the "gold standard intelligence test." T4 186:18. His full I.Q. score was in the fifth percentile, which was the very low range. His I.Q. score was not necessarily determinative, as "there were significant discrepancies between different domains of cognitive functioning. So . . . it's important to examine each of the domains separately." T4 187:9-12. Even though I.Q. is not the only thing Humm examined, and there were discrepancies, "we worry about an individual's ability to keep up with general education students if you have that overall score[.]" T4 188:7-10.

With respect to working memory, M.T. performed in the average range. He struggled with vocabulary, verbal reasoning, visual special skills and information processing speed, all of which were in the very low range. With respect to executive functioning, it was difficult for him to "generate information at least in a timely manner with

regard to coming up with words that started with a particular letter, phonemic verbal fluency or categorical verbal fluency, coming up with numbers of a particular semantic category quickly.” T4 189:6-11. Humm also found that, “even with repetition [he] struggles with learning information from an auditory perspective[.]” T4 190:1-3. A list of fifteen items had been repeated five times, after which he was able to “get an average number of items[.]” T4 190:5-6. Although he benefitted from repetition, “overall, he is not learning as much as others his age.” T4 190:7-8.

Humm observed that M.T. was polite, answered direct questions, was “incredibly” cooperative and made an excellent effort. T4 201:4. He did not “show a wide range of facial expressions, and it was kind of hard for him to sustain conversations between tasks.” T4 200:18-20. She observed no oppositional behavior or defiance.

In October 2016, Humm recommended M.T. “receive instruction in a self-contained classroom so that his instruction can be targeted and individualized in all subjects. A focus on applied academics and life skills is recommended.” J-3 at 48. She explained that, although she did not know about the school’s special education program offerings, she contemplated a program akin to the school’s LLD program:

I did picture . . . smaller group instruction, slower pace of instruction, definitely with a special education teacher with modifications to the curriculum and potentially at the time he . . . met criteria for autism level 2, which was a higher level of severity, so at that time with that and language impairments and attention problems and anxiety, I guess that’s closer to an LLD classroom than a resource classroom.

[T4 198:2-10.]

Humm also recommended accommodations if M.T. were in a mainstream classroom setting. J-3 at 48. They included providing him outlines of class material in advance of class. This would facilitate repetition of the information as M.T. would have had the opportunity to review the information prior to class. She also recommended M.T. take brief notes throughout lecture based classes to help him be engaged in class. However, he could not be expected to capture all of the class information in his notes

because he had “limitations in writing speed, processing speed, attention working memory, executive functioning[.]” T4 199:23-25. She recommended that it “may also be helpful” if M.T. were permitted to record his lectures “as needed.” J-3 at 49. This would provide another way for the information to be repeated.

She noted, “he’s a very persistent young man and he works very hard and he wants to do well[.]” T4 246:16-18. She recognized that recording would not necessarily be beneficial for those classes that do not use a lecture format, given that multiple conversations could take place at the same time. However, it could be helpful if M.T. were able to record when the teacher approached him or a group he was in. Also, a note taker could capture information that could not be recorded.

On September 19, 2017, Humm reevaluated M.T. and prepared an addendum to her neuropsychological evaluation. J-20. She administered the Kaufman Test of Educational Achievement, which reviews all aspects of academic achievement. While there was some variability in M.T.’s performance, his “overall academic skills battery was in the low range at the fourth percentile.” T4 227:14-16. He was in the third percentile for reading, thirteenth percentile for written language, and fourth percentile for math. Id. at 118-119. She concluded he would “need intensive, individualized instruction to meet his academic needs.” J-20 at 120.

In the report, Humm noted that S.S. wanted M.T. to be placed in the general education classes and receive “supplemental multi-sensory instruction in reading as well as other accommodations (e.g., for slow processing speed).” J-20 at 121. Humm wrote this could be appropriate “only . . . if it is possible to provide individualized instruction (e.g., in an inclusion classroom with access to a special education teacher and work modified to his skill level as well as a slower pace of instruction). If such programming is not possible or does not exist, [M.T.] would benefit from being taught in a smaller resource classroom so that he can receive individualized instruction at his skill level with a much slower pace of instruction.” Ibid. Humm explained that, while she did not have “very intimate knowledge of the different placements” at the school, she thought a “resource classroom potentially would be a good setting for him[.]” T4 229:8-12. She noted, however, that S.S. “really wanted him to be in a classroom that had general education

students in it. So an in-class resource classroom would be the most appropriate given his needs to be around typically developing peers for social reasons, in addition to needing some kind of special education modifications and accommodations.” T4 229:12-18. Since M.T. had autism, it would be “optimal” if he could be in “a less restrictive environment with peers where he can kind of learn from their social presentation[.]” T4 229:21-24.

Humm noted that M.T. still required “repetition in order to encode [information] efficiently.” T4 231:5. She recommended modifications of the classwork, a slower pace of instruction, repetition, single step instructions repeated multiple times, multi-sensory instructional techniques, explicit instructions and “assistance making connections between concrete knowledge and more abstract concepts, as well as making connections between new and previously learned information” J-20 at 121. She also recommended accommodations “to address his inattention and disorganization.” Ibid. This included shortened instructions with repetition, brief explanations with time for information processing, multi-sensory instructions, taking tests in quiet settings free from distractions, working for shorter periods of time, homework reduction or elimination, and not requiring him to complete unfinished classwork at home. Id. at 121-122.

Humm could not opine whether M.T. progressed between the dates of her two evaluations because she did not perform the same tests during the evaluations. She summarized her findings by noting that M.T. continued “to have difficulty with aspects of language like phonological processing. So he needed a specific curriculum, which was multi-sensory Orton Gillingham type of approaches or Wilson reading. . . . [H]e continued to have significant language difficulties, both with comprehension and expression. So he needed ongoing speech and language support, and then the social recommendations were ongoing. So [he needed] social skills instruction in the school setting as well as outside.” T4 232:9-19. An inclusive class would be helpful with respect to development of social skills.

