



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 09675-19

AGENCY DKT. NO. 2019-30150

K.A. ON BEHALF OF B.A.,

Petitioners,

v.

AUDUBON BORO

BOARD OF EDUCATION

Respondent.

Colleen E. Patrick, Ed.S., BCBA, Parent Advocate, for petitioners, pursuant to
N.J.A.C. 1:1-5.4(a)(7)

Patrick J. Madden, Esq., for respondent (Madden & Madden, P.A., attorneys)

Record closed: April 13, 2021

Decided: April 23, 2021

BEFORE **ELAINE B. FRICK**, ALJ:

STATEMENT OF THE CASE

Petitioner, K.A., the mother of a minor child, B.A., alleges that respondent, Audubon Borough Board of Education (the District), failed to provide a free appropriate public education (FAPE) for the child. Petitioners request out-of-district placement and

compensatory education for B.A., a pre-school student, seeking to place him for two years in another district's school with a full-day pre-school program, before returning to the District to begin kindergarten in the 2021-2022 school year. The District asserts that it provided FAPE and seeks denial of petitioners' requests for relief.

PROCEDURAL HISTORY

Petitioners submitted a request to the New Jersey Department of Education, on or about June 18, 2019, seeking out-of-district placement and compensatory education, and simultaneously filed an emergent application. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed on July 18, 2019, to be heard as a contested matter. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13. The emergent application was resolved by the parties and memorialized in a Decision Approving Settlement, dated June 28, 2019.

During the pendency of the underlying due process application, petitioners filed another emergent application on or about August 28, 2019, which was resolved by the parties. They entered into another settlement agreement, memorialized in an Order on Application for Emergent Relief.

The hearing began on January 23, 2020. Prior to the next scheduled hearing date, respondents filed a Motion to Bar Expert Testimony. An Order Regarding Motion to Bar Expert Testimony was entered on March 12, 2020, granting the motion.

Subsequently scheduled hearing dates were adjourned, due to the COVID-19 pandemic being declared a public-health emergency, resulting in the entry of Executive Orders by the Governor of the State of New Jersey, mandating work from home and stay at home provisions, which suspended in-person proceedings at the OAL. The parties agreed to proceed with the hearing scheduled on July 17, 2020, via the Zoom video-conferencing platform. On the morning of July 17, 2020, the parties advised this tribunal that there was a change in custody for B.A. The hearing date was adjourned and information was thereafter obtained confirming the custodial status of B.A. An Order

Confirming Advocate was entered on August 21, 2020, confirming that Colleen Patrick would continue to serve as advocate on behalf of petitioners.

The hearing resumed via Zoom on September 21, 2020. A schedule for the submission of written summations was set, and thereafter extended at the request of the parties. Petitioners failed to appear for the final hearing date of February 26, 2021, which was rescheduled for April 5, 2021. Written summations were thereafter submitted. Petitioners requested to place oral summations upon the record, and the final hearing date of April 5, 2021, was rescheduled by consent of the parties. Oral summations were placed upon the record on April 9, 2021. The District submitted supplemental legal citation information on April 9, 2021. Petitioners submitted supplemental legal citation information on April 12, 2021.

STIPULATED FACTS

The parties submitted an executed “Joint Stipulation of Facts.” (J-128) I **FIND** that such facts are undisputed and therefore adopt as **FACTS** and set them forth verbatim as follows:

1. By correspondence of August 9, 2018, received by the Audubon School District on August 13, 2018, Petitioner, K.A., requested evaluations of B.A. (J-1.)
2. On September 20, 2018, the Audubon Child Study Team conducted an initial evaluation planning meeting respecting B.A. (J-6.)
3. As a result of the meeting conducted on September 20, 2018, it was determined that initial evaluations were warranted. (J-6.)
4. By correspondence of September 20, 2018, the District notified K.A. that it proposed to evaluate B.A. for eligibility for special education and related services. (J-7.)

5. By correspondence of October 17, 2018, the District notified Petitioner, K.A., that she had not provided information necessary to complete B.A.'s registration as a resident student in the District. (J-8.)
6. On October 19, 2018, B.A.'s pediatrician, Cooper Pediatrics, completed a Preschool Medical Screening. (J-9.)
7. On October 19, 2018, the District completed a speech and language evaluation and issued a report of even date. (J-10.)
8. A confidential psychological evaluation was completed by Nancy Scully, Ed.S. of the District on October 25, 2018 and a report was issued of even date. (J-11.)
9. An occupational therapy evaluation was completed by Marge Walsh, MS OTR/L on November 5, 2018, and a report was issued of even date. (J-12.)
10. On November 20, 2018, Paul D. Rogers, LCSW completed a confidential social evaluation and issued a report of even date. (J-13.)
11. On November 30, 2018, Petitioner, K.A., was invited to a meeting to determine B.A.'s initial eligibility for special education. (J-14.)
12. By correspondence of December 5, 2018, Nancy Scully, School Psychologist and case manager for B.A., advised Petitioner, K.A., that "[i]n order for [B.A.] to participate in the preschool program, he needs to be registered in the Audubon School District." (J-15.)
13. At a conference of December 13, 2018, it was determined that B.A. requires special education and/or related services and is eligible according to the category of preschool child with a disability. (J-16.)

14. The determination of eligibility was executed by Petitioner, K.A., on December 17, 2018. (J-16.)
15. An Individualized Education Plan (“IEP”) was adopted for B.A. dated December 13, 2018. (J-17.)
16. As per the 12/13/18 IEP, Educational and related services were to be provided to B.A. at the Audubon Preschool, located at 2 Road C, Audubon Park, New Jersey.
17. Petitioner resides at 23 XXXXXX Street, Apartment A, Audubon, New Jersey. [Street name redacted for confidentiality purposes.]
18. Distance on foot from Petitioner’s residence to the Audubon Preschool was approximately 1.6 miles.
19. On December 17, 2018, Petitioner and/or her advocate sent an email to the District stating:

Hi Nancy,

Can you confirm if this is your email address?

Thanks again for meeting with us today. Colleen set this email up for me and [B.A.] to communicate about school and she is helping me write emails, because of my own disability, until I learn more about the process.

I’m looking forward to [B.A.] starting school on January 2nd, but I wanted to confirm that I disagree with initial IEP, just because of the 2 points we spoke about (OT and Transportation).

I’d like him to get individual and small group OT starting in January since he is eligible based on fine motor delays, is in the 3%, 5%, and 9% on his OT sub-tests and is having aggression and self-injurious behavior from his sensory issues and other delays.

Thanks for looking into that with Mrs. Walsh as well as the transportation situation.

We look forward to hearing from you. Colleen set this email up so it goes straight to my phone now.

Sincerely,
[K.A.] (Mom) and Colleen Patrick (Aunt)
(J-17.)

20. Petitioner and/or her Advocate, via email of January 3, 2019, requested the provision of transportation as a related service to be included within the aforementioned IEP. (J-19.)
21. Petitioner and/or her Advocate additionally requested individual occupational therapy services via an email of January 3, 2019. (J-19.)
22. By email of January 2, 2019, Ms. Bisinger advised Petitioner and/or her Advocate that “as of today [January 2, 2019], the registration is not yet complete. (J-1.)
23. By letter of January 8, 2019, Ms. Bisinger advised Petitioner that B.A.’s registration process had not yet been completed, and that “to date, the registration process, including parent submission of a doctor’s medical plan to address [B.A.’s] asthma, is still not complete.” (J-20.)
24. By correspondence of January 16, 2019, to Petitioner, Ms. Bisinger noted that parental consent had not been provided in order to implement the initial IEP. (J-26.)
25. The aforementioned correspondence noted Petitioner’s request to add transportation and individual occupational therapy to the initial IEP, and scheduled an IEP meeting for January 25, 2019, to address same. (J-26.)
26. An IEP meeting was conducted on January 25, 2019. (J-27.)
27. In the IEP meeting of January 25, 2019, transportation services were added to the IEP for the remainder of the 2018-2019 school year. (J-27.)

28. The aforementioned IEP provides “transportation as a related service, to be provided upon continued parent submission of medical documentation and review of medical documentation for determining if required and appropriate.” (J-27.)
29. The aforementioned IEP further stated that “because transportation is being provided due to medical reasons related to temperatures, the District will need medical clearance for [B.A.] to participate in recess.” (J-27.)
30. The January 25, 2019, IEP further reflected that “[a]s a component of this program, [B.A.] will participate in weekly speech/language, physical therapy, and occupational therapy group sessions.” (J-27.)
31. On February 25, 2019, a thirty (30) day IEP review was conducted at parental request to discuss B.A.’s transition into the preschool program. (J-29.)
32. The IEP reflects: “Parent was contacted by phone. She is pleased with [B.A.’s] transition. She had questions about whether [he] is beginning to interact with the other children in his class.” (J-29.)¹
33. The IEP generated as a result of the February 25, 2019; thirty (30) day review was provided to Petitioner under correspondence of February 28, 2019. (J-30.)
34. On May 13, 2019, a meeting for the annual review of B.A.’s IEP was conducted. (J-33.)
35. The May 13, 2019, IEP provided for extended school year (“ESY”) and for the 2019-2020 school year services to be provided at the Haviland Avenue Elementary School. (J-33.)

