



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

**FINAL DECISION**

OAL DKT. NO. EDS 09948-19

AGENCY DKT. NO. 2020-30290

**C.B. ON BEHALF OF C.B.,**

Petitioners,

v.

**HOPEWELL TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**Jamie Epstein, Esq.** for petitioners

**John B. Comegno, II, Esq.** and **Alexandra A. Stulpin, Esq.,** for respondent  
(Comegno Law Group, P.C.)

Record Closed: May 6, 2021

Decided: May 18, 2021

BEFORE **TAMA B. HUGHES, ALJ:**

**STATEMENT OF THE CASE**

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, C.B. (“mom” or “petitioner”) has requested a due process hearing on behalf of her son C.B., who is classified as eligible for special education and related services. Petitioner contends that the Hopewell Township Board of Education (the “Board” or District”), failed to offer her son an Individualized Education Program

(IEP) that delivered a Free and Appropriate Public Education (FAPE). Petitioner seeks an IEP reasonably calculated to offer C.B. a FAPE with appropriate accommodations and compensatory education.

### **PROCEDURAL HISTORY**

The request for due process was received by the Office of Special Education Programs (OSEP) on July 1, 2019. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on July 25, 2019, pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13. The matter was scheduled for a settlement conference on August 1, 2019, however, at petitioner's request, was adjourned to August 15, 2019. The matter did not settle and was assigned to the Honorable Tama B. Hughes, ALJ. On August 20, 2019, a prehearing conference was held and hearing dates were set for December 20, 2019, February 3, 2020, February 4, 2020, February 5, 2020, February 19, 2020 and February 24, 2020.<sup>1</sup> See August 3, 2019, Prehearing Order.

On November 1, 2019, petitioner filed a Motion for Prior Written Notice (PWN) and Discovery. By Order dated December 10, 2019, the motion was denied. See *December 10, 2019 Order*.

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<sup>1</sup> Hearing dates in the matter were originally scheduled for December 20, 2019, February 3 – 5th, 2020, February 19, 2020 and February 24, 2020. Within hours of setting the hearing date, counsel for the Board notified the Tribunal and opposing counsel that they were unavailable on December 20, 2019 due to a prior commitment. The date was instead, converted to an in-person settlement conference. Notably, over the ensuing months, as new dates were required to complete the testimonial portion of the case, multiple objections were placed on the record, and in writing by the petitioner over the respondent's unavailability on several of the suggested hearing dates and their alleged failure to provide "good cause" for declining the proposed dates. Given the short notice and/or inability to access schedules at the time, and/or basis provided by respondent's counsel as it related to their unavailability, the Tribunal accepted the Board's representations and overruled the petitioner's objections.

Notably, two of the hearing dates - March 30, 2020, and April 27, 2020, were subsequently adjourned, over the objection of petitioner's counsel, due to constraints imposed as a result of the Covid-19 virus. The April 27, 2020, date was instead converted to a status call to determine new hearing dates. Over the ensuing months, as alternate dates were being pursued to complete the testimonial portion of the case, multiple objections were again placed on the record by the petitioner's counsel over the respondent's unavailability.

On January 2, 2020, petitioner filed a Motion to allow petitioner's expert to testify via Skype. By Order, dated January 13, 2020, the Motion was granted. *See January 13, 2020, Order.*

On January 27, 2020, the Board's attorney requested an adjournment of the February 3, 2020, and February 4, 2020, hearing dates due to the death of a family member of one of the Board's primary witnesses/participants. Over the objection of petitioner's counsel, the hearing was adjourned for both dates and new dates were provided to the parties. The rescheduled hearing dates were February 5, 2020, February 6, 2020, February 12, 2020, February 19, 2020 and February 24, 2020.

On January 28, 2020, petitioner's counsel filed an application seeking among other forms of relief, the striking of respondent's Answer for failure to provide all discovery that had previously been requested in his June 29, 2019, Discovery Demand letter. By letter, dated February 4, 2020, petitioner's application was granted to the extent that any documentation which was not produced in accordance with N.J.A.C. 1:6A-10.1 with limited exception, would be excluded. *See February 4, 2020 Letter Order.*

On or about January 28, 2020, respondent's counsel filed a Motion in Limine seeking to preclude the testimony of Christine Bell and Karen Sloan. By Letter Order, dated February 11, 2020, the respondent's application was denied. *See February 11, 2020, Letter Order.*

On February 5, 2020, at the request of the parties, the hearing date was converted to a settlement conference which flowed over into February 6, 2020. The matter did not settle at that time and the hearing commenced, taking place over multiple days (February 6, 2020, February 12, 2020, February 19, 2020, February 24, 2020, July 15, 2020, July 27, 2020, September 29, 2020, September 30, 2020, November 9, 2020), March 24, 2021.<sup>2</sup>

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<sup>2</sup> A status call was held on November 12, 2020, however, due to technical difficulties in transferring the recording, the record was lost and had to be recreated. Transcripts were received by counsel in mid-March 2021. On March 24, 2021, the parties conferenced and documents that were entered into evidence

On February 6, 2020, petitioner's counsel requested a reconsideration of his January 28, 2020, application and the tribunal's February order as it related to discovery. The application was denied on the record. As a result of the denial, petitioner's counsel requested that I recuse myself on the basis of bias and impartiality. The application was denied.

Due to the closure of the OAL offices for in-person hearings as a result of Covid-19, on March 25, 2020, petitioner's counsel filed an application to have the scheduled hearing dates of March 25, 2020, and April 27, 2020, conducted remotely via Zoom. By Letter Order, dated March 27, 2020, petitioner's application was denied as to the March 25, 2020, hearing date but reserved as to the April 27, 2020, hearing date. *See March 27, 2020, Letter Order.* Upon reevaluation of petitioner's application in April 2020, as to the April 27, 2020, hearing date, petitioner's application to proceed via Zoom was again denied and new hearing dates were subsequently set for July 13, 2020, July 15, 2020, and July 27, 2020.

On June 24, 2020, counsel for the respondent filed a motion to adjourn the July 2020, hearing dates until in-person hearings were available. By Letter Order, dated July 9, 2020, respondent's application was denied.<sup>3</sup>

On August 28, 2020, counsel for the respondent filed a Motion to Quash a subpoena issued by the petitioner to a Donna VanMeter (VanMeter), a witness which the petitioner was seeking to testify as well as an application for reconsideration of the Tribunal's February 11, 2020, Letter Order. By Order, dated September 18, 2020, the respondent's application was reserved until further information was received from petitioner's counsel. Thereafter, on September 29, 2020, after hearing argument from counsel, respondent's application to preclude VanMeter's testimony as a rebuttal witness was granted and their motion for reconsideration was denied.

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were identified. At the time of the call, the parties were informed that their summation briefs were to be simultaneously submitted on May 3, 2021. See March 25, 2021 Letter

<sup>3</sup> Due to respondent's counsel having a scheduling conflict on the July 13, 2020, hearing date, with petitioner's consent, the matter was adjourned to the next scheduled hearing date of July 15, 2020.

Closing briefs were required to be submitted no later than May 3, 2021. Respondent's brief was timely submitted. No brief was submitted by the petitioner and thereafter, the record closed on May 6, 2021.<sup>4</sup>

## **FACTUAL DISCUSSION AND FINDINGS OF FACT**

### **Testimony:**

**Sarah Levin Allen, Ph.D. (Dr. Allen)**, a licensed Psychologist, was qualified and testified on behalf of the Board, as an expert in pediatric neuropsychology, school psychology and special education program review.<sup>5</sup> (R-1)

Dr. Allen testified that C.B. was referred to her by the District for an independent evaluation. Her name had been provided to the District by the petitioner. One of the first things she does when she gets a referral is question the parent about the educational concerns that they have for their child. In this case, petitioner expressed concern about C.B.'s programming and whether he would thrive in an inclusion classroom with a special needs teacher. Petitioner also expressed concerns about C.B. developing social skills with typically developing peers and wanted the school to be provided with techniques and skills which would allow C.B. to stay with his peers. (R-8.)

As part of her evaluation process, she observed C.B. who, at the time, was seven-years- eleven-months-old and in second grade, on three occasions - January 16, 2019, January 28, 2019, and February 7, 2019. Her first observation of C.B. took place

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<sup>4</sup> By Letter Order, dated May 4, 2021, petitioner's counsel was ordered to provide good cause for his failure to provide a closing brief. *See Letter Order, dated May 4, 2021.* In response, petitioner belatedly certified that he had other matters that took precedence, however, he would submit his brief the following day. No brief was submitted and by Letter Order, dated May 6, 2021, petitioner's counsel was ordered to provide his brief by the end of the day for it to be taken into consideration by the Tribunal. *See Letter Order dated May 6, 2021* No brief was submitted.

<sup>5</sup> Petitioner's counsel ongoing objections to the form of the Board's attorneys' foundational questions of Dr. Allen's credentials and questions on direct examination were noted for the record. Petitioner's objection on the qualification of Dr. Allen as an expert in Special Education Program Review were also noted for the record. A second application for my recusal was submitted by petitioner's counsel as well as a motion for a mistrial during the voir dire of respondent's expert witness. Both applications were denied.

in the school setting in both the general education classroom as well as the pull-out class. At the time, he had a one to one aide sitting next to him. He was fidgety and inattentive as she observed him, and had to be cued frequently, but overall, he was able to follow along in the lesson. The teacher engaged him in the lesson, and he was able to work with the rest of his peers.

She also reviewed a myriad of reports and records including his 2018/2019 IEP (J-3), progress reports, conducted testing, and she also spoke to C.B.'s case manager.

In discussing the reports/evaluations that were reviewed, Dr. Allen stated that she took a look at the testing that was done by the Children's Hospital of Philadelphia (CHOP) – specifically the Wechsler Intelligence Scale for Children (WISC-V), the Autism Diagnostic Observation Schedule (ADOS-2) and a Clinical Evaluation of Language Fundamentals.

The WISC-5, which was administered in February 2018, reported that C.B.'s full scale IQ was 95 - within the thirty-seventh percentile, which placed C.B. solidly in the "average range". The ADOS-2, an evaluation that is used to diagnose autism, came back with a score of twenty which was above the cutoff for an autism spectrum diagnosis and qualified him for the diagnosis of autism. Also reviewed was the Kaufman Test of Educational Achievement II (Kaufman Test) which showed a low average in reading, and average math and writing scores. C.B.'s reading equivalent on the test was a 1.2, which according to C.B.'s pull-out reading instructor, placed him at a first-grade level. At the time of the evaluation, C.B. was receiving a total of one hundred and thirty-five minutes of reading and language throughout the day, forty-five minutes of phonics, and fifteen minutes of spelling in the resource room. The remainder of his day was in the general education class with a one to one aide.

Also taken into consideration was the evaluation by Ellen Topiel (Topiel) who found that C.B. had difficulty automatically reading or decoding sight words on grade level. This was consistent with the school's findings and standardized tests. Topiel also found that C.B. had difficulty spelling and reading rules, did not check nearby

words to decipher meaning, had poor recall and retelling of stories and had deficits in reading comprehension strategies.

Dr. Allen went on to state that on the testing that she conducted, C.B. performed average to low average on the verbal learning and memory task. On visual tracking and fine motor, he fell within the average range for visual scanning. On the receptive language measure, he performed in the average range. In looking at his attention and executive functioning, C.B. performed in the low average range for auditory attention which decreased as the tasks became more complex.

According to Dr. Allen, based upon her observations, testing and review of prior records/evaluations, she found that the District's programming had several strengths as well as areas of weaknesses. Among the itemized strengths, she determined that C.B. felt comfortable, happy and well situated in the classroom. This was important because that was a basic need – safety, security and comfort. A second strength was C.B.'s teacher who incorporated him into the classroom, managed him and his impulsivity and made him feel as though he belonged. The third strength was the mixture of exposure that C.B. was getting between the typical peers as well as the specialized instruction.

In discussing the programming weaknesses, Dr. Allen noted that while the one-to-one aide was very supportive, she was providing too much cuing to the point that C.B. often missed the instruction in the general education classroom. Another weakness noted was the reading group size. She believed that C.B. would benefit from a small reading group so that the instruction could be more individualized. She also felt that C.B.'s executive skills were still an area of weakness and that he would benefit from more individualized training in that regard. (R-8.)

As part of her report, Dr. Allen explained that she also provided several recommendations. Among the recommendations were individualized reading instruction throughout the summer – either through a tutor during the Extended School Year (ESY) program or in place of ESY; a smaller reading group of just two to three students with his progress getting tracked individually; with support from the data collected – start fading back of the aide to allow some independence; transitioning to

using the general education teacher and/or peers in his class to clarify instructions. Also, giving him a checklist, for instance, to help support him and help him generalize strategies in the classroom; and if C.B.'s impulsivity and inattention significantly impact his performance in the classroom as the aide is fading back, work with a behaviorist to further develop a plan for independent skill building including improving attention and reducing impulsive behaviors. She also provided executive skills recommendations.

According to Dr. Allen, after her report was prepared, she submitted it to the District and the petitioner. She does not recall if the petitioner received it before or after the District, however, remembered getting a call from the petitioner who was upset over her findings. She also spoke to petitioner's counsel and recalled the conversation being adversarial and hostile. During that call, petitioner's counsel repeatedly suggested ways for her to make substantive changes to her report - which she refused to do.

Dr. Allen went on to state that after the District's IEP team reviewed her report, another IEP was prepared which included some of the recommendations that she had proffered. Thereafter, she participated in the triennial IEP reevaluation/eligibility/individual education program review meeting - not as the expert for the District's or petitioner, but on behalf of C.B. (J-4.)

The proffered IEP incorporated a number of her recommendations – one of which was her suggestion that C.B. be given more independence. The IEP called for a shared aide in math, science and social studies and a one to one aide for language arts literacy. Another recommendation, which was quasi incorporated, was the group size for reading. The new IEP called for an in-class resource setting for one period during which the teacher would work with C.B in a group no larger than three students. While not what she specifically recommended, she agreed with the proposed change. Also incorporated was her recommendation that C.B. receive individualized tutoring between July and August 31st. Last, the new IEP called for a Functional Behavioral Assessment (FBA) by a Board Certified Behavior Analyst (BCBA) in September 2019, which was along the same lines of what she had suggested. Dr. Allen went on to state that she agreed with all of the proposed modifications to the IEP.



In review of the “Accommodations, Modifications and Supplementary Aids and Services to be provided” Dr. Allen noted that a number of her recommendations had also been incorporated in multiple subject areas.

Dr. Allen went on to testify that in January 2020, in preparation for the upcoming Due Process hearing, she went to C.B.’s school to see his progress. Based upon that visit, she prepared a Neuropsychological Program Update.<sup>6</sup>

On cross-examination Dr. Allen was asked about what her fee arrangement was with the District and whether all of her services had been paid. In response, she relayed the flat rate for her report and her hourly rate. To date, the only fees that had been paid by the District were for her March 2019, report.

Dr. Allen recalled seeing an email from the petitioner in January 2019, which provided some suggestions of what she should look at when she performed her evaluation of C.B. as it related to what should or should not be in his IEP. The IEP in question being the November 2018, IEP. Attached to the email was a list of “guidelines” which the petitioner wanted her to consider. (PX-1.) When questioned whether she made the recommendations because they were lacking in C.B.’s current IEP, she stated that the recommendations were what she would like to see incorporated into C.B.’s IEP. She disagreed with the notion that her report did not connect her findings and recommendations to C.B.’s IEP - citing to her report where she stated that the “following is recommended for incorporation in C.B.’s IEP. According to Dr. Allen, it was not that the services – such as reading during ESY were not being provided, her recommendation suggested a change in format to a more individualized approach.

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<sup>6</sup> A challenge was raised by the petitioner as to the admissibility of Dr. Allen’s January 23, 2020, report and her testimony as it related to it during the hearing on February 6, 2020. The parties were asked to brief the issue and upon review of the same, on February 19, 2020, Dr. Allen’s January 23, 2020, report and all related testimony were stricken from the record for the reasons cited on the record.

In drafting her report, she took into consideration the prior reports, evaluations and records that were provided to her – including a report generated by Topiel. Everything that was reviewed was itemized in her report. She did not recall receiving a report from Dr. Odri who had conducted a behavioral assessment on C.B. Dr. Odri's report was dated April 2019, which was after she had generated her report, however, she may have seen a draft of it at some point in time. As a clinical psychologist and one of her specialty areas, she is qualified to review behavior. In C.B.'s case, she looked at his behavior, and the behavior reports from the school and the data collected. It was her belief, that he did not need a behavior assessment. She did recommend, however, that when the aide was faded back, that a behavior plan be developed and data tracked.

When asked if C.B.'s ability to focus and distractibility at times impedes his learning - which was noted in the November 2018, IEP, she agreed that it did and was something that she had observed. When asked what type of training and supervision was provided to C.B.'s one-to-one aide, Dr. Allen stated that she did not know. Nor did she know what type of documentation system was in place for the school or the aide to keep track of all of the interventions that were required or used to track C.B.'s data and progress. She was also unaware if the school had any type of documentation system which tracked C.B.'s behavior's that interfered with his learning. She did not see any documentation that tracked his performance. Dr. Allen acknowledged that the November 12, 2018, IEP did not provide for any type of Applied Behavior Analysis (ABA) programming nor was there a Behavior Intervention Plan (BIP) in place.

Dr. Allen was also questioned whether the November 2018, IEP provided C.B. with a plan to address his inappropriate social skills. In response, she cited to the social related goals which worked on his receptive, expressive and pragmatic skills. While she was aware that C.B. had previously received counselling from a clinical psychologist she did not know what the counselling goals were. To the best of her knowledge, C.B. did not have any mental health disorders. While she was aware that Dr. Odri had recommended a clinical psychological evaluation, this was not an unusual recommendation and depending on the outcome of that evaluation, further action may or not may be taken.

When asked if a reading evaluation had been done on C.B. prior to Topiel's evaluation by the District, Dr. Allen stated that at the time the January 6, 2014, Multidisciplinary Team (MDT) report was created, C.B. was two and couldn't read however, other pre-academic skills were assessed. In looking at the April 2016, MDT Report, when C.B. was in pre-school, his reasoning and academic skills were assessed and that he was found to be in the significantly delayed range. Based upon her review of the report, it appeared that they were unable to perform a reading assessment given his level of performance.

Dr. Allen recalled a discussion with the petitioner about the draft report and petitioner wanting her to change or rephrase certain things. She also recalled her conversation with petitioner's attorney, Mr. Epstein. She does not recall whether or not the District received a copy of the draft report. When petitioner requested a copy of the final report, she told the petitioner that she needed to reach out to the District to coordinate the report's dissemination. This was particularly important given petitioner's response to the report and the tenor of her previous call with Mr. Epstein over the draft. Dr. Allen went on to add that typically, her draft reports and final reports are identical and she does not substantively change the final report unless there was something significantly incorrect. It is her recollection that the District and the petitioner received copies of her report close in time to one another. When questioned about an email that she sent to the petitioner on April 5, 2019, wherein she stated that she reached out to the District to ask about sending out the final report, Dr. Allen stated that that's what she had testified to earlier. She had reached out to the District to make sure that she was handling the dissemination of the report properly because she was not familiar with who was supposed to get the report first. (PX-2)<sup>7</sup>

When asked, if looking at C.B.'s list of modifications and accommodations, whether his grades were a true reflection of his ability, she stated that she believed they

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<sup>7</sup> Based upon our discussion on March 24, 2021, PX-2 was reserved coming into evidence until petitioner provided the Board's attorney a copy of the exhibit and a chance to review and object. Petitioner's counsel sent a copy of PX-2 on March 25, 2021. No objection was received by the Board and the document was entered into evidence.

were. When she evaluated him, she gave him standardized testing, looked at his grades, pulled data based on his curricular based assessments and his reading scores, and other evaluations that were performed. While she made a number of recommendations that should be put into his IEP, she did this not because the school wasn't providing him enough services but to optimize his programming even further.

Dr. Allen was also questioned whether she reviewed the September 2016, FBA. (P-7.) In response she stated that she had not - she only reviewed the documents that had been provided to her. When she conducts her evaluations, she typically requests only the most recent evaluations. At the time of her evaluation, she believed he was undergoing an independent behavior assessment. She reviewed a couple of multi-disciplinary reports and she also observed his behavior in the classroom. Dr. Allen acknowledged that at the time of her evaluation, there was no BIP in place - however, she believed that one was not required because his behavior was being appropriately addressed in the classroom. No charting or tracking was provided in support of this - rather, the information was verbally communicated to her by his teachers. Dr. Allen went on to add that she did recommend in her report, that if C.B.'s behaviors increased and interfered with his learning, particularly as the aide was being faded back, one may be needed.

At the time of her observation, the November 12, 2018, IEP was in place. When questioned whether, other than for speech, she reviewed any documentation of C.B.'s progress on his IEP goals and objectives, she stated that she reviewed the present levels involved in his IEP, spoke to his teachers and looked classroom records.

She acquiesced that the November 12, 2018, IEP goals and objectives did not have all of the recommendations set forth in the September 2016, FBA, however, noted that, while there was no formal behavior plan in place, the District was tracking a number of interventions that were in place to determine his progress. Dr. Allen went on to provide the example of C.B. acting as a social detective in one of the objectives noting that the evaluation procedures for this objective included speech pathologist observation, teacher input and progress notes. (J-3.) When questioned whether she recommended in her report, what type of training or supervision C.B.'s one to one aide

should have, or the type of documentation system the aide needed to keep, she stated that she had not.

Dr. Allen was also questioned about the areas of weaknesses that she identified in C.B.'s programming, her recommendations and how she evaluated what kind of progress C.B. had made. In response she again reiterated that she had reviewed C.B.'s records, spoke to his teachers about his performance, observed him, and gathered data from the classroom to determine his progress. Dr. Allen went on to note that not all behavior in children require data collection and based upon her expertise, she is qualified to determine whether or not behavior data should be collected.

**Samantha Killeen (Killeen)**, a School Psychologist for Hopewell Crest School, was qualified and testified as an expert in school psychology on behalf of the respondent. (R-2.) As the school psychologist, the majority of her time involves case management. She also handles consultations with parents, teachers, and group or individual counseling with students. In addition to her other responsibilities, she attends all IEP meetings, performs psychological evaluations and is part of the intervention and referral services team.

She became C.B.'s case manager in September 2017 and has been his case manager ever since. She runs all of his IEP team meetings and is responsible for compiling all of the information for the same. She compiled all of the documentation for the C.B.'s September 2017/2018 IEP which was the year C.B. entered first grade. (J-1.)

The September 7, 2017, IEP proposed that C.B. be placed in the general education classroom with a one to one aide for all academic classes. While C.B. was performing well in the general education classroom setting, he continued to need prompting, staying on task and cuing. The IEP also proposed that he have a classroom aide during lunch and specials. Additionally, C.B. was to receive speech therapy (ST) and occupational therapy (OT). It was their belief that C.B. would benefit from a general education classroom as opposed to a special education classroom or pull out

replacement class because he was being provided enough support in the general education classroom with the one to one aide, was making progress and it was the least restrictive environment. The IEP also called for ESY. (J-1, Page J-0008.)

In going through the goals and objectives of the IEP, Killeen stated that it was her belief that all of the identified goals and objectives, were appropriate and specific to C.B.'s needs. They focused on his strengths and weaknesses as identified by his teachers, the data and evaluations. The IEP also called for several accommodations, modifications, and supplementary aides and services. These were developed by the IEP team as well as input from C.B.'s one to one aide who saw first-hand what he benefitted from the most.