Humm believed that, as of the day of the hearing, it would appropriate for M.T. to be placed in general education classes, with modifications and supports, “in most subjects.” T4 248:11. She explained that, because math continues to be a problem for

M.T., he should “have a slower modified curriculum with a slower pace of instruction and more repetition[.]” T4 248:15-19. A pull-out resource classroom would thus be appropriate for his math class. In “other subjects he has made a tremendous amount of progress over time and with intervention.” T4 248:19-21. In-class resource programs – general education -- would be appropriate for his science, social studies, English, gym, art and elective classes, with appropriate accommodations and supports. They would include a slower pace of instruction, repetition of instruction, clarification of directions for tasks, reminders to stay on task if his mind wanders, help with organization, planning projects and ensuring his projects are broken down into multiple steps. Further, if he were to struggle with generalizing from one topic to another, he should be assisted with understanding how to apply previously learned skills to new information, problems and tasks.

Humm also noted that M.T. would need “support for social difficulties he might encounter.” T4 252 5-6. Finally, she believed, at the time of the hearing, that audio recordings of classes would be helpful because it is “common at the college level” and it would be worthwhile to “learn how to do at this point, to take notes and fill in your notes from something that you heard in a lecture based class and sort of get an additional repetition of the information that way. If it’s an accommodation that he might use at the college level and beyond, then it is a life skill.” T4 252:10-17.

During Humm’s evaluation, M.T. was asked to repeat a list of fifteen items. He performed at the average range after five repetitions of the list. Humm acknowledged that this was not the type of information he would hear in class. Rather, he would hear information and concepts of a higher level. Humm could not opine whether M.T. would need to listen to recordings of his lectures five times in order to understand the concepts; it would depend upon his previous knowledge. She could not reference research that found that a student will comprehend a lecture after having listened to it several times. She also acknowledged that her test evaluated rote recall, not comprehension, which are different things. However, the recording could be useful in helping M.T. to fill gaps when he missed information in class.

On cross-examination, Humm acknowledged that she has never worked for a public school district and does not typically observe public school districts. She reiterated that the pace of M.T.'s classes was an important consideration and that M.T. would require a slower pace of instruction in general education classes. She acknowledged, however, that this was not available in the general education setting. Rather, it was available in the pull-out replacement resource program. Humm also acknowledged that, although in 2017 she believed M.T. needed "more modified instruction" than general education, she had been "trying to work with the family as a whole and trying to help them meet goals for their son." T4 273:21 to 274:6

Humm believed that it would be helpful if M.T. were provided notes prior to class and if a scribe took adequate notes for him. The use of Google Docs, to record the notes, would also be helpful, as would listening to the notes generated by the program. She acknowledged, however, that, at the time of the hearing, she did not know what M.T. required in the way of accommodations.

FACTUAL FINDINGS

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

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In determining credibility, I am aware that District employees would want to support the program they developed for M.T. and would believe that the District’s program would provide him with FAPE. I am also aware that petitioner believes that what she seeks is in the best interest of M.T. In addition to considering each witness’ interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their demeanor, willingness, or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony.

S.S. testified in a pleasant manner and her demeanor was calm and measured. It is clear, and no one contests, that she and M.T.’s father were motivated to maximize M.T.’s skills, advance his education, and support his goal of becoming an engineer. This was evident when she emotionally testified about his capacity and goals and their desire to ensure his success is not hampered in any way. S.S. also testified at length about her understanding of M.T.’s diagnoses and her views concerning the methods, accommodations and modifications that she believed were appropriate. However, much of S.S.’s support for her opinions and critiques was based on her personal understanding of how the school should have functioned. While S.S. has clearly taken steps to learn about the relevant issues, such as by speaking with individuals familiar with education and conducting independent research, she does not have relevant training or professional experience.¹³ While it cannot be doubted that she has dedicated herself to becoming a

¹³ I note that petitioner testified that, on more than one occasion, she believed “resource room” referred to “general education” classes. She claimed to not understand the distinction, notwithstanding that she was represented by an attorney during at least one of the meetings that generated a recommendation for resource room placement.

strong advocate for M.T., her testimony concerning his conditions and the appropriateness of his education cannot be accepted as expert opinion. I accept her testimony as that of a mother who has closely observed her child and who can report those observations with accuracy.

However, S.S.'s testimony concerning several important facts or assertions was unsupported by the evidence. Importantly, she asserted, without support, that the District did not properly provide accommodations or modifications to M.T. She testified that she reached this conclusion after she reviewed M.T.'s class materials and spoke with him about his work. She opined that what she observed was insufficient; however, she offered no details. When asked if M.T. received class notes for classes other than history, S.S. testified, "I do not recall, but I want to say, no. History was the only one." T3 269:16-17. Nothing more was offered in this regard. The evidence in the record, however, documents that M.T.'s teachers employed accommodations and modification in each class throughout the school year. Because petitioner provided a conclusory statement that assumed she was qualified to evaluate class materials and determine whether they met M.T.'s needed, I cannot credit these claims.

Further, while S.S. claimed that she provided Humm's September 19, 2017, addendum report to the District, she could not testify about this with specificity. After the hearing, petitioner produced a September 13, 2018, email to that she asserted served as documentation that she sent the report to the District. P-2. The email was dated September 13, 2018, approximately one year after the report was prepared. Ibid. This contradicts petitioner's testimony that she gave the report to the District in 2017, explaining, "whenever she [Humm] did it, we then turned and emailed it to her." Also, petitioner claimed the District had agreed to permit M.T. to record his classes but provided no evidence of this. Rather, all of the evidence in the record documented that the District consistently did not permit recording.¹⁴

¹⁴ S.S. made other assertions that were contradicted by the evidence in the record. By way of example, she claimed the District would not support or assist M.T. with respect to his application to attend Mercer County Technical Schools. However, his counselor reviewed his application; determined M.T. was ineligible for the program he sought; and advised S.S. accordingly. The counselor referred S.S. and M.T. to the programs for which he was then eligible. He was able to participate in the original program when he later became eligible. Also, petitioner claimed that the District's actions were motivated by racial animus. No evidence has been presented, other than petitioner's assertion, concerning the District's alleged motive. Although it is clear that some members of the District staff believed petitioner was "uncivil" toward them, and petitioner believed she was treated in the same manner, the evidence in this record does not permit

I accept as credible petitioner's testimony concerning her son's abilities and needs. S.S. is an attentive and loving mother who is intimately familiar with her child. To the extent petitioner attempted to offer expert testimony, however, I cannot find this to be reliable.