¹ Petitioner is not stipulating that this phone contact occurred on February 25, 2019. [This footnote is original to the Joint Stipulations.]

36. The aforementioned IEP provides:

On 3-21-19, a letter from Jodi Levy, MD (Cooper Pediatric Care at Voorhees) was submitted to the district. This letter indicates that [B.A.] is allowed to go on class trips and go outside as long as the temperature is 40 degrees or higher. (J-33, page 5.)²
37. By correspondence from Ms. Bisinger to Petitioner dated June 10, 2019, Petitioner was advised that ESY would be conducted at the Haviland Avenue school and that “[n]o transportation is provided.” (J-95.)
38. The Haviland Avenue Elementary School is located at 24 South Haviland Avenue, Audubon, New Jersey.
39. The Haviland Avenue Elementary School is located 0.4 miles from Petitioner’s residence.
40. Petitioner was provided with the 2019-2020 annual IEP for B.A. under cover of May 17, 2019. (J-35.)
41. On or about May 20, 2019, Petitioner requested an independent occupational therapy evaluation. (J-36.)
42. On or about June 11, 2019, Petitioner executed a Written Notice of Evaluation/Consent to Evaluate with respect to the performance of an independent occupational therapy evaluation. (J-41.)
43. Petitioner requested that the independent occupational therapy evaluation be conducted by the Gloucester County Educational Services Commission. (J-41.)

² The District does not stipulate to the accuracy, validity or admissibility of Dr. Levy’s opinion. The District solely stipulates that her letter states as set forth above, and it was received by the District. [This footnote is original to the Joint Stipulations.]

44. On or about June 18, 2019, Petitioner filed a request for due process and for emergent relief, seeking emergent relief on the issue of transportation not being provided for ESY. (J-119.)
45. As memorialized within a Decision Approving Settlement, dated June 28, 2019, the parties resolved the application for emergent relief by the District providing reimbursement for transportation services to Petitioner for ESY, as forth within the settlement agreement appended to the Decision Approving Settlement. (J-115.)
46. The independent occupational therapy evaluation was completed by Gloucester County Special Services School District, and a report issued, dated July 30, 2019. (J-48.)
47. The independent occupational therapy evaluation provided the following recommendations:
 - Direct, once weekly occupational therapy services for 30 minutes.
 - Sessions may occur in the classroom to reflect natural context skills or be of a pullout nature to teach specific skills.
 - Consultation with classroom staff should occur as needed to allow for issues and concerns to be addressed. (J-48.)
48. On or about August 28, 2019, Petitioner filed a second application for emergent relief seeking inter alia the continuation of transportation for the 2019-2020 school year. (J-116.)
49. Petitioner's application for emergency relief further sought an order compelling the District to "provide OT 1 x per week individual and 1 x per week small group." (J-116.)
50. The August 28, 2019, application for emergent relief was resolved as memorialized within an Order on Application for Emergent Relief with

appended settlement agreement as executed by Petitioner, her Advocate and the District. (J-117.)

51. On September 18, 2019, the parties met to revise B.A.'s IEP as a result of the aforementioned settlement agreement. (J-54.)
52. The IEP adopted as a result of that meeting provided for the provision of occupational therapy for the 2019-2020 school year in the frequency of once per week (individual) for a duration of 20 minutes each session. (J-54.)
53. The aforementioned IEP further provided for the provision of physical therapy services for the time period of September 12, 2019 to October 30, 2019, in the frequency of once per week (individual, 8 – week time period) of a duration of 20 minutes per session. (J-54.)
54. On September 30, 2019, Petitioner and/or her Advocate issued correspondence respecting the aforementioned IEP indicating that she agreed with the addition of the services of occupational therapy and physical therapy. (J-56.)
55. Petitioner further indicated disagreement with parental concern statement not included in the body of the IEP; transportation removed without a doctor's recommendation and it has not been placed back in the IEP as a related service; request for a second individual session of occupational therapy for 8 months; and request for a second individual session of speech. (J-56.)
56. On October 7, 2019, another IEP meeting was conducted in response to a parent request for increased speech and occupational therapy services. (J-59.)
57. The aforementioned IEP reflected that B.A. currently receives the following services in his program: weekly, individual occupational therapy (20 minute session), weekly, individual physical therapy (20 minute session), individual

speech/language therapy (3 times per month, 20 minute session), and small group speech/language therapy (3 times per month, 20 minute session). B.A. also participated in weekly fine and gross motor activity groups within the classroom setting. (J-59, page 4.)

58. The aforementioned IEP reflected that, “based on [B.A.’s] present levels of functioning, progress, and the disabilities, the current IEP remains appropriate and is meeting his educational needs.” (J-59, page 28.)
59. On October 19, 2019, Petitioner issued correspondence disagreeing with proposed IEP for the following reasons:
 - Transportation removed without a doctor’s recommendation.
 - Request for a second session of occupational therapy; and
 - Request for a second individual session of speech. (J-64)
60. On November 20, 2019, the parties participated in another IEP meeting. (J-66.)
61. The purpose of the meeting was to review the provision of individual physical therapy services, which had been added to the IEP, to begin after the school year and for a duration of 8 weeks, pursuant to the agreement resolving Petitioner’s application for emergent relief of August 28, 2019. (J-66, page 4.)
62. The meeting was also held in response to a parent request for occupational therapy in a small group setting, outside of the preschool classroom. (J-66, page 28.)
63. The IEP reflected that, as a result of a physical therapy evaluation, B.A. did not meet the criteria for continued physical therapy services. (J-66, page 28.)

64. The IEP further reflected that B.A. had already been receiving small group, pullout occupational therapy in the 2019-2020 school year, and that the IEP was being updated to reflect this service specifically on the statement of services page. (J-66.)

65. The IEP of November 20, 2019, reflects the provision of the following related services:

RELATED SERVICE	DATES THE SERVICES WILL BEGIN AND END	FREQUENCY	LOCATION	DURATION
Occupational Therapy	November 21, 2019 to June 19, 2020	1 per week (small group)	OT area	20 minutes
Speech/Language Therapy	September 5, 2019 to June 19, 2020	3 per month (small group)	Speech Room	20 minutes
Speech/Language Therapy	September 5, 2019 to June 19, 2020	3 per month (individual)	Speech Room	Individual
Occupational Therapy	September 9, 2019 to June 19, 2020	1 per week (individual)	OT area	20 minutes

66. By correspondence of November 25, 2019, Petitioner expressed that she disagreed with the proposed IEP for the following reasons:

- Disagreement with discontinuation of physical therapy.
- Demand for an increase of individual speech services from 20 minutes to 40 minutes.
- Transportation as a related service removed from B.A.’s IEP. (J-69.)

67. Petitioner and/or her advocate provided the documents or reports³ referenced below to the District on the dates indicated:

- 9/17/19 - Initial OT Evaluation Weisman Rehab
- 9/17/19 – Initial SLP Evaluation Weisman Rehab
- 12/19/19 – OT Progress Report Weisman Rehab

³ The District does not stipulate to the accuracy, validity or admissibility of any findings or opinions expressed within these documents or reports. The District solely stipulates that referenced document or report was received by the District. [This footnote is original to Joint Stipulations.]

- 12/30/19 – Letter of Medical Necessity for Transportation – CHOP Genetics
- 1/9/20 – 48XXXY Syndrome Diagnosis and Test Results from CHOP Genetics

(J-128.)

During the hearing on January 23, 2020, the parties stipulated that the pre-marked hearing exhibits did not include a copy of the letter invitation notice to K.A. and/or Colleen Patrick, of the February 25, 2019, thirty-day IEP review meeting.

FACTUAL DISCUSSION AND FINDINGS

Noelle Bisinger testified for the District. She is the Supervisor of Special Education for Audubon. She is a certified school psychologist. She has been employed by the District since September 2011, having served as a school psychologist and case manager on the Child Study Team (CST). She became the District's Supervisor of Special Education in March 2018. (R-124.)

On August 13, 2018, the District was first notified that B.A. may be a student in need of services, by receipt of a letter from B.A.'s mother, K.A., dated August 9, 2018. (J-3.) B.A. turned three years old on August 28, 2018. Ms. Bisinger was unaware of any prior efforts by petitioners, or anyone on their behalf, to communicate with the District, or directly with her, that B.A. was an incoming student and the parent was requesting evaluations.

Nancy Scully was the District's case manager assigned to B.A. Ms. Bisinger identified Ms. Scully's handwritten initials and notation on K.A.'s August 9, 2018, letter, indicating that Ms. Scully had called K.A. and left messages on September 6 and September 7, 2018. Ms. Scully scheduled the initial CST planning meeting for September 20, 2018, to discuss the referral of B.A. for special education evaluation and if warranted, evaluation planning.