According to Killeen, petitioner was not in agreement with the proposed placement and instead wanted an out of district placement. The IEP team disagreed with the petitioner - believing that an out of district placement was an extreme jump given the progress that C.B. had made. This position was supported by C.B.'s teachers, findings from the 2016/2017 school year which noted the meaningful progress that C.B. had made, and his first grade teacher's report who commented that while early in the school year, C.B. was doing well with the support of the aide and using the accommodations and modifications. (J-1, Page J-003 – J004.) None of the teachers who had provided input, noted any behavioral concerns with C.B; that a behavior plan should be put in place; or that an FBA was warranted. While the IEP noted that C.B.'s behavior sometimes impeded his learning or that of others, this comment was directed at his inability to focus or pay attention which was being addressed with the one to one aide.

As his case manager and the school's psychologist, she did not see the need for an FBA or that ABA services were required. Additionally, at no time from September 2017, through to June 2019, did any of his teachers suggest or convey concern that an FBA was warranted, or that ABA services were needed.

Killeen went on to state that about a month after the September 2017, IEP meeting, petitioner requested a meeting with IEP team to discuss the possibility of

placing C.B. in an in-class resource program. This was not viewed as an appropriate placement given that it was a more restrictive environment and C.B. was making progress in his current program. As such, no changes were made to his programming. Thereafter, on November 7, 2017, an annual review meeting was held wherein C.B.'s progress was reviewed. Included in this review were teacher summaries. (J-2.)

C.B.'s general education teacher, Mrs. Fisher, reported that C.B. was showing a lot of social growth, was happy and cooperative. In math, he was using his fingers to add and subtract so different strategies were being implemented to improve his fluency. In language, he was doing well with phonics and enjoyed the dictation lesson. What needed to be worked on, which they were in the process of doing, was tracking print with reading to improve C.B.'s accuracy and fluency. No behavioral concerns were noted nor was there a request to change C.B.'s academic supports; related services; or one to one aide frequency or duration.

The special education teacher, Mrs. Youngblood, reported that based upon her classroom observations of C.B., he would benefit from some modifications and accommodations that could be added to the supplementary aides and services. All of the recommendations were included in the IEP. Her summary did not recommend additional behavioral supports for C.B.

Review of Ms. Busnardo's OT summary found that C.B. was progressing in OT. She recommended that he continue with the services. C.B.'s speech therapist, Ms. Fiorani, noted C.B.'s progress and recommended that he continue with the services two times per rotation for twenty minutes in a small group. Both the OT and speech recommendations were followed

As with the September 2017, IEP, the November 15, 2017, noted under "other factors" that C.B.'s behavior sometimes impeded his learning or that of others. Killeen, again related this statement to C.B.'s attention and the need for the one on one aide to keep him on task. Killeen went on to state that at the time of the IEP meeting, C.B. was academically functioning at grade level and in her opinion, all of the identified goals and objectives, were appropriate and specific to C.B.'s needs.

According to Killeen, in February 2018, C.B.'s general education teacher, Mrs. Fisher, noted that he was struggling with pacing and fluency of the general education classroom and was starting to slip behind - primarily in phonics and the fluency. She recommended that C.B. receive a pullout replacement program for one period of the language arts which petitioner consented to. (J-2, Page J-037.) The proposed change provided a smaller group setting and focused on his areas of weakness.

By the end of first grade in June 2018, C.B. was either "developing" or "secure" in his goals and objectives. (R-12.) In discussing how C.B. was progressing, Killeen went through his 2017/2018 progress report. (R-12.) The grading system was "B" for beginning, "D" for developing and "S" for secured. By June 2018, the end of first grade, C.B. was either developing or secured in his goals and objectives.

C.B.'s next annual program review occurred on November 12, 2018, when he was in second grade. (J-3.) Prior to the annual review, the Kaufman Test of Educational Achievement – II, was administered to C.B. gauge his progress in reading, writing and math. In looking at C.B.'s 2018 results compared to his 2017 results, his progress was notable. When the test was administered in 2017, C.B. was in first grade. His grade equivalent at that time in reading was "<1"; "1.0" in math, and "K.3" in writing. When he was tested in 2018, a year later, his grade equivalent in reading was "1.2", "2.2" in math, and "2.1" in writing. (J-3, Page J-040.)

Teacher summaries in math and language arts, reported C.B. to be doing well and that he enthusiastically participated in the classroom activities and discussions and worked well with his peers. Spelling tests appeared to be a struggle for C.B. as he became frustrated if the words were too difficult. As a result, his teacher started allowing him to take a retest for any test lower than eighty percent on the words that he got incorrect. None of his teachers reported any behavioral concerns or request behavioral supports.

The same with science and social studies where his teacher reported that C.B. participated, volunteered and was an enthusiastic learner. He was able to stay on topic



on the subject matter being discussed. His special education teacher reported that C.B. was doing well with his reading - his Fountas and Pinnell level at "E". With reading, it was noted that C.B. had progressed from "E" books to "F" and "G" in the guided reading grouping.

The recommendation at that time was to continue C.B. in the pullout replacement program for a portion of the language arts literacy block however also have him receive spelling to address his frustration with the quantity and pacing of the general education spelling lessons. According to Killeen, this would allow him more time, extra practice and reduce demands on C.B. It was also believed that C.B. would continue to benefit from having a one to one aide during the academic portion of his day due to focusing and distractibility, however, he did not need any type of support for lunch, specials and homeroom. For related services, it was recommended that the services continue, however, changing the frequency.<sup>8</sup>

Killeen agreed with all of the proposed changes, and the recommendation of C.B.'s continued placement in the general education classroom. She also believed that the accommodations, modifications and supplementary aids and services which were developed in consultation with C.B.'s teachers and his one to one aide, were appropriate. She noted that in this IEP, unlike the other IEP's, the paraprofessional's role was further outlined and defined. ESY was also reviewed and it was decided that it would be wise to revisit that program at the end of the school year - closer to summer, to see how he progressed. Killeen believed that all of the goals and objectives were developed in coordination with C.B.'s teachers and specific to C.B.'s needs.

According to Killeen, C.B.'s parents participated in the review meeting, however, disagreed with the proposed changes - concerned with C.B.'s spelling and reading levels. At the end of the meeting, they refused to take a copy of the IEP meeting review notes. (J-3, Page J-059.) Killeen could not recall whether the parents requested a behavior plan or ABA services at the time and it was not noted in the parent summary

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<sup>8</sup> It was recommended that ST continue – once a week in a small group setting and once a week integrated into the classroom setting. It was recommended that due to the progress that C.B. had made, that OT take place once a week integrated into the classroom setting.

which is where it would have been mentioned if they had. While the IEP did, under “other factors”, state that C.B.’s “focusing and distractibility sometimes impedes his learning” – this again was the only behaviors that were being seen and were being managed by the one to one aide and only needed in his academic classes. (J-3, Page J-043.)

Killeen went on to comment that after the IEP meeting, C.B.’s parents sent a letter stating that they disagreed with the proposed November 12, 2018, IEP and that C.B. was in “stay put” pending the completion of their due process. (R-17, Page R-194.) In response, the Child Study Team (CST) informed the petitioner that the time for mediation or due process had elapsed, and that the IEP was set to be implemented on December 17, 2018. (R-17, Page 196.) Thereafter, the IEP was implemented.

C.B.’s parents also requested that independent evaluations be conducted. This request was denied as it was the District’s belief that C.B. was progressing and his tri-annual re-evaluation period was coming up in June 2019. The District subsequently did obtain independent evaluations of C.B. – specifically a neuropsychological evaluation, a FBA and a reading evaluation from the professionals whom the petitioner had specifically requested. In addition to the independent evaluations, the District also sought to have several other evaluations completed to assist in the determination of continued eligibility of C.B. – specifically a learning evaluation, speech evaluation, occupational evaluation and Ados testing. (J-5.) Petitioner only consented to having the OT and ST evaluations. (J-5, Page J-107.)

In review of C.B.’s second grade progress report, Killeen noted that by June 2019, all of his goals were either secured or being developed. (R-12, Pages 83 thru 84.) On June 6, 2019, the triennial IEP Reevaluation meeting was held. (J-4.) The purpose of the meeting was to review the evaluations that were performed and determine eligibility and classification. At the time of review, it was determined that C.B. continued to be eligible under the criteria for autism.

Among the recommendations that were put forward at the time of the meeting was that C.B. would benefit from a one to one aide in language arts literacy, however,

only needed a shared aide for math, science and social studies. This change was recommended because C.B. was weaker in language arts literacy and he was on grade level in the other areas, seemed to perform well, and did not need as much support. Additionally, it was also recommended that C.B. be placed in the in-class resource setting for one period a day - during the response to intervention (RTI) period. During this time, the special education teacher would push into the RTI time and work with him in a small group (no more than three students) and work primarily on his reading skills. ST was also recommended – eighty minutes a month in a small group setting and eighty minutes a month pushed into the classroom setting. Also, based upon the recommendations from the independent evaluators, counselling in a small group setting two times a month was included in the IEP.<sup>9</sup> Individualized tutoring targeting reading (fifteen hours) was also proposed throughout the summer months, which was recommended by some of the independent evaluations, as well as ESY was also proposed. No OT was offered based upon Lewis's evaluation which found that he no longer needed the services.

The last item recommended was that a BCBA complete an FBA assessment in September 2019. While the District did not believe that such an assessment was necessary as C.B.'s behavior did not rise to that level, Killeen stated that in an effort to work collaboratively with the family and in consideration of the independent evaluations that had been conducted, this was included in the IEP.

Accommodations, modifications and supplementary aids and services were developed with input from C.B.'s teachers, recommendations from the private evaluators and things and/or approaches that had been used in the previous IEP's that were found to be beneficial.

In going through C.B.'s academic performance, Killeen referenced C.B.'s April 20, 2019, Kaufman Test of Educational Achievement - II, which tracked C.B.'s academic performance over several years. It was her opinion that while C.B. had some

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<sup>9</sup> Killeen noted that the counselling services had been offered in September 2017, however, C.B.'s parents who had initially consented to the services, revoked their consent.

areas of difficulty – such as in letter and word recognition, he continued to show progress. She went on to state that the June 2019, IEP addressed C.B.'s areas of weakness by for instance placing him in a smaller setting for the one portion for the phonics, fluency, a guided reading. The individualized tutoring over the summer months was also another vehicle that was being proposed to address C.B.'s areas of weakness.

The IEP also provided summaries from C.B.'s teachers which captured both his strengths and weaknesses. For instance, Mrs. Dickenson, C.B.'s general education teacher commented that C.B.'s reading comprehension was below grade level. While he was showing improvement, decoding was difficult for him which interfered with his understanding of inferences. According to Killeen, this area of weakness was addressed in the June 2019, IEP by putting him a smaller group setting that focused on guided reading and decoding with a one to one paraprofessional.

Among C.B.'s strengths were his math skills. In that subject Mrs. Dickenson commented that C.B. could calculate in his head, was kind and considerate and well behaved. C.B.'s fourth marking period grades were good – with C.B. holding an "A" in literacy with a great deal of support and an "A" in math with very little support. Mrs. Dickenson went on to report that she only witnessed one melt-down by C.B. and it was during a spelling game when C.B. became upset because they were not playing with his words. They were able to redirect him and accommodate him after that. No additional behavioral supports were required.

Mrs. Burlingame, C.B.'s special education teacher reported that C.B. was showing progress with his reading, his Fountas and Pinnell having achieved "level I" which was up from "level E" – the level where he started in September 2018.

In discussing the goals and objectives that were put forward in the June 6, 2019, IEP, Killeen stated that they were developed with input from C.B.'s teachers, and the recommendations made by the independent evaluators. On this last note, Killeen testified that she put together a spreadsheet with all of the recommendations by the independent evaluators which cross referenced where, if at all, their recommendations

were in the IEP and rationale behind the same. Under some of the recommendations, such as the reading specialist Topiel's report, a number of her recommendations were covered in the IEP's academic goals, however, some were already covered in the curriculum so they were not marked as "yes" or "no". Other recommendations by Topiel were not included in the IEP, such as a certified reading specialist or placing C.B. in a self-contained classroom.

The rationale behind these decisions was that C.B. was being provided a significant amount of support and FAPE. Additionally, placing C.B. in a self-contained classroom would have been a disservice to him and taken him out of the least restrictive environment. The data did not support placement in a more restrictive environment nor did his behavior indicate the need for such a placement.

In discussing C.B.'s grades in first and second grade, Killeen noted that his grades and the progress reports reflected ongoing progress.<sup>10</sup> (J-10, R-11 and R-12.) Reading records also recorded growth as evidenced by the levels he achieved from September 2017, through May 2019. (R-16.) Review of 2018 ESY goals and objectives and how C.B. performed, found that he had either progressed or mastered the identified goals. (R-15.)

On cross-examination, Killeen was questioned about her preparation for the hearing – specifically, who she spoke to and what documents were reviewed. In response, she stated that she reviewed the entirety of C.B.'s 2017 CST file from 2017 to present, and spoke to the Board's attorney in trial prep. When asked if she had spoken to Dr. Allen prior to the trial or before the issuance of her (Dr. Allen's) second report, dated March 26, 2019, she stated that she had not.

While she is the school psychologist, she has never completed a psychological evaluation of C.B. She is familiar with C.B., is aware that he is African-American, and that less than half his class in first grade were also African-American. She was also

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<sup>10</sup> Only first and second grade academic progress reports were considered by the tribunal as it related to R-11 and R-12.

aware that in Kindergarten, C.B.'s teachers were switched. She became C.B.'s case manager in the 2017/2018 academic year (first grade), taking over for his prior case manager, Kelli Manski (Manski).

She is familiar with the September 7, 2017, IEP and upon being shown the participant list, acknowledged that C.B.'s one-to-one aide at the time, Stephanie Grusemeyer (Grusemeyer), was present at the IEP meeting. When questioned where the information for first grade came from, she stated that it was based off the annual review meeting notes. The information in the IEP from kindergarten, was written into the IEP by C.B.'s prior case manager, Manski.

According to Killeen, her review of C.B.'s levels of performance at that time were based on his evaluations that he had prior to the IEP, as well as from teacher input among other things. Among the evaluations reviewed were the Battelle, Kaufman Test of Educational Achievement which was completed in September 2017, and the April 2016, Multidisciplinary Report. According to Killeen, typically only the most updated evaluations are reviewed.

When asked why other evaluations that were done prior to September 7, 2017, were left out of the IEP, such as the September 2016, FBA, the June 2016, OT evaluation and the June 2016, Physical Therapy (PT) evaluation, Killeen stated that those evaluations would have been discussed in the 2016/2017 IEP – noting that the timeframe was prior to her employment with the District. She also reiterated that the 2017/2018 IEP provided the most updated studies.

Also questioned was whether the 2017/2018 IEP contained a BIP. In response, Killeen stated that it did not, even though she was cognizant of the fact that there was a prior assessment that had been done recommending data collection on target behavior. When asked if the IEP had any plan to collect data on target behaviors, she reiterated that there was no BIP as it was their belief that there were no behaviors requiring remediation or further work in the classroom. Additionally, C.B. had a one to one aide who worked with him on focusing and redirection. She also noted that counselling had been recommended.

When asked to review the participation list for the November 15, 2017, IEP meeting - specifically whether Grusemeyer was present, Killeen conceded that she was not. (J-2, Page 19.) When asked if the aide was present for the November 12, 2018, IEP meeting, Killeen again conceded that she was not, nor was VanMeter, C.B.'s aide at the end of the 2018/2019 academic year present for the June 6, 2019, IEP meeting. (J-2, Page 38; J-4, Page 60.) While she acknowledged that the aides have a significant level of involvement with their students, they are not part of the IEP team. She went on add, however, that the aides report directly to the teachers with whom they routinely consult, and the teachers are part of the IEP team.

In drawing Killeen's attention to the September 7, 2017, IEP, specifically the CST Summaries, she was asked whether any other evaluations were conducted to challenge the findings of the April 7, 2016, Multidisciplinary Report – particularly the BASC survey findings. In response, she stated that she was not with the District at the time the report was issued, and that the findings of the report remain in the IEP until a new evaluation is completed. When pressed further, she acquiesced that no other evaluations were done to contest the Multidisciplinary Report, no second opinion was obtained or referral sent for a behavioral assessment, psychiatric evaluation or reading evaluation. Instead, they obtained teacher input from the previous academic year which were set forth in the "Teacher's Summary" in the IEP. She went on to add that C.B. had a one to one aide who was with him all day every day to help with any hyperactivity, aggression or withdrawal.

Killeen was also asked the source of the comment in the September 7, 2017, IEP which stated that C.B.'s behavior sometimes interferes with his learning or that of others. In response she stated that typically, if a child requires the support of a one to one aide, it is usually because there was some sort of function or behavior that they need help with. She acknowledged that there was no verbiage in the IEP to protect C.B. from the aide reinforcing inappropriate attention getting behavior. However, she went on to state that C.B.'s one to one aide was primarily for his academics and prompting C.B. back to task. His behavior did not rise to the level of requiring a BIP. If

they felt that a BIP was necessary, it would have been discussed in the “Discipline Statement” of the IEP.

When questioned whether the IEP included a reward token economy system or a sticker chart as positive reinforcement for good behavior, she stated that it did, pointing to the Supplementary Aids and Services section of the IEP.

Killeen was also asked if she ensured that the 2017/2018 IEP was being implemented, to which she stated yes, throughout the school year. While she did not keep a record of her monitoring, she would routinely go into the classroom to observe the students and also consulted with all of the teachers to see how the students were progressing.

She was also asked a series of questions about whether certain behavioral strategies were recommended in the 2017/2018 IEP which included among other things: provision of a timer or clock to use as a visual aid to help guide him in complete task; creating a buddy system with a specific student to help C.B. stay on task; or limiting the use of the aide’s verbal prompts rather than other types of prompts. Killeen acquiesced that the specific accommodations and modifications listed by counsel were not in the IEP.

In questioning Killeen if the IEP had any type of documentation system for measuring the effectiveness of the accommodations and modifications, she replied that there was progress reporting on the goals. Additionally, while there was no documentation system in place to track whether the accommodations and modifications were effective, she continuously went through each one of them with all of C.B.’s teachers to see if they continued to be appropriate or needed to be modified.

Regarding the goals and objectives in the September 7, 2017, IEP, Killeen agreed that the only goals and objectives in the IEP were for Speech, OT and counselling. No other goals and objectives were noted. In looking at the counselling goals and objectives, Killeen acquiesced that the recommendations were not based on an evaluation by a clinical psychologist, nor had such an evaluation been



recommended. She also acquiesced that there was no information in the IEP that spoke to C.B.'s current level of performance and agreed that it would be difficult to know whether C.B. met the mastery criteria in that section. Killeen went on to state, however, that at the meeting for the IEP, the counselling goals were discussed and if things needed to be modified, they would have been. Additionally, she would have been able to monitor the situation and compare C.B.'s progress against his typically developing peers to get a percentage of how he was functioning. She never had an opportunity to do that because the petitioner revoked consent for counselling. When questioned about the OT goals and objectives, Killeen deferred to the occupational therapist stating that she (OT Therapist) not only had the expertise in that arena, but also the history with C.B.

Turning next to the November 15, 2017, IEP, Killeen was questioned about the comments under "Other Factors" specifically, the statement that C.B.'s behavior sometimes impedes his learning or that of others". More specifically, she was asked whether this IEP called for a BIP. In response she stated that the November 15, 2017, IEP meeting was held just two months after the September 2017, IEP meeting at the request of the petitioner. Similar to the September 7, 2017, IEP, it did not call for a BIP.

Killeen disagreed with petitioner's counsel's comment that unlike the prior IEP, the November 15, 2017, had goals and objectives, and that across the board, the "Success Criteria" was reduced to eighty percent. She noted that the prior IEP did in fact have goals and objectives and the November 15, 2017, had many areas continued to require a ninety percent "Success Criteria". She went on to state that the revisions were made after consultation with C.B.'s teachers. The teachers go through a form, similar to a spread sheet, and select the goals and objectives that are the most individualized for that student. In the alternative, the teacher can write in a goal that they feel directly addresses the child's needs.

When asked if the November 15, 2017, IEP provided C.B.'s present level of functioning, she stated that it does not have it listed but each marking period they go in to see whether the student is "beginning", "developing" or "secured". If the child reaches eighty percent, then the goal is taken out of the IEP. Killeen was again asked

how the teacher would know what C.B.'s level of performance was if they didn't know his current level. In response, she stated that he is monitored. If he is not making progress then, things would be adjusted. When asked how the teachers determine if C.B. has met even the eighty-percent "Success Criteria", if there was no data collection, Killeen stated that C.B.'s teachers continuously collect data in the form of worksheets, classwork, test, quizzes and homework.

She disagreed with the notion that C.B.'s teachers were not collecting data on the objectives – once again pointing out the data from the classwork, worksheets, tests etc. Additionally, there were teacher observations which provided data on some of the objectives that she believed was both measurable and observable. When challenged on how a teacher would know if C.B. understood something, she again reiterated that between the teacher and the aide, they would be able to see whether C.B.'s needs were being met.

When asked what IEP was in place from July 1, 2018, to November 12, 2018, she stated that there was an addendum to the November 15, 2017, IEP, dated February 7, 2018. The addendum to the IEP stayed in effect until the IEP expired in November 2018, which was when the next annual review meeting occurred.

In review of the November 12, 2018, IEP (second grade) Killeen was asked about the educational history and its accuracy. She responded that the history was an accurate chronological overview of C.B.'s academic history. When questioned further on this, she acknowledged that he had received ABA services when he was in preschool but there was no FBA discussed in the history. Neither were his October 2017, and February 2018, CHOP reports. (P-10.) She was familiar with the reports and agreed that the reports were used as a basis for C.B.'s classification eligibility. She was also familiar with the "Brain Change Study" which petitioner had provided to the team and agreed that the IEP did not state one way or the other whether the IEP team accepted or rejected the report's recommendations. She also agreed that the IEP did not include some of the findings from the CHOP's reports such as C.B. having below expectation adaptive behavior skills or difficulties in his executive skills functioning.

When asked if the IEP addressed CHOP's recommendation that he needed behavior and environmental strategies to help him manage his attention and improve his focus, she stated that that was addressed by having a one to one aide. Regarding the recommendation for OT to target his sensory body processing, self-regulation and executive functioning skills, she stated that the IEP addressed the areas that C.B. needed to work on in the school based setting but acquiesced that those specific areas were not addressed by OT in the IEP. Nor was there a recommendation for a further evaluation of C.B.'s anxiety and depression symptoms addressed. On this last point Killeen noted that the IEP is required to consider the recommendations, they are not required to follow them.

In discussing the accommodations and modifications that C.B. was receiving, Killeen was asked whether all of that was taken into account in how he was graded. In response she said that they were not. When asked how CB.'s teachers were getting a true gauge of his performance if that were the case, she stated that not all of the accommodations and modifications were used all of the time. He was getting assistance when needed in the least restrictive environment. Additionally, even with accommodations and modifications, C.B. was still doing the work. The accommodations were included in C.B.'s IEP and part of the reason that he had one.

Killeen was also asked about the independent evaluations that were done and whether they were mentioned in the June 6, 2019, IEP, she stated that they were not. The evaluations in question were reviewed and some of the recommendations implemented throughout the IEP, but they were not specifically identified in the IEP. Only the updated evaluations from April 2019, that the District conducted were mentioned. When asked about the June 14, 2019, letter sent to the petitioner and whether it discussed the implementation of the FBA or the reading evaluation, she stated that the letter was a synopsis of the meeting notes and proposed programming and placement.

Regarding the independent FBA and reading evaluation that were received in March 2019, Killen was asked if the school had thought about getting their own, to

which she stated that they had not. Nor did they seek to do them when consent was sought to conduct the OT and speech evaluations. (J-5.)

