



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 12404-19

AGENCY DKT. NO. 2020 30525

J.H. AND S.R. ON BEHALF OF E.H.,

Petitioners,

v.

MORRIS SCHOOL DISTRICT

BOARD OF EDUCATION,

Respondent.

Staci J. Greenwald, Esq., and **Andrew I. Meltzer**, Esq., for petitioners (Sussan, Greenwald & Wesler, attorneys)

Marc G. Mucciolo, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: November 12, 2020

Decided: January 7, 2021

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, J.H. and S.R. has requested a due process hearing on behalf of their son, E.H., who is classified as eligible for special education and related services. Petitioners assert that the Morris School District Board of Education (the Board, or the

District) denied E.H. a free and appropriate education (FAPE). Petitioners seek reimbursement for the expenses incurred in unilaterally placing E.H. at the Craig School, a private placement.

PROCEDURAL HISTORY

Petitioners filed a request for a due process hearing on or around August 13, 2019, which was transmitted to the Office of Administrative Law (OAL), where it was filed on September 9, 2019. A hearing was initially scheduled for February 3, 10 and 19, 2020, but adjourned at the request of the parties, and rescheduled to May 15, June 22 and June 26, 2020. The May 15 and June 22 dates were also adjourned at the request of the parties. The hearing took place over the course of three days: June 26, July 13 and July 29, 2020, via Zoom, with the parties' consent, as in-person hearings were not being conducted at the OAL due to the COVID-19 pandemic. The parties presented post-hearing briefs, and the record closed on November 12, 2020.

FACTUAL DISCUSSION AND FINDINGS OF FACT

General Background Facts

The following background facts are uncontroverted, and I **FIND**:

At the time of the hearing E.H. was a nine-year-old rising fourth grader at the Craig School, a private out-of-district placement, where he had been unilaterally placed by his parents since the second grade.

Previously, E.H. attended a full-time private pre-school program since he was two years old, followed by the Chatham Day School (Chatham Day) for kindergarten and first grade.

When E.H. was five, his parents referred him for a Child Study Team (CST) evaluation at the District because he was exhibiting learning difficulties, including problems learning letters, numbers, and with reading and math skills. E.H. was seen by

the CST in January 2016, and they agreed that Psychological and Educational evaluations were warranted.

A Psychological Assessment, conducted in early 2016, revealed that E.H.'s Full Scale IQ (FSIQ) was in the average range. As part of the Educational evaluation, the Woodcock-Johnson IV and Young Children's Achievement Test were administered which revealed a very low-range score in the cross-academic Brief Achievement cluster, and below average range in the Basic Reading Skills cluster. E.H. was found to be eligible for special education and related services in April 2016 under the classification category of Specific Learning Disability (SLD), and an IEP was developed for the 2016–2017 school year (2016 IEP). (J-4.)

The 2016 IEP provides for pull-out resource support forty minutes a day in language arts and math, in full-time kindergarten program, as well as several modifications, including a “multi-sensory approach to teaching (auditory, visual, tactile and kinesthetic)”. S.R. signed the consent to the proposed initial IEP in April 2016. E.H., however, never attended the District kindergarten program as the petitioners opted to place E.H. in Chatham Day School.

Chatham Day School

E.H. attended Chatham Day School, a private school, for kindergarten (2016–2017 school year) and first grade (2017–2018). His parents placed him there, at least in part, for the small class size of approximately ten students. While in kindergarten, the parents recognized that E.H. was struggling academically. S.R. described E.H.'s experience at Chatham Day School as a “mixed bag,” where the gap between E.H. and the other children widened as time went on.

Petitioners retained neuropsychologist Dr. Phyllis Lakin (Lakin) during E.H.'s kindergarten year, and S.R. testified that with Lakin's March 2017 evaluation, they learned that E.H. was profoundly dyslexic. Following an occupational therapy (OT) evaluation, E.H. began receiving OT twice per week. He also started to see a reading specialist outside of school twice per week. The parents hired a one-to-one aide to accompany

E.H. in the classroom for first grade. This aide was a general education teacher who was trained in Orton-Gillingham (O-G). S.R. testified that when the aide went on maternity leave near the end of first grade, E.H. was significantly affected. His self-esteem suffered as he compared himself with others in the class. S.R. testified that it became clear that E.H. should leave Chatham Day school.

I **FIND** that E.H. is profoundly dyslexic, and that this became evident when he was attending the first grade at Chatham Day School. I **FIND** that even with a one-to-one aide, and assistance from a reading specialist outside of school, E.H. still struggled to make progress at Chatham Day School.