A letter, dated September 11, 2018, was authored by Ms. Bisinger to K.A., confirming that the initial evaluation planning meeting was scheduled for September 20, 2018. (R-4.) Another letter was authored by Ms. Bisinger to K.A., on September 17, 2018, confirming the scheduling of the September 20, 2020, initial evaluation planning meeting. (R-5.) Ms. Bisinger did not attend the initial evaluation planning meeting, as she generally does not do so as Supervisor of Special Education. Members of the CST who were present for the meeting on September 20, 2018, were the parent, K.A.; the learning disabilities teacher consultant (LDTC); the preschool teacher, Cherie McNellis, who is certified as a general education and a special education teacher; a social worker; the psychologist, who also served as case manager, Nancy Scully; and another individual, also with the initials K.A., identified as “Aunt” for the child. (J-6.) Ms. Bisinger acknowledged that there was no known waiver by K.A. excusing a separate general education teacher from being present at the September meetings.

A “Written Notice of Evaluation/Consent to Evaluate” was executed by the parent, K.A. (J-6.) The areas to be evaluated were: Psychological Evaluation, for cognitive assessment; Social History Assessment, for adaptive/social functioning and family/social and cultural factors; Speech/Language (S/L) Assessment for language and articulation; and an Occupational Therapy (OT) assessment. (J-6.) Ms. Bisinger authored a letter to K.A. confirming that the District proposed to evaluate B.A. for eligibility for special education and related services. (R-7.)

Ms. Bisinger was unaware of petitioner, or her advocate, expressing any complaint about not having a general education teacher present at meetings, prior to the filing for due process. After the request for due process was made, the District has had another general education teacher sit in on meetings regarding B.A., even though that individual has had no input or been involved in the crafting of B.A.’s subsequent IEPs. Ms. Bisinger is unaware of petitioner or her advocate asking any questions of that general education teacher during subsequent meetings.

During the process of completing the initial evaluations for B.A. in the fall of 2018, the District followed up with K.A. to ensure that the child’s registration was complete and that all necessary documentation was provided to enable B.A. to attend school. Ms.

Bisinger advised K.A. by letter, dated October 17, 2018, that K.A. needed to contact the school registrar to complete the registration of the child. (R-8.) Ms. Bisinger identified hand written notes at the bottom of the copy of that letter, by a secretary, interpreted as: medical documentation and immunization information was still needed as of October 22, 2018; the psychologist/case manager was following up with the parent for the required registration information as of November 27, 2018; and the registrar called the parent on December 10, 2018. (R-8.)

The IEP determination meeting was scheduled for December 13, 2018. Notification was sent to the parent, K.A. by Ms. Bisinger, dated November 30, 2018, advising that a determination would be made at that meeting for initial eligibility of B.A. for special education. (R-14.) The case manager authored a letter to the mother, K.A., dated December 5, 2018, indicating she left a voice mail message for K.A. regarding the upcoming eligibility meeting of December 13, and that B.A.'s registration needed to be completed to enable him to participate in the preschool program. (R-15.)

The determination meeting was conducted on December 13, 2018, and an IEP was adopted. (J-16, J-17.) K.A. did not attend. She did sign the Determination of Eligibility/Eligibility Review and IEP, on December 17, 2018. (J-16; J-17.) Colleen Patrick, identified as "Aunt" for B.A., signed the Determination of Eligibility/Eligibility Review on December 17, 2018. (J-16.) The District received an authorization, dated December 17, 2018, executed by K.A., to permit the District to receive information from and release information to Colleen Patrick regarding B.A. (J-18.) Prior to that date, the District had no other authorization on file from K.A. allowing the District to communicate with Colleen Patrick. The District also received notification that K.A. wanted the District to correspond by email with her, by use of a specific email account through Gmail, (the B.A. Gmail account) which had the child's name and year of birth as the address. (J-19.) Representatives of the district received emails from that account, with a signature area indicating that the email was from the mother, K.A.; from the "step" father, V.R.; and from the child's "aunt," Colleen Patrick.

The CST determined that B.A. would be classified as a pre-school child with a disability and required special education and/or related services, as outlined in the IEP.

(J-16; J-17.) The IEP set forth that B.A. would attend the integrated pre-school for special education and would receive related services of S/L therapy three times per month in a small group and three times per month individually. (J-17.) The child's projected start date for pre-school was December 17, 2018. (Ibid.)

As of the 2018-2019 school year, the District's pre-school program was held at the Audubon Park School, located 1.6 miles from petitioners' residence. There are two half-day pre-school sessions conducted each school day, with each session approximately two and one half hours in duration. The pre-school classes are taught by one teacher, who is certified in general education and special education. The District's program is an integrated pre-school, with general education and classified students in the same room and related therapies and services infused within the program. Group-based services for S/L, OT, and physical therapy (PT) are provided, which are not components of preschool programs at other school districts.

Ms. Bisinger had not been involved in the development of the December 13, 2018, IEP for B.A. The matter was elevated to her as Supervisor, when there was a disagreement regarding requests for services that did not appear in that IEP.

An email was sent from the B.A. Gmail account on December 21, 2018, to Ms. Bisinger, indicating that K.A. was not going to send back the executed signature page of the December 13, 2018, IEP because she disagreed with two items. She requested that transportation and OT services for B.A. be added to the December 13, 2018, IEP. (J-19 at R79; J-17.) The email also indicated that K.A. was "finishing up" B.A.'s registration and asked when B.A. would be able to start attending pre-school if he was not permitted to begin on January 2, without the documentation needed. (J-19 at R79.)

Ms. Bisinger responded to the B.A. Gmail account email on January 2, 2019, indicating that the school had been closed from December 21, 2018, and reopened on January 2, 2019. She noted that B.A.'s registration process was still not completed and that K.A. should contact the registrar for assistance. (J-19 at R78.) She further indicated that transportation was not a required related service in B.A.'s IEP, and that all preschool students in the District receive group OT, PT, and S/L.

The OT evaluation of B.A. indicated that individual OT was not recommended at that time. However, the case manager had proposed a thirty-day review in which individual OT services could be revisited and discussed. (J-19 at R78.) The thirty-day time period would allow for B.A. to transition to the program and for staff to observe him and make additional or new recommendations. (J-19.)

Regarding the request for transportation, Ms. Bisinger indicated that there was no rationale provided as to why transportation for B.A. was needed. Petitioners resided approximately 1.6 miles from the location of the pre-school building for the 2018-2019 school year. The District does not provide bussing to general education students, due to the geographic size of the community. It is considered a walking district. Transportation will be provided to a special education student based upon the child's functioning and need, but there is no blanket bussing program for classified students.

After the initial request for transportation, the District received an email from the B.A. Gmail account indicating that petitioner had no car and no driver's license, and therefore transportation was needed. (J-19.) There was some discussion thereafter between the District and petitioner regarding the child's medical conditions, his diagnoses, and the District's need for clarification from petitioner that it was medically necessary for B.A. to be transported to school. A doctor's note, dated January 9, 2019, was provided to the District on or about January 16, 2019. (J-21.) The child's pediatrician, Dr. Bruner, noted that it was medically necessary for B.A. to be transported to and from school. Dr. Bruner enumerated the child's "problem list" as:

- Gastroesophageal reflux disease without esophagitis
- Tracheomalacia
- FTT (failure to thrive) in child
- ASD (atrial septal defect)
- Flexural eczema
- Mild persistent asthma without complication
- Speech delay

(J-21.)

Dr. Bruner's note further stated: "Transportation to school is medically necessary to avoid extreme temperatures and elements that may exacerbate [B.A.'s] symptoms or cause illness that could exacerbate illness." (J-21.) Transportation was thus added to an IEP crafted on January 25, 2019.

Regarding the request for individual OT for the child, which was not included in the December 2018, IEP, the District acknowledged that the occupational therapist, Margaret Walsh, was not present at that IEP determination meeting. Individual OT was not provided for in the December 2018, IEP. Although B.A. had scored poorly in fine motor skills for his OT evaluation, the deficiency was believed to be due to lack of exposure. Group OT is provided to the entire class, and it was believed that would address the child's OT deficiencies. The parent disagreed, and requested individual OT in the January 2, 2019, email.

An IEP determination meeting was conducted on January 25, 2019. Although the parent had signed the December 13, 2018, IEP as of December 17, 2018, the District had not received approval from the parent to implement the IEP.

K.A. and Colleen Patrick were present for the January 25, 2019, IEP meeting. (J-27.) Present from the District were the preschool teacher, Cherie McNellis; the occupational therapist, Margaret Walsh; the Supervisor of Special Education, Ms. Bisinger; the case manager; related service personnel; and the principal, Adrienne McManis, who is also a certified general education teacher. (J-27 at 1.)

As a result of the determination meeting, a January 25, 2019, IEP was developed and provided for transportation as a related service, "to be provided upon continued submission of medical documentation and review of medical documentation for determining if required and appropriate." (J-27 at 4.) Transportation was added as a related service based upon Dr. Bruner's medical note of January 9, 2019. (J-27 at 4, 23-24.) Handwritten on the January 25, 2019, IEP was a note that because of Dr. Bruner's

letter stating that transportation was medically necessary, the District would need medical clearance for B.A. to participate in recess. (J-27 at 23.)