When asked about the qualifications of C.B.'s one to one aide and whether she had ABA training, Killeen stated that they are not required to have expertise in ABA, autism spectrum disorder, special education or deficit hyperactivity disorder, however they are required to know the student's IEP and follow the individualized plan. (PX-4.) She acknowledged, that one of the concerns raised by the evaluators was that C.B.'s aide was overly involved.

Killeen was also asked about the spreadsheet she created for the June 6, 2019, IEP. According to Killeen she created the spreadsheet once all of the evaluations were completed. It identified the recommendations of each of the evaluators and where and/or how in they were addressed in the IEP. While she did not recite each evaluator's recommendations verbatim, it was her belief that she had accurately captured the intent of the recommendations and how the IEP implemented them. She acquiesced upon further questioning, that if the IEP did not implement the evaluator's recommendation, her spreadsheet did not reflect that or the District's rationale in not doing so.

In questioning Killeen how for example, the District would have individualized Dr. Allen's recommendation for reading instruction throughout the summer and tutoring services, she stated that the IEP offered fifteen hours of individualized tutoring in the ESY. When pressed on how that was individualized for C.B., she stated that the person working with C.B. would review the IEP and ensure that they were administering all of the accommodations.

Killeen reiterated that all of the evaluator's recommendations were considered, however, it was their belief that not all of the recommendations were necessary, She went on to note that in some instances, the evaluator's contradicted one another citing to Topiel's recommendation for a "Self-contained Autistic classroom" which was contrary to both Dr. Odri and Dr. Allen's recommendations. Another example was the recommendations as it related to the ESY program. She acknowledged, when

questioned, that the District did not have another expert report that contradicted or disagreed with Dr. Odri's or Topiel's recommendations.

Killeen was also questioned about the findings from the various evaluators that the aide was providing too much cuing – specifically where it was noted in the IEP and how the issue was addressed. Killeen responded by stating that while not specifically noted in the IEP, it was addressed with the recommendation that C.B. have a one to one aide during language arts literacy and a shared aide for all other academics.

She was also asked if the IEP, called for data collection and provision for a BIP as recommended by Dr Odri and the September 2016, FBA. Killeen responded that when the September 2016, FBA was provided, the District was not seeing behaviors that warranted the need for a behavior plan. Regarding Dr. Odri's recommendations in her April 2019, report, several of her recommendations were incorporated into the June 6, 2019, IEP. Additionally, the IEP called for a BCBA to come in in September to obtain more information. When she attempted to reach the petitioner to obtain her consent the petitioner did not get back to her until December 2019, at which time consent was withheld. At that point, Dr. Odri's report was nine months old and it was their belief that it would be more beneficial to have updated information from the District's behaviorist. Additionally, they were not sure that a BIP was even warranted because they did not believe that C.B.'s behavior rose to the level of requiring one. When asked if Dr. Allen, Dr. Odri and Topiel recommended having another FBA, she stated that Dr. Odri had not but Topiel had.

Killeen was also questioned whether the District precluded Dr. Odri and Topiel from attending the June 6, 2019, IEP meeting. She deferred to the Director and the Board as to why they were not present. She herself did not take any action to have them attend the IEP meeting. Regarding the termination of OT and Dr. Odri's recommendations to amend the OT goals to add a "Fluency, responding/pacing" goal, and whether the IEP team considered it, she stated that based upon the schools OT evaluation, it was determined that C.B. no longer required school based OT. She did not answer the question of whether Dr. Odri's OT recommendations were considered.

On redirect, Killeen was asked whether the September 7, 2017, IEP noted any concerns about C.B.'s behavior by either his teachers or his parents in kindergarten to which she responded "none". (J-1.) When asked if, during first grade, C.B.'s teachers requested a psychiatric evaluation or expressed concerns about his behavior, she said "no". (J-2.) Nor were such concerns raised in second grade by either his teachers or the parents. (J-3.) It was her belief that all of the IEP's adequately addressed his needs as it related to focusing, inattention and impulsivity and at no time has there been an observation of aggression towards his peers. The fact that there was no BIP in the respective IEPs did not make them deficient, if he had needed a behavior plan, one would have been put in place.

Also questioned was whether Topiel in her report or C.B.'s teacher's ever expressed concerns or used the phrase that C.B.'s "orthographic processing disorder" was not being addressed. In response she stated no. When asked if Dr. Allen or Dr. Odri had expressed concern that the one-to-one aide was reinforcing bad behaviors in their reports, she again stated that they had not. Nor to the best of her knowledge had he ever been disciplined for behavior that was a manifestation of his disability.

Killeen was also asked whether the counselling goals in the September 2017, IEP were implemented to which she stated no, because the petitioner had withdrawn her consent. While she did not conduct a psychological evaluation of C.B., she believed that he had the cognitive ability to verbalize his emotions.

In turning to the CHOP reports that she had been questioned about on cross-examination, Killeen was asked if the author of the reports, Dr. Hanvier, had ever reached out to the school to speak to C.B.'s teachers or came to the school to observe him in the classroom. Killeen responded that she had not and, it appeared that Dr. Hanvier's sole source of outside information came from the petitioner. Regarding NICHQ Vanderbilt Scales completed by petitioner's parents and the findings that C.B. had difficulty with hyperactivity/impulsivity, at no time had C.B.'s teachers report such difficulties.

Also touched upon was the Brain Change Study, dated February 6, 2018. (P-10.) According to Killeen, as with the CHOP report, the authors of the Brain Change Study did not speak to anyone at C.B.'s school, review his school records or come in and observe him in the classroom setting. It appeared that much of the reporting came from the petitioner herself. Killeen went on to note that the study also specifically stated that it should not be viewed in the same way as the results from a neuropsychological evaluation and that the scores alone should not be used to make educational decisions. Dr. Allen performed a neuropsychological exam which was taken into consideration in the June 6, 2019, IEP.

Last, with regard to the draft chart that identified as PX-6 and the purpose behind the chart, Killeen stated that the chart was created years ago, she could not recall by whom, to track and monitor C.B.'s daily regimen in the classroom. It was not created by a BCBA, a reading specialist or anyone on the CST. Usage of that exact chart was not implemented however she believed in first grade there may have been something similar to the chart used.

**Eileen Lewis (Lewis)**, a retired Senior Occupational Therapist from the Burlington County Special Services School District (R-6), was qualified and testified as an expert in occupational therapy and occupational therapy in special education.<sup>11</sup>

She if knows C.B. having worked with him in the 2018/2019 (second grade) school year in both small group sessions and push-in into the classroom. She was also involved in his triennial IEP reevaluation. She described C.B. as a hardworking young man who was supportive of the other children in the group sessions. While at times he needed some direction to focus, he otherwise did a nice job in OT and did everything she asked of him. At no time did she have any behavioral issues with him.

She is familiar with the 2017/2018 (first grade) IEP and the OT comments found therein. In review of the September 7, 2017, teacher summaries, she noted under the comments, that while C.B. had made progress the prior year, at the end of the year he

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<sup>11</sup> Ongoing objections as to the form of the question during the voir dire of Lewis was noted for the record.

continued to need work on some of the same goals. One of the things that had been observed by his therapist at the time was backward writing which they were working on along with focus and attention, as well as well as the concept of time and how to best utilize it to complete tasks. The summary also noted that C.B. could write his name and had started trying to tie his shoes. He had also started to copy from the board. Recommended at that time was for C.B. to continue with individual sessions and possible push-in in-class sessions at times. The recommended individual sessions were two times a week for thirty minutes. Under related services, C.B. was to receive small group therapy in the OT room two times a week/thirty minutes. It was her belief, based upon her review of C.B.'s file, that the goals for OT that were outlined were appropriate for C.B. at the time and provided him a FAPE.

Lewis had also reviewed C.B.'s November 15, 2017, IEP in preparation of the upcoming 2018/2019 IEP meeting. According to Lewis, at the time of the November 2017, IEP, C.B. was receiving the recommended OT – push-in and pull-out. According to Lewis, the push-in therapy allowed the therapist to look at any concerns and skill sets that may not have been seen in an individual or small group session outside of the classroom. It also allowed the therapist to see how C.B.'s skill sets were being generalized in the classroom. The pull-out session focused on individually specific skills sets that needed to be worked on in a more concentrated, less busy environment.

According to the therapist at the time, Ashley Busnardo (Busnardo), C.B. was consistently using his right hand - appropriately grasping a pen/pencil/crayon for writing and coloring. He could write his name, write in upper and lower case letters, and color seventy-five percent of a picture - deviating from the line less than an eighth of an inch. Also noted was a marked improvement in C.B.'s motor coordination and self-help skills.

In pull-out sessions, C.B. was showing more focus and required less cuing than when he was in his classroom which, according to Lewis, was a mark of progress. Some of the accommodations that had been recommended and implemented included, having C.B. sit directly facing the front of the board; using different colors or tangible objects to differentiate amounts when counting; correcting reversals on the spot and pointing out the correct way blocking out questions/problems besides the one he was



working on to decrease visual distraction; and allowing him time to stand or a quick movement break when he started to fade during a lengthy assignment.

According to Lewis, while progress had been made, Busnardo appropriately recommended that he continue having accommodations in the classroom and receive OT at the same frequency.

She attended C.B.'s November 12, 2018, IEP meeting and was his treating OT Therapist at the time. (J-3) She found him to be a cooperative, hardworking child, who never gave her a hard time and always did what was asked of him. He was always pleasant and while at times he got frustrated, he always worked through it.

At the time the November 2018, IEP was developed, C.B. was using a tripod grasp when writing and coloring. His letter formation and size were good as was the spacing between letters and words. He could consistently color within the lines. Near and far point copying were accurate and timely, and fine motor coordination and dexterity were good. He could visually track in all planes with no associated head movements and he demonstrated good visual perceptual skills. C.B. was also able to follow multi-step directions with minimal verbal cues and redirection.

In looking at the November 2017, goals and objectives, C.B. had mastered all but the last one - "Will use sensory and/or cognitive strategies in order to focus and pay attention". (R-13.) Given the fact C.B. had not mastered that objective, for the 2018/2019 IEP, she recommended that he continue working on that goal. In addition to that recommendation and based upon the progress that he had made the prior year, she developed goals and objectives for him for the 2018/2019 (second grade) school year.

Among the services recommended for the 2018/2019 school year was a reduction in OT services from two times a week to one time a week/thirty minutes. She felt that this was appropriate because C.B.'s performance on his goals and in therapy sessions had improved significantly. He was able to do the tasks/skills necessary for his classroom activities as it related to OT. By classroom activities she was referring to

writing, tracking, copying things from the board, which includes motor skills, as well as visual integration of it. The fact that C.B. had not mastered the last goal did not greatly concern her because the area of weakness was not significant, and she believed that it could be addressed in the weekly sessions.

Based upon her evaluation of C.B., she believed that the 2018/2019 IEP as it related to OT offered him a FAPE.

Lewis went on to state that she also took part of C.B.'s triennial review and conducted an evaluation of C.B. on May 13, 2019, and May 16, 2019. This was to determine whether C.B. still required OT services. (J-6.) The evaluation consisted of observations, record review, teacher interviews and testing.

During the observational part of her evaluation, she observed C.B. in several settings - classroom, playground and cafeteria. During the classroom observation, C.B. independently came into the classroom, placed his homework items in the proper location and started working on his morning activities. He was occasionally prompted by his one-to-one aide to keep him focused on task. He was also observed engaging appropriately with his peers – laughing, talking and socializing, throughout the observation period. No behavioral problems or aggression were observed.<sup>12</sup>

The documentation which she reviewed as part of her evaluation included, among other things, C.B.'s file - work samples (writing, coloring, cutting, etc) to see how he had progressed over time and also to see if there were any notations from his teachers or classroom staff that might indicate that the use of a certain tool would be useful. C.B.'s teachers were also interviewed as part of her evaluation to see if they had any concerns about his performance and his strengths and weaknesses. She also reviewed his Progress Reports.

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<sup>12</sup> Petitioner's counsel placed an ongoing objection on the record that a request had been made for this and all of the expert witnesses' files which was denied by the BOE. It was petitioner's position that they were unable to fully cross-examine the expert witnesses as to their evaluations and the contents of their files.

Assessments were also performed as part of the evaluation process among which was the Bruininks-Ostertsky Test of Motor Proficiency, second edition (BOT-2). According to Lewis, this is an evaluation that assesses fine and gross motor skills. C.B.'s score for fine motor precision (small muscle control and manipulation of items), was well above average. His score for fine motor integration (crossing midline and incorporating that into specific tasks), manual dexterity and upper limb coordination was average. In looking at his composite score of fine motor precision and integration, C.B. scored sixty-five which was above average. The composite score for manual dexterity and upper limb coordination was forty-seven which was average. According to Lewis, given C.B.'s scores, his results showed that he was age appropriate for the skills tested.

She also conducted a Developmental Test of Visual Perception which assessed C.B.'s perceptual skills, fine motor skills and visual motor skills. The test consisted of a battery of five subtests - eye-hand coordination, copying, figure ground, visual closure, form constancy. The test measured different but interrelated visual perceptual and visual motor abilities and allows for a comparison between motor reduced visual perception and visual motor skills.

On the eye-hand test, C.B.'s ability to coordinate visual with motor performance – i.e. cutting, coloring, he scored slightly below average. According to Lewis, C.B.'s score on this subtest did not concern her greatly because he was not that far below average and that particular component required C.B. to focus which is something he struggles with along with attending.

On the copying component, C.B. was required to reproduce different shapes and pictures which got progressively more difficult. C.B. scored above average on this segment.

On the "figure ground", which is the ability to pick out items on a similar background, he scored in the superior range. The "visual closure" component assessed the student's ability to look at a partial object and picture what that item would look like if all of the lines were completed. On this segment, C.B. scored above average. The last segment was the "form constancy" which is the ability to see a shape

within a shape and know that it remains the same. C.B. scored “superior” on this segment.

Lewis went on to state that given results on the Developmental Test of Visual Motor Perception-3, it was clear that perceptual skills were a strength for C.B. He did well with copying and reproducing shapes and was performing age appropriately. With the exception of the hand-eye coordination component, C.B. scored above average in all of the tests. She also noted that the results may not accurately reflect his true ability. In other words, the tasks that were performed required a great deal of focus and attention - which C.B. has difficulty with, as opposed to the actual task itself.

Also looked at was C.B.’s postural control/neuromuscular status. According to Lewis, she found that he was able to perform the tasks appropriate to his age.<sup>13</sup>

On the fine motor coordination component of the evaluation, the “print tool” was utilized which assessed C.B.’s handwriting in eight areas.<sup>14</sup> The assessment requires the child to be able to write from memory upper and lower case letters and numbers. It then assesses if it’s written the correct way – placement on the line, size, was the letter formed in a typical order, spacing between letters and words.

On memory, C.B. scored above typical second grade at ninety-six percent. For orientation, placement on the line, start and sequence, he again scored above typical second grade at ninety percent, eighty five percent, ninety-six percent and ninety-two percent, respectively. In size, he scored one hundred percent – again above typical second grade.<sup>15</sup> Lewis went on to state that C.B.’s overall score of ninety-four percent was well above the average second grade percentage of eighty-five percent.

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<sup>13</sup> Among the things looked at in this assessment was C.B.’s range of motion of his upper and lower extremities, hand coordination, gross motor coordination and core strength. C.B. was able to stay focused and on task throughout the assessment period.

<sup>14</sup> Memory, orientation, placement, size, sequence, spacing, start.

<sup>15</sup> C.B. scores on number orientation and sequencing fell below the typical second grader. On orientation, he scored seventy one percent. The average score was ninety percent. For number sequencing, C.B. scored seventy-eight percent. The average score was eighty-five percent.

In going through C.B.'s strengths, Lewis found that C.B. was age appropriate for pencil grasp. He was able to form all upper and lower case letters and numbers from memory. He was able to copy from the board accurately. His fine motor coordination and dexterity were good. He demonstrated excellent perceptual skills, including figure ground, visual closure and form constancy. He also had the ability to manipulate a variety of clothing fasteners and shoe tying independently. He was also independent in school based self-help skills (i.e. manipulating his bookbag, putting things where they needed to go, carrying a tray, opening containers, etc).

Based upon her evaluation, in her opinion, C.B. no longer required OT. His skills were age appropriate in the areas assessed in the scope of practice for OT. As such, he did not need direct OT any longer. She attended the June 6, 2019, IEP meeting wherein the results of her evaluation were incorporated into the proposed IEP and her recommendation of the cessation of OT followed. (J-4.)

On cross-examination, Lewis was asked whether she attended the September 7, 2017, IEP meeting and whether she was even employed by the District at that time. (J-1.) In response, she stated that she did not attend the meeting nor was she employed by the District at the time. At the time of that meeting, C.B.'s therapist was Busnardo. When she came on board the following year in September 2018, she familiarized herself with C.B.'s case by going through his then current IEP, prior IEP's, and progress summaries in the IEP. She acknowledged that Busnardo did not keep progress notes and that she did not have any orientation when she came on board by Busnardo, as to C.B.'s file.

The first IEP meeting that she attended for C.B. was the November 12, 2018, meeting. Her summary of C.B.'s status was based upon data that she herself had taken. When asked where the data was, she indicated that she had not retained it, however, it was all summarized in the IEP. With regard to the goals and objectives and percent rate of success set forth in the November 12, 2018, she acknowledged that she had not developed them – they had been developed by C.B.'s prior therapist Busnardo. She went on to state, however, that while she did not develop the goals and success criteria, when she took over as C.B.'s therapist, she sat down with his current accepted

IEP goals and tested each one of them to see how he had progressed. She acknowledged, when questioned, that she could not recall how close he was to achieving the success criteria and that her testing/findings were not set forth in the present levels of functioning in the November 12, 2018, IEP. Lewis went on to note however, that after she started working with C.B., if for some reason she believed the goals were not appropriate, she would have asked the team to change them. This would have included eliminating a goal if he had mastered it.

Lewis was also asked about the goals and objectives for OT in C.B.'s November 15, 2017, IEP (first grade), and who was responsible for implementing them (OT, teacher or aide) and how they were to be implemented. She acknowledged that the IEP did not specify who was responsible for implementation or how they were to be implemented. She went on to state, however, that she always provided ongoing training when she was in the classroom and things happened – not necessarily specific to the goals as written, but fine motor as a skill.

Lewis was next asked about the evaluation report that she generated in May 2019, for C.B.'s triennial reevaluation – specifically, where the data was reflecting C.B. mastery of the success criteria on all nine goals. In response she stated that while she did not have the data in front of her, it was collected either monthly in accordance with the IEP specifications and if not specified in the IEP, she did it quarterly. She agreed that it was difficult to keep track of his performance on nine goals every time she saw him. When asked how she tracked her quantification of his performance, she stated that she made a note that went into C.B.'s file.

When questioned further on how she kept records of C.B.'s progress and when and where she worked on the nine goals, Lewis stated that she saw C.B. two times a week, thirty minutes apiece. One session was a push-in in the classroom and the other session was in the therapy room. She would not work on all nine goals every session - it would vary week to week. In a push-in, she would try to focus on the skill set as it related to what he was doing in the classroom and she would record what goals were worked on. Each goal was tracked separately on a sheet.

Lewis did not recall reviewing an April 15, 2019, FBA or a January 24, 2019, reading evaluation as part of her evaluation process. However, she typically looks at documentation that is specific to OT and her scope of progress. She recalled seeing records that discussed C.B. having behaviors that interfere with his learning and that C.B. required the services of a one-to-one aide. It was her belief that the aide was required to assist him in functioning in the classroom for learning and extra support, however, she did not know what their specific role was because that was not part of her OT piece. She did not know what type of training the aide had, whether the aide had expertise in autism or if they had any experience in ABA. She did not recall whether C.B. had a BIP in his IEP and she was never trained to implement a BIP with him. According to Lewis, C.B. never exhibited any difficulty with over stimulation nor did she recall it being mentioned in other reports. What she noted were difficulties with focus and attending.

Lewis was also asked whether there were any assessments in OT for a child who has an inability to modulate their energy level. In response she stated that there was a sensory profile which was a questionnaire that had several different components and it goes by age. She went on to state that there was a parent questionnaire and that there could also be a teacher questionnaire. This assessment was not done with C.B. during the times that she observed C.B., he was fine. Nothing was seen that was atypical of all the other children in the room. The last time she treated him was in May 2019. She went on to state that she never witnessed any issue with over-stimulation with C.B. nor did she recall seeing any other report which noted a problem with over-stimulation. She again went on to reiterate was that what she observed was attending issues.

In going back to documentation reviewed as part of her evaluation, Lewis was asked if she had reviewed the October 2017, report from CHOP (P-9), and the February 6, 2018, Brain Change Study from CHOP. (P-10.) She could not specifically recall reviewing either of them.

**Lindsay Fiorani (Fiorani)**, testified on behalf of the District as an expert in Speech-Language Pathology. She described speech-language pathology as the study

of receptive (understanding of speech coming in from outside), expressive (how you are using the language yourself), and various modes of communication. She started working with C.B. when he was initially evaluated for his initial eligibility and saw him again for his re-evaluation prior to kindergarten and has seen him for direct therapy since kindergarten.

She attended the September 7, 2017, IEP meeting and acknowledged that she had provided a summary of C.B.'s progress for the IEP. (J-1, Page 5.) The summary update noted that C.B. had been receiving speech and language services two times per rotation for twenty minutes and continued to make progress on his goals. She went on to explain that the services that he was receiving worked on C.B.'s expressive and receptive language. At the time they were working on following directions, turn taking and sharing in a group. He had made significant progress in this regard, having mastered his goals. She recommended that he continue with the services because she felt that there were still areas that needed to be addressed.

Fiorani went on to state that she authored the goals and objectives set forth in the September 7, 2017, IEP. The goals were based on the areas of weakness that she had identified. One of the areas that C.B. was showing a weakness was in speech.<sup>16</sup> As she had noted earlier, she had been working with C.B. since pre-school through to the present time. At no time had anyone expressed concerns to her regarding C.B.'s behavior. She herself has been in class with C.B. since November 2018, once a week for an integrated session. Throughout that time period, she has never observed C.B. being aggressive with his classroom peers nor has she observed classroom behavior that was not appropriately addressed by his teacher or one to one aide. What she has witnessed was C.B.'s friendliness with his peers, taking turns sharing and looking to his peers when he sees where the group is moving. It is her belief that he has an appropriate relationship with his peers. What she observed in the classroom was the same behavior that he exhibited in her group sessions. He did not appear to have any

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<sup>16</sup> Petitioner's counsel stipulated that the goals and objectives for speech-language were appropriate and provided FAPE in the September 7, 2017, IEP, November 15, 2017, IEP, the November 12, 2018, IEP and the June 6, 2019, IEP.



social skill difficulties nor did he executive functioning skill difficulties that she was unable to address.

She authored the November 12, 2018, Summary of Progress for C.B. and filled in the progress information found in the report. Mastery criteria for the goals and objectives was eighty-percent. (R-14.)

On cross-examination, Fiorani was asked if she evaluated C.B.'s executive functioning skills to which she responded that she had not specifically evaluated those skills. She did evaluate his social skills and found that he had strengths and weaknesses in that arena. According to Fiorani, one of the weaknesses that needed further work on was his social pragmatic skills – becoming a “we thinker” as opposed to a “me thinker” and realizing what behavior was expected out of him given the situation - the “hidden rules”.