Peters testified in a clear and professional manner. She demonstrated her understanding of the relevant processes and the needs of students with IEPs. She also demonstrated a well-developed understanding of M.T.'s needs. Through her testimony, she established that she is conscientious and was motivated by the goal of best addressing M.T.'s needs. Rather than shirk her duties, she sought to have the District conduct additional evaluations of M.T., which S.S. rejected. Peters endeavored to respond to M.T.'s needs without the benefit of having these evaluations or the evaluations that S.S. privately procured but did not share with the District. Although Peters did not recall the dates of some specific conversations, and offered general statements concerning her practices rather than specific details, she thoroughly explained her reasoning and that of the team that worked with her in an effort to best respond to M.T.'s needs. I find her testimony to be credible. To the extent details were required but not offered, this has been considered when determining the weight to be given to particular assertions and facts.

Merchant testified in a clear and professional manner. She explained her analysis thoroughly and provided a useful explanation of relevant concepts. She also clarified the subject matter that is within and without her area of expertise. There is no basis for questioning her motivation or capacity to render her opinions. I find her testimony to be credible.

Humm also testified in a clear and professional manner. She explained her analysis thoroughly and clarified when her opinion was outside the scope of her expertise

a finding of discrimination. I note that petitioner directed school staff to not speak with M.T. outside of her or M.T.'s father's presence or without their prior consent. Presumably, this hampered the capacity of school personnel to properly do their jobs and contributed to any discord between the parties.

or knowledge. She clarified that she is not an audiologist and cannot diagnose auditory processing disorders and that she was not thoroughly familiar with the placement categories offered by the District high school for special education students. She also acknowledged that, although she recommended placements for M.T. going forward, she did not know what M.T. currently required in the way of accommodations. I find Humm's testimony to be credible, bearing in mind the caveats she offered concerning her capacity to so opine.

Before making additional factual findings, petitioner's expert's testimony and the reports authored by other professionals must be addressed. None of the authors of the reports offered by petitioner, other than Humm, testified. In the absence of direct testimony by the authors of the reports, the reports are hearsay. While I may consider these reports, I cannot exclusively rely upon them to determine the correctness of M.T.'s placements. However, Peters referenced Kay's 2019 report and testified that it supported the District's determinations concerning M.T.'s educational program. Kay's 2019 report is, thus, admissible pursuant to the residuum rule, as it is hearsay that is corroborated by admissible credible evidence.¹⁵

During the hearing, Humm testified concerning her then-current opinion of M.T.'s needs, without referencing her 2019 report.¹⁶ Petitioner argues in her post-hearing brief that Dr. Kay's 2019 report served as a foundation for Humm's testimony concerning her then-current opinion concerning M.T. However, Humm did not testify that she relied upon Kay's 2019 report in reaching her conclusions nor did she offer testimony that would permit this correlation. Humm's testimony concerning her then-current expert opinion about M.T. is not supported by a factual foundation.¹⁷

¹⁵ Hearsay evidence is admissible in the trial of contested cases, and shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). However, while hearsay evidence is admissible, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1971).

¹⁶ Petitioner was not permitted to offer the 2019 report into evidence because she produced it after the close of discovery and the first day of hearing.

¹⁷ Expert testimony shall be supported by a factual foundation. Vuocolo v. Diamond Shamrock Chemicals Co., 240 N.J. Super. 289, 300 (App. Div. 1990); Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). The "net opinion rules requires an expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion." State v. One Marlin Rifle, 319 N.J. Super. 359 (App. Div. 1999)(citation omitted). See also N.J.A.C. 1:1-15.9(b).

Having considered the testimony and documentary evidence and having had an opportunity to observe the witnesses and to assess their credibility, I **FIND** the following as **FACT**:

The District initially placed M.T. in LLD classes because he required a substantial amount of support and because he had been homeschooled and not exposed to a public school setting the year before he entered the District high school. M.T.'s deficits required the use of modalities including the provision of information verbally and visually; repetition of information; and use of step-by-step instructions.

The District continually worked with S.S. and M.T. to reevaluate and address his needs and capacities. Approximately six months after M.T.'s first IEP, the District proposed he attend resource and LLD classes and general education elective and physical education classes. Two months later, it proposed that he attend general education in-class resource programs for science and social studies and resource room classes for English and math. It proposed this in response to S.S.'s request and because M.T. had made progress in his other classes.

Petitioner filed a due process complaint challenging the proposed IEP. In August 2018, the parties agreed to the following placement: resource classes for English and math and in-class support (general education) for biology and U.S. history. Accommodations and modifications that were typically offered in LLD and resource room classes were incorporated into the general education classes for M.T. The District also agreed to provide M.T. with academic support and tutoring during the summer, to help him be prepared for the coming school year.

The next IEP, originally dated October 19, 2018, placed M.T. in resource classes for English and math, in-class support class for science and general education class for history.¹⁸ The District assigned a paraprofessional to take notes for M.T. using a computer program that permitted M.T. to follow along and make edits or additions in real

¹⁸ In addition to other programs including study skills and speech and language therapy.

time. The program would read the notes back to M.T. at any time, to permit him to listen to the notes and review specific elements of the notes while he read the material. This provided the multi-sensory learning methodology that M.T. required. This was done in M.T.'s science, history, English, Latin, health and elective classes. The paraprofessional also helped M.T. with organizing his notes and agenda.