The January 25, 2019, IEP did not provide for individual OT. B.A. had been evaluated for OT, and as stated in the December IEP, it was determined that B.A. had functional foundation skills, but his fine motor skills were in the poor range. Overall, B.A. was slightly below his age group for fine motor skills, but that was believed to be due to limited exposure and his decreased ability to sustain attention and follow directions. The January 25, 2019, IEP did note that the parent's concern regarding the lack of individual OT was attached to the IEP, which was the email from the BA Gmail account at the beginning of January 2019. (J-19; J-27.) Also handwritten in on the January 25, 2019, IEP was a note that the mother expressed concerns during the meeting of January 25, 2019, for individual OT. (J-27 at 4.) Although individual OT was not outlined as a service to be provided in the January 25, 2019, IEP, it was agreed that the issue of OT would be reviewed after thirty-days so that the CST could then review B.A.'s transition into preschool and his behavioral needs. (J-27 at 4, 24.) K.A. consented to implementation of the January 25, 2019, IEP. (J-27 at 26.)

B.A. began attending the pre-school program shortly after the January 25, 2019, IEP was implemented. A letter, dated January 29, 2019, was forwarded to K.A. which included a Special Education Medicaid Initiative (SEMI) consent form for her to execute, authorizing communication between Dr. Bruner and the District. The authorization was executed by K.A. (R-28.) The school nurse had to follow up with K.A. as of January 31, 2019, since the nurse needed to have medication to administer for a treatment plan. (R-94.) The nurse had received the child's physician orders, but the medication that was provided needed to be properly labeled, and the inhaler that was provided was expired. (R-94.)

Ms. Bisinger consulted with other CST members and staff and made her own observations of B.A. when he began to attend the preschool program. She found that he was progressing. The staff reported to her that B.A. transitioned nicely into the program and classroom structure, without any behavioral concerns. B.A. was very quiet at first.

B.A.'s social skills increased as he interacted and communicated with peers. The teacher reported that B.A. was instructionally progressing.

The thirty-day follow up meeting, as identified in the January 25, 2019, IEP, was conducted on February 25, 2019. Three individuals were listed as present as per the signatures on the IEP: Cherie McNellis, the preschool teacher; Nancy Scully, the case manager; and Margaret Walsh, the occupational therapist. (J-29.) Ms. Bisinger acknowledged that she did not see among the evidence documents a waiver from the parent that a general education teacher could be excused from the meeting. K.A. and Colleen Patrick were not present at the February 25, 2019, follow up meeting. The District stipulated that it did not provide a copy of the notice of the meeting purportedly sent to petitioner, during the exchange of discovery for this due process petition. Ms. Bisinger indicated that upon her review of the original file, there was a copy of a letter addressed to petitioner, giving notice of the February 25, 2019, meeting. She opined that it must have been lost in the shuffle of paperwork and somehow not copied and provided during discovery for the OAL due process matter.

The updated information in the February 25, 2019, IEP indicates: "2/25/19: Teachers report that B. has shown steady growth over the past 30 days. He is easily grasping skills once he is shown 1-2 times. He enjoys participating in OT, PT, and Speech groups. B. keeps his fingers in his nose and mouth. He is beginning to respond to redirection. To date, all medical paperwork is current with the exception of clearance for B. to play outside." (J-29 at 6.) It was also noted that the District received the January 9, 2019, letter from Dr. Bruner, which indicated that transportation was medically necessary. (J-29 at 6; J-21.) Noted thereafter was that "B. uses a nebulizer for asthma-related symptoms." (J-29 at 6.) The final note on that page of the IEP indicates: "**Parent was contacted by phone. She is pleased with B.'s transition. She had questions about whether [sic] is beginning to interact with the other children in his class[.]**" (J-29 at 6, emphasis original.) A letter was authored to K.A., dated February 28, 2019, in which the thirty-day review IEP was enclosed for her. (R-30.)

The annual IEP review meeting occurred on May 13, 2019. K.A. and Colleen Patrick participated by phone. Ms. Bisinger was present along with the preschool teacher,

Cherie McNellis; the case worker, Nancy Scully; the principal, Adrienne McManis; and an individual noted to be related service personnel. (J-33.) There is no indication that a separate general education teacher was present. There is no indication that K.A. or Colleen Patrick objected to a separate general education teacher not being present.

The proposed IEP provided for B.A. to attend ESY and the integrated preschool program for the 2019-2020 school year. Speech related services were recommended. (J-33.) K.A. consented to implementation of the IEP as per her signature on the IEP as of May 30, 2019. (J-33 at 28.)

The proposed IEP of May 13, 2019, did not include transportation for the recommended ESY program or the 2019-2020 school year. (J-33.) This was a change from the prior IEP's of January 25, 2019, and February 25, 2019. Ms. Bisinger explained that transportation was not being recommended because the location of the preschool program was shifting from the Audubon Park location to the Haviland School, which was closer to petitioners' residence, being approximately .4 miles from their residence. The path of travel when walking to Haviland did not include walking along a busy traffic street, except for crossing the White Horse Pike, which was an intersection controlled by a traffic light and believed to have a crossing guard present.

The District had also received conflicting information about the child's medical needs, so it was not recommending transportation to be provided. Dr. Bruner's note from January indicated that it was medically necessary for B.A. to be transported to and from school, noting that extreme temperatures and inclement weather could pose a risk to B.A., to become ill or exacerbate his medical conditions. The District requested more clarification about the medical fragility of B.A. shortly after the January 25, 2019, IEP, but did not receive it. The District subsequently received a note from another doctor, Dr. Levy, indicating that B.A. had no medical restrictions to prevent him from participating in recess or attending field trips. (J-38.) This was noted in the May 13, 2019, IEP as: "On 3-21-19, a letter from Jodi Levy, MD (Cooper Pediatric Care at Voorhees) was submitted to the District. This letter indicates that B. is allowed to go on class trips and go outside as long as the temperature is 40 degrees or higher." (J-33 at 5.)

During the time B.A. had started to attend the preschool program, there were no reports to Ms. Bisinger from petitioners, nor from school staff, that he was unable to participate in physical activities. She knew that B.A. attended the class trip to Storybook Land, a children's amusement park. B.A. did not require any accommodations to attend the trip. B.A. participated in the full length of the trip, without a stroller, wheelchair, or assistance. Nothing was reported to Ms. Bisinger, suggesting that B.A. had any difficulties during the field trip.

Ms. Bisinger was aware that transportation costs were provided by the District for B.A. to attend the ESY in 2019, and for the 2019-2020 school year, as the result of emergent applications brought by petitioners during the pending due process request, which were consented to by the parties. She acknowledged that B.A. did not go outside for recess during the ESY program. That decision was made due to conflicting medical documentation. Dr. Bruner's note indicated that extreme temperatures could exacerbate the child's symptoms, or cause illness, while Dr. Levy indicated there were no medical issues to prevent B.A. from participating in recess or attending field trips, and he could go outside as long as the temperature was forty degrees or higher.

Ms. Bisinger indicated that the ESY students do not always go outside for recess every day. That decision is made by the teacher, who may choose not to take the class outside due to extreme weather. The teacher made the decision to keep B.A. inside during recess, to err on the side of caution, given the conflicting medical documentation that he was medically fragile and could not walk to school and be exposed to extreme temperatures, yet was cleared to play at recess and attend field trips, without restrictions. (J-21; J-31.) Ms. Bisinger confirmed that the teacher did not notify K.A. of her decision to keep B.A. indoors during ESY recess.

After the May 13, 2019, IEP, the district physician, Dr. Runfola, was engaged in the matter. Ms. Bisinger reached out to Dr. Runfola and explained the situation regarding the dispute over the provision of transportation; provided records to him; and asked for his opinion based upon the documentation and information they had, to clarify what the child's medical needs were. She understood that he reached out to the child's medical providers to get further information.

B.A. attended the 2019 ESY program. A progress report was issued by B.A.'s summer teacher. (R-45.) It was reported to Ms. Bisinger from other staff members that B.A. was doing well and progressing.

Ms. Bisinger acknowledged a subsequent IEP issued on November 20, 2019, which provides for transportation and OT, because of the resolution of the emergent applications during the pending due process request. (J-66.) Other than the OT and speech related services in the November 20, 2019, IEP, the CST did not recommend any related services for B.A.

James Runfola, M.D., testified for the District. He is licensed to practice medicine in the State of New Jersey. He obtained his MD degree in 1997, was a resident in family practice, and has been employed in the field of family medicine as a primary care physician since 2000. (R-128.) He serves as a school physician for several area schools. He has been the school physician for Audubon since 2012. He was qualified as an expert in the fields of school and family medicine.