When asked if the one to one aide was present when she conducted her integrated session she responded affirmatively. The aide would observe what she was doing with C.B, take note of the vocabulary being used, and continue with the program when she (Fiorani) was not in the classroom. There was no documentation system or records to reflect the aide's continuation of the program nor was there formal training. She would however informally go through what she had worked on in therapy with the aide. She agreed that the IEP did not identify, note or address the one to one's aide continuance of C.B.'s speech program in her absence.

When questioned about the November 12, 2018 “Summary of Progress”, she stated that she keeps data of his current level of performance on each objective. The mastery criteria for each objective was eighty-percent and she felt that the goals and objectives were individualized for C.B. To achieve the eighty percent, which was mastery, he would have to achieve the objective three consecutive sessions in a row. The objectives changed as C.B. has made progress. When asked if the data sheets had been shared with the petitioner, she stated that they had not, she just went over the progress report with her.

**Ellen Topiel (Topiel)**, a Certified Reading Specialist in Elementary Education, was qualified and testified on behalf of the petitioner as a reading and writing specialist in special education.<sup>17</sup> (P-17.)

C.B. was referred to her in January 2019, for an Independent Educational Evaluation. (J-9.) At the time of the evaluation, he was seven-years-old and in second grade. As part of her evaluation, she reviewed a number of C.B.'s academic records among which were his IEP progress reporting.

In review of the November 12, 2018 IEP, she noted that his general education teacher stated that C.B. was doing great in language arts – doing well with reading curriculum, comprehension, vocabulary, grammar and phonics, however, he needed his tests read to him. She (Topiel) felt that this was important because that meant C.B. could not read the tests himself. His teacher also noted that C.B. struggled on the weekly spelling tests and was being allowed to retake the tests if he scored under eighty-percent. His teacher also reported that C.B. got frustrated and upset if the spelling words were too hard for him.

C.B.'s special education teacher reported that he was doing well with reading and had achieved a Fountas and Pinnell level of “E” and was progressing from reading “E” books to “F” and “G” level books in the guided reading grouping. The special education teacher also reported that CB was mostly independent at completing his phonics skill practice. When the class did dictation on the whiteboard, he was accurate with encoding and marking his work.

She also reviewed the CHOP Brain Change Study conducted in February 2018, when C.B. was in first grade. The report noted areas of weakness which included visual motor coordination, concentration and processing speed. There was also a

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<sup>17</sup> Respondent did not object to the witness being tendered as an expert in reading. However, did object to her being admitted as an expert in reading and writing in special education. After a lengthy voir dire of the witness, over respondent's objection, Topiel was accepted as a reading and writing specialist in special education. According to Topiel, a reading specialist is a specialist in all areas of literacy which encompasses writing, phonics, comprehension, vocabulary, fluency, speaking and listening.

weakness in CB's vocabulary - word knowledge and verbal concept. According to Topiel, CB's speed of processing information was low, and he had difficulty defining words which is a big part of reading and being good reader.

The report also found C.B.'s basic working memory to be average but his speed of processing information low. Regarding his basic language abilities, CB had difficulty maintaining reciprocal conversations and staying on topic. His speech was unexpectedly more repetitive based on his expressive language level, which according to Topiel, was a feature of autism.

Under executive functioning, the report noted that CB had great difficulty in behavior regulation and metacognition abilities (initiating, problem solving, multi-step processes, working memory, organizing). According to Topiel, that are all involved in the reading comprehension process.

In the adaptive behavior section of the report, she found it significant that C.B. was below age expectation in attention, impulsiveness, communication, daily living, and motor skills – all part of being able to participate and read properly. Also concerning were the findings regarding CB's emotional functioning which noted clinical concerns about his anxiety and depression. Specifically, that he had difficulty getting his mind off certain thoughts and sustaining his attention which would interfere with learning issues.

According to Topiel, as part of her evaluation she also reviewed the two Kaufman Tests that were conducted – September 2017, test and the November 2018, test. In looking at the results of both tests, she found that C.B. was below his grade level for reading in kindergarten and first grade. She also noted that the "brief form" of the test was administered rather than the full achievement test. In discussing the difference, she stated that the brief form is not as in-depth to assess reading comprehension, writing or spelling skills. Topiel also expressed concern on the test scoring. Specifically, grade level was placed at the level set by the middle fifty percent of scores and not scored in relation to an individual's particular strengths and needs. Data also revealed that the test may be disproportionately calibrated – therefore one

more correct answer could advance a student's percentile score to jump more than ten points.

Due to these concerns, she administered her own tests one of which was the Ekwall Shanker Reading Inventory - a phonics awareness test. The test provided a baseline of C.B.'s phonics skills and identified his strengths and weaknesses. Review of his test scores found that C.B.'s was weakest on vowel pronunciation and his inability to recognize vowel teams. He obtained a zero out of fifteen on that segment. He also had difficulty on phoneme segmentation and phoneme blending. However, he did well with initial sound recognition, initial consonants and middle vowels. C.B. did fairly well with initial blends and diagraphs, phonograms.

Her overall assessment of C.B.'s test results for the Ekwall-Shanker Reading Inventory was that he scored higher in receptive abilities than decoding abilities. When shown a whole word, C.B. showed strong skills in choosing the correct letter representation from a list of five choices. However, when asked to decode without a visual support and asked to rely on his own knowledge of the rules of phonics and on his auditory and visual skills, C.B.'s scores were much weaker. This weakness was further evidenced in the QRI-6 which she also administered.<sup>18</sup>

In going through some of the QRI-6 results, Topiel stated that on the sight word list, C.B. did poorly. The list consisted of twenty words. He was tested on his knowledge of the sight word and how automatically he said it. On the pre-primer 1 test, C.B. tested at a frustration level for how automatically he said the word. He knew some of the words but not as automatically as he should have. According to Topiel, this is a significant part of being a fluent reader and meant that he was probably on a sight word level somewhere between kindergarten and first grade.

On the comprehension passages, Topiel stated that for the first passage, he was given a pre-primer 1 level story, consisting of thirty-five words, on a topic that he was

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<sup>18</sup> Topiel testified that she administered the QRI-6 in strict accordance with the guidelines. According to the protocols, the test allows very little prompting.

familiar with. He was then asked to read the story out loud and while he did this, she recorded the number of errors he made in decoding. Once he was done reading the story, he was asked what he remembered about it. She then asked him comprehension questions which were both literal and implicit that required inferencing. Thereafter, he was scored on decoding and comprehension.

C.B. scored at the frustration level in his errors in decoding. He was able to retell the story fairly easily and was able to answer the five questions that she asked him correctly. According to Topiel, a frustration decoding level meant that that was C.B. at instructional level for comprehension.

When she went to the higher passage to see if his performance was the same, C.B. decoded at an instructional level but scored a comprehension level of frustration. According Topiel, C.B. struggled with reading fluency which was indicative of causing comprehension scores to be low. As an example, she cited to the narrative passage “Just Like Mom/Pre-primer 2”. In decoding the passage, he miscued “nobody” for “numbers” and incorrectly answered the question. While the text had a picture that could have helped him arrive at the correct answer, he either did not remember it or did not pay attention to it.

In the expository text passage: People at work/pre-primer 2, she found that C.B.’s fluency rate was extremely slow - below pre-primer. He made many miscues when he decoded the words. A lot of the words were meaning changing and possibly affected his comprehension. C.B. was only able to tell her two details from the story. To her, it appeared that his weak decoding skills really interfered with his fluency and his comprehension of the passage.

Also administered was the Primary Spelling Inventory Test - a standard test given to grades K – 12. She started with the kindergarten level test wherein C.B. was given eight words to spell. She would say the word out loud, then in a sentence and then say the word again out loud again after which he would spell it. C.B. was only able to spell three words correctly placing him in the thirty-eight percentile which was below kindergarten level. He was able to get the initial consonants correct but when it came

to the other parts of the word, he did poorly. Given how poorly he did on the initial test, she did not continue to the next level as it would have been too frustrating for him.

Topiel noted that the spelling test was very frustrating for C.B. and stated that he would benefit from using hands-on letters such as plastic letters. This would allow him to manipulate the letters and sounds to try to spell words. She recalled that the use of plastic letters was in C.B.'s IEP but did not know if the IEP specifically mentioned that they should be used for spelling.

A writing sample was also obtained from C.B. wherein he was asked to write a paragraph about his favorite animal - whales. The paragraph consisted of three sentences which were each written factually. Only one sentence contained a period at the end of it. He had a basic understanding of sentence structure but his spelling was poor and he worked very slowly – closer to a first grader than a second grader.

She also conducted two observations as part of her evaluation. One was in C.B.'s resource room - language arts literacy block, and the other one was in his regular education class. She found that C.B. was very comfortable in the resource room. He participated throughout the class with his aide next to him who frequently prompted him to stay focused. In the general education classroom, he did not appear as comfortable. One of the things observed was that C.B. had difficulty following along in the text in one of the lessons. According to Topiel, there was an audio/video version playing on the wall and a hard copy of the book on the desk. C.B. would pay attention by listening to the audio and follow along in his book. While he was quiet during this segment, she noticed that he started to fidget – touch his face, frequently rub his eyes, drop his paper on the floor, yawn. He did not exhibit these behaviors in the resource room. C.B. would also talk without raising his hand – some of the things he said were on topic and some were not. Topiel went on to state that she saw that the aide had increased the number of prompts she gave him - such as how to sit in the chair or point to the sentence he should be looking at.

According to Topiel, other significant things that she observed in the classroom setting was that C.B. was much slower at writing than his peers. She also felt that in

the reading group, he was not able to keep up with the discussion fluently because he was processing things more slowly. It was her belief that C.B. required a lower level of text so that he could participate more fully. When given an assignment to diagram vowel patterns, he had difficulty following each step and required a lot of prompting from his aide. After observing C.B. in the classroom, she felt it would be in C.B.'s best interest to have an OT Therapist or behavior specialist find other ways to prompt him non-verbally or find out what was causing him to have focusing issues. Topiel went on to note that C.B.'s IEP did not call for a BIP

She also interviewed the petitioner and agreed with her assessment that the school was basing C.B.'s grades on things that he had already mastered, and that the aides were providing too much assistance to CB - which did not allow for independence. There was also concern whether C.B. was receiving spelling instruction.

In review of C.B.'s current IEP – specifically the November 12, 2018, she found that the current level of functioning set forth in the IEP was not the same level of functioning that she found in her evaluation. More specifically, based upon her testing, among other things, she found that C.B. had difficulty automatically reading site words to grade level and poorly blends and segments with automaticity. He had poor recall and retelling ability and did not check the meaning of nearby words to decipher if the decoded word made sense. C.B. also had a limited vocabulary and weak spelling knowledge.

Topiel went on to state that she felt that C.B. was overwhelmed at times. He was getting a lot of feedback – the audio/visual, the aide continuously prompting him and the teacher prompting him. With all of that, he appeared to lose focus in the general education classroom which requires him to be more independent. She also found it troubling that C.B.'s tests were being read to him which was indicative that he had poor reading abilities. According to Topiel, given C.B.'s pre-primer level of sight-word fluency, there was potential issues when he reached the upper grades. Along these same lines, Topiel opined that given all of the accommodations that C.B. was receiving, it was unclear what his actual progress was or has been. She went on note that the mastery criteria in C.B.'s current IEP did not specify whether it was with or

without accommodations which was important in evaluating his true progress. It also failed to discuss C.B.'s current level of performance in relation to the eighty or ninety percent mastery criteria. (J-3.)

In discussing her findings regarding C.B.'s phonological weaknesses, one of her recommendations was that he be trained to understand the structure of the sounds within a word (beginning, middle, end).

Based upon her findings and in looking at C.B.'s current IEP, she was concerned that the goals were not specific enough and were not sufficiently measurable. While there were criteria for measurement of a certain percentage, there was no context such as duration and frequency. In other words, the mastery criteria was not stated in quantitative terms nor was the "progress indicator by marking period" on the IEP. An example given in the instructional section of language arts literacy was recognizing long and short vowels – there was no understanding of how many vowels and which vowels they were; how were they being presented and tested. In sum, there was no information on how the data was going to be tracked for progress and monitored. While the objectives were close to what C.B. should be working on, they were not written in a way that could be meaningfully measured and monitored. The objectives also covered too many skill areas and were not broken down into explicit objectives.

In discussing the IEP's "evaluation method", Topiel stated that she did not review teacher-made tests, however, did review C.B.'s standardized tests, and report cards. She went on to state that in her opinion, even the evaluation methods itemized in the IEP, lacked specificity and failed to provide appropriate quantitative measures of goals and objectives.

Other recommendations set forth in her report included intermittent breaks, tight routines and a lot of multisensory teaching in a small quiet classroom. She also recommended that an FBA be conducted to determine the best strategies and environmental factors that would help C.B. pay attention and learn. Also recommended throughout the day, both at home and school, was to have C.B. sound out words on signs and labels and read decodable and leveled text multiple times a day to be



become fluent. Additionally, spelling instruction should follow and complement decoding instruction.

Topiel went on to state that given C.B.'s attention-deficit/hyperactivity disorder (ADHD) and Autism and all of the difficulties that he had with his processing speed and decoding, that he be provided one-to-one instruction and remediation by a certified reading specialist in order to catch up to his grade level as soon as possible. She recommended that he meet with the reading specialist daily for thirty-five to forty minutes daily because of how far behind he was. She estimated that it would take C.B. a year to catch up. She also recommended that he be provided guided reading that is more individualized and targeted on the skills that he was working on with visual supports for things that he has difficulty remembering to help him along in the guided reading and reader response questions.

Also recommended was that the reading specialist work with the CST to among other things, coordinate techniques and set goals, train paraprofessionals and teachers in effective strategies and monitor C.B.'s progress.

With regard to C.B.'s writing, she felt that he required a lot of structure and recommended that he do short structured writes. He would also need visual supports with lists of vocabulary and strong verbs that he can use in his writing. If he is tasked with writing an essay in something that he was interested in, he should be given the spellings of key content words and access to a dictionary for reference so that he can develop independence at spelling the big words. Topiel also suggested that he be given a self-monitoring checklist, token system, and timed breaks so that he could refocus himself and access to audio text.

It was her belief that C.B. would benefit by being placed in a special education classroom for kids with autism for all of his academic classes due to his struggles with reading and writing. Placement in that setting would provide C.B. a smaller setting with trained staff who know how to work with autistic children. Additionally, the one to one aide assigned C.B. should have at least sixty college credits – preferably in education, child development or special education and have at least a year of experience working

with autistic children and be trained to handle to C.B.'s particular needs. She went on to note that his current IEP provided for no such qualifications.

In addition to her other recommendations, Topiel also recommended that C.B. be placed in an ESY program that provides intensive one-to-one reading and writing instruction by a certified reading specialist daily.

In her review of C.B.'s June 6, 2019, IEP, none of her recommendations as it relates to her proposed goals and objectives, provision of a reading specialist, qualifications for the one to one aide, ESY or any of her recommended accommodations were integrated. According to Topiel, while she offered to attend the June 6, 2019 , IEP, the school informed her that her presence was not necessary. She went on to state that none of C.B.'s IEP's including the June 6, 2019, IEP, provided C.B. an appropriate education.<sup>19</sup>

On cross-examination, Topiel was asked what the percentage of her evaluation work was for a Board of Education versus private. In response she stated that eighty percent of her evaluations were for Boards and the remaining twenty percent were private evaluations. All of the Board evaluations were independent evaluations done at the request of a parent.

In going through her certifications, Topiel stated that she is a board-certified education advocate, certified elementary education teacher, certified reading specialist and a registered art therapist. She does not have certification in special education or writing and has never testified as an expert in a court of law in elementary education or as a reading specialist. According to Topiel, her reading specialist certification encompasses all parts of literacy including writing.

Topiel was also asked about her work experience, specifically, whether in any of her prior work experiences, she worked as a CST member. In response, she said that

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<sup>19</sup> The Board's ongoing objection to this line of questioning was noted for the record.

she had not. Nor does she have any expertise that would allow her to develop special education programs on a broad spectrum outside of reading.

Regarding her evaluation of C.B., Topiel stated that she spent approximately five hours with him - two of which involved observation. While less than a full day of school it was within the standard range of time by industry standards. She found him to be charming and sweet – not a behavior problem.

In going through her report, Topiel was questioned whether a test that is read out loud to a student is a reasonable accommodation. In response she stated that it was a reasonable accommodation in certain circumstances, but not all. She reviewed C.B.'s IEPs from 2016 – 2019.<sup>20</sup> She could not recall reviewing C.B.'s Progress reports from 2016/2017. She did recall seeing his Progress Reports from 2017/2018, however, did not address them in her report. She also reviewed C.B.'s 2018/2019 Progress Reports.

Topiel was also questioned about her comments in her evaluation about the Brain Change Study done by CHOP and whether that was something she normally relied upon. In response she stated that she looks at records to see test scores and to get a generalized idea of where child's strengths and weaknesses were as it related to reading and writing. She was vague on how many times she has actually used or reviewed such a study.

In going through her report commentary as it related to the Brain Change Study, Topiel was asked whether low processing speed was a function of autism and ADHD. In response she stated that it could be a feature of either, or it could be something else. Upon further questioning, she agreed that low processing could be a feature of C.B.'s disability.

Topiel was also asked about how she arrived at her executive function findings specifically her findings that C.B. had great difficulty in behavior regulation and medication abilities under executive functioning. In response she stated that it was her

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<sup>20</sup> On direct examination, Topiel had testified that she did not review C.B.'s 2016 IEP.

interpretation of the Brain Change Study. When shown C.B.'s scores in the study which, when averaged out fell within a range of ninety to one hundred and ten, she agreed that the scores fell within the average range but pointed out that she quoted it from another part of the study.

Under "Emotional Functioning" and the statement that "C.B.'s parents reported clinical concerns about his anxiety and depression", Topiel was asked how petitioner was qualified to make such a statement. In response, Topiel admitted that she did not know what petitioner's qualifications were. She (Topiel) took the statement from another report that she had read but could not recall which one. She agreed when questioned further, that all of the information in her report which related to C.B.'s difficulty in behavior regulation and medi-cognition abilities, were based upon petitioner's representations and not verified assessments, tests and data.

In going through the Kaufman Test results in her report, Topiel agreed that between the September 2017, test and the November 2018, test, C.B. had made progress in reading, writing and math. She acknowledged that the test was a "normed" test and not subjective.

Turning to Topiel's reporting of parental concerns in her report, she was questioned about the section which stated, "The first month of school both teachers were under the impression that the other teacher was providing spelling to him". Topiel was unaware that the time period in question was not a month rather, a five day time period between the beginning of school and back to school night. According to Topiel, she quoted what the petitioner had reported to her.

Questioned next was how long the Eckwall-Shanker Reading Inventory lasted and how C.B. presented himself. In response Topiel stated that the test took approximately three hours. C.B. was cooperative, listened well and followed directions and performed to the best of his ability. The test consists of eight sub tests. C.B. mastered four of the tests – the mastery criteria being ninety-percent. Anything below ninety percent was not considered mastered. In summing up his results, Topiel agreed that C.B. scored one hundred percent on initial sound recognition, initial consonants,

and vowels. He scored eighty percent on initial blends and digraphs and ninety percent on phonograms which are a few letters that make one sound. On pheno blending he was able to successfully blend certain consonants and consonant blends, however, other ones he could not. On vowel pronunciation, he could not pronounce any of the fifteen vowel combinations that were listed.

Turning to the “Explanation of Writing Sample”, Topiel was questioned where the writing sample was located in her report. In response she stated that she had it in front of her when she wrote her report, but that it was not included in her report. In discussing Section Six of her report – “Additional Comments on Spelling Testing”, Topiel was asked whether she recalled what modifications and accommodations were provided to C.B. during the 2018/2019 school year. While she could not recall the specifics, she did recall seeing that he was to have a one to one aide. She acknowledged that the aide could give C.B. one to one instruction and slow guidance during his academic periods, however, felt that the aide would need to be properly trained to do so. She did not know what the qualifications of C.B.’s aide, nor did she ask despite the fact that she had recommended that he have an aide and that he should be going into a certain program. At no time did she read the Board’s policy on aide qualification requirements. In defending her commentary surrounding C.B.’s current aide, she stated that she relied upon her observations and comments from other evaluators, however, could not recall who the evaluators were, or their commentary. This statement subsequently changed with Topiel admitting that there was no other evaluator’s report that she relied upon – rather C.B.’s IEP information and her discussions with C.B.’s parents.

Topiel also asked about her classroom observation on January 29, 2019 (second grade). According to her report, she observed C.B. in two different settings on that date – the resource room and in the general education classroom. In both settings she commented upon C.B.’s aide prompting him. When questioned about her comments on the aide, she agreed that prompting a student with autism and ADHD would help them retain focus and engage in their schoolwork. Regarding her commentary that C.B. had difficulties participating in small group, she acquiesced that the observation of this behavior was in the general education classroom and that the teacher immediately

addressed the situation and accommodated him. She went on to state, however, that she felt that the teacher should not have said what she did in front of the entire class.

She also agreed that an aide giving verbal prompting to C.B. was an accommodation. Also questioned was whether C.B. enjoyed verbally participating in the classroom. Topiel placed caveats on her answer stating while that he did enjoy participating in class, he had anxiety about it and go off topic to a subject that he would prefer talking about. Despite not having a degree in psychology, she felt that she was qualified to say that he suffered from anxiety based upon her training and experience and the fact that she was an excellent observer.

When asked if fidgeting, losing interest and not participating in a classroom, eloping or a desire to work on a preferred task as opposed to a non-preferred task, was a function of ADHD and autism, she was agreed that it was. She also acknowledged that C.B. had not been diagnosed with anxiety by a professional and modified her earlier testimony stating that she did not say that C.B. had anxiety, but that based upon her observation, he seemed to have some.

On section nine of her report (Explanation of Current IEP Levels of Functioning), Topiel was asked about how she arrived at her findings. According to Topiel, she did not use C.B.'s progress reports to come to her conclusions, rather derived her findings from her interpretation of the testing she conducted and data. By data she meant the data that came from her assessment of his needs and strengths. She did not feel that her conclusions were subjective because they were based on the tests, she conducted which showed C.B.'s strengths and weaknesses. She also reviewed C.B.'s IEPs for first and second grade.

In going through section ten of her report (Considerations about the Current IEP), Topiel was questioned about how she would know if a goal was appropriate. In response, she stated that she had experience in knowing how to write measurable

smart goals and objectives.<sup>21</sup> She did not feel that a goal was measurable if the mastery criteria only stated, for instance “complete a task at eighty-percent by the end of the year” - despite the fact that the aforementioned goal was measurable and had a time duration.

Under section eleven of her report wherein she recommended that an FBA be conducted, Topiel testified that at the time she conducted her evaluation, an FBA had already been done. She agreed later in her testimony that one of the recommendations in the June 6, 2019, triennial evaluation was that an FBA be obtained which was consistent with her recommendation. She also recommended a small reading group of no more than three students but stated that it was important that a reading specialist direct the curriculum and guide the teacher to allow C.B. to catch up to grade level.<sup>22</sup> At the time she conducted her evaluation, C.B. was in second grade. She was aware that when the Kaufman test, which was conducted in November 2018, placed C.B.’s at a second grade writing grade level. Topiel also acknowledged that C.B. was provided access to multi-sensory and kinesthetic activities in his current IEP, which was something she had recommended in her report.

When questioned about her recommendation that C.B. be placed in a self-contained classroom and how she was qualified to make such a recommendation, Topiel stated it was based upon her work experience over the prior fifteen years. She was aware that none of the other independent evaluators made the same recommendation. Topiel was also questioned whether an individual, who has a master’s in reading and a certificate in dyslexia, could assist the CST in coming up with the appropriate programming for a child with a reading deficit, she stated that “it might”.<sup>23</sup> However, according to Topiel, in all of the records she reviewed, there were

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<sup>21</sup> Topiel testified that a smart goal and objective was specific, measurable, attainable, reasonable, and have a time duration attached to it.