Summer 2018 through December 2018 Meeting with District

In late June 2018, following E.H.'s completion of the first grade at Chatham Day School, the parents returned to the District and started the process of registering him. S.R. testified credibly that the parents informed the District at that time that E.H. had an IEP that the District developed two years earlier, that E.H. had an ISP at Chatham Day School, and that the District informed petitioners that they would be in touch with them.

In the meantime, the parents enrolled E.H. in the summer program at the Craig School, which had been recommended to petitioners by Lakin.

Following the June 2018 registration, there was no communication between the District and petitioners until the parents' newly-retained counsel sent the District a letter in mid-August requesting that the District create an appropriate program for E.H. The letter also informed the District that the parents would be placing E.H. at the Craig School, and they reserved the right to seek reimbursement. I **FIND** that prior to mid-August, the petitioners did not provide the District with any notice of their unilateral placement of E.H. at the Craig School for the summer of 2018.

Since the parents had not heard from the District, petitioners wrote to the District again by letter dated October 17, 2018 requesting that the District provide an appropriate IEP. I **FIND** that following the petitioners' June 2018 registration, the District did not reach

out to petitioners concerning E.H. or his status until sometime after receiving petitioners' October 2018 letter requesting an IEP for a second time.

E.H. attended the Craig School for the 2018–2019 school year. S.R. testified that E.H. really enjoyed the summer program, and because she was concerned about the “risk [of] taking an unknown leap” in the fall, petitioners decided to keep him at the Craig School while the District determined “how they’re going to educate him.” I **FIND** that because the parents were satisfied with the Craig School that summer, and the District had not developed an IEP for E.H. for the start of the 2018–2019 school year, the parents chose to have E.H. remain at Craig that year. I also **FIND** that although the parents registered E.H. in the District in June 2018 and the District was aware, or should have been aware, that E.H. had been classified in 2016 with a learning disability, the District failed to provide E.H. with an IEP for the start of the 2018–2019 school year, nor did the District provide a viable explanation as to why an IEP was not in place for September 2018.

December 2018 Meeting and Proposed IEP

The District convened an Initial Identification and Evaluation Planning Meeting on December 10, 2018, at which time the District proposed several evaluations, including an Educational Evaluation, Psychological Evaluation, Social History, Assistive Technology Assessment, OT evaluation, classroom observation by District Personnel and Neurological or Neurodevelopmental Assessment. (J-15.) The December 2018 Draft IEP (December 2018 IEP), which classified E.H. as eligible for Special Education and Related Services under the classification of SLD, provides for In-class Resource support in Language Arts and Math once a day for forty-minutes and includes several modifications to be provided in a co-teaching classroom. The IEP notes that the District considered and incorporated at least some of the recommendations identified in Lakin’s March 2017 report. The December 2018 IEP also provides for “multi-sensory supplemental reading program to address [E.H.’s] identified needs in the area of decoding, word recognition and comprehension . . . [to be provided] 30 minutes daily in a small group” and OT following an evaluation.

In addition to Lakin's March 2017 Psychological Evaluation, the Child Study Team (CST) considered the following records in preparing the December 2018 IEP: ISP of April 18, 2018; Chatham Day School Report Card (June 2018); Psychological Assessment (Dr. Golob, March 31, 2016); Educational Assessment (Santana, March 30, 2016); Pediatric Neurodevelopmental Evaluation (March 16, 2016); and April 15, 2016 IEP.

S.R. testified that she neither agreed nor disagreed with the December 2018 IEP, and she recognized that additional information had to be obtained for the District's consideration. Petitioners offered to give the District more information and the District offered to conduct additional evaluations. Petitioners also requested that Lakin observe the District's proposed program, and the District requested to observe the Craig School. I **FIND** that petitioners did not reject, nor agree to, the December 2018 IEP as the parties agreed that additional testing was necessary to better understand E.H.'s needs and update the December IEP based on results of these assessments and observations while E.H. continued to attend Craig.

Assessments and Classroom Observations

Following the December 2019 IEP meeting, the District conducted a number of assessments and two classroom observations at the Craig School.