Dr. Runfola was tasked with reviewing B.A.'s medical conditions to assess the alleged need for transportation to and from the preschool. He authored a report, dated December 18, 2019, concluding that B.A. did not have a medical need for transportation due to a diagnosis of asthma, nor due to an atrial septal defect. (J-109.)

Dr. Runfola came to his conclusion based upon a review of B.A.'s medical records from Children's Hospital of Philadelphia (CHOP), Cooper Pediatrics, and a cardiovascular specialist; the communications from Cooper Pediatrics to the school district; school records from the CST; nursing communications; parent communications; and his communications with Dr. Levy and Dr. Bruner. (J-44; J-46; J-47.) Dr. Runfola did not find any limitation recommendations regarding transportation in B.A.'s medical treatment records. There was a limitation in the pediatric cardiologist records that B.A. should not engage in SCUBA diving due to B.A.'s atrial septal defect. He viewed a video clip of B.A. walking down approximately three steps with a person whom he presumed to be a therapist. He did not recall seeing B.A. struggle in navigating the steps. He

acknowledged that he did not observe B.A. in the school setting, did not perform a physical evaluation of the child, and never met B.A.

Based upon his medical expertise, Dr. Runfola concluded that the child's mild persistent asthma diagnosis "has a level of disease severity that will permit physical activity and exposure to weather patterns in our locale that will not increase his risk of significant exacerbations." (J-109.) He noted even with poor treatment compliance, B.A. did not have any "exacerbations that were markers for a higher level of disease severity and risk." (J-109.) B.A. did not have a medical need for transportation.

Nancy Scully testified for the District. She has been employed as the school psychologist for the District since 2004. (R-125.) She serves as case manager for all preschool students, and was B.A.'s case manager. (CM Scully.)

In August 2018, CM Scully first heard of K.A.'s request for B.A. to be evaluated. When she returned to work for the 2018-2019 school year, she was provided a copy of K.A.'s letter of August 9, 2018, requesting testing for B.A. (J-3.) She attempted to contact K.A. on September 6, and September 7, 2018, leaving messages for K.A. on those dates. Ms. Bisinger thereafter sent a letter to K.A., advising the parent of the scheduled planning meeting on September 20, 2018. (J-4.) K.A. attended that meeting and consented to the requested evaluations of the child. (J-6.)

CM Scully completed a psychological evaluation of B.A. on October 25, 2018, and signed her evaluation report on November 14, 2018. (J-11.) An OT evaluation was completed on November 5, 2018, by occupational therapist Margaret Walsh. (J-12.) A Social Evaluation was completed on November 20, 2018. (J-13.)

An eligibility meeting was scheduled for B.A. on December 13, 2018. A letter, dated November 30, 2018, from Ms. Bisinger to K.A., notified K.A. of the scheduled eligibility meeting. (J-14.) CM Scully called K.A. and left a voice mail for her, confirmed the date of the eligibility meeting, and issued a letter to K.A., dated December 5, 2018, reiterating that the meeting was scheduled. (J-15.) CM Scully's letter to K.A. also directed K.A. to contact a specific school representative to complete the child's registration

process and she enclosed registration materials to be completed by K.A. (J-15.)

K.A. did not appear for the meeting on December 13, 2018. A few days thereafter, Ms. Scully received a voice mail message from Colleen Patrick, on behalf of K.A. CM Scully returned the call, and was advised by Ms. Patrick there was some misunderstanding regarding the scheduled date for the meeting. Ms. Patrick requested to come in with K.A. to meet with CM Scully, which they did on December 17, 2018. CM Scully was advised that B.A.'s father had recently passed away and that K.A. had experienced trauma and abuse during her relationship with B.A.'s father. She was advised that there was drug addiction during that relationship. She was advised that K.A. had difficulty understanding the IEP process and Ms. Patrick was there to help her navigate through the process. K.A. signed the authorization for the District to communicate with Ms. Patrick. (J-18.) They all reviewed B.A.'s eligibility documents and the proposed IEP. (J-16, J-17.) K.A. and Ms. Patrick signed the eligibility review document and the December 13, 2018, IEP on December 17, 2018. (J-16, J-17.)

CM Scully confirmed that the OT evaluator was not present at the December 13, 2018, eligibility meeting. (J-16.) CM Scully had not received a waiver from K.A. to excuse the OT evaluator from attending the meeting, nor did she receive a waiver from K.A. excusing either a general education or special education teacher from being present at the meeting. CM Scully indicated that the OT evaluator was not required to attend the eligibility meeting. She also confirmed that Cherie McNellis, the pre-school teacher certified in general education and special education, signed the attendance sheet for the eligibility review meeting on the general education teacher line. (J-16.) CM Scully believed teacher McNellis erred by signing on the general education line, instead of next to the special education teacher line where her name was typed in as a conference participant. (J-16.) CM Scully acknowledged that a general education teacher would not have been present at the meeting, had teacher McNellis signed as the special education teacher, according to the other signatures that appear on the attendance list. (J-16.)

An email from the B.A. Gmail account, outlining parental concerns, was sent to CM Scully on January 6, 2019. (J-27, R000125-126.) Colleen Patrick and K.A. attended the IEP meeting of January 25, 2019. (J-27.) The text of the January 6, 2019, email was not

typed into the IEP, nor cut and pasted into the IEP. It was attached to the IEP, as per CM Scully's supervisor. The parental concerns email was noted in the IEP, which stated that the email was attached. (J-27 R000102; R000125-126.) The attachment is considered part of B.A.'s IEP.

K.A. did not attend the February 25, 2019, thirty-day IEP review meeting. (J-29.) CM Scully believed that K.A. was provided notification of the meeting. It is her typical practice to call the parents in advance of the meeting and the District sends a letter notification to the parents.

CM Scully acknowledged that no one was listed on the attendance sheet on February 25, 2019, who could act as the general education teacher at that meeting. She was unaware of K.A. signing any waivers excusing any participants from the meeting. She is aware that the principal, who attended some of the IEP meetings, is certified in general education and special education and knows the general education curriculum.

CM Scully called K.A. after the February 25, 2019, IEP meeting. She reviewed with K.A. that the meeting was held and what was agreed upon. She asked K.A. if she had any concerns. K.A. was pleased with B.A.'s transition and inquired about whether he was interacting with other children in the class. (J-29 at R000133.)

CM Scully acknowledged there were no progress notes in the section of the February 25, 2019, IEP, regarding goals for that IEP. (J-29.) Likewise, there were no notes on the May 13, 2019, IEP for the goals listed on that IEP. (J-33.) She indicated that goals and objectives are not typically filled in on the IEP. She asserted that each IEP was completed with "Present Levels of Academic Achievement and Functional Performance." (J-29, R000132; J-33, R000163.) The parents can access information about their student's progress via the online parent portal. Progress reports and report cards are issued by the teacher during the school year.

CM Scully is familiar with B.A. As case manager, she will pop into the pre-school classroom and observe the session. She communicates with the OT and PT therapists regarding the students and their progress. During the summer 2020 ESY program, she

served as the classroom aide for B.A.'s class. She thus has personally observed B.A.

When B.A. began the pre-school program, he was very timid, quiet, shy, and cautious. It took B.A. a bit to build stamina to get through the two and one half hour pre-school program. Initially, he would nap a lot. By the summertime of 2018, B.A. was talking and very trusting and comfortable with the staff and other students. His comfort level and communication level had grown. B.A. wanted to participate in all class activities. She was aware that B.A. attended a class trip to Storybook Land without limitation or accommodations. The only issue she was aware of regarding any restrictions for B.A., was that he could not be outside in extreme weather or extreme temperatures.

Cherie McNellis testified for the District. She has been employed by the District as the pre-school teacher since September 2007. She holds degrees in special education and psychology. She holds certifications as a K-5 general education teacher and ages three to twenty-one special education teacher. She was B.A.'s teacher from approximately February 2018, through the end of the 2019-2020 school year. She was on maternity leave from approximately June 2018 through November 2018. She did not teach in the summers when B.A. attended the ESY program.

There were approximately thirteen to fourteen students in her classroom while B.A. was a student. The preschool program is five days per week, for two and a half hours. Throughout that time, therapists will come into the classroom and conduct sessions. The therapy sessions were conducted in small groups of approximately four to five students, for approximately twenty minutes, by the occupational therapist, physical therapist, and speech therapist. Those sessions were provided to all students in the classroom, both general education and special education students. Students receiving individualized therapies would be pulled from the classroom. Ms. McNellis recalled that B.A. received individual occupational therapy sessions in the fall of 2019.

When she first came to know B.A., Ms. McNellis found him to be very quiet, meek, and he made one word utterances. B.A. would not refer to objects by name, often using the word "birdie." He did not refer to others by their names. B.A. often fell asleep in class. He was able to use scissors properly, copy and trace straight lines, but could not write

basic letters or copy a circle. By the end of B.A.'s time in preschool, Ms. McNellis observed a much different child. B.A. was "super" outgoing and talkative to staff members and students. He participated, asked questions, and referred to the staff by name. B.A. verbally identified objects properly. His manual dexterity improved. B.A. did continue to have some pre-academic skills at issue, such as writing his name without assistance due to his grasp of a pencil. B.A. did have improved motor skills utilizing blocks and Legos.