During the 2018-2019 school year, M.T. earned final grades of A or A- in his resource room classes, English and math. Each class employed modifications and accommodations and were smaller in size than the general education classes. His resource room teachers reported that he required the accommodations and modifications and they enumerated multiple skill areas in which he needed to improve, including but not limited to higher-level thinking and connecting information to new concepts. The math teacher recommended continued placement in the resource room

M.T. earned B and C grades in biology and history, his in-class support and general education classes, during the 2018-2019 school year. His final grades were C+ and C, respectively. He was able to earn these grades due to the supports and modifications provided to him. His teachers, however, noted multiple areas of weakness in which he needed to improve as well as areas in which accommodations and modifications had not yielded progress. M.T. needed to improve with respect to learning vocabulary meaning from context, reading comprehension, analytical skills, primary source analysis, processing and in-class participation. Neither teacher indicated that M.T. should not continue with general education classes with accommodations and modifications.¹⁹

Progress reports for the 2018-2019 school year showed that M.T. progressed in many areas. In reading, he progressed satisfactorily and was expected to achieve objectives/benchmarks or progressed gradually but could still achieve the objective/benchmark. He also progressed satisfactorily in writing and with respect to

¹⁹ Neither general education teacher recommended in their PLAAFP statements that M.T. should be moved to resource room classrooms for these courses. Although Peters testified that they reported this to her, these statements are hearsay. The statements are not bolstered by the evidence in the record, which indicates that M.T. was able to benefit from accommodations and modifications in the general education setting, albeit not with equal success across all areas.

many objectives/benchmarks of speaking/listening. He progressed satisfactorily and gradually in most areas of math, having achieved three math objectives/benchmarks. In science, he progressed gradually or inconsistently in all but three objectives/benchmarks. He progressed satisfactorily in the remaining three areas. There was a chance he might not achieve the objective/benchmark in some areas.²⁰

A comparison of Kay's August 7, 2019, IEE and Peters' 2017 IEE, showed that M.T. had improved. He improved with respect to rote learning and higher level thinking skills and his performance was in the average range for basic reading skills, reading fluency, reading comprehension, spelling and written expression. Notwithstanding this progress, he still had auditory language deficits and performed below the level of his peers in some areas, particularly with respect to math, understanding higher-level concepts when reading, auditory memory and overload. He did not extrapolate information or draw inferences easily. He required multiple accommodations and supports and, in at least some subjects, he required classes that moved at a slower pace.

The experts' opinions varied with respect to the appropriate placements for M.T.; however, there was largely agreement concerning the accommodations and modifications that M.T. needed. He benefitted from the use of Google Docs, with the assistance of paraprofessional, and from listening to the notes generated by the program. There is no evidence that this or other accommodations or modifications disrupted the general education class or improperly diverted the teachers' attention away from the rest of the class. With the aid of the supports, M.T. achieved passing grades in the general education classes and, further, was able to be with his typically-developing peers, which provided social and learning opportunities. Although M.T. achieved excellent grades in his resource classes, he continued to lag with respect to multiple objectives and his teachers recommended continued placement in resource classes for those subjects.

The only genuine dispute concerning the provision of accommodations or modifications is the propriety of the District's decision to not permit M.T. to record his

²⁰ M.T. was not eligible for English "PLUS" or math "PLUS" classes because they were available to only those students who were in general education English and math classes.

classes. Here, none of the experts who testified stated that M.T. absolutely required this tool.

At the time of Merchant's evaluation, M.T.'s auditory system was age appropriate and intact. His deficits fell within the category of higher order disfunction, as his intellectual functioning ability was at a low-range level. This impacted his capacity to manage information. The consistency between his cognitive functions and his academic and educational functions indicated that he had a learning disability separate from an auditory processing disorder. He thus required a multi-sensory educational program that relayed information visually and auditorily. The District provided this by way of a paraprofessional's use of Google Docs and other accommodations and modifications. Recording of classes would thus not benefit M.T., regardless of whether he had an auditory processing disorder, because merely listening to recordings would not enable him to take in and understand the information on the recording.

Humm, petitioner's expert, did not testify that recording was essential. She acknowledged that, if M.T. were to listen to recordings, it would be time consuming and potentially counterproductive. Further, Humm's opinion was of limited utility, as she evaluated M.T. for only rote recall, not comprehension. She acknowledged that she could thus not opine whether M.T. would need to listen to recorded lectures numerous times before he could understand the concepts. She agreed, however, that he would benefit from the use of Google Docs and listening to the notes generated by the program.

Dr. Williams, a neurodevelopmental pediatrician, opined recording was necessary due to M.T.'s auditory processing deficits. The deficits in her report render it unreliable: she did not conduct an audiological evaluation and did not indicate which, if any, assessments she conducted. She also did not indicate in her report that she met with M.T. Williams did not testify and, thus, these deficiencies remain unresolved. Moreover, she is not an audiologist and, thus, is not the proper expert to make this recommendation. Dr. Kay recommended use of a "live scribe" pen that could be used to record classes. She, too, did not testify and, thus, she could not explain how this tool could be properly used in classrooms that did not employ a lecture format or how M.T. could learn from listening to the recordings, given his higher learning deficits. While both Williams' and

Kay's reports were considered, their findings and recommendations are afforded less weight than that of the credible testimony of the witnesses.

Accordingly, M.T. would not necessarily benefit from recording his classes. The use of recordings could very likely have proved counterproductive.

Although opinions differed concerning whether M.T. had a CAPD, only an audiologist could make this diagnosis. As late as January 2019, audiologist Lavene found M.T. did not have a CAPD. Without this finding, there is not a basis for the audiologist to make recommendations concerning M.T.'s educational needs and program and the IEP team must then determine the appropriate educational programs.