<sup>22</sup> Later in her testimony, Topiel acknowledged that C.B.’s June 6, 2019, triennial evaluation called for C.B. to be placed in a small reading group no larger than three students but stated that it did not follow her recommendation that C.B. be provided access to a reading specialist. She acknowledged, however, that she had no idea what the teachers’ credentials were.

<sup>23</sup> This reference was specific to the November 15, 2017, IEP, specifically Susan Allen-Youngblood, the Special Education Teacher who participated in the IEP meeting.

no records for reading services or a reading evaluation other than the one she conducted.

In highlighting some of the accommodations, modifications and supplementary aids in the November 15, 2017, IEP, Topiel was asked if they would assist a student with ADHD and autism. In response she stated that they would provide some supports. She was also asked about the mastery criteria and evaluation method in the IEP and if the mastery criteria identified, a way to measure a goal. Begrudgingly she stated that the evaluation methods itemized were one way to measure a goal and objective but it was not what she recommended.<sup>24</sup> She also acquiesced that ESY was a way to remediate concerns about academic progress, as did the provision of related services (speech, OT), an aide, and standardized testing accommodations – all of which were provided in the November 12, 2018, IEP.

In going through the November 12, 2018, IEP, Topiel was questioned whether the accommodations, of which there were more, were a way to support C.B. In response she stated that more accommodations would not necessarily mean that they were the appropriate accommodations. She would not answer the question, even though it was asked several different ways, as to whether the accommodations that were put in place would assist C.B., much less a child with ADHD and autism.

When questioned whether the goals and objectives set forth in the November 12, 2018, IEP had mastery criteria, evaluation methods and marking periods to note progress, she stated that the IEP did have different evaluation methods and mastery criteria, however she disagreed with them. According to Topiel, it was not a question of percentage of mastery - some of the goals as written for instance, had too many skills to master with no understanding of, for example, how many vowels or words there were. Therefore, she questioned what the skills were being measured against.

Topiel was also asked about her earlier testimony that she offered to attend the June 6, 2019, triennial evaluation meeting, however, the District informed her that her

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<sup>24</sup> The evaluation methods identified in the IEP were 1. Standardized Tests; 2. Teacher Made Tests; 3. Report Card Grade; 4. Teacher Observation



presence wasn't necessary. She acknowledged that the District had invited her to the meeting, however, when she asked for additional monies, they declined to pay it. She could not, or would not, answer whether someone else, for instance, the petitioner, could have paid her fee to attend the meeting. In going through some of the salient points of the June 6, 2019, IEP, Topiel was asked about the ESY program. Specifically, whether the recommended fifteen hours of individualized tutoring - which specifically targeted reading, would be a way to remediate reading deficits. In response she stated that it could, but that what was being proposed was not sufficient for the level of C.B.'s needs. Additionally, she had no way of knowing what level of experience the tutor provided would have.

In going through several of the language arts literacy goals and objectives and whether they incorporated her recommendations, Topiel could not recall whether they were the same recommendations that she had outlined in her report. Even if they were, they were not verbatim to what she had recommended. She admitted after further questioning that in a "general" way, they were the same, however, it was her belief that many of her recommendations were not included by the school. When asked several times, that if by incorporating her recommendations into the IEP, that the school considered her report, she stated that they had not because in her opinion, the goals were not written in a way that shows how progress should be monitored. The measurements that the school was using would not provide accurate and appropriate measurements of C.B.'s progress.

**Kathleen McCabe-Odri (Dr. Odri)**, Ed.D., BCBA-D, was qualified and testified as an expert in the field of ABA, autism and special education. (P-18.) When she conducts an FBA, the methodology that she uses is based upon the principles of ABA to gather information of antecedents or triggers, as well as consequent of events or environmental responses to a child's challenging behaviors. She tries to identify the challenging behaviors that are in question. She reviews records, interviews key people and conducts observations during which she may collect objective data. She may also request the school staff to record a week's worth of observational data.

In C.B.'s case, she reviewed a number of documents, one of which was his 2016 IEP. At the time of that IEP, C.B. was receiving ST, O.T., and ABA services with a one to one assistant. The IEP noted that C.B.'s behavior was interfering with his learning and the learning of others however there was no definition of the specific challenging behavior or a BIP. She also reviewed the BASC survey that was mentioned in the IEP which listed certain descriptive characteristics such as hyperactivity, aggression and withdrawal. Dr. Odri went on to state that an ABA therapist attended the 2016 IEP meeting and that C.B. was receiving ABA services two times weekly for forty five minutes in an ABA room and in the general education classroom. There did not appear to be any specific goals that were going to be delivered with the ABA services. In review of C.B.'s record for kindergarten, she did not find any documentation of C.B. receiving ABA services.

She also reviewed the FBA that was done in September 2016, noting that the assessors used the same screening tools that she uses and came to similar conclusions of the function of his behavior. She also noted that at the end of the report, the recommendations called for the development of a BIP.

According to Dr. Odri, an FBA provides information to identify variables that may be causing challenging behaviors and environmental responses and makes suggestions about intervention strategies and recommendations to develop a behavior management plan. She went on to note that it was important that the behavior management plan be more specifically developed by the "team" that supports the subject of the FBA.

She reviewed the September 2016, FBA to provide her with a history of C.B.'s history of challenging behavior, and what was suggested to address the same. She also looked at C.B.'s December 7, 2016, IEP to see if the recommendations were incorporated. According to Dr. Odri, there did not appear to be any reference to the September 2016, FBA, or a proposed behavior management plan. While the IEP recommended that he receive ABA services for the 2016/2017 school year, no specific goals and objectives were provided.

Dr. Odri also reviewed C.B.'s November 15, 2017, IEP. No reference to the September 2016, FBA was made in the IEP nor did she see any goals and objectives related to ABA services. The same with the November 12, 2018, IEP. While the November 12, 2018, discussed the ABA services that had been received in kindergarten, there were no services discussed for first or second grade.

In going back to her report and her findings, Dr. Odri stated that C.B.'s identified disabilities were autism and ADHD. She went on to state that it was very important to develop objective target behavior definitions so that they could be consistently identified and measured. Since C.B.'s IEP did not include specific target behavior definitions, she developed them based upon C.B.'s records, interviews that had been conducted, and her observations. The information was then shared with the CST so that they could measure his identified target behaviors. The behavior that she identified which interfered with C.B.'s learning was stereotypical behavior, aggression, non-compliance, crying as well as prompts and independents. Dr. Odri noted, however, that the independence would not be considered a challenging target behavior - rather a proactive or skill target behavior. She found that the target behaviors were consistent with the identified behavior disorders and education deficits.

In addition to the data collected when she observed C.B., four days of data were also recorded by C.B.'s teacher and his one to one aide. During her first observation of C.B. in two separate environments, she noted that he appeared to be on task with his peers at the time of observation. However, he had challenges with social interactions with the teacher, staying on topic, and reading social cues during classroom discussion. During her second observation of C.B., she was able to observe him in his pullout language arts. She also interviewed both his language arts and general education teachers. One of her observations was that C.B. on task behavior was well below his peers when he rejoined the general education classroom. She also noted that C.B. received ongoing prompting from his one to one aide which at times conflicted with the vocal directions and interactions from his teacher. While the November 2018, IEP provided for accommodations, modifications and recommendations, there was nothing specifically defined as the appropriate types of prompts that should be used to redirect C.B.

According to Dr. Odri, she used the Functional Assessment Screening Tool (FAST) when interviewing C.B.'s teachers. She described the FAST as a way to categorize the responses from the individuals whom she interviewed. C.B.'s general education teacher, Mrs. Martorana (Martorana), described C.B. as friendly to his peers, functioning well and had a desire to share his knowledge. His area of strength was math. Martorana also noted that he at times required redirection, does not like having modified work that is different from the rest of his class, and was doing well with copying work from a distance. She also noted, as did Manski, that the few tantrums that he had during the year were related to work demands and modified assignments. No documentation was provided by the school regarding the tantrums.

In going through the four days of data that was collected by C.B.'s teaches, Dr. Odri stated that there were zero instances of higher level behavior such as crying, aggression or non-compliance. His range of independence was sixty nine percent. There were instances that scored both prompts and stereotypical – the average for prompting was thirty two percent or approximately one third of his school day and seven percent or twenty-five minutes a day for stereotypical behavior. Her take away from the data was that challenging behaviors were likely to be triggered by demand and restricted access antecedents and were maintained by access to attention/tangibles as well as escape from those demands. There also appeared to be a lesser function for stereotypical movements related to automatic/sensory function.

In identifying the most significant components of each of her recommendations, Dr. Odri stated that in her first recommendation, she noted that while C.B.'s intelligence appeared to be within the normal range, he had significant barriers in his ability to process information. He also engaged in distracting behavior that interfered with his ability to pick up cues in his environment. While placement in a full day self-contained classroom was not appropriate, he should be provided additional accommodations in the general education classroom such as a reading specialist to identify and support this area of weakness. She also recommended that C.B.'s OT goals be amended to add fluency and pacing goals because C.B. appeared to lag behind his peers in processing auditory information and responding vocally as well as meteorically. In her

review of C.B.'s records, she did not find that OT addressed fluency and pacing special education needs.

Dr. Odri's second recommendation was that C.B. continue to receive one to one support throughout all academic periods. The aide should be trained in ABA techniques/principles as well as C.B.'s specific behavior intervention and impulse/attending plan. She recommended that C.B. have the aide in all of his academic areas due to the language based instruction that occurred across the board as well as his impulse control issues that presented obstacles to his classroom functioning. It was her belief that by having an ABA trained aide throughout the academic day would exponentially support C.B.'s success in the least restrictive setting. According to Dr. Odri, having an aide that was not appropriately trained would be unable to address C.B.'s behavioral needs. She also recommended that an individualized behavior management plan be designed by a BCBA. At no time did she recommend that a new FBA be conducted because her report was complete.

In her third recommendation, she felt that C.B. should receive instruction about stress management to reduce potential outbursts and meltdowns. This could be done through the school's counselor and goals could be added and measured in the IEP. According to Dr. Odri, the current IEP did not include recommendations to provide strategies or measures for C.B.'s emotional overreactions/limited responses to stress. She also recommended that he be evaluated by a clinical psychologist for children as she could not evaluate C.B. for any residual effects/trauma related to the prior school discipline incident.

The fourth recommendation called for coping strategies to be incorporated into the behavior management plan and implemented throughout the day. The plan should also include the use of self-monitoring techniques in accordance with her second recommendation. Dr. Odri went on to state that it was very concerning to her that objective measurements of C.B.'s independence and behaviors were not being recorded or measured. The plan should be developed by a BCBA with the skills and frequency to help train others to implement the plan and monitor C.B.'s progress.

In the fifth recommendation, Dr. Odri recommended among other things, weekly social skills instruction due to C.B.'s difficulty in monitoring others and understanding his social partner's interests when he was speaking. He also appeared to have difficulty with detailed listening and transitioning topics. Dr. Odri went on to state that while C.B. displays very engaging social behaviors at times, his style of offering assistance or engaging in a topic of interest can be startling to others. According to Dr. Odri, the IEP did not include those areas of social deficits and that having a counselling goal of "will identify and understand various non-verbal communication behaviors" does not satisfy her recommendation.

Dr. Odri's sixth recommendation provided for C.B. to attend a full length ESY program that was geared to address his social, behavioral, and academic needs – specifically reading and executive functioning, impulse control and fluency. She also recommended that he have continued access to specialized reading instruction, social skills in speech as well as OT. According to Dr. Ordi, fifteen hours of individual tutoring would not fulfill her entire recommendation. She went on to state that once an effective intervention plan was put in place, it was important that C.B. have consistent access to it over extended breaks to avoid regression, as well as to support any new/emerging skills in these higher order processing areas.

In explaining why, she recommended that C.B. have daily access to a reading specialist, Dr. Odri stated that it was important that a reading specialist be available during language arts because they have specific strategies and assessments that can identify and address underlying deficit areas in language arts.

On cross-examination, Dr. Odri was asked how long she actually observed C.B. in the school setting to which she responded approximately three hours. Her observations took place in C.B.'s general education classroom, pull-out special education class, and during his lunch period which was in a general education setting. She only spoke to him once during her observations when he came up to her and asked who she was. Other than that, she never had any other personal interaction with him. No assessments were conducted at that time but were done as part of her FBA.

Aside from the task performance data which she scored during her observations; all data was collected by C.B.'s teachers over a period of four days.

When asked about her understanding of a "Least Restrictive Environment (LRE)" Dr. Odri went through the continuum. As it related to C.B. it was her belief that C.B. would benefit from continuing on in the general education classroom with changes in the level of support as well as communication between the special education environment, the resource language arts that he was receiving, and when he engaged in general education for language arts. She did not recommend that he be moved out of the general education setting nor did she recommend that he be placed in a special education program for the entire day.

She acknowledged that she did not assess C.B.'s reading and that she was not an OT therapist. Therefore, she did not assess his OT performance through any kind of O.T. assessment.

In discussing her recommendations, specifically, her second recommendation about targeting certain behavior and a plan, Dr. Odri was asked about the target behaviors that she had identified in her report - stereotypical, aggression, non-compliance, crying and prompts. More specifically, how many of the target behaviors were observed during her three hour observation of C.B. at school and over the four day observation his teachers. In response, she stated that there were no observations of incidents of aggression, crying or non-compliance. With regard to the other two target behaviors – stereotypical and prompts, she stated that stereotypical behavior was noted seven percent of the time and prompts occurred an average of thirty-two percent of the time.

She acknowledged that stated another way, ninety three percent of the time no stereotypical behavior was observed and sixty-eight percent of the time no prompts were observed. Dr. Odri went on to state that the assistant probably did not report their findings in the data because they were not properly trained in ABA and not working from a properly constructed behavior management plan because none was in place. When questioned on this statement, she acknowledged that nowhere in her report did

she reject the data collected by the teachers/assistants or question the observers qualifications. She further acknowledged that all of the target behaviors – three of which were not observed during the data collection period and two of which were observed, were with an aide that did not have any additional training. In trying to validate her recommendations, Dr. Odri again stated that the data was not observed by the recorder. When she was again questioned where in her report, she noted that, she acquiesced that nowhere in her report did she say that the data was flawed or that she did not rely upon it.

Dr. Odri was also asked about her third recommendation which spoke to stress reduction strategies and the recommendation for counselling and whether she was aware that the petitioner had revoked permission for the District to provide such services. In response she stated that she was aware that the District had offered the services and that permission had been revoked by the petitioner, however, she did not mention that fact in her report.

Regarding her commentary in her fourth recommendation about her concern that objective measurements of certain behavior was not being taken, Dr. Odri agreed that the behaviors in question were the five target behaviors that she had previously identified. She went on to state that the IEP does not provide for such measurement. When queried again on the fact that three out of the five behaviors were not seen during her observation period, she went back to her earlier statement that the behaviors were just not observed during the four day data collection period.

In questioning Dr. Odri about her fifth recommendation as it related to social skill instruction – she agreed that nowhere in her report did she mention that social skills support was already being provided to C.B. two times a week or that push in social skills and small group social skills were also being provided.

On her sixth recommendation – the provision of a full length ESY program to avoid regression, Dr. Odri was asked where the data was which showed that there had been regression. In response, she stated that there was no data collection for her to review. She made the recommendation to have data collection so that they could



evaluate if there was regression as well as the emerging skill and interruption of that. She acknowledged that she had reviewed C.B.'s IEPs from kindergarten through to second grade, interviewed his case manager and reviewed C.B.'s grades as part of her review process. She was aware that he consistently received A's and B's, however, stated that there were qualifications to those grades which reflected ongoing supports. The school did not provide any information as to what his grades would have been without the supports. While she did not mention any of this in her report, she did mention her concern over prompting not remediating the underlying cause of his performance barriers.

In going through the sources of information which she used to conduct her evaluation, Dr. Odri was asked about whether she reviewed Dr. Allen's report, dated March 26, 2019, and the IEE draft by Topial. According to Dr. Odri, she received Topial's report from either petitioner's counsel or from the petitioner.

**Christine Bertolini (Bertolini)**, testified that she was hired by the Hopewell Township School District as an aide for the 2016/2017 school year. In going through her educational and work history, she stated that after high school, she attended college for one year, left after her first year but then went back years later to earn the sixty credits required to become a substitute teacher. Prior to getting hired by the District, she worked as a substitute teacher at another school.

When she learned of the opening at the school for an aide, she filled out a job application. Her background check was still valid at the time she applied for the job. According to Bertolini, no experience was necessary for the job. While she does not specifically recall, she believes she was interviewed for the position. After she was hired and prior to the school year, she attended orientation at which time they probably went through the Board's aide policy. There was no training on how to work with special education children, autistic children or provide ABA services.

Prior to the start of the school year, received a letter from the school which identified her classroom assignment and informed her that she would be working with C.B. She did not meet C.B. until the first day of school when his teacher, Mrs. Seay,

introduced them. When the school year started, she did not know what was contained in C.B.'s IEP and never saw it the whole time that she was working with him. She didn't even realize she could access C.B.'s IEP until the following school year, when she had been reassigned to another classroom to work with a different child and she was given access to that child's IEP. Even then, she had no idea what she was looking at.

According to Bertolini, Manski was supposed to be her supervisor, however, she was subsequently informed that it was Mrs. Seay. No one told her what to do or how to handle C.B. other than to sit next to him and redirect him. By redirect, she meant that when the teacher was speaking, she was to make sure he was paying attention. If C.B. needed a question read out loud to him, she would do that. She would also walk with him to the bathroom and lunch. At no time, did she receive training on what to do if he exhibited inappropriate behavior, however, she figured it out on her own. She was unaware that C.B. had had a behavior plan previously and she did not recall anyone in September 2016, discussing a behavior assessment being done with C.B. At no time did she keep data or documentation on C.B.'s performance.

The first time she met the petitioner was after she (petitioner) requested to meet C.B.'s teachers. She recalls that in December 2016, there was an IEP meeting for C.B., however, she was not part of the meeting. One of the things that she remembered about her time with C.B. was how he was treated differently. As an example, she recalled in December 2016, Mrs. Seay would tell the children to do something and after they did it, she would walk around the room and put smiley a face on their desk and say good job. When she got to C.B., she would skip him. At one point, C.B. asked why the teacher was skipping him. According to Bertolini, that was the beginning of the end for her. She spoke to Mrs. Seay about the issue and suggested that she stop skipping him. At first, it seemed as though she went along with her suggestion. As all of this was happening, she kept on thinking of different ways to help C.B. and started reading up on autistic children. She conveyed her thoughts to Manski who initially thought that her ideas were great but after talking to Mrs. Seay, it appeared that her suggestions were not acceptable.

Bertolini went on to recall another event that stood out. According to Bertolini, Manski and Mrs. Seay were speaking to her and not speaking to the petitioner. This was contrary to what Manski had previously told her that it was good to talk to children's parents because it helps connect to the child. However, Mrs. Seay did not approve of her talking to C.B.'s parents and thereafter came up with a plan that C.B. did not need her anymore.

She went on to state that one day, when she came into school, C.B. was sitting in the back right corner of the classroom. This was where they normally sat so she could sit next to him and not disturb the class. When she came into the classroom, C.B. wanted her for something. When she went to approach him, Mrs. Seay went over to where C.B. was sitting, picked up his chair with him in it, and carried C.B. to the front/middle of the classroom and told him that he did not need her (Bertolini) anymore. Mrs. Seay then turned to her and said "stay". C.B. was screaming and crying saying "why". According to Bertolini, she did not "stay" as Mrs. Seay had told her to do, instead, she approached Mrs. Seay and questioned what she was doing. In response Mrs. Seay told her that C.B. no longer needed her and told her to stay in the back. From that point on, she was given "chores" to do in the back of the class. Even Manski told her that she was not Mrs. Seay's secretary. While she was hired as C.B.'s aide, she was not allowed to assist him and told to leave him alone. Thereafter he had to walk to classes by himself and do everything by himself.

After this incident occurred, she went to the principal, Ms. Lammerson and explained what had happened. Ms. Lammerson informed her that she would take care of the situation. According to Bertolini, she continued doing the "chores" that she was assigned and C.B. continued to be by himself. She started seeing behavioral issues with C.B. such as him sucking on his shirt, saying things like he had "snakey" with him. He had never done that before. He knew he was not allowed to talk to her so when he walked by her, he would not look in her direction. The situation was very disturbing to her.

Bertolini recalled another incident that occurred on a day that she was out. Another aide, Stephanie Greusmyer (Greusmyer), had been assigned to C.B. At one

point, Gruesmyer texted her to let her know that Mrs. Seay told Gruesmyer that she required Gruesmyer's assistance, which left C.B. alone. When she received the text, she contacted the petitioner to let her know. Petitioner scheduled a meeting with the school to address the issue. Shortly after the last incident occurred, the CST called a meeting with the aides and informed them not to speak to parents, or they would be fired. She recalled Manski participating in the meeting.

After that meeting, she was removed from the classroom and assigned to float around the school to different departments. At one point she helped the school nurse. C.B. remained in Mrs. Seay's classroom but was eventually moved into Mrs. Sloan's classroom. When this occurred, she was reassigned into the new classroom to help C.B. Mrs. Sloan did not operate the same as Mrs. Seay. Mrs. Sloan was good with C.B. and would help him. Mrs. Sloan also provided her with ideas on how to help him. Additionally, Mrs. Sloan did not care if she reached out to the petitioner, whom she liked talking to, because she provided insight on C.B. to further assist her in helping him.

According to Bertolini, other teachers and staff members which included Mrs. Seay, would periodically stop by Mrs. Sloan's classroom. She wasn't sure why that occurred but it was her belief that they were checking up on her. The following school year (2017/2018), when C.B. moved into first grade, she was not assigned to assist C.B. despite petitioner having requested that she continue on as C.B.'s aide. Manski told the petitioner that they typically switch aides as the child progresses, however, that was not true, because other children had the same aide for many years.

Bertolini went on to state that for the 2017/2018 academic year, she was assigned to another child who had behavior issues. She had a lot of problems with the child and did not know how to take care of him. While she asked for training, the school failed to provide any. Eventually, however, she was provided computer training. She was subsequently hurt on the job after the child that she had been assigned to, pulled a chair out from underneath her. As a result of her injuries, she was unable to work for a period of time. After the incident, she resigned in January 2018 - it being her

belief that the school failed to provide her a safe environment and did not show her how to take care of a child with behavioral issues.

On cross-examination, Bertolini was asked when exactly she resigned. In response she stated that she could not recall, going on to state that she could not mentally do the job anymore – she could not stay in a position where no training was provided other than watching a video on the computer. When shown a copy of an August 20, 2019, Appellate Division opinion found under Docket No. A-4664-17T4 wherein she was the complainant and the District was one of the respondents, she was questioned on the substance of the complaint which asserted a hostile work environment that adversely affected her health, and the court's findings.<sup>25</sup> (R-38.)

When shown the August 2017, aides training sign in sheet, she acknowledged her signature. (R-34.) When shown the agenda for the training, she acknowledged the various topics that were part of the training which included crises intervention among other things. (R-34.) She was also shown the November 15, 2017, sign-in sheet for paraprofessional training which had her signature. She acknowledged that she had participated in that training as well. When provided a copy of the August 29, 2017, signature sheet for receipt of the District's cell phone policy which prohibited the use of cell phones by staff members while performing their assigned duties, she acquiesced that she had received that policy as well. (R-36, R-37.)