Ms. McNellis acknowledged that B.A. was not toilet trained when beginning preschool and could not utilize the toilet on his own. By the end of the school year, B.A. was able to pull his pants down and utilize the toilet, but did not always stay dry through the class session.

K.A. never communicated to Ms. McNellis any physical or medical restrictions or limitations for B.A., except for situations if he had been out sick for the day and was returning to school with some type of limitation.

Ms. McNellis accompanied the students to outdoor play time, which required the students to navigate the hallway and two flights of steps, and traverse outside to the playground, which had two playground sets. It took approximately four to five minutes to walk out to the play area. She observed B.A. to walk and navigate steps without issue. B.A. actively played on the playground equipment, and loved to run, climb, and use the slides. She did not observe any limitations in B.A. during outdoor play. She observed B.A. during the class field trip to Storybook Land, where he was accompanied by his "step" grandmother. B.A. did not utilize any assistive devices such as a wheelchair or stroller. B.A. navigated the park without limitations or any observed issues.

She was not the summer teacher during the time B.A. was withheld from participating in outdoor play time. She did not recall any specific feedback regarding B.A. for the summer, from the summer teacher, but for a general report that all students did well.

She was at the IEP meeting of December 13, 2018, as the special education teacher. (J-16.) She acknowledged that the social worker and occupational therapist

were not present. She acknowledged that none of the “specials” class teachers, for art, music, library, or physical education were present at any of the IEP meetings for B.A.

Ms. McNellis was aware that B.A. was transported by bus to preschool when he attended the program held in the Audubon Park building. B.A. was driven to school by his “step” grandmother while attending preschool during the 2019-2020 school year.

Credibility Analysis

A fact finder is obligated to weigh the credibility of witnesses. 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 observations 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. Credibility findings are “often influenced by matters such as observations of character and demeanor of witnesses and common human experience that are not transmitted by the record.” State v. Locurto, 157 N.J. 463, 475 (1999.) “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).

The school physician, Dr. Runfola, testified in a straightforward, professional manner. There was no embellishment or personal animus towards petitioner detected from his demeanor and testimony. He candidly confirmed he has never met B.A. His opinion was based upon his review of the child’s medical records and the communications he had with the medical providers and school staff. His opinion was delivered in a thoughtful and reasonable manner, based upon the information and documentation he reviewed and his knowledge and skills. His testimony was credible.

The school staff members who testified were frank and earnest in their opinions as to their interactions and observations of the child. They were not evasive in responding

to cross-examination questions. Their testimony was consistent with one another and the evidential documentation. I deem their testimony as credible.

Further Factual Findings

Based upon careful consideration of the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, and having previously adopted and **FOUND** as **FACTS** the joint stipulations of the parties as recited above; I further **FIND** the following as **FACTS**:

B.A. was born on August 25, 2015. His mother is K.A., and his father is deceased. In August 2018, K.A. requested that B.A. be evaluated by the District.

B.A. was evaluated and an IEP was adopted for him, dated December 13, 2018. K.A. did not attend the IEP meeting. K.A. and B.A.'s "aunt," Colleen Patrick, met with Nancy Scully, B.A.'s case manager, on December 17, 2018, and discussed the December 13, 2018, IEP. On December 17, 2018, after that meeting, K.A. sent an email to Ms. Scully, indicating that Ms. Patrick assisted her to set up email so that she could access it from her phone. She inquired about OT services and noted that Ms. Scully would be "looking into" transportation for B.A.

As of the beginning of January, 2019, the child's pre-school registration process still was not complete, due to additional documentation and information to be submitted by the parent. B.A. began to attend pre-school towards the end of January 2019.

The Audubon preschool program is an integrated program, with general education and special education students in the classroom. A component of the integrated program includes weekly SL, PT, and OT group sessions. The pre-school session is two and one half hours.

Another IEP meeting was conducted on January 25, 2019, to address the parent's concern about the provision of transportation and individual OT services. The January 25, 2019, IEP provided for transportation services for the 2018-2019 school year, noting

that supplemental medical documentation was needed. Weekly group OT sessions were provided in the January 25, 2019, IEP for the child.

A thirty-day IEP review was conducted on February 25, 2019, generating another IEP. Written notice of the meeting to the parent was in the District's file, but not produced during discovery for this matter. The parent did not attend the February 25, 2019, meeting. She did confirm on the telephone with the case manager, on February 27, 2019, that she was pleased with the child's transition and inquired as to whether B.A. was interacting with other students.

B.A. initially presented as timid to engage with peers and staff members. He would nap and needed time to develop stamina for the two and one half hour pre-school session. He transitioned into the program smoothly. The staff members all reported progress by B.A. in his social interaction with peers and staff and his SL skills. The staff members did not observe any physical or other limitations by B.A. during classroom sessions, outdoor play time, navigating the hallways, nor during a class field trip to an outdoor children's amusement park. B.A. did not require any assistive devices or equipment. No additional medical documentation was provided by the parent regarding any claimed physical or medical condition or issue for B.A. necessitating transportation, to supplement the January 9, 2019, note of Dr. Bruner, or the note from Dr. Levy, dated March 21, 2019.

On May 13, 2019, a meeting for the annual review of B.A.'s IEP was conducted. K.A. and Ms. Patrick participated by telephone. The May 13, 2019, IEP provided for ESY and for the 2019-2020 preschool services to continue to be provided in the District, but at a different building location, closer to petitioners' residence, without transportation.

Petitioners submitted a note from Dr. Levy, dated May 26, 2019, to the District on or about May 20, 2019. Dr. Levy's note indicates "It is medically necessary for [B.A.] to have transportation to and from school." The note enumerated the child's "problem list" which was a diagnosis list, without explanation as to why each diagnosis necessitated transportation. The note stated: "Transportation to school is medically necessary to avoid extreme temperatures and elements that may exacerbate his symptoms or cause illness that could exacerbate illness. Extreme temperatures include hot and cold temperatures."

(J-37; J-38.) Supervisor Bisinger issued a letter, dated May 23, 2019, to petitioner, confirming receipt of Dr. Levy's note, and that same would be reviewed and considered."

The May 13, 2019, IEP did not provide for individual OT for the child. Petitioners requested an OT independent evaluation and executed authorization for the school to conduct same. The OT independent evaluation was completed July 30, 2019.

Petitioner filed for due process on or about June 18, 2019, and simultaneously sought emergent relief, requesting transportation for the impending 2019 ESY program. The emergent application was resolved by consent, with the District agreeing to reimburse the K.A. for transportation of B.A. for the ESY program.

Petitioner submitted a second emergent application, on or about August 28, 2019, during the pendency of this due process request, seeking transportation for the 2019-2020 school year and OT services. That emergent application was also resolved by consent.

On September 18, 2019, the parties met and a revised IEP was adopted for the 2019-2020 school year, reflecting the agreement reached for the emergent application from the end of August. Another IEP was completed on October 7, 2019. Petitioners disagreed with that IEP. Another IEP meeting was conducted on November 20, 2019, which also was disapproved by petitioners.

Petitioners' due process request, which is the subject of this matter, challenges the May 13, 2019 IEP. Petitioners seek out of district placement, or enhanced services and educational time in district, and compensatory education.

The District contends that it has provided FAPE. The District's integrated pre-school program provided services outlined in the child's IEP and B.A. progressed. There is no demonstrated need for B.A. to receive enhanced services, additional educational time, nor any compensatory education. The District provided transportation pursuant to the January 25, 2019, IEP, and should not be required to provide any further

transportation, as per the May 13, 2019, IEP, which is the subject of petitioners' due process petition.

LEGAL ANALYSIS AND CONCLUSIONS

The Federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., was enacted to ensure that children with disabilities have access to a free appropriate education (FAPE). 20 U.S.C. § 1412(a)(1). FAPE includes special education instruction and related services designed to meet the needs of the child. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1, et seq. The primary method of ensuring delivery of FAPE is through an IEP. 20 U.S.C. § 1414(d)(1)(A). An IEP outlines the child's present levels of academic achievement and functioning, outlines measurable goals and the services to be provided, and establishes objective criteria for evaluating the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); C.H. v Cape Henlopen School District, 606 F.3d 59, 65 (3d Cir. 2010).

Pursuant to the IDEA, "a child with a disability" is one who has a disabling condition and needs special education and related services. 20 U.S.C. §1401(3)(A). In New Jersey, a student is eligible for special education and related services by satisfying a three part test, by demonstrating: 1) the student meets the criteria for one or more of the disabilities defined in N.J.A.C. 6A:14-3.5(c)1-14; 2) the disability adversely affects the student's educational performance; and 3) the student is in need of special education and related services. N.J.A.C. 6A:14-3.5(c); H.M. v Haddon Heights Board of Education, 822 F. Supp. 2d 439, 449-450 (D.N.J. 2010).