LEGAL ANALYSIS AND CONCLUSIONS

The issue presented is whether the Board provided M.T. with FAPE in the least restrictive environment for the school years following the August 2, 2018, settlement agreement. Petitioner contends the District failed to provide FAPE in the least restrictive environment, denied M.T. the curriculum he needed to pursue his educational goals, and prohibited him from recording his classes, which petitioner considered an essential accommodation. She further contends that the proposed IEPs also failed to offer a FAPE because they offered inappropriate class placements and were otherwise flawed.

The District contends that much of petitioner's argument concerns matters that were the subject of a settlement agreement. With respect to the years at issue, it contends that the programs developed for M.T. were designed to allow him to obtain meaningful educational benefits and implemented all applicable recommendations by the independent experts. Consequently, M.T. progressed while in LLD and resource room classes. He had lesser success in his general education classes, even with in-class supports. The District contends that, notwithstanding his success in general education classes, he "would make even more progress if appropriately placed in the resource setting, where the modifications and accommodations he relied upon daily would be engrained in his setting." Resp. Brief at 37. The District further contends that it properly

denied M.T.'s request to record his classes because it would not have aided him and he, in fact, progressed without the assistance of audio recordings of his classes.

The IDEA requires that a state receiving federal education funding provide a FAPE to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. § 1414(d). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court held that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017). The Third Circuit determined that Endrew F.’s language “mirrors [its] longstanding formulation [that] the educational program ‘must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential and individual abilities.’” Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248, 254 (3d Cir. 2018) (quoting Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3d Cir. 2012)). 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 IEP 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); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988), cert. den. sub. nom., Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030 (1989).

The IDEA thus does not require that the District maximize M.T.’s potential or provide him the best education possible. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). The District will have satisfied the requirements of law by providing

M.T. with personalized instruction and sufficient support services “as are necessary to permit [him] ‘to benefit’ from the instruction.” G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009) (citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)).

An IEP “turns on the unique circumstances of the child for whom it is created.” Andrew F., at 1001. It is usually “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. at 999 (quoting Bd. of Ed. of Hendrick Hudson Ctr. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 203-04 (1982)). “And while parents often play a role in the development of an IEP, they do not have a right to compel a school district to provide a specific program or employ specific methodology in educating a student.” E.E. v. Ridgefield Park Bd. of Educ., 2020 U.S. Dist. LEXIS 102249, *8 (June 11, 2020)(quoting Ridley Sch. Dist., 680 F.3d at 269, 278).

The appropriateness of an IEP must be determined as of the time it is made, and the reasonableness of the school district’s proposed program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564–65 (3d. Cir. 2010). When determining the appropriateness of any given IEP, a court’s focus should be on the IEP actually offered by the board and not upon an IEP that it could have offered. Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989).

A complete IEP must contain a detailed statement of annual goals and objectives. N.J.A.C. 6A:14-3.7(e)(2). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general-education curriculum and “be measurable,” so both parents and educational personnel can be apprised of “the expected level of achievement attendant to each goal.” Ibid. Such “measurable annual goals shall include benchmarks or short-term objectives” related to meeting the student’s needs. N.J.A.C. 6A:14-3.7(e)(3).

Any plan must involve the least restrictive environment (LRE). To the maximum extent appropriate, students are to be educated with children who do not have a disability. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2(a). The Third Circuit applies a two-part

test to assessing LRE compliance: (i) whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily; and (ii) if placement outside of a regular classroom is necessary, whether the school has mainstreamed the child to the maximum extent appropriate, i.e., whether the school has made efforts to include the child in school programs with non-disabled children whenever possible. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1215–17 (3d Cir. 1993) The District’s effort in this regard must be significant:

If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive. The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.

[Id. at 1216 (citations omitted)].

Indeed, the Third Circuit has emphasized that just because a child with disabilities might make greater academic progress in a segregated special-education classroom does not necessarily warrant excluding that child from a general-education classroom. Id. at 1217. Conversely, less than ideal grade in the general education setting may be satisfactory. See D.E.R. v. Bd. of Educ. of Ramsey 2005 U.S. DIST LEXIS 48817 (N.J. Dist. Ct. May 18, 2005)(summary judgement granted to student when student received a below-average grade in a general education class but demonstrated progress).

Although Congress preferred education in the regular classroom, it also recognized that such an environment is not suitable for every student. Rowley, 458 U.S. at 181, n.4 (1982) “The regulations specifically require school districts to provide "a continuum of placements . . . to meet the needs of handicapped children." 34 C.F.R. § 300.551(a). The continuum must "make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." 34 C.F.R. § 300.551(b).” Oberti, 995 F.2d at 1216. Indeed, “children with disabilities who are placed in regular classrooms will most likely receive some special education and

related services outside of the regular classroom, such as speech and language therapy or use of a resource room[.]” Id. at 1215, n. 21. See also Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989)(“EHA and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education”).

Here, from the start of M.T.’s relationship with the District, it endeavored to be responsive to M.T.’s needs. Mindful of his several limitations and the fact that he had been separated from public school for one year, the District assessed his needs and worked with S.S. in an effort to best address them. Contrary to petitioner’s claim, it did not neglect or disregard M.T. Rather, it proposed amendments to M.T.’s program twice during his first year, in an effort to respond to his evolving growth and needs. Notwithstanding petitioner’s belief that M.T. required a differently styled program, there is no evidence to support her claim that the District reluctantly endeavored to maximize his educational opportunities.

The IEPs that were drafted after the August 2018, settlement agreement were responsive to M.T.’s needs. They incorporated multiple accommodations and modifications that corresponded to the recommendations of the experts who testified as well as the authors of the reports offered by petitioner, some of which were not available to the District at the time the IEPs were prepared. The IEPs included detailed statements of M.T.’s goals and objectives, which were measurable, as well as benchmarks and short-term objectives that correlated to M.T.’s needs. The only substantial areas of disagreement concerned M.T.’s placement in general education classes and the recording of classes.