When questioned how many times during the 2016/2017 school year she texted the petitioner, Bertolini stated that she could not recall - it was not only a daily basis initially but as they became friends their conversations became more frequent - occurring a couple of times a week. Even after she was no longer C.B.'s aide, they continued to have contact with one another, but she could not say how often.

Bertolini was also asked if she ever put in writing her concerns about C.B. to Manski, the school principal or the superintendent. In response she stated that she

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<sup>25</sup> Bertolini appealed the determination of the Board of Review, Department of Labor who affirmed the Appeals Tribunal findings that she was not eligible for unemployment benefits. The Appellate Division affirmed the Board's determination.

really wasn't computer savvy and did not recall sending any emails. When questioned further, she stated that if there was a problem, she would go and see them personally.

**Karen Sloan (Sloan)**, a former teacher in the Hopewell Township school district testified on behalf of the petitioner. She worked in the school system for twenty years as a kindergarten teacher in the general education classroom. She became familiar with C.B. after he was transferred into her classroom in March 2017. She recalled that Manski and Lammerson stopped into her classroom one day after school and informed her that she would be getting a new student – C.B. They did not convey any additional information such as his December 7, 2016, IEP, or any other IEP's from when he was in pre-school. She was unaware that C.B. had a behavior plan when he attended St. John of God, and at no time was she given any type of orientation on how to work with C.B.

A couple of days after C.B. had been transferred into her classroom, other teachers showed up at her door and discussed the implications of C.B. being moved into her classroom and the possibility of future litigation as a result of the same. According to Sloan, as a result of that visit, she went to the administration to let them know what had happened and what was currently happening as a result of C.B. being transferred into her classroom. (P-23, Pages 191-192.) She met with Manski and Ms. Lammerson, however nothing was done. Teachers, including Mrs. Seay continued to call her classroom every day - obsessed over how C.B. was making out. If the aide answered the phone, they would accuse her of being rude and report the aide to Manski. All this was going on as she was trying to teach the class.

In June 2017, on the last day of school, she contacted the administration again to complain about how Ms. Rizzo (Rizzo) was second guessing how she was handling her classroom and in particular C.B.<sup>26</sup> On this date, it was about the school bus being late. Rizzo did not appear to care about the other student's being impacted by the late bus, just C.B. She went out of her way to question how Sloan was handling the issue with him. (P-23, Page 189.) The administration called her and Rizzo in to discuss the

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<sup>26</sup> Rizzo was the school librarian and a union representative at the time.

situation but Rizzo refused to meet without a union representative being present, therefore nothing got resolved.

On cross-examination, Sloan acknowledged that she was aware that C.B. had an IEP when he was moved into her classroom, however she did not ask to see it or any behavioral programming or evaluation data. When she wanted to see an IEP, she would go and visit the CST and review the student's file noting, however, that she typically receives a student's IEP in the beginning of the school year. After being shown a March 24, 2017, contact sheet Sloan acknowledged that she had in fact reviewed C.B.'s case file when he was assigned to her classroom which included his IEP.

Sloan was also questioned about her testimony that she was having difficulties working with C.B. – specifically whether she called for an IEP meeting. In response she stated that she had not. She also acknowledged that in her June 19, 2017, email she did not even she even reference C.B.'s IEP. (P-23, Page 189.)

**C.B. (petitioner)** testified she has a B.A. in Public Health and for the past fifteen years has worked for the Cumberland County Health Department as an Environmental Specialist. C.B. was her first child and she realized early on that he was not meeting milestones that other children the same age were meeting. One such example was that C.B. didn't "coo" or make eye contact. After seeing the family doctor, she was referred to Children's Hospital of Pennsylvania (CHOP) where hearing and sight testing were conducted. These tests came back normal. When she went back to the family doctor, he referred her to Children's Specialized Hospital to be evaluated. This was when C.B. was about sixteen-months-old. Due to the lengthy "wait list", C.B. was not seen until he was eighteen-months-old. Prior to being seen at the Children's Specialized Hospital, C.B. started in the Early Intervention Program (EIP) where he received O.T., speech and an instructional program.

When he was seen at the Children's Specialized Hospital, the doctor's diagnosed C.B with autism. C.B. was walking but not talking at the time. It was not until he was four and a half when he started to verbalize. C.B. stayed in EIP until he

was three years old. Thereafter, he entered into the Hopewell pre-school program and was placed at St. John of God since Hopewell did not have their own program. Prior to placement in the pre-school, C.B. was evaluated and had an IEP. While attending St. John of God, C.B. he received O.T., speech and ABA. He also had a one to one aide.

At the time, C.B. did not have many self-help skills because he was non-verbal. Due to his inability to verbalize, he would have fits – throwing himself down on the ground crying because he couldn't communicate what he wanted. In an effort to help with this, they started leaving picture cards around the house so he could pick them up to let them know what he wanted but that did not work out well. Using the bathroom was another issue which was not really resolved until C.B. started kindergarten.

When C.B. started kindergarten, he attended the Hopewell Crest School and had a one to one aide. According to the petitioner, C.B.'s IEP meeting was held within five days of the start of the school year and she did not recall seeing C.B.'s aide in attendance, however, did remember seeing her at the December 7, 2016, IEP meeting. (P-8.) C.B.'s teacher in kindergarten was Mrs. Seay. To communicate with her, she would call, send in notes on C.B.s forms or use the school app communicate. At one point she realized that some of C.B.'s work was coming home and the star or the happy face at the top of the sheet was not filled out.

Concerned, because she was not getting responses from Mrs. Seay about her son's progress, she spoke to Manski on several occasions who encouraged her to speak directly with C.B.'s aide, Bertolini, which she did. Bertolini was very helpful and shared her thoughts on certain techniques that she thought may be helpful to C.B. Bertolini also wanted to run her thoughts by Manski and the CST such as providing C.B. more time to stay on task. Thereafter, she and Bertolini frequently communicated. One day, C.B. came home upset and she called Bertolini to ask what had happened. At first Bertolini didn't tell her what happened, however she found out later that there had been an incident which Bertolini had reported to Manski and Lammerson.

According to the petitioner, after she learned what happened to her son in the classroom, she contacted Manski but nothing got done. Thereafter, she brought it to



the Board's attention that her son was being overlooked with his education and mistreated. At first the Board appeared to want to help and asked for time to look into the situation. The day after the Board meeting, someone contacted her job to try to get her fired, claiming that she had used her position with the health department at a public meeting to get her way. She believes it was one of the teacher's husband, who was involved contacting her work. Her supervisor called Lammerson who told her that that was not the case and the matter was dismissed. Eventually the Board did get back to her and asked for something in writing because they did not feel that there was an issue. The Board itself never put anything in writing, however, her son was moved out of Mrs. Seay's classroom

Petitioner went on to state that she found out that her son was being moved into a new classroom by the CST. Once again, nothing was in writing. She was informed verbally. C.B.'s new teacher was Mrs. Sloan (Sloan). When her son was moved into Sloan's classroom, she (Sloan) conducted an evaluation of him. Thereafter Sloan would sit down with her and go through C.B.'s educational progress.

After C.B. was transferred out of Mrs. Seay's classroom, several issues arose one of which was Rizzo, having access to C.B.'s file by the CST. After she (Rizzo) accessed her son's file, complaints started to crop up centering around C.B., his aides and Sloan. Petitioner noted that at no time did she give permission for Rizzo to access her son's file. According to petitioner, Sloan sent multiple e-mails to the administrators seeking help and letting them know that she could not properly teach C.B. with the drama that was being created, however, this too was to no avail.

The following October, in 2017, she took C.B. to Children's Specialized Hospital for an evaluation at which time he was diagnosed with autism, ADHD and learning difficulty. The evaluation was shared with Hopewell, however, was not addressed by the school when she provided them with the report or at the next IEP meeting.

In February 2018, she took C.B. to CHOP for a Brain Change Study. C.B. was still being followed by the group who continues to follow C.B.'s as he gets older to see how he is developing. They provide her tools and techniques to use to help C.B. and

gives the District resources to use. The report was also provided to the school, however, at no time did the school call a meeting to address the findings and only one tool which had been provided in the report, was included in C.B.'s next IEP – the November 12, 2018, IEP, which was nine months later. No written notice was provided as to why the school rejected the recommendations in the report.

In May 2018, she requested that independent evaluations be conducted in the area of reading, behavior and neuropsychology. The school denied her request. She filed a petition for due process which was granted by the Honorable John Kennedy, ALJ on December 5, 2018. (R-31.) The Board appealed Judge Kennedy's determination to the Federal District Court who upheld his determination. (P-27.) Petitioner went on to note that the independent evaluation process did not even start until February 2019 – almost a year later.

Segueing to C.B.'s second grade aide, petitioner testified that his aide was Ms. VanMeter. According to petitioner, she requested that VanMeter attend C.B.'s November 12, 2018, IEP meeting. Her request was denied by Manski – the rationale given was that Ms. VanMeter was not part of the IEP team. Thereafter, on November 20, 2018, she requested a copy of the draft of C.B.'s IEP. She put this in writing because when she was at the school earlier in the day, she had requested a copy because she never received one following the IEP meeting as promised. (P-21, Page 166.) It was not true that she refused to accept a copy at the time of the meeting. At the time she requested a copy, Manski informed her that she was unable to provide her with a one because the IEP was with their attorneys for review.

She sent a second email the following day, reiterating that she had not received a copy of the IEP and demanding a copy of the same. (P-21, Page 167.) She felt that Kaleen's testimony was not truthful that she (petitioner) had refused to take a copy of the IEP at the time of the meeting. Petitioner indicated that this was consistent with Hopewell's history of not providing her information. As an example, petitioner stated that in September 2018, she requested a copy of her son's records from July 2016 to September 2018, which they failed to provide all of the records. As a result, she filed a complaint with the Government Record Council (GRC). (P-26.) Another example was

her request to Manski to have Dr. Allen conduct the independent neuropsychological evaluation. That was in July 2018. In response, Manski told informed her that Dr. Allen's rate was too high (\$3,500). When she requested a copy of the report, it was not provided. Petitioner went on to note that she filed a complaint with GRC and the Board was ordered to provide her all of her son's records. Upon receipt and review of the records, she saw that in addition to the monies that the Board expended for Dr. Allen's initial evaluation, they paid her an additional sum of money (\$3,425.00) in January 2020, for a follow-up report.

Petitioner went on to state that after she received her sons' records, she started piecing together what had happened to her son in Mrs. Seay's class – specifically, that he had been dragged across the classroom floor in his chair causing him to cry. His teacher thought he was fine and left him alone. While Bertolini filed a complaint with the principal and CST, nothing was done. Petitioner went on to state that Bertolini eventually told her what happened but she did not have the whole story so she filed an OPRA request for the emails. In so doing, she found an email about what had actually occurred. Once she had all of the pieces of what had occurred, in 2018 she filed a HIB complaint which the Board dismissed after their investigation - informing her that there was no evidence of HIB.<sup>27</sup> After that her son was moved out of Mrs. Seay's classroom. According to petitioner, either during the HIB investigation or after it, she asked for a classroom review wherein herself and Manski observed C.B. in the classroom for an entire day. In so doing, they witnessed her son being overlooked educationally, therefore, the very next day, he was moved into Sloan's classroom. Petitioner's testimony evolved and changed on this last point, with her son being moved at her request and then again changed to her son being moved as a result of an agreement with the Board in 2017.

It is petitioner's belief that she was retaliated against for her complaint against Mrs. Seay. The basis for her belief was that her son was removed from Mrs. Seay's

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<sup>27</sup> Noted for the record was respondent's counsel ongoing objections to any and all testimony as it related to testimony surrounding C.B.'s kindergarten academic year, any and all complaints that the petitioner had filed, including the due process petition for independent evaluations as well as the complaint filed with GRC.

classroom in March 2017. The following day, she emailed the CST and principal requesting that Mrs. Seay and Rizzo not have any contact with her son. That same day her job received a complaint that she used her position to influence the Board which was unfounded. She also believes that the Board contacted the prosecutor's office to have her prosecuted for taping the Board meeting – even though the Board was well aware that she was taping it. Petitioner also found out that Mrs. Saey, Rizzo and other union representatives, filed an OPRA for her work emails – her assumption being that they were trying to get her fired. These same individuals on another occasion created and wore a T-shirt to a meeting which mocked her. Another teacher complained about it to the principal and union representative. According to the petitioner, when she found out about that incident, she filed a second HIB complaint.

In addition to all of that, no one at the school was allowed to speak to her - not the teachers or aides. Petitioner went on to state that the aide's book that was created by the District the following year was due to what happened with her son. As a result, the aides were now cut off from speaking to parents and in particular her. C.B.'s teachers were short with her and everything had to go through the CST. All reports of C.B.'s behavior was mostly positive, however, there was no true feedback of his real progress.

Petitioner went on to state that when she tried to work with her son at home, he could barely spell the words or complete the forms. These were the classes that he was receiving either ninety or one hundred percent. This caused her to question how much the aide was contributing to giving him answer and also caused her to question where he was truly at placement wise.

In discussing C.B.'s November 2017, IEP meeting which was when C.B. was in first grade, petitioner testified that C.B. aide was not present at the meeting. Nor was his aide present at the next year's meeting in November 2018, or the one after that in June 2019. This was despite her request to have C.B.'s aide present at the IEP meeting. According to petitioner, C.B.'s aide in first grade was Gruesmeyer and his aide in second grade was VanMeter. Petitioner relayed a conversation that she had had with Gruesmeyer after she left the district and was told that she was never given a

copy of C.B.'s IEP and at no time did C.B.'s teacher or the CST go through it with her. Greusmeyer also informed her that she never received any type of training to be an aide for C.B.

In March 2019, when C.B. was in second grade, she requested a meeting to discuss the independent evaluations that had been completed. In response she was informed that she would have to wait until July 2019, when the re-evaluations were complete to which she responded that that was unacceptable. (P-21, Pages 161 and 162.) Despite her objections over waiting, the evaluations were not discussed until the June 6, 2019 triennial IEP reevaluation meeting. Notably only Dr. Allen was allowed to participate in the meeting, Dr. Odri and Topiel were not permitted to participate in the meeting. According to petitioner, Dr. Odri's and Topiel's recommendations were not incorporated into C.B.'s IEP which was one of the reasons she filed the instant petition for due process.

Petitioner went on to state that at no time in first or second grade (academic years 2017/2018 and 2018/2019) did C.B. have any type of documentation system in place to chart incidents of his target behaviors. As a result, she developed a documentation system to assist in charting his behaviors and provided it to the school however the school refused to use it. (PX-6.)

In summing up the relief she was seeking, petitioner stated that she would like the school to take the independent evaluations seriously. It would be beneficial for the school to track C.B.'s progress – his true progress, so that the IEP's can reflect what is working and what is not working, and to ensure that C.B.'s IEPs are truly individualized. She believes it is important for C.B. to have access to a reading specialist – particularly now with Covid-19, where he is attending school remotely and having to read everything now and struggling with it and becoming frustrated. She would also like to see C.B. placed in an inclusion classroom which was recommended by Topiel and his specialist at the Children's Specialized Hospital prior to the independent evaluations being completed. Additionally, she would like an actual behavioral plan created and to have the school make up for the period of time that C.B. was not receiving an appropriate education.

On cross-examination, when asked whether she was present in her son's kindergarten classroom when the alleged incident occurred with her son, she acquiesced that she was not. She also acknowledged that other individuals were present, in addition to Mrs. Seay and Bertollini, however, no one else reported seeing anything, nor were there any reports of child abuse filed with the Division of Child Protection and Permanency.

In questioning petitioner about her testimony surrounding the basis for her son's move from Mrs. Seay's classroom to Sloan's, she admitted that she is the one who requested the move. However, it is her fervent belief that the Board of Education, the administration, and the teachers retaliated against her. She cannot point to any one piece of paper or document which calls for any one of the schools' administrators or supervisors directing a teacher to call the Board of Freeholders on her. Nor does she have any proof that the teachers in question called from the school or that the teachers asked their union attorney to OPRA her work email.

In questioning her testimony about not receiving a copy of the November 2018, IEP at the time of the meeting, petitioner acknowledged that she did receive a copy of the meeting minutes which outlined what was discussed at the meeting. Regarding the independent evaluations that she had requested, she agreed that the evaluations were done, but noted that it was only after the Board was ordered to do so. She was aware of the Board's policy on independent evaluations and aware that it was up to the Board to set a reasonable rate for obtaining an evaluation. It was her belief based upon a call to an unknown person at the State Department of Education, that the rate was inappropriate. She could not recall who she spoke to or when she had placed the call. She had nothing in writing to document that she had actually made such a call or spoke to someone.

Petitioner was also asked about her testimony that Grusemeyer informed that she had never receive training. When shown the training agenda and sign in sheet which Grusemeyer signed, she acknowledged that Grusemeyer's name was on the sign

in sheet. (R-34 and R-35.) The training took place in November 2017 – C.B. was in first grade at that time and Grusemeyer was his aide.

Also questioned was her statement that the Board refused to allow Dr. Odri and Topiel to attend the June 6, 2019, triennial IEP reevaluation. In response petitioner admitted that the District did not prohibit them from attending, it was because the Board would not pay their fee.

**Discussion:**

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact finder assigns to the testimony of a witness, and it contemplates an overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). 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).

After hearing the testimony of both Sloan and Bartonlini, I **FIND** that they were not credible and that their testimony appeared to be agenda driven.

At no time did Sloan, C.B.'s teacher for the last half of his kindergarten year, talk about C.B.'s performance in her classroom. Indeed, little to no testimony was elicited surrounding any academic or behavioral concerns that she may have had with C.B. Most of her testimony, which was hearsay, centered on what other people were doing, saying and how they were conducting themselves – the implication being that untoward

attention was being concentrated on her and the fact that C.B. had been assigned to her classroom.<sup>28</sup> While hearsay is admissible in administrative proceedings, in accordance with the “residuum rule”, a factual finding cannot be based on hearsay alone. Weston v. State, 60 N.J. 36 (1972) In this regard, no competent evidence was offered to corroborate Sloan’s version of the events.

Sloan’s credibility was further undermined when she testified on direct that when C.B. was assigned to her classroom, she was provided no information – was unaware what his IEP contained or that he had a behavioral plan. In other words, at no time was she given any type of orientation on how to work with C.B. Taken in a vacuum, Sloan’s statements would have been alarming. However, her testimony on direct belies her subsequent testimony on cross and her teacher summary in C.B.’s September 7, 2017, Annual Review.

When C.B. was transferred into her classroom, she was in fact aware that he had an IEP and went to the CST office to review his case file. (R-40.) In the September 7, 2017 Annual Review, she was politic in how well he acclimated himself to her classroom. She evaluated him on all concepts when he was transferred into her classroom and was aware of his strengths and weaknesses and she differentiated her instruction to meet his needs. At the end of the academic year, she evaluated him

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<sup>28</sup> However, in accordance with the “residuum rule,” a factual finding cannot be based on hearsay alone. Weston v. State, 60 N.J. 36 (1972). As the Weston court stated:

Hearsay evidence in proceedings before the state administrative agencies," 36 A.L.R. 3d 12, 41, et seq. (1971). However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. [citations omitted]

[Id. at 51]

The Uniform Administrative Procedure Rules are in accord and require that “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 evidence must be accorded the weight deemed appropriate when the nature, scope and character of the evidence, together with the circumstances of its creation and production, are taken into account. N.J.A.C. 1:1-15.5(a).



again and went into great detail on his progress. The only deficiency noted being that he had difficulty completing timed tasks and would benefit from extended time. All in all, I did not give weight to Sloan's testimony.

As with Sloan, most of Bartolini's testimony was hearsay, appeared agenda driven and overall lacked credibility. She made a point of testifying that she received no training on how to handle C.B. when she was first assigned to him and kept no data or documentation on his performance. Notably, there was absolutely no testimony about C.B. himself – his needs, wants, academic performance in the classroom or behavioral issues/concerns. Indeed, most of her testimony centered on her alleged difficulties with Mrs. Seay, an unsubstantiated event in the classroom involving C.B., and her difficulties with the District in the 2017/2018 school year when she was assigned as an aide to a different child.

On the issue of training, Bartolini testified at length that at no time did the District provide training – particularly in the 2017/2018 school year when she was assigned to a student with behavioral issues. This was contradicted on cross-examination when shown the District's training sessions of which she attended.

As with Sloan, I have difficulty giving weight to her testimony as it appeared disingenuous and contrived.

I found petitioner's testimony in part, lacked credibility, called for a significant amount of speculation, and attempted to draw conclusions without foundation. There is no question that petitioner has her child's best interest at heart, however, her underlying animus with the District appears to be significant and it is clear that she assigns nefarious motives to every action or inaction taken by the District.

Multiple examples of the above was seen throughout her testimony. While too many to cite, some examples include petitioner's testimony surrounding the filing of a HIB complaint alleging that Mrs. Seay dragged her son across the classroom in his chair, causing him to cry. She filed the complaint after Bertolini, her friend and confidant, reported to her that her son had been dragged across the floor in his chair,

and discovering an email from Mrs. Seay after she had filed an OPRA request, which she claimed supported the alleged incident. Notably, the email states that when C.B. was moved, he cried but was fine (P-23, Page 186.) More importantly, the tenor of her testimony suggested that everyone from the teachers, the HIB investigator and the Board conspired - resulting in the dismissal of the HIB complaint. Petitioner was not present in the classroom at the time the alleged incident – however other individuals aside from Mrs. Seay and Bertonlini were, and no one else reported an issue. A full investigation was conducted into the matter at the end of which, the HIB complaint was dismissed. To believe petitioner, a huge conspiracy was perpetrated to cover up the incident.

Another example of misrepresentation was petitioner recitation of events of how her son was transferred into Sloan’s classroom. According to petitioner, after the alleged incident, she and Manski observed her son in Mrs. Seay’s classroom and saw that he was being educationally overlooked. As a result, he was moved the following day. There was no credible evidence presented that C.B. was being educationally overlooked - in fact, there was no evidence at all presented in that regard. When questioned on cross-examination about her earlier statements petitioner admitted that the reason her son was moved was because she had requested it.

Yet another example was petitioner’s testimony surrounding the June 6, 2019, IEP meeting and her statement that Dr. Odri and Topiel were prohibited from participating in the meeting. On cross-examination, petitioner acknowledged that Dr. Odri and Topiel were not prohibited from attending the meeting – rather, the Board would not pay their fee to participate. Once again, petitioner’s initial presentation while partially true was not completely candid.

It appears to be petitioner’s sincere belief that everything stemmed from the alleged incident with her son in kindergarten and ever since then, she has been retaliated against to the detriment of her son.

In support of this position, she testified quite a bit about the due process petition filed seeking the District to pay for independent evaluations, and her complaint filed with

the GRC seeking her sons' records. It was her fervid belief that the District intentionally created roadblocks in retaliation of, and stemming from, the complaint she filed against Mrs. Seay. I **FIND** no nexus to or relevance of those matters as it relates to the instant matter and no negative inferences will be drawn as a result. There was also quite a bit of testimony of perceived slights, hearsay testimony of statements attributed to other individuals, and speculation on who filed an OPRA request of her work emails and who allegedly contacted her work attempting to get her fired. While such events may have occurred, petitioner's assertion that her son was denied the services that he required in retaliation for the complaint that she filed stretches credulity. Notably, while I heard quite a bit of testimony of perceived acts of retaliation by the school and the Board, what I heard very little of was any substantive testimony about C.B. – his behavior, academics or otherwise.