If a change in a child's IEP is sought, whether by the parents or the school district, the burden to prove whether an IEP is appropriate is upon the school district. Lascari v Board of Education of the Ramapo Indian Hills Regional High School District, 116 N.J. 30, 44 (1989).

The IEP of May 13, 2019, is in contention by petitioners. The difference from the February 25, 2019, IEP in question is petitioners' request for out of district placement to address the lack of transportation in the May 13, 2019, IEP and petitioners request for

individual OT.

The February 25, 2019, IEP did not provide for individual or group OT. Although noted in that IEP that B.A. had some difficulties with some OT skills, his delays appeared to be secondary to limited exposure. He demonstrated steady growth over thirty days, as the Audubon preschool integrated program did incorporate once weekly OT therapy for all students in the class. The May 13, 2019, IEP reiterated the information from the thirty day review IEP of February 25, 2019, regarding B.A.'s steady growth. K.A. and Ms. Patrick participated by phone for the May 13, 2019, IEP. No concerns for OT services were noted in the May IEP. It was not until after the meeting that K.A. raised a concern for OT, and requested an independent evaluation, which was completed. Thereafter, the parties agreed upon OT services after an emergent application was presented at the start of the 2019-2020 school year. That was incorporated into a September 18, 2019, IEP, whereby once per week OT for twenty minutes would be provided.

With respect to petitioners' contention that there should be compensatory education for OT, nothing in the record demonstrates the need to order same. Petitioners contend that parental concerns were not addressed by the District. The record does not demonstrate that. To the contrary, the parent requested an independent OT evaluation after the May 13, 2019, IEP issued. The evaluation was completed. The parties imminently addressed the issue of OT prior to the start of the 2019-2020 school year. They agreed upon OT therapy services for the child, which was memorialized and incorporated into the September 19, 2019, IEP. Nothing has been presented to demonstrate a deficiency on the part of the District in failing to include individual OT in the May 13, 2019, IEP. Nothing has been presented to demonstrate the need for compensatory education, nor out of district placement, in order to provide FAPE for B.A. I **CONCLUDE** that petitioners' request for compensatory education or out of district placement for B.A. because OT individual services were not provided to B.A. during the pre-school 2019-2020 year, shall be **DENIED**.

Petitioners contend that B.A. should have transportation provided by the District, as part of a required service for B.A. to access the curriculum. School districts are required to provide transportation for elementary students who live more than two miles

from their public school. N.J.S.A. 18A:39-1. B.A. resided less than two miles from the school buildings where he attended the pre-school program. However, school districts shall provide transportation to students with disabilities, who have been determined to be eligible for special education and related services, in accordance with their IEP. N.J.A.C. 6A:27-5.1(a).

Petitioners assert that transportation is a service which should not have been removed from B.A.'s IEP of May 13, 2019. Initially, in January 2019, petitioners sought transportation for B.A. because K.A. did not have a driver's license and did not have a motor vehicle. When those reasons were found insufficient to mandate the District to provide transportation, petitioner obtained the note from Dr. Bruner, indicating that transportation was "medically necessary" for the child. The February 25, 2019, IEP provided for transportation services to and from school from "01/28/2019 – 06/19/2019" five days per week, per the school calendar. (J-29, R000131.) The school acted appropriately by including transportation in the child's IEP due to the District's receipt of Dr. Bruner's January 16, 2019, note which listed the child's diagnoses and specified that transportation was "Medically necessary to avoid extreme temperatures and elements that may exacerbate [B.A.'s] symptoms or cause illness that could exacerbate illness." (J-29, R000133.) The note lacked specifics as to the connection between the listed diagnoses and the "medical" need for transportation. The IEP appropriately noted "Transportation as a related service, to be provided upon continued submission of medical documentation and review of medical documentation for determining if required and appropriate." (Id.)

Petitioners submitted a note from Dr. Levy, dated March 21, 2019, which simply stated: "[B.A.] is allowed to go on class trip and go outside as long as the temperature is 40 degrees or higher." (J-31.) No additional medical documentation had been submitted to the District by petitioners, thereafter, as required by the February 2019, IEP, in any way related to the issue of transportation as a required service due to the child's medical needs. It was not until after the May 13, 2019, IEP was issued, that a post-dated medical note/letter from Dr. Levy was provided to the District on May 20, 2019. That letter listed the child's medical diagnosis and merely concluded that transportation was "medically necessary to avoid extreme temperatures and elements that may exacerbate [B.A.'s]

symptoms or cause illness that could exacerbate illness. Extreme temperatures include hot and cold temperatures.” (J-37.)

I **CONCLUDE** that the note from Dr. Bruner, and the two notes from Dr. Levy, are net opinions. There was no supporting information or documentation provided with any of the notes, nor was any presented during the OAL hearing, to describe the nexus between the child’s medical diagnoses and the medical necessity for transportation to be provided to B.A. at the public’s expense. Dr. Runfola opined that there was no medical necessity for transportation to be provided. His opinion is supported by his communications with B.A.’s medical providers and his review of B.A.’s medical records. The only medical restriction contained in the medical records was that B.A. should not go scuba diving. Dr. Runfola’s opinion was unrebutted by petitioners. I **CONCLUDE** that based upon a preponderance of the evidence, there is no medical condition or other reason for B.A. to be provided transportation to and from school by the District at the public’s expense, to enable B.A. to access the curriculum. I thus **CONCLUDE** that the removal of transportation as a provided service for the child, from the May 13, 2019, IEP was appropriate.

Petitioners raised concern about the lack of a separate general education teacher and special education teacher at IEP meetings. Petitioners assert that K.A. did not provide a waiver excusing any member of the IEP from participating in the meetings. See, N.J.A.C. 6A:14-2.3(a); N.J.A.C. 6A:14-2.3(k)10. The child’s pre-school teacher, Ms. McNellis, is certified as a general education teacher and special education teacher. She was present at the May 13, 2019, meeting. The parent participated by telephone, along with her requested advocate, Ms. Patrick. In matters involving an alleged procedural violation, an administrative law judge may decide that a child did not receive FAPE only if the procedural inadequacies: 1) impeded the child’s right to FAPE; 2) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or 3) caused a deprivation of educational benefits. N.J.A.C. 6A:14-2.7(k). The record is devoid of any factual support that the procedural deficiency of the lack of a separate special education teacher and separate general education teacher at the IEP meetings resulted in B.A. being denied FAPE. I **CONCLUDE** that the procedural deficiency raised by petitioners that specific members of the CST were

not present during the first IEP meetings, did not affect the child's receipt of FAPE.

The record supports that the District responded to parental concerns and appropriately addressed same. The parental concerns were either typed into the body of the IEP, or concerns which were outlined in emails from or on behalf of the parent were attached to the IEP. Whatever personal deficiencies the parent apparently has, do not reflect as deficiencies of the child, to warrant the relief sought. The documentation and unrebutted testimony of the District's staff members supports that B.A. thrived and progressed in the pre-school program provided by the District, despite assertions that the parental concerns were not addressed. The child's exposure to the program had a positive and progressive impact upon the child's skills and academic progress in pre-school, despite the home environment. The services B.A. received, in this school district, were what was needed for him to thrive and grow. The evidence preponderates that B.A. did thrive and progress. I **CONCLUDE** that the District provided FAPE to B.A. I **CONCLUDE** that all relief sought by petitioners in the due process petition shall be **DENIED**.

ORDER

It is **ORDERED** as follows:

1. Petitioners' request for out of district placement is **DENIED**.
2. Petitioners' request for compensatory education is **DENIED**.
3. Petitioners' request for enhanced services is **DENIED**.
4. Petitioners' request for transportation for B.A. is **DENIED**.
5. Petitioners' request for any other relief from the District pursuant to their due process petition, is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2020) 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 (2020). 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.