During the 2018-2019 school year, M.T. achieved meaningful process in his general education and resource classes. Although he did not achieve the same grades in the general education classes as he did in his resource classes, and he was not as successful with respect to meeting his IEP objectives, he nonetheless progressed. His general education teachers detailed how he benefitted from the accommodations and modifications and enumerated the multiple objectives he was on track to satisfy. Even if these accommodations and modifications were typically found in resource or LLD

classes, they were implemented in M.T.'s general education classrooms without apparent difficulty or disruption. Furthermore, M.T. was able to interact with his typically-developing peers, which provided him opportunities for social growth. Thus, M.T. was able to participate and achieve passing grades in the general education classes and derive the benefits associated with those classes.

Conversely, even though M.T. earned excellent grades in his resource room classes, his teachers reported numerous, significant areas in which he still needed to improve. He had not achieved a satisfactory level of success in those areas notwithstanding the slower pace and smaller class sizes provided by the resource classes. M.T.'s resource room teachers thus recommended he continue with those classes even though he earned excellent grades.

Petitioner also argues that the District failed to provide a FAPE to M.T. because it did not schedule certain classes for him. She argues the October 2018 IEP failed to include classes for eleventh and twelfth grade and that the April 2019 IEP did not include physics and algebra II, which were prerequisites for the pre-engineering program M.T. wanted to attend. She contends M.T. was forced to take a geometry class at another school to obtain a prerequisite for physics and algebra II. She also claims that the October 2018 IEP was flawed because it did not include goals for M.T.'s general education classes, notwithstanding that he required accommodations to succeed in those classes.

In support of her claim that this constituted a denial of a FAPE, petitioner cites to Matthew B. v. Pleasant Valley Sch. Dist., 2019 U.S. Dist. LEXIS 19026 (M.D. Pa. October 31, 2019). In that case, the District Court found that FAPE had been denied when the school repeatedly failed to update numerous goals after the student "nearly mastered them[.]" 2019 U.S. Dist. LEXIS at *11. Also, goals were not written in a manner that explained how the school would help attain the goals. The failures concerned transition services and functional skills, which were the student's primary needs and areas of focus. By failing to properly address these fundamental areas of need, the IEP was not "appropriately ambitious" with respect to these areas. Ibid.

As addressed above, a FAPE does not require a school district to provide a specific program or employ a specific methodology. Indeed, Matthew B. is not applicable here because the student in that case was denied services that were essential for him to function well. Petitioner does not argue that M.T. was denied classes, accommodations or modifications that were essential to enable him to access his education and make progress. Rather, she wanted to be able to tailor M.T.'s classes with an eye toward meeting his long-term career goals.

M.T.'s IEPs enumerated the classes M.T. was to take during the time periods covered by the IEPs. None of the evaluators or experts offered by petitioner opined that M.T. was deprived of a FAPE by virtue of the course selection or the absence of any enumerated goals. Moreover, the evidence in the record documents that S.S. attempted to enroll M.T. in certain classes prematurely and the District provided guidance concerning when he could properly enroll in those classes.

To the extent petitioner asserts that specific accommodations were not adequately implemented, there is no evidence to support this other than her supposition. Rather, the evidence in the record demonstrated that the accommodations, modifications and services enumerated in the IEPs were provided as required.

The credible evidence supports the conclusion that M.T. would not obtain an educational benefit from recording. Merchant and Peters, both credibly testified concerning the multiple reasons why recording would not necessarily benefit M.T. and could very likely be counterproductive. Humm, petitioner's expert, did not testify that recording was essential. She acknowledged that, if M.T. were to listen to recordings, it would be time consuming and potentially counterproductive. Further, Humm's opinion was of limited utility, as she evaluated M.T. for only rote recall, not comprehension. She acknowledged that she could thus not opine whether M.T. would need to listen to recorded lectures numerous times before he could understand the concepts. She agreed, however, that he would benefit from the use of Google Docs and listening to the notes generated by the program. As noted, contradictory opinions were not explained or supported by credible testimony and were, thus, given less weight. For all of these

reasons, the District has demonstrated by a preponderance of the evidence that recording would not necessarily benefit M.T. and could very likely be counterproductive.

I respect the desire of the parents to consider first and foremost the best interest of their child in making decisions about his education. However, that is not the standard that applies in a matter such as this. The standard that applies is not whether the program being offered by the school district is the best possible program or whether it is designed to confer the best possible education. What is required is that the program be designed so as to permit the child to make meaningful, educational progress from year to year by achieving passing marks and advancing from grade to grade. In this matter, I **CONCLUDE** the District has demonstrated by a preponderance of the credible evidence that the program it provided to M.T. – resource classes for English and math and general education classes for history and science – was reasonably calculated to enable him to receive meaningful educational benefit given his potential and abilities. This program provided M.T. a FAPE in the least restrictive environment. For the same reasons, I **CONCLUDE** that the District has not demonstrated by a preponderance of the credible evidence that M.T. should be moved from general education to resource classes for science and history. Furthermore, I **CONCLUDE** the District has demonstrated by a preponderance of the credible evidence that the accommodation of recording of classes would not provide M.T. with a meaningful educational benefit or help him to access his education. The District's refusal to permit recording does not constitute a denial of FAPE. Also, for the foregoing reasons, I **CONCLUDE** M.T. was not denied a FAPE by virtue of his class selections or other aspects of his IEPs.

Petitioner asserted a violation of Section 504 of the Rehabilitation Act, which prohibits any federally funded program from discriminating against persons with disabilities:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]

29 U.S.C. § 794(a).

The requirements imposed by Section 504 substantially duplicate those provided under the IDEA. W.B. v. Matula, 67 F.3d 484, 492-493 (3d Cir. 1995) (“[t]here appear to be few differences, if any, between IDEA's affirmative duty and §504's negative prohibition”). The requisite showing for a Section 504 claim is that the student: “(1) has a disability; (2) was otherwise qualified to participate in a school program; and (3) was denied the benefits of the program or was otherwise subject to discrimination because of [his] disability.” K.N. v. Gloucester City Bd. of Educ., 379 F.Supp. 3d 334, 345 (D.N.J. 2019) (quoting Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 189 (3d Cir. 2009)). The third element can be established by demonstrating that the student “was not given meaningful access to a program.” Id. Meaningful access requires “evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance.” Id. (citation omitted).