Indeed, the only testimony about C.B.'s academics was petitioner's testimony that when she tried to assist C.B. with his homework, he could not spell the words, or complete the forms that had been done in school earlier in the day. Due to the fact that her son was receiving high marks in the subjects, it caused her to question if his aide was contributing too much, and whether his placement was appropriate. There was no context given by the petitioner as to when and how often this occurred – it was just a generalized statement.

Individually, the instances noted above may be put down miscommunication or misinterpretation, however, when viewed as a whole, the lack of candor by the petitioner undermined her credibility. Additionally, I **FIND** that no credible evidence was presented to support a claim, theory or argument that the school or the Board retaliated against the petitioner or had anything other than C.B.'s best interest at heart in the development and implementation of his educational programming.

Topiel was qualified and testified as reading and writing specialist in special education however she does not have a certification in special education or in writing. While I found some of her findings on point, overall, I did not find that her testimony inspired confidence. Several times throughout her testimony, she contradicted herself and in review of her report – a number of her findings and/or recommendations did not

appear to be supported by verified data or were already being implemented by the District. She could not say for certain what IEP's she reviewed or if she reviewed any of C.B.'s progress reports.

In review of some of the programming recommendations that were made, one of the recommendations was that the aide assigned to C.B. have specialized instruction. When asked on cross if she ever questioned the District about the qualifications of C.B.'s aide, she stated that she had not. Instead, she relied upon what petitioner had told her, the IEPs, her own observations and other evaluators reports. When questioned further about what other evaluator's report she had relied upon, Topiel admitted that she had not reviewed any other evaluator's report as it related to C.B.'s aide. Therefore, her recommendation as it related to the aide, was based upon two hours of observation, conversations with the petitioner, and review of C.B.'s IEP's.

Topiel also opined that C.B. had anxiety in the general education classroom and that when she observed him, he would go off topic when he became anxious and go back to a subject when he felt more comfortable with. When questioned how she was qualified to say C.B. had anxiety, she stated that as a reading specialist, she observes children on the basis of their diagnosis and behavior and that she was an expert in all of C.B.'s disabilities. She also pointed out that the Brain Change Study talked about his anxiety. Topiel is not a psychologist or a psychiatrist nor is she qualified to provide testimony on whether C.B. suffers from anxiety. The Brain Change Study referenced were comments attributed to the petitioner, not a diagnosis. Most importantly, most if not all of his behaviors can be attributed to functions of C.B.'s disabilities which Topiel seemed to have difficulty acknowledging.

I found Dr. Odri's testimony, overall to be credible, however, question some of her recommendations, a few of which were outside the scope of her expertise (reading and OT) and others that did not appear to be supported by the data. On this last note, Dr. Odri testified on direct that it was "very concerning that objective measurements of certain behavior was not being taken". In her report, she recommended that certain behavior be targeted (stereotypical, aggression, noncompliance, crying and prompting) and that a plan be developed. However, during her three hours of observation, and the

four days of data collection by C.B.'s teachers in both his general education classroom and pull-out special education classroom, there were no instances of aggression, crying or non-compliance. The other two behaviors - stereotypical and prompting, were observed seven percent and thirty-two percent of the time, respectively. What undermined her recommendations and her testimony was not only the absence of the behaviors that she suggested should be targeted, but her testimony that inferred that the behaviors were present but were not recorded and/or not observed by the assistant. There was no support for that supposition and nowhere in her report, did she cite to any flaws in the data collection or disagree with the findings.

Dr. Odri also made recommendations that certain services should be provided but failed to note that some of the services recommended, had either been offered and rejected by the parents - such as counseling, or were currently being provided such as social skills supports twice a week in speech language therapy.

While the above are not fatal to Dr. Ordri's findings and report, they do affect the weight given to the same.

Dr. Allen was qualified and testified on behalf of the Board as an expert in pediatric neuropsychology, school psychology and special education program review. She evaluated C.B. during the 2018/2019 academic year – second grade, and as part of her evaluation process, reviewed a myriad of reports that dated as far back as 2014 and included among other things, multidisciplinary reports, IEP's, progress reports, and evaluations to name a few. She also conducted her own observations and testing.

I found her to be extremely credible and her findings/recommendations well grounded. What I found to be particularly credible about her testimony was her candor about the strengths and weaknesses of the District's programming. I also felt that she was straight forward in her testimony that while the District did not incorporate all of her recommendations or in some instances only partially incorporated them, she believed that the District had identified all areas of C.B.'s needs and that the programming in place enabled him to make progress.

The District employees, all of whom were qualified as experts in their respective fields, testified credibly and were familiar with the facts and their respective direct contacts with C.B. throughout the school day. The detailed testimony of Killeen, as C.B.'s case manager, Lewis, C.B.'s OT therapist and Fiorani, C.B.'s speech pathologist – all of whom personally worked with, and routinely observed C.B., was especially persuasive as they are all educational experts in delivering special instruction to children with disabilities. The testimony was detailed as far as the chronology of events and evaluations completed to assess the suspected areas of C.B.'s disability; his performance in school; the specific teaching methodologies used for instruction; C.B.'s interactions with his teachers and peers; the modifications and supports in place to assist C.B.; and the assessments utilized to determine that C.B. made reasonable and appropriate educational progress.

In consideration of the above, and after hearing the testimony and reviewing the evidence presented in this matter, in addition to the findings above, I make the following **FINDINGS of FACT:**

When C.B. was sixteen-months-old, he started in the EIP where, among other services, he received OT and speech. When he was eighteen-months-old, he was diagnosed with autism. He continued to receive services until he was three years old at which time, he entered into the Hopewell Township's pre-school program and placed at St. John of God. Prior to placement, EIS referred C.B. to the CST. In January 2014, an eligibility meeting was held at which time it was determined that C.B. was eligible for special education and related services under the criteria for a child with a preschool disability.

C.B. remained at St. John of God until he started kindergarten in 2016 at the Hopewell Township Crest School. Prior to the start of kindergarten, in June 2016, a reevaluation and eligibility meeting was held at which time it was determined that C.B. continued to be eligible for services under the classification of autistic. Under the IEP, C.B. was placed in a pull-out replacement resource program for math and language arts. He was mainstreamed in all other areas with accommodations and modifications.

He received speech services, OT and ABA services. He had a one to one aide for all academics and shared an aide during homeroom and lunch.

Annual review meetings were held in December 2016, and March 2017, respectively. During both of those meetings it was determined that C.B. continued to make progress. He continued in the general education classroom for all academics with a one to one aide. He also continued to receive speech and occupational therapy services and was found eligible for ESY services.

### **2017/2018 Academic Year (First Grade)**

On the September 7, 2017, an annual review meeting was held at the parents request at which time C.B.'s placement was reviewed. Petitioner at the time was seeking an out of district placement. (J-1.) Among other individuals in attendance at the meeting were C.B.'s social worker, LDT/C, psychologist, speech/language specialist, general education teacher, special education teacher, aide, OT therapist, and petitioner.

As part of the program review, the CST noted C.B.'s educational history starting in preschool through kindergarten, C.B.'s scores on the Kaufman Test of Education Achievement dated 9/17 and CST summaries. Teacher summaries were also reviewed.

Teacher summaries included progress reports from his kindergarten teacher, his current general education teacher, the aide, his OT therapist and his speech therapist.

According to C.B.'s kindergarten teacher (Sloan), C.B. made measurable and identifiable progress the prior year (2016/2017 academic year). He went from fifty-four percent accuracy to sixty-five percent accuracy with sight words, color words and number words. His reading fluency and comprehension also progressed from Pre-A to Independent A and Instructional B. He was able to speak with complete sentences, make appropriate eye contact, use emergent spelling and write independently. He did well in math, knew his math facts, showed mastery of writing numbers 0-20, counting to

100 by 1'ss and 10's, and understood the concept of addition and subtraction. One of the difficulties noted, however, was C.B.'s difficulty in completing timed tasks and that he benefitted from extended time. No behavioral concerns or issues were raised or commented upon. (J-1.)

From all evidence presented, C.B. performed well in kindergarten and made meaningful progress.

C.B.'s general education teacher (Fischer) acknowledged that it was early in the school year, however, she felt that C.B. was performing well in her classroom – working well in the whole group instruction with the support from his one on one aide. She also indicated that she felt he was appropriately placed.

C.B.'s OT therapist (Busnardo) provided an overview of C.B.'s progress and areas of weakness. The areas of weakness included handwriting, fine motor coordination, visual skills, self-help skills, cognitive skills and sensory regulation. The goals and objectives which were proposed addressed all areas of the noted weaknesses and outlined the evaluations procedures (clinical observation, standardized/unstandardized tests, teacher consultation) and levels of mastery for each objective. The personnel responsible to work on each of the objective were Busnardo, C.B.'s teacher and his aide. (J-1, Page 12.)

The ST therapist (Fiorani) commented on C.B.'s progress but also noted that areas of weaknesses included categories and grouping as well as a lag in answering questions and the need for additional time in that area. The goals and objectives which were proposed addressed all of the areas of identified weaknesses. It outlined the evaluation process (speech pathologist observation, teacher input, progress notes) and provided mastery criteria. (J-1, Page 11.)

At the end of the meeting, it was determined that C.B.'s placement was appropriate and that he was eligible for special education and related services under the classification of autistic. The IEP called for C.B.'s continued placement in the general education classroom with the one on one aide for all academic classes and a



classroom aide for all other classes. He was to continue to receive speech services – two times per rotation for twenty minutes, in a small group and OT – two times a week individually, thirty minutes each session. Counselling and counselling goals were also provided; however, petitioner subsequently revoked her consent for such services.

The IEP, also called for accommodations, modifications and supplementary aides and services to be provided. For academic areas (language arts/literacy, math, social studies, science) the IEP provided for: a one on one aide to address C.B.'s inattention and provide cueing to remain on task; use an assignment book; break multiple step instructions into brief, clear, single step directions; divide complex tasks into several segments, giving one segment at a time; provide visual reinforcement during instruction; limit length/frequency of classroom and homework assignments; provide preferential seating; individualized rewording and reinforcement in separate area as needed; use behavior reinforcement system and/or behavior contract.

For special area subjects – (general education, Spanish, physical education, computer, music, art, library), the modifications and accommodations included: spelling will not be graded; break multiple step instructions into brief, clear, single step directions; divide complex tasks into several segments, giving one segment at a time; provide preferential seating; spelling will not be graded; classroom aide; use a flexible grading system or a pass/fail system; allow additional tie for completing tests; use behavior reinforcement system and/or behavior contract; allow for frequent bathroom breaks.

There were no reports of any behavioral concerns at the time of the meeting and no behavioral supports were deemed necessary. There was no request for a BIP. While the IEP stated that C.B.'s behavior sometimes impeded his learning or that of others, this statement related to C.B.'s inability to focus or pay attention which was being addressed with the one on one aide, not as a result of behavioral concerns. The IEP also called for ESY.

On November 15, 2017, an annual review was held at the request of the parents at which time C.B.'s placement and progress were reviewed. Notably, the month prior, in addition to autism, C.B. was diagnosed with ADHD.

At the time of the meeting, C.B.'s parents continued to be in disagreement with his placement and requested that he either be placed out of District or in the in-class resource program. In attendance at the meeting were the LDT/C, psychologist, speech/language specialist, general education teacher, special education teacher and both parents. At the time of review, the District believed that C.B.'s placement in the general education classroom was appropriate. C.B. was progressing well and was on grade level with the assistance of his aide.

C.B.'s general education teacher (Fischer) reported that he was happy and cooperative and showed social growth. In math, he was dependent on his fingers for addition and subtraction. According to his teacher, she was implementing various strategies to improve his fluency. In language, he was also doing well with phonics and enjoyed the dictations lessons. She was working on tracking print with reading to improve his accuracy and fluency. The special education teacher (Youngblood) was also in attendance. She had observed C.B. in the classroom to see if any additional accommodations would be beneficial to C.B. Based upon her observations, the strategies that she recommends included modeling, multisensory approach to spelling (mesh, chalkboard, etc.) finger spelling, Braille.

The OT therapist (Busnardo) reported that C.B. was seen two times a week for thirty minutes for individual or small group sessions. One session was in the classroom and one session was outside of the classroom. Busnardo highlight C.B.'s progress and also went through areas that C.B. was having some issues with which required additional assistance. An example provided was that C.B. would write multi digit numbers from right to left and required verbal and visual cues to correct the reversals. To correct the problem, they were working on C.B.'s visual skills. She also noted that C.B. was more focused and required less cueing in the pull-out sessions than when he was in the classroom. To work on that they started having C.B. sit directly facing the front of the board; encouraged the use of the restroom during non-instructional time;

using different colors or tangible objects to differentiate amounts when counting; blocking out questions/problems beside the one he is working on to decrease visual distraction; and correcting reversals on the spot to name a few. (J-2, Page 22.)

ST therapist (Fiorani) likewise highlighted what she was currently working on with C.B. and his progress. She was continuing to see him two times per rotation for twenty minutes in small group. As had his other teachers, she reported how much effort he puts into his work, that he was an active participant and a pleasure to work with.

While the IEP stated that C.B.'s behavior sometimes impeded his learning or that of others, this statement was again attributed to C.B.'s inability to focus or pay attention.

Goals and objectives for academics (language arts literacy, mathematics, and social studies) were further identified based upon C.B.'s current levels and what he needed to work on over the course of the year.

In review of the language arts/literacy goals and objectives, they included among other things:

- C.B. will write in clear, concise, organized language that arise in content and form for different audiences: formulate a complete sentence in written form – Mastery Criteria 80%; demonstrate correct punctuation, capitalization, question mark, period – Mastery Criteria 80%
- Spelling Skills –Visually and auditorily discriminate between letter sounds – Mastery Criteria 80%; spell words on a sight word list – Mastery Criteria 80%
- C.B. will read various materials and texts with comprehension and critical analysis – Phonetic Analysis – C.B. will: Recognize and name upper and lower case alphabet in manuscript - Mastery Criteria 90%; Name upper and lower case alphabet out of sequence – Mastery Criteria 90%.
- Comprehension – C.B. will recognize main idea and supporting details – Mastery Criteria 80%; recall story facts (who, what, where, when) – Mastery Criteria 80%; relate sequence of events – Mastery Criteria – 80%; Will view,

understand, and use non-textual visual information – C.B. will: demonstrate use of context clues and illustrations to derive meaning

In mathematics, some of the goals and objectives included, among other things:

- Time – C.B. will tell time to the hour, half – Mastery Criteria 80%.
- Will communicate mathematically through written, oral, symbolic and visual forms of expression – C.B. will read and write numerals through 120; Compare sets – both with a Mastery Criteria of 80%
- Will understand, select, and apply various methods of performing numerical operations – Addition – C.B. will compute facts 1-10, Compute facts 11 – 18 – Mastery Criteria 80%; Subtract – C.B. will compute facts 1 – 10 and 11 – 18 – Mastery Criteria 80%

In social studies, some of the goals and objectives included, among other things:

- Understanding relationships in the community – Mastery Criteria – 80%

In science, some of the goals and objectives included, among other things:

- Investigating the diversity of life – Demonstrate knowledge about plants and animals – Mastery Criteria – 80%
- Will gain an understanding of the structure, dynamics and geophysical systems of the earth – C.B. will Demonstrate knowledge about landforms and demonstrate knowledge about weather – Mastery Criteria for both – 80%.

Each goal and objective outlined mastery criteria and evaluation methodology (teacher-made tests, report card grade, teacher observation).

OT goals and objectives were modified with new goals and objectives put in place – all of which addressed the areas of weakness that had been identified. All of the goals and objectives provided for mastery criteria and evaluation methods.

ESY was deemed necessary and included in the IEP along with related services once a week.

With regard to accommodations and modifications, in addition to what had previously been provided Youngblood's recommendations (use of multisensory approaches – such as: writing on mesh, writing on sandpaper, arm/air writing, index card "braille", chalkboard, show word-spell word-mistake write 3x) were added.

In February 2018, C.B.'s general education teacher (Fischer) noted that C.B. was struggling with pacing and fluency and that he was starting to slip behind in phonics. To remedy this, she recommended that C.B. receive a pullout replacement program which provided for a smaller group setting that focused on his areas of weakness. On February 7, 2018, petitioner consented to the IEP addendum. (J-2, Page 37.)

Review of C.B.'s first grade report card – specifically the fourth quarter, finds that overall, C.B. made progress.<sup>29</sup> In language literacy, all of his grades were either a "3" or a "2". In review of the grades where he received a "2", the following was noted. In foundations of reading – subcategories "Specifically identifies unknown words in text" and "Uses learned vocabulary in reading", C.B. scored a "2" throughout the year – he continued to develop. On "Reads grade level text fluently", improvement was noted in the fourth marking period wherein C.B. achieved a score of "2" by the fourth quarter. Therefore, there was improvement and in continued to develop. (J-10, Page 160.)

In language, C.B. – subcategories "Writes complete sentences" and "Uses different types of sentences", C.B. scored a "2" throughout the year (continues to develop). However, by the fourth marking period in all of the other subcategories, he had met the standards.

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<sup>29</sup> The Report Card "General Education Key" noted the following: #3 – Meets the Standard (Developing Appropriately); #2 – Approaches the Standard (Beginning to Develop); #1 – Does not yet meet the standard (Needs to Develop); NE – Not Evaluated at this time. For SS/Sci & Special Area Key: ME – Meets Expectations; NI – Needs Improvement.

In reading fiction and nonfiction, C.B. scored a “3” in most of the subcategories. In the subcategory of “Compares and contrasts two characters or topics”, he scored a “2” throughout the year – developing. In “Reads grade level text (fiction and non-fiction”, there was improvement from the first marking period to the second marking period where he remained “developing” for the remainder of the year.

In writing, once again, C.B. maintained a “2” or a “3”, and showed improvement from the first marking period forward, however, for the most part, from the second marking period on, he continued to receive a “2” or “develop” in the following subcategories: writes for different purposes; applies learned writing strategies; uses an opening in writing; provides details to support topic; uses a closing in writing.

In math, C.B. appeared to have excelled with a couple of exceptions. In operations and algebraic thinking, subcategory “Fluently subtract within 10”, he received a “1”. In the subcategory of “Fluently add within 10”, while he improved his score after the first marking period, he remained at a “2” (developing) for the remainder of the year in this subcategory.

In social studies, science, music, physical education, computer lab, and homeroom, C.B. scored ME. Only one area that he received a “Needs Improvement” was in Spanish – subcategory “Demonstrates responsible personal behaviors”. All other subcategories under Spanish met expectation.

On reading grade level text fluently, improvement was shown over the course of the year, by the end of the fourth marking period, he was “Approaching the Standard”.

Review of C.B.’s academic progress reports for first grade (2017/2018), specifically the fourth marking period (6/14/18) found that C.B. had either “Secured” the goals and objectives or was “Developing”.<sup>30</sup>

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<sup>30</sup> The Progress Indicator Key denotes the following: B=Beginning; D=Developing; S=Secure

In language arts literacy, subsection 3.1 (Will speak for a variety of real purposes and audiences), C.B. throughout the year received a “Developing” in the following subcategories:

- Make contributions that are relevant in group discussion
- Ask questions freely when he/she doesn’t understand
- Give directions and explanations

In subsection 3.3 (Will write in clear, concise, organized language that varies in content and form for different audiences and purposes), C.B. throughout the year received a “Developing” in the following subcategories:

- Formulate a complete sentence in written form
- Demonstrate correct punctuation capitalization, question mark period
- Self-edit for proper capitalization and punctuation
- Visually and auditorily discriminate between letter sounds
- Spell words on a sight word list

In subsection 3.4 (Will read various materials and texts with comprehension and critical analysis), C.B. received a “Developing” in the following subcategories:

- Recognize consonants heard and associate with visual form in initial, medial, and/or final positions
- Comprehension – Recognize main idea and supporting details
- Comprehension – Relate story facts to own experience

In subsection 3.5 (Will view, understand, and use non-textual visual information, C.B. received a “Developing” in subcategory “Demonstrates use of context clues and illustrations to derive meaning”

In mathematics, C.B. received a “Developing” in the following subcategories:

- Tell time to the hour, half hour

- Subsection 4.2 – Read and write numerals through 120
- Subsection 4.4 – Write addition and subtraction number sentences for pictured situations
- Subsection 4.7 – Identify and work with 2-D and 3-dimensional shapes
- Subsection 4.8 – Compute facts 1-10; Compute facts 11 – 18

No testimony or documentary evidence was presented that there were any behavioral concerns, issues or incidents with C.B. that warranted the need or request for additional behavioral supports in the 2017/2018 academic year. Nor were any concerns raised that in addition to the one on one aide who kept C.B. on task and prompted him, that additional academic supports were necessary.

C.B. attended the District’s ESY program in the Summer of 2018. Review of his Progress Report finds that he “Progressed” throughout the program in all areas and mastered two areas in math. (R-15) According to his teacher’s report, C.B. required occasional redirection to task during tabletop activities however no other behavioral issues were reported. (R-15, Page 98)

**2018/2019 Academic Year (Second Grade)**

C.B.’s next annual review took place on November 12, 2018, when C.B. was in second grade. Prior to his review, the Kaufman Test of Educational Achievement – II was administered to gauge C.B.’s progress in reading, writing and math. The results indicated that he had improved across the board.

September 2017	Standard Score	Grade Equivalent
Reading	77	>1.0
Math	97	1.0
Writing	80	K.3



November 2018	Standard Score	Grade Equivalent
Reading	84	1.2
Math	102	2.2
Writing	101	2.1

In review of the teacher summary, C.B.'s general education teacher (Martorana) reported that C.B. was doing well in math. He could work independently once directions were explained to him and after a few of the problems were done as a class. Tests were read aloud to him in math and in language arts. In language arts, she reported that C.B. was doing well on the weekly tests for Journeys (comprehension, vocabulary, grammar and phonics) however he struggled on the weekly spelling tests. She started allowing him to take retests for any test lower than eighty percent on the words he got incorrect. She noted that C.B. at times became frustrated during spelling tests and very upset if the words became too difficult. Overall, she found C.B. to be a hard worker, enthusiastic, and worked well with his classmates.

C.B.'s special education teacher (Burlingame) reported that C.B. was doing well with his reading. His Fountas & Pinnell level was at an "E". In reading he progressed from reading "E" books to "F" and "G" level books in the guided reading grouping. She also noted that C.B. was a friend to all in the classroom.

Given the above, it was recommended that C.B. be placed in the pull-out replacement program for the phonics, fluency (guided reading) and spelling portion of the language arts literacy block, and within the general education classroom setting for the remainder of the day. C.B. was to continue to have a one to one aide for math, language arts literacy, science and socials studies due to focusing and distractibility. However, it was determined that he did not need a one to one aide for homeroom, lunch and specials.

Additionally, based upon the progress made over the prior year, it was recommended that OT be reduced to once a week with the sessions integrated into the

classroom setting. (R-13.) C.B. also continued to make progress in ST and it was determined that services would continue two times a week – One pull-out therapy session each week in a small group – not to exceed three students, and a second session integrated into the classroom.

The accommodations, modifications and supplementary aids and services, provided to C.B. under the IEP were added to/modified to incorporate the following: use an assignment book; break multiple step instructions into brief, clear, single step directions; divide complex tasks into several segments, giving one segment at a time; use multi-sensory approach during instruction; provide visual reinforcement during instruction; allow additional time for processing presented information; limit length/frequency of classroom and homework assignments; provide preferential seating; read material aloud for student; reword directions/instructions to assure student understands material; use a flexible grading system, as needed; support from a one to one paraprofessional; one to one paraprofessional's responsibilities include, but not limited to: cueing, prompting to remain on task, reading material out loud, rewording directions, break down instructions for understanding, adapting classroom activities under the instruction of the teacher.