April 23, 2021

DATE

ELAINE B. FRICK, ALJ

Date Received at Agency

Date Mailed to Parties:

/dm

APPENDIX

WITNESSES

For petitioners:

None

For respondent:

Noelle Bisinger
James Runfola, M.D.
Nancy Scully
Cherie McNellis

EXHIBITS

Joint:

- J-1 December 17, 2018 to January 8, 2019, email chain re transportation
- J-2 January 26, 2017, BDI inventory
- J-3 August 9, 2018, letter from parent requesting evaluations
- J-4 NOT STIPULATED, ENTERED AS R-4
- J-5 NOT STIPULATED, ENTERED AS R-5
- J-6 September 20, 2018, evaluation notice and consent
- J-7 NOT STIPULATED, ENTERED AS R-7
- J-8 NOT STIPULATED, ENTERED AS R-8
- J-9 October 19, 2018, preschool med screen
- J-10 October 19, 2018, speech evaluation
- J-11 October 25, 2018, psychological evaluation
- J-12 November 5, 2018, OT evaluation
- J-13 November 20, 2018, social evaluation

- J-14 NOT STIPULATED, ENTERED AS R-14
- J-15 NOT STIPULATED, ENTERED AS R-15
- J-16 December 13, 2018, eligibility review
- J-17 December 13, 2018, IEP
- J-18 December 17, 2018, Child Study Team student information release form
- J-19 January 3, 2019, request for transport in IEP
- J-20 January 8, 2019, letter to K.A. from Bisinger re answers to K.A.'s questions
- J-21 January 9, 2019, Cooper Pediatric
- J-22 January 9, 2019, email to Noelle re no response from Noelle for her concerns
- J-23 January 9, 2019, note from Doctor re transportation requirement for B.A.
- J-24 January 9, 2019, parental concern email
- J-25 January 13, 2019, letter to K.A. from Martin re denial to issue medication
- J-26 January 16, 2019, letter to K.A. from Bisinger re parental consent needed to implement IEP
- J-27 January 25, 2019. IEP
- J-28 NOT STIPULATED, ENTERED AS R-28
- J-29 February 25, 2019, IEP
- J-30 NOT STIPULATED, ENTERED AS R-30
- J-31 March 21, 2019, Cooper Pediatric
- J-32 April 16, 2019, letter to K.A. from Bisinger re annual IEP review meeting
- J-33 May 13, 2019, IEP with sign in sheet
- J-34 NOT STIPULATED, ENTERED AS R-34
- J-35 May 17, 2019, letter to K.A. from Bisinger re copy of IEP from 05/13/2019
- J-36 May 23, 2019, letter to K.A. from Bisinger re independent evaluation
- J-37 May 25, 2019, letter from Dr. Levy
- J-38 May 26, 2019, letter from Jodi Levi MD re necessity for B.A. to have transportation
- J-39 NOT USED
- J-40 May 29, 2019, letter to K.A. from Bisinger re meeting for re-evaluation planning
- J-41 June 11, 2019, OT IEE Consent to Evaluate
- J-42 June 17, 2019, letter to K.A. from Bisinger re services for B.A.

- J-43 June 20, 2019, Department of Education complaint
- J-44 June 21, 2019, James Runfola, MD letter
- J-45 NOT STIPULATED, ENTERED AS R-45
- J-46 July 17, 2019, Runfola letter
- J-47 July 30, 2019, Dr. Bruner letter
- J-48 July 30, 2019, OT evaluation with addendum
- J-49 July 30, 2019, OT independent evaluation
- J-50 August 31, 2019, Weisman PT evaluation
- J-51 September 19, 2019, from Kelsey re getting her children to Moorestown
- J-52 district calendar 2019-04-17
- J-53 September 17, 2019, from CP re request for additional services
- J-54 September 18, 2019, IEP
- J-55 September 19, 2019, parent concerns
- J-56 September 30, 2019, from KA disagreeing with IEP
- J-57 September 30, 2019, letter from Scully to petitioner with IEP
- J-58 PJM recording of September 18, 2019, meeting
- J-59 October 7, 2019, IEP meeting
- J-60 October 3, 2019, BA written notice
- J-61 October 4, 2019, email to petitioner with written notice
- J-62 October 7, 2019, letter from CP re Marge Walsh
- J-63 October 7, 2019, IEP
- J-64 October 19, 2019, disagreement with IEP
- J-65 November 20, 2019, IEP meeting
- J-66 November 20, 2019, IEP
- J-67 November 22, 2019, determination of eligibility letter
- J-68 November 22, 2019, determination of eligibility REVIEW
- J-69 November 25, 2019, disagreement letter from petitioner
- J-70 B.A. parent invitation letter November 6, 2019
- J-71 BA PT evaluation October 31, 2019
- J-72 BA rescheduled meeting letter November 11, 2019
- J-73 NOT USED
- J-74 NOT USED
- J-75 November 5, 2018, letter to CP re classroom teacher

- J-76 July 4, 2019, and 11 with CP on various issues
- J-77 September 30, 2019, letter from CP re asthma plan
- J-78 October 2, 2019, and 3, re medical visit update
- J-79 October 15, 2019, letter re doctor's notes
- J-80 October 21, 2019, petitioner note re absences
- J-81 October 22, 2019, letter re footwear
- J-82 October 25, 2019, letter re footwear
- J-83 November 5, 2019, letter from classroom teacher re diapers
- J-84 November 5, 2019, re return of teacher from leave
- J-85 November 14, 2019, from classroom teacher re BA in underwear
- J-86 November 21, 2019, email re diapers
- J-87 November 21, 2019, email to CP re point of contact
- J-88 November 27, 2019, CP mail re boots, arm fused and PT
- J-89 November 27, 2019, CP email re various issues
- J-90 December 10, 2019, to petitioner re attendance
- J-91 diaper photo
- J-92 October 2019, exchange with school nurse
- J-93 NOT USED
- J-94 NOT STIPULATED, ENTERED AS R-94
- J-95 June 10, 2019, letter to KA re Haviland and no transportation
- J-96 June 27, 2019, Dr. Bruner letter
- J-97 July 30, 2019, Bruner asthma treatment plan
- J-98 Runfola authorization and medical documents
- J-99 combined due process correspondence with petitioner
- J-100 December 20, 2019, letter from CP re experts
- J-101 NOT USED
- J-102 Children's Specialized Hospital
- J-103 Early intervention – initial evaluation
- J-104 Letter from Colleen Patrick enclosed discovery response
- J-105 Our Lady of Lourdes records
- J-106 January 20, 2020, response to CP discovery request
- J-107 July 3, 2019, letter to K.A., Patrick requesting discovery 07/03/2019
- J-108 September 9, 2019, letter to CP with discovery responses

- J-109 Dr. Runfola December 18, 2019
- J-110 CHOP records
- J-111 letter to CHOP requesting updated medical records November 26, 2019
- J-112 Cooper Pediatric Care (received December 3, 2019)
- J-113 Cooper Records September 11, 2019
- J-114 June 24, 2019, opposition to application for emergent relief
- J-115 June 28, 2019, decision approving settlement
- J-116 August 28, 2019, BA emergent relief application
- J-117 September 11, 2019, EDS 09675-19 KA obo BA v Audubon Boro BOE
Order on Application for Emergent Relief
- J-118 30150 Complete case file KA obo BA v Audubon Boro BOE
- J-119 30150 ER complete case file KA obo BA v Audubon Boro BOE
- J-120 Answer filed July 15, 2019
- J-121 through J-123, PRE-MARKED, NOT USED
- J-124 and J-125, NOT STIPULATED, entered as R-124 and R-125
- J-126 and J-127, PRE-MARKED, NOT USED
- J-128 Joint Stipulations of the Parties

For petitioners:

- P-1 thru P-12 PRE-MARKED, NOT USED
- P-13 MARKED January 23, 2020, not moved in
- P-14 thru P-17 PRE-MARKED, NOT USED
- P-18 MARKED January 23, 2020, entry denied September 21, 2020

For respondent:

- R-1 through R-3 Identification (ID) not used
- R-4 September 11, 2018, letter to K.A. from Bisinger re meeting invitation for special ed and evaluation planning
- R-5 September 17, 2018, letter to K.A. from Bisinger re: evaluation meeting rescheduled
- R-6 ID NOT USED, entered as J-6

- R-7 September 20, 2018, letter to Arnold from Bisinger re notification of Audubon's plans to evaluate B.A. for special ed eligibility
- R-8 October 17, 2018, letter to K.A. from Bisinger re failure to register B.A. as a resident student in the district
- R-9 through R-13 ID NOT USED, entered as J-9 through J-13
- R-14 November 30, 2018, letter to K.A. from Bisinger re determination of initial eligibility for special education
- R-15 December 5, 2018, letter to K.A. from Nancy Scully re B.A.'s eligibility to participate in preschool program
- R-16 through R-27 ID NOT USED, entered as J-16 through J-27
- R-28 January 29, 2019, letter to K.A. from Bisinger re copy of parental SEMI consent form
- R-29 ID NOT USED, entered as J-29
- R-30 February 28, 2019, letter to K.A. from Bisinger re 30 day IEP review
- R-31 through R-33 ID NOT USED, entered as J-31 through J-33
- R-34 May 13, 2019, IEP
- R-35 through R-38 ID NOT USED, entered as J-35 through J-38
- R-39 PRE-MARKED, not used
- R-40 through R-44 ID NOT USED, entered as J-40 through J-44
- R-45 July 2, 2019, ESY progress report
- R-46 through R-72 ID NOT USED, entered as J-46 through J-72
- R-73 PRE-MARKED, NOT USED
- R-74 PRE-MARKED, NOT USED
- R-75 through R-92 ID NOT USED, entered as J-75 through J-92
- R-93 PRE-MARKED, NOT USED
- R-94 January 31, 2019, letter from nurse to KA re inhaler
- R-95 through R-100 ID NOT USED, ENTERED as J-95 through J-100
- R-101 PRE-MARKED, NOT USED
- R-102 through R-121, ID NOT USED, ENTERED as J-102 through J-121
- R-121 through R-123, PRE-MARKED, NOT USED
- R-124 Resume of Noelle Bisinger
- R-125 Resume of Nancy Scully
- R-126 and R-127, PRE-MARKED, NOT USED

R-128 CV Dr. Runfola