A “violation of Section 504 is not “a *per se* violation” of IDEA, or vice versa.” Matthew B. v. Pleasant Valley Sch. Dist., 2019 U.S. Dist. LEXIS 190226, *1 (November 1, 2019)(citing Andrew M. v. Del. Cty. Office of Mental Health & Retardation, 490 F.3d 337, 349 (3d Cir. 2007) (“[E]ven in cases brought under the IDEA . . . a plaintiff must still prove that there was a violation of [Section 504 of] the RA.”)). Thus, petitioner “must still prove the elements under Section 504, though they may rely on the same facts in doing so.” Ibid.

Here, in arguing that she has proven all aspects of a Section 504 claim, petitioner asserts only that M.T. has a disability and “was discriminated against on the basis of not being provided FAPE or an opportunity to participate in PLUS classes.” Pet. Brief at 75. However, she only set forth arguments under IDEA without providing any additional support for her Section 504 claim. Accordingly, because petitioner has not asserted an argument concerning her 504 claims beyond a conclusory statement concerning her IDEA contentions, there is no foundation for a finding of a Section 504 violation.

Petitioner seeks an award of compensatory education. The purpose of compensatory education is to remedy past deprivations of a FAPE. Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990). It “serves to 'replace [] educational services the child should have received in the first place' and that such awards 'should aim to place disabled

children in the same position they would have occupied but for the school district's violation of IDEA." See Ferren C. v. Sch. Dist. Of Phila., 612 F.3d 712, 718 (3d Cir. 2010) (quoting Reid ex. rel. Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2008)).

In A.G. v Wissahickon School District, 374 Fed. Appx. 330, 334 (3d Cir. 2010), the court reconfirmed that the concepts of FAPE and LRE are distinguishable and should not be conflated. It held that "for purposes of entitlement to compensatory education, the ultimate inquiry is two-fold: (1) did the school district provide the student with a FAPE and (2) if it failed to do so, when did the school know of that failure?" Ibid. The court thus turned its compensatory education analysis squarely on the question of FAPE, and FAPE alone. As the child at issue had received a meaningful educational benefit, the court determined that "[a]n award of compensatory education would have been improper." A.G. v Wissahickon School District, 374 Fed. Appx. at 336, citing Lauren V. v DeFlaminis, 480 F 3d 259, 272-73 (3d Cir. 2007). Likewise, in A.S. v Harrison Twp. Bd. of Educ., 2016 U.S. Dist. LEXIS 57008, where a student was determined to have been on the "right educational path" the court determined that "[a]warding [the student] further compensatory education under these circumstances would be akin to awarding damages which is not appropriate under the IDEA." Id. at *13, citing Chambers v Philadelphia Bd. of Educ., 587 F. 3d 176, 186 (3d Cir. 2009), which confirms that monetary damages are unavailable under the IDEA.

In D.B. o/b/o H.B. v. Gloucester Twn. Bod. Of Educ., 2014 N.J. AGEN LEXIS 817 (OAL Dkt. No. EDS 15077-12, November 6, 2013), to which petitioner cited, the ALJ found the District failed to offer the student a FAPE in the least restrictive setting in its proposed IEPs. However, the ALJ did not award compensatory education because he did not find that the student had received an "inappropriate education." Id. at 57. He found the student had "done well in her current setting and the recommendation is to formalize that setting as a jumping off point going forward." Id. at 58.

Thus, if a child received a FAPE, compensatory education would not be warranted even if the child had not been educated in the least restrictive environment. Here, it is clear that, while the proposed IEP inappropriately sought to remove M.T. from his general education classes, he in fact achieved meaningful educational and academic progress,

in the least restrictive environment, pursuant to the stay-put IEP, as evidenced by his grades, progress reports and evaluations. I, thus, **CONCLUDE** there is no basis for an award of compensatory damages.


ORDER

For the foregoing reasons, it is **ORDERED** that petitioner's request for compensatory damages is **DENIED**. It is also **ORDERED** that petitioner's request that the District permit M.T. to record his classes is **DENIED**. It is further **ORDERED** that the parties should endeavor to prepare an IEP that reflects M.T.'s current status and progress and that provides for, at a minimum, the same amount of time in appropriate general education classes as M.T. received with the stay-put IEP, with appropriate supports. Any such supports shall not include recording of classes.

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.

August 3, 2020

DATE



JUDITH LIEBERMAN, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

JL/vj

APPENDIX

LIST OF WITNESSES

For petitioner:

S.S.

Dr. Michelle Humm

For respondent:

Lisa Peters

Dr. Donna M. Merchant

LIST OF EXHIBITS

Joint:

- J-1 Auditory Processing Assessment (Lorraine S. Sgarlato (Audiologist CCC-A)),
June 15, 2015
- J-2 Individualized Education Program (“IEP”), Trenton Public Schools, November 30,
2015
- J-3 Report of Neuropsychological Evaluation (Michelle S. Humm, PhD), October 13,
2016
- J-4 Evaluation Request, July 7, 2017
- J-5 Reevaluation planning meeting, July 18, 2017
- J-6 Educational Evaluation (Princeton), July 28, 2017
- J-7 Social History (Princeton), August 7, 2017
- J-8 Speech and Language Evaluation, August 16, 2017
- J-9 Eligibility & IEP Notice, August 21, 2017
- J-10 Eligibility Meeting Sign-in Sheet, August 29, 2017
- J-11 IEP (Princeton), August 29, 2017
- J-12 Letter from S.S. (Re: Objection to IEP), September 4, 2017
- J-13 Notice IEP Meeting, September 7, 2017