The language arts literacy goals and objectives focused on phonics, vocabulary development, spelling and comprehension. The goals and objectives, worked on:

- Phonetic Analysis – Recognize long vowels, short vowels r-controlled vowels, vowel digraphs, vowel represented by y – Mastery Criteria 80%; Recognize consonant blends, consonants with multiple sounds (c,q,s,x), silent consonants, consonant digraphs, consonants associated with another sound (gh/ph=f) – Mastery Criteria 80%; Structural Analysis – C.B. will identify unfamiliar words by using phonics structural analysis, and syllables – Mastery Criteria – 80%
- Vocabulary – C.B. will identify first and second level sight words – Mastery Criteria 80%
- Comprehension – C.B. will recognize main idea and supporting details with second grade content – Mastery Criteria 80%; Read to draw

conclusions, predict outcomes, make inferences, find specific information  
– Mastery Criteria – 80%

- Spelling – C.B. will spell words on a first grade sight word list – Mastery Criteria – 80%;
- Annual Goal – increase independence from the support from the one to one paraprofessional – C.B. will stay on task for 70% of the period without needing verbal and physical cues from the one to one paraprofessional – Mastery Criteria – 80%; Will participate in the general education language arts literacy classroom with minimal support from his one to one paraprofessional – Mastery Criteria 80%

Evaluation methods were also outlined for each objective which varied depending on the objective.

Mathematics, social studies and science goals and objectives also focused on increasing C.B.'s independence from the support of the one to one paraprofessional, each section outlining mastery criteria and evaluation methods.

At the time of the meeting, there were no reports of any behavioral concerns and no behavioral supports were deemed necessary. There was no request for a BIP. While the IEP stated that C.B.'s focusing and distractibility sometimes impeded his learning, this was being addressed with the one to one aide. The IEP indicated that ESY would be revisited closer to the summer of 2019. Petitioner, who was represented by counsel at the time, did not agree with the proposed IEP, however, did not file for due process. The IEP went into effect on December 17, 2018.

In review of C.B.'s grades for the 2018/2019 academic year, specifically his final grades, C.B.'s overall performance averaged between ninety to one-hundred percent. (J-10.) He procured "100" in math, art, library, Spanish, physical education/health, and music. He procured "95" in science and social studies and a "96" in language literacy 2 – 2-3. His lowest grade was a "90" in computer lab.

In review of his last progress report in June 2019, he continued to progress – and by the end of the academic year, he was either “Developing” or “Secure”. No behavioral issues were reported during the school year.

In early 2019, five evaluations, three of which were independent, were done in advance of the June 2019, triennial IEP reevaluation. The evaluators who conducted the independent evaluations (neuropsychological, FBA and reading) were selected by the petitioner. The remaining two evaluations, OT and speech, were conducted by the District with the consent of the parents. (J-5, Page 106.)

In April 2019, C.B. was administered the Kaufman Test of Educational Achievement – II which showed areas of weakness.

April 20, 2019	Standard Score	Grade Equivalent
Letter & Word Recognition	77	K.11
Reading Comprehension	82	1.4
Math Computation	95	2.5
Math Concepts & Application	100	2.9
Spelling	80	1.2
Written Expression	86	1.6

All evaluations were taken into consideration by the CST in developing the June 6, 2019, IEP. In attendance at the meeting were the LDT/C, psychologist, speech/language specialist, general education teacher, special education teacher, petitioner, OT therapist, neuropsychologist, the BOE attorney and petitioner’s attorney. (J-4.)

In review of the neuropsychological evaluation conducted by Dr. Allen, she found that the District's programming had several strengths as well as areas of weaknesses. Among the itemized strengths, she determined that C.B. felt comfortable, happy and well situated in the classroom. A second strength was C.B.'s teacher who incorporated him into the classroom, managed him and his impulsivity and made him feel as though he belonged. The third strength was the mixture of exposure that C.B. was getting between the typical peers as well as the specialized instruction.

In discussing the program's weaknesses, she noted that the one-to-one aide was providing too much cuing to the point that C.B. often missed the instruction in the general education classroom. Another weakness noted was the reading group size. She believed that C.B. would benefit from a small reading group so that the instruction could be more individualized. She also felt that C.B.'s executive skills were still an area of weakness and that he would benefit from more individualized training in that regard. (R-8.)

Dr. Allen's recommendations included among other things, that C.B. should have: individualized reading instruction throughout the summer – either through a tutor during the ESY program or in place of ESY; a smaller reading group of just two to three students with his progress getting tracked individually; with support from the data collected – start fading back of the aide to allow some independence; transitioning to using the general education teacher and/or peers in his class to clarify instructions. Also giving him a checklist to help support him and help him generalize strategies in the classroom; and if C.B.'s impulsivity and inattention significantly impact his performance in the classroom as the aide is fading back, work with a behaviorist to further develop a plan for independent skill building including improving attention and reducing impulsive behaviors. She also provided executive skills recommendations.

Dr Odri conducted the FBA. She too found that C.B. should remain in the general education classroom. While she identified several target behaviors (stereotypical behavior, aggress, non-compliance, crying, prompts and independents) that she believed interfered with C.B.'s learning - only two of the target behaviors (stereotypical and prompts) were actually observed during her evaluation period.

She, as with the other evaluators, found that C.B. tested in the average intelligence range. It was her belief that C.B.'s reading deficits and impulsive behavior presented frequent barriers for his academic and social performance. Based upon her evaluation, she made several recommendations, which included among other things that: C.B. have access to a reading specialist during language arts; amend OT to add fluency responding/pacing goals; development of a BIP and for C.B.'s one to one aide be trained in ABA techniques; counselling services; full length ESY geared to address C.B.'s social behavioral and academic needs – specifically in the areas of reading, executive functions, impulse control fluency and processing.

Unlike the other evaluators, Topiel, who conducted the reading evaluation, recommended that C.B. be placed in a self-contained classroom for autistic children. She also recommended that he have a one to one aide for all classes. The aide should have sixty hours of college credits, one year experience working with autistic children which includes ABA training and other credentials. Other recommendations included an out of District placement for ESY in a program that provides intensive one to one reading and writing instruction by a certified reading specialist on a daily basis.

Lewis, C.B.'s OT therapist in second grade, also conducted an evaluation of C.B. in advance of the triennial IEP reevaluation. The evaluation consisted of observations, record review, teacher interviews and testing. During the observational part of her evaluation, she found that C.B. independently came into the classroom and started working on his morning activities. He occasionally had to be prompted by his aide to keep focused on task. He engaged appropriately with his peers throughout the observation period. No behavior problems or aggression was observed.

Documentation reviewed included work samples to see how he progressed over time and interviews with C.B.'s teachers to see if they had any concerns about his performance, strengths and weaknesses. Assessments performed included the BOT-2 and the Developmental Test of Visual Perception. On the BOT-2, C.B. was age appropriate for the skills tested. On the Developmental Test of Visual Perception, with the exception of the hand-eye coordination component of the test, overall C.B. scored

above average. Review of his postural control/neuromuscular status determined that C.B. was able to perform the tests appropriate to his age.

Based upon her evaluation, in her opinion that C.B. no longer required OT as his skills were age appropriate.

Fiorani, the District's speech-language pathologist, evaluation found C.B.'s fluency and voice appropriate for his gender and chronological age. His oral structures were within normal limits for speech production. Correct production of the voiced and voiceless – "th", continued to be worked on during therapy and had not yet been carried over into conversational speech. Additionally, pragmatic skills continued to be worked during therapy as C.B. was becoming a "social detective" and "flexible thinker". She found that C.B. exhibited skills within the average range for his chronological age expectancy in the area of receptive vocabulary. Within the areas of receptive and expressive language, he demonstrated skills in the average range for his chronological age.

Review of the June 6, 2019, IEP finds that many of the recommendations of the independent evaluators were either already existing or were incorporated in some fashion in the IEP.

Examples of this can be seen as follows:

Dr. Allen recommended that C.B. be provided with individualized reading instruction throughout the summer and that the school provide tutoring services either within ESY or in place of ESY. Dr. Odri recommended that C.B. attend a full-length ESY program geared to address his social, behavioral and academic needs and that he continue to access specialized reading instruction, social skills in speech or counseling and OT during extended school breaks. Topiel recommended ESY, however, believed it should be out of District, in an intensive 1reading and writing instructional program with a certified reading specialist.

The IEP provided for ESY and fifteen hours of individualized tutoring which specifically targeted reading skills.

Dr. Allen recommended that a plan be developed to fade C.B.'s one to one with the support of data collected by a qualified professional such as a behavior analyst or the special education teacher. Dr. Odri recommended that C.B. continue to have one to one support but that the aide have specialized training in ABA techniques and be able to assist C.B. in all academic periods. She also recommended that an individualized behavior management plan be designed by a BCBA. Topiel recommended a one to one aide in all academic classes in a self-contained special education room for autistic children. She also recommended that an FBA be conducted to determine the best strategies and environmental factors that will help CB focus and pay attention.

The IEP provided for C.B. to continue to receive support from a one to one aide during language arts literacy and receive support from a shared aide for math, science and social studies. In language arts/literacy, math, science and social studies, the aide's responsibilities included among other things, cueing, prompting to remain on-task, reading material out loud, rewording directions, break down instructions for understanding, adapting classroom activities under the instruction of the teacher. The IEP also called for an FBA assessment in September 2019.

Dr. Allen recommended that C.B. receive small group reading instruction of no more than three students. Topiel recommended that C.B. should be in a guided reading group of no more than three students.

The IEP calls for no more than three students in the guided reading groups in language arts literacy and response to intervention.

The IEP also recognized and addressed many of Topiel's recommendations. For example, to address C.B.'s decoding weaknesses, IEP provided for, among other things:



- When given commonly used sight words, C.B. will accurately read with 90% accuracy five consecutive trials – Mastery Criteria 90%
- While reading at instructional level, C.B. will blend beginning, middle, and ending sounds to form words with 85% accuracy in five consecutive sessions – Mastery Criteria 85%
- When presented with multi-syllabic words, C.B. will correctly identify the number of syllables in each word with 80% accuracy 4 of 5 trials – Mastery Criteria 80%
- When given a series of words, C.B. will correct identify the root word with 80% accuracy 4 of 5 trials.

To address comprehension, the IEP provided for among other things:

- After reading a story on his F&P level, C.B. will identify the main idea and two supporting details with 80% accuracy in 4 of 5 trials – Mastery Criteria 80%
- When presented with how, why and what-if questions after reading a story silently, C.B. will answer comprehension questions with 80% accuracy four of five trials – Mastery Criteria 80%
- When presented with a passage at instructional level, C.B. will read to confirm initial predictions with 80% accuracy 4 of 5 trials – Mastery Criteria 80%

To address writing needs, the IEP provided for among other things:

- When given a purpose, C.B. will formulate complex and compound complete sentences in written form with 80% accuracy – Mastery Criteria 80%
- Demonstrate correct punctuation; capitalization, comma, question mark, quotation marks – Master Criteria 80%

Each goal and objective outlined measurable mastery criteria. The evaluation method included standardized testing, teacher made tests, report card and teacher observations for C.B.'s academic course.

Both Dr. Allen and Dr. Odei, also recommended counselling services which notably had been offered in C.B.'s previous IEP. The June 6, 2019, IEP called for counselling two times per month for thirty minutes in a small group session. The counselling goals and objectives called for among other things:

- During counselling sessions, C.B. will accurately identify feelings and appropriate coping strategies when presented with real or fake situations 4 out of 5 trials – Mastery Criteria 70%
- Intervention Strategy – Modeling behavior; identifying appropriate coping strategies – Mastery Criteria 70%
- C.B. will identify and understand various non-verbal social communication behaviors (i.e. Tone of voice personal space, vocal volume, body orientation, facial expressions) by stating the implied meaning 4 out of 5 trials – Mastery Criteria 70%

Once again, all of the goals and objectives were identifiable and measurable. The evaluation method used were both teacher observation and counselor observation.

Speech was also continued, with the goals and objectives working C.B.'s pragmatic and articulation skills. The goals and objectives, called for among other things:

- Given visual and/or verbal prompts, C.B. will define what it means to be a “social detective” and then observe people during therapy and within the school to identify how they feel and what they need from others with moderate decreasing to minimum cues – Mastery Criteria 80%
- Based on where a person is looking, C.B. will describe what he thinks the other person is thinking (when looking at photographs, movie clips, and then other people with whom is communicating) – Mastery Criteria 80%

- C.B. will produce the voice and voiceless /th/ in the initial position at the sentence level during a variety of speech activities given visual and verbal prompts and cues – Mastery Criteria 80%
- C.B. will produce the voice and voiceless /th/ in the final position at the phrase level during a variety of speech activities given visual and verbal prompts and cues – Mastery Criteria 80%

The evaluation procedures were to be conducted by the speech-pathologist observation, teacher input and progress notes.

The IEP's accommodations, modifications and supplementary aids and services further were further enhanced from existing ones or added to incorporate some of the evaluator's recommendations. In language arts literacy, for instance, the accommodations/modifications/supplementary aides and services included:

Use of an assignment book; break multiple step instructions into brief, clear, single step directions; divide complex tasks into several segments, giving one segment at a time; provide visual reinforcement during instruction; use a multi-sensory approach during instruction; allow additional time for processing presented information; limit length/frequency of classroom and homework assignments; provide preferential setting; limit number of spelling words given, if necessary; use a flexible grading system, as needed; read material aloud for student; reword directions/instructions to assure student understands material, use multi-sensory approaches, such as writing on mesh, writing on sand paper, arm/air writing, index card "braille", chalkboard; support from one to one paraprofessional; one to one paraprofessional's responsibilities include, but are not limited to: cueing, prompting to remain on task, reading material out loud, rewording directions, break down instructions for understanding, adapting classroom activities under the instruction of the teacher.

There is no question that all of the reports by Dr. Allen, Dr. Odri and Topiel were reviewed and considered and quite a few of their respective recommendations were incorporated or already covered in the school's curriculum or C.B.'s IEP goals and objectives.

**LEGAL ANALYSIS AND CONCLUSIONS OF LAW**

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482. One purpose of the Act, among others, is to ensure that all children with disabilities have available to them a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C.A. § 1400(d)(1)(A). This “free appropriate public education” is known as FAPE. In short, the Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C.A. § 1401(9). A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the State involved; and d) are provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d).

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). An IEP should be developed with the participation of parents and members of a district board of education’s CST who have participated in the evaluation of the child’s eligibility for special education and related services. N.J.A.C. 6A:14-3.7(b). The IEP team should consider the strengths of the student and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluations of the student; the student’s language and communications needs; and the student’s need for assistive technology devices and services. The IEP establishes the rationale for the pupil’s educational placement, serves as the basis for program

implementation, and complies with the mandates set forth in N.J.A.C. 6A:14-1.1 to - 10.2.

The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701. The Act did not, however, impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. In support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (DC 1972). Rowley, 458 U.S. at 192, 102 S. Ct. at 3043-44, 73 L. Ed. 2d at 703. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, 458 U.S. at 192-93, 102 S. Ct. at 3043-44, 73 L. Ed. 2d at 703-04.

In addition, the Court noted that available funds need only be expended “equitably” so that no child is entirely excluded. Rowley, 458 U.S. at 193, 102 S. Ct. at 3044, 73 L. Ed. 2d at 704, n.15. Indeed, the Court commented that “the furnishing of every special service necessary to maximize each handicapped child’s potential is . . . further than Congress intended to go.” Rowley, 458 U.S. at 199, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. Therefore, the inquiry is whether the IEP is “reasonably calculated” to enable the child to receive educational benefits. Rowley, 458 U.S. at 206-07, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

The Board will have satisfied the requirements of law by providing C.B. 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 (D.N.J. Feb. 27, 2009) (citing Rowley, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701). The IDEA does not require the Board to maximize C.B.’s potential or provide him the best education possible. Instead, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). But an IEP must provide meaningful access to education and confer some educational benefit upon the child. Rowley, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. To meet its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. (2017); 137 S.Ct. 988; 197 LEd 2d 335.

“The educational opportunities provided by our public-school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom.” Rowley, 458 U.S. at 198, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry, and that “[i]t is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variation in between.” Rowley, 458 U.S. at 202, 102 S. Ct. at 3049, 73 L. Ed. 2d at 709.

Based upon the testimony and documentary evidence presented in this matter, I **CONCLUDE** that the September 7, 2017 IEP, November 15, 2017 IEP and February 1, 2018 Addendum, November 12, 2018 IEP and the June 6, 2019 IEP proposed by the District offered C.B. a free and appropriate public education with the opportunity for meaningful educational benefit and progress appropriate in light of C.B.’s circumstances, within the least restrictive environment.

I further **CONCLUDE** that the program offered C.B. by the District constituted FAPE as that term is defined by law. A review of the evidence reveals that C.B. progressed in his educational program, and that the child study team regularly adjusted his program in an ongoing effort to personalize his instruction and address his educational needs. School personnel testified convincingly as to C.B.'s progress, and the burden of proof and production rests with the Board. N.J.S.A. 18A:46-1.1

The IDEA also includes a mainstreaming requirement requiring education in the “least restrictive environment.” 20 U.S.C.A. § 1412(a)(5) mandates that

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school setting as the least restrictive, to enrollment in a residential private school as the most restrictive. 34 C.F.R. § 300.115 (2015); N.J.A.C. 6A:14-4.3. Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3) (2015); N.J.A.C. 6A:14-4.2; Oberti v. Clementon Bd. of Educ., 789 F. Supp. 1322 (D.N.J. 1992).

Courts in this Circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom., Scott P. v. Carlisle Area Sch. Dist., 517 U.S. 1135, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996).

Based upon the testimonial and documentary evidence presented in this case, I **CONCLUDE** that the Board has proven by a preponderance of the competent and credible evidence that the IEPs offered by the Board provided C.B. a FAPE with the opportunity for meaningful educational benefit appropriate in light of C.B.'s circumstances, within the least restrictive environment.

### Statute of Limitations

A petition for due process filed under the IDEA must be brought within strict statutory timelines. The statute provides that:

[a] parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

[20 U.S.C. § 1415(f)(3)(C)]

Elsewhere, 20 U.S.C. § 1415(b)(6) provides that the procedures required by the IDEA shall include:

- (6) An opportunity for any party to present a complaint—
  - (A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and
  - (B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

The Third Circuit Court of Appeals has interpreted these provisions to mean that “parents have two years from the date they knew or should have known of the violation



to request a due process hearing through the filing of an administrative complaint. . .” G.L. v. Ligonier Valley School District Authority, 802 F. 3d 601, 626 (3rd. Cir. 2015). In G.L. the parties had urged that these two statutory provisions contained an incongruity that arguably expanded the window for relief available to a petitioner. The court rejected this argument, holding that the IDEA’s “two-year statute of limitations . . . functions in a traditional way, that is, as a filing deadline that runs from the date of reasonable discovery and not as a cap on a child’s remedy for timely-filed claims that happen to date back more than two years before the complaint is filed.” Id. at 616.

The due process petition in this case was filed June 29, 2019, however petitioner attempts to capture allegations that date prior to June 28, 2017. While there are exceptions to the two year statute of limitations, I **CONCLUDE** that the petitioner has failed to establish that any of them are applicable in the instant matter. 20 U.S.C. § 1415(f)(3)D) Even assuming arguendo that they were not barred, I have considered the testimonial and documentary evidence presented in this matter and **CONCLUDE** that the District did provide C.B. with a FAPE during the time period in question.

**ORDER**

Based upon the foregoing, it is hereby **ORDERED** that the petition for due process be and is hereby **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.



May 18, 2021

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DATE

**TAMA B. HUGHES, ALJ**

Date Received at Agency

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Date Mailed to Parties:

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TBH/dm

**APPENDIX**

**WITNESSES**

**For petitioners:**

Ellen Topiel  
Kathleen McCabe Odri  
C.B.  
Christine Bertolini  
Karen Sloan

**For respondent:**

Sarah Levin Allen  
Eileen M. Lewis  
Samantha Killeen  
Lindsay Fiorani

**EXHIBITS**

**Joint Exhibits:**

J-1 September 7, 2017, IEP  
J-2 November 15, 2017, IEP  
J-3 November 12, 2018, IEP  
J-4 June 6, 2019, IEP  
J-5 April 16, 2019, Reevaluation Consent  
J-6 2019 Occupational Therapy Evaluation (Lewis)  
J-7 2019 Speech and Language Evaluation (Fiorani)  
J-8 2019 Functional Behavior Assessment (McCabe-Odri)  
J-9 2019 Reading Evaluation (Topiel)  
J-10 C.B. Report Cards

**For petitioner:**

- P-2 April 7, 2016, Multidisciplinary Report\*
- P-5 June 8, 2016, Eligibility/Individual Education Program Review\*
- P-7 September 16, 2016, Functional Behavioral Assessment\*
- P-8 December 6, 2016, IEP\*
- P-9 October 12, 2017, Children's Hospital of Philadelphia – Developmental and Behavioral Pediatrics\*
- P-10 February 6, 2018, Children's Hospital of Philadelphia - Brains Change Study\*
- P-14 C.B. writing samples\*
- P-16 2017 – 2020 C.B.'s Report Cards (Also in evidence as J-10)
- P-17 Curriculum Vitae - Ellen Topiel
- P-18 Curriculum Vitae - Kathleen McCabe-Odri
- P-21 Miscellaneous correspondence (Pages 161, 162, 163, 164 & 166)\*
- P-23 Karen Sloan email correspondence (Pages 189, 191, 192)\*
- P-26 GRC decision\*
- P-27 US District Court – District of New Jersey - Memorandum Opinion\*
- PX-1 January 10, 2019, Email from C.B. to Dr. Allen
- PX-2 April 5, 2019 Correspondence from Dr. Allen to petitioner.
- PX-3 GRC Decision\* (Also in evidence as P-26)
- PX-4 Hopewell Township BOE Policy 4223
- PX-6 Daily Summary Chart\*

**For respondent:**

- R-1 Curriculum Vitae – Sarah Levine Allen
- R-2 Curriculum Vitae - Samantha Killeen
- R-5 Curriculum Vitae – Lindsay Fiorani
- R-6 Curriculum Vitae – Eileen Lewis
- R-8 March 26, 2019, Neuropsychological Executive Functioning Screen
- R-10 Independent Evaluation Analysis by Samantha Killeen\*\*

- R-11 Comprehensive Student Record
- R-12 CB IEP Goals and Objectives Progress Reporting 2017 to Present
- R-13 OT Goals and Objectives (Also in evidence as part of J-3)
- R-14 CB Speech/Language Goals and Objectives Progress Reporting
- R-15 ESY Progress Reporting (2018 & 2019)
- R-16 C.B. Lexile Reading Achievement Levels (September 2017 – Present)
- R-17 Correspondence – December 16, 2016, to present (Pages 194, 195 and 196)
- R-27 December 13, 2018 - Final Decision – Summary Decision – Honorable John S. Kennedy, ALJ\*
- R-31 February 20, 2019, BOE Complaint/Appeal to US District Court of New Jersey\*
- R-33 August 29, 2017, Aids Training Sheet
- R-34 Aides Training Agenda
- R-35 November 15, 2017, Sign in Sheet
- R-36 Acknowledgement of Memo and Policy – Policies 4119.27 and 4219.27
- R-37 June 8, 2009, Policy 4219.27
- R-38 Appellate Division Decision – Christine Bertolini v. Board of Review, Department of Labor and Hopewell Twp. Board of Education
- R-39 2017/2018 Paraprofessional Handbook\*\*
- R-40 Contact Sheet

\* Entered into evidence over the Board's objection

\*\*Entered into evidence over the Petitioner's objection