- J-14 Meeting Sign-in Sheet, September 8, 2017
- J-15 Accept/Reject Forms, September 8, 2017
- J-16 Letter from Princeton (Re IEP Meeting), September 13, 2017
- J-17 Notice IEP Meeting, September 13, 2017
- J-18 Letter From S.S. Re Wilson, September 15, 2017
- J-19 Notice IEP Meeting, September 15, 2017
- J-20 Addendum to Neuropsychological Evaluation, September 19, 2017
- J-21 Letter from S.S. re Independent Educational Evaluation (IEE), October 6, 2017
- J-22 IEP (Princeton), October 8, 2017
- J-23 Consent Form, October 10, 2017
- J-24 Letter from S.S. (Re Discrimination and Bullying), November 16, 2017
- J-25 Letter from Princeton (Re IEE), November 17, 2017
- J-26 Independent Educational Evaluation (Margaret J. Kay, Ed.D. NCSP, DABPS), November 28, 2017
- J-27 Policy 5516 Use of Electronic Communication and Recording Devices, December 12, 2017
- J-28 Letter from Princeton attaching IEP (October 6, 2017), December 14, 2017
- J-29 Notice IEP Meeting, February 1, 2018
- J-30 IEP (Princeton), February 13, 2018
- J-31 Letter from S.S. (Re Least Restrictive Environment (LRE)), February 13, 2018
- J-32 Health Record, February 13, 2018
- J-33 Assistive Technology Referral, February 21, 2018
- J-34 Letter from Princeton (Re Resource Room placement), March 7, 2018
- J-35 OSEP Complaint, March 22, 2018
- J-36 PARCC ELA Assessment Spring 2018, April 1, 2018
- J-37 Advance Budget 2019, April 6, 2018
- J-38 Notice Facilitated IEP Meeting, April 12, 2018
- J-39 IEP (Princeton), April 26, 2018
- J-40 Letter from Peters Re IEP, May 29, 2018
- J-41 Due Process Petition, June 13, 2018
- J-42 Decision Approving Settlement, August 3, 2018
- J-43 Technology Plan, August 23, 2018
- J-44 Notice Meeting, September 7, 2018

- J-45 Meeting Attendance Sign-in Sheet, September 13, 2018
- J-46 Letter from Peters, September 14, 2018
- J-47 Letter from S.S. (Re Recording Classes), September 15, 2018
- J-48 Notice IEP Meeting, September 25, 2018
- J-49 PSAT Score Report, October 10, 2018
- J-50 Audiological Evaluation, October 12, 2018
- J-51 Notes FIEP (Facilitator), October 19, 2018
- J-52 IEP (Princeton), October 19, 2018
- J-53 Letter from S.S. (Re IEP Input), October 19, 2018
- J-54 Reevaluation Planning, October 23, 2018
- J-55 Due Process Petition, October 23, 2018
- J-56 Answer to Petition for Due Process, November 26, 2018
- J-57 Consent for Additional Assessments (Declined), December 4, 2018
- J-58 Application - Pre-Engineering (Mercer County Technical Schools), January 25, 2019
- J-59 Audiological Evaluation, January 31, 2019
- J-60 Speech Language Evaluation, February 14, 2019
- J-61 Letter from Tenisha A. Williams, M.D. Ph.D., April 18, 2019
- J-62 Math Diagnostic Report, April 20, 2019
- J-63 Draft IEP (Princeton), April 25, 2019
- J-64 Letter from Peters, May 20, 2019
- J-65 IEP (Princeton), October 19, 2018
- J-66 Notice Evaluation Request, April 25, 2019
- J-67 Educational Certifications, May 22, 2019
- J-68 Audit History Results, July 21, 2017 - July 21, 2019
- J-69 Progress Report (The Hun School of Princeton), July 24, 2019
- J-70 Geometry Grades (Hun), August 9, 2019
- J-71 History Notes, Various Dates
- J-72 Program of Studies, 2019-2020
- J-73 Bell Schedules - Princeton Public Schools, Undated
- J-74 PARCC Spring State Summary Report, 2017-2018
- J-75 Glossary - Princeton Public Schools, Undated
- J-76 M.T. Test Results, August 15, 2019 (Printed)

- J-77 State Test Data, August 16, 2019 (Generated)
- J-78 NJSLA Test Results, August 16, 2019 (Printed)
- J-79 Auxiliary Aids and Services for Postsecondary Students with Disabilities (Office for Civil Rights), August 19, 2019 (Printed)
- J-80 LiveScribe Pens - Office of Disability Services (Rutgers), August 19, 2019 (Printed)
- J-81 IEP (Princeton), August 20, 2019 (Provided by District)
- J-82 CST Access Log, August 21, 2019 (Printed)
- J-83 Tanishia Williams, MD, PhD C.V.
- J-84 Dr. Michelle Shanahan Humm C.V. 2019
- J-85 Margaret J. Kay, Ed.D., NCSP C.V.
- J-86 Independent Educational Evaluation, August 7, 2019
- J-87 Progress Reports
- J-88 Grades and Attendance
- J-89 Email correspondence
- J-90 Independent Evaluation Documents
- J-91 Doctor's Note (Re Audio Recording), March 30, 2018
- J-92 Technology Loan Agreement, September 6, 2018
- J-93 Technology Plan, 2018-2019
- J-94 Document Review (YH. A. Wolfinger and Associates), September 25, 2018
- J-95 OCR Decision, May 23, 2019
- J-96 IXL Continuous Diagnostic Action Plan, April 20, 2019
- J-97 Crystal M. Riddick C.V.
- J-98 Lisa M. Peters C.V.
- J-99 Report Review - 09-19 Princeton final
- J-100 Order, September 9, 2019
- J-101 Donna M. Goione Merchant, Au.D, CCC, FAAA C.V.
- J-102 Email correspondence
- J-103 Progress Reports, 2017-2018 and 2018-2019 school years
- J-104 Geometry Testing Materials

For petitioner:

P-1 Email documents bates stamped SS-2636 through 2809

P-2 September 13, 2018, email with attachment