Joan Graham, Ed.D., LDT-C (Graham), who was E.H.'s case manager prior to her retirement, conducted an educational evaluation of E.H. on or around January 23, 2019, and prepared an Educational Assessment. (J-27.) As part of her evaluation, Graham conducted an observation of E.H. in his classroom at the Craig School and administered the Woodcock-Johnson IV which revealed E.H.'s overall level of achievement in the very low range. She concluded in her report that his academic skills and his ability to apply these skills were in the low range. E.H.'s scores in reading and basic reading skills were in the very low range; scores on written language and written expression were in the low average range; scores on broad written language were in the low range; and scores in Math, Broad Math and Math Calculation Skills were also in the low average range. She concluded in her report that her observation revealed that E.H. required repetition, reinforcement and some redirection.

An OT evaluation was conducted on or around February 1, 2019.

Mary Ellen DiCataldo, Psy.D. (DiCataldo), school psychologist, observed E.H. at the Craig School for approximately sixty minutes on February 4, 2019. She prepared a report documenting her observations and findings. (J-16.) DiCataldo noted in her report that E.H. appeared to be engaged in the lessons and that while in a small group of two, he remained on task although he tended to be silly or distracted at times. She notes that in the larger classroom setting his distractibility was mild. She notes that E.H. was readily redirected when necessary and appeared motivated to complete the work. He also appeared to get along well with his peers and was interactive both socially and with the content.

The District conducted an Assistive Technology assessment in February 2019 to determine whether E.H. would benefit from technology supports “to improve his written productivity and access to curricular materials.” A report was prepared in early February 2019 which made a number of assistive technology recommendations, including the use of a dedicated Chromebook and software to assist in reading and writing. (J-17.)

A Social History assessment of E.H. was conducted in February 2019. (J-18.) The report notes that E.H.’s teachers are concerned with his reading level and self-esteem at times.

Jennifer Weber, Ph.D., BCBA-D (Weber) also conducted a classroom observation of E.H. at the Craig School, at the District’s request, on June 7, 2019, and prepared a report. (J-26.) Weber observed reading instruction for one hour. She notes in her report that E.H. required redirection and she recommended that E.H. would benefit from a reinforcement system, such as a token economy, to reinforce him for attending to instruction. Weber’s report notes that this system is embedded into the Corrective Reading Program she recommends. Her report notes that in her observation, E.H. had a difficult time with generalization, including generalizing the words read on the index card to the words on the passage. Therefore, Weber recommended that E.H. “would benefit from a reading program that is structured and sequenced and where each exercise is

built on one another. She writes in her report that Corrective Reading is a Direct Instruction program that E.H. would benefit from due to the scope and sequence of the program, and opportunities embedded into the program to help with generalization of new words and rules. She also wrote that “in order to maximize E.H.’s instructional time, it is important that all activities incorporate E.H.’s reading needs. Therefore, E.H. would benefit from scripted and structured lessons, such as Corrective Reading that build on one another and offers daily data collection so data-based decisions may be made in order to maximize E.H.’s instructional time.” She concludes that the Craig program is not meeting his learning needs because words taught in isolation are not being generalized when reading short stories or passages. She writes that, on the other hand, the Corrective Reading program is systematically sequenced to account for both abstraction and generalization.

Dr. Lakin’s Assessments and Reports on behalf of E.H.

Lakin assessed E.H. at his parents’ request. She prepared a report in 2017 (Lakin’s 2017 report), which was received and considered by the District prior to the December 2018 IEP meeting. In this report, Lakin opines that E.H. meets the diagnostic criteria for SLD with impairment in both reading and writing, and Developmental Coordination Disorder.

In late 2018, at the parents’ request, Lakin conducted a comprehensive re-evaluation of E.H.’s cognitive, academic and social emotional functioning. Lakin prepared a second report (Lakin’s 2018 report) with her findings. Lakin’s 2018 report also documents her impressions following a three-hour classroom observation of E.H. at the Craig School in October 2018, where she observed a reading class, oral language class, math class, and an art class.

According to her report, E.H.’s level of intellectual functioning is noted to be in the average range, with a verbal comprehension score in the very high range, and a working memory index in the low average range. His spontaneous conversation skills were noted to be adequate, with good receptive and expressive language skills in spontaneous

conversation. Significant difficulties were noted in those aspects of language important to the acquisition of reading and writing skills.

With respect to E.H.'s receptive language, Lakin's 2018 report notes that E.H. demonstrated excellent language comprehension. He displayed poor auditory perceptual processing of phonological information and phonological awareness (with CTOPP 2 Phonological Awareness of 82, 12th percentile). She notes that poor phonological awareness is associated with poor reading. E.H. demonstrated very poor ability to code information phonologically for temporary storage in working or short-term memory as demonstrated by the CTOPP 2 score of 64 in Phonological Memory (1st percentile). A deficit in phonological memory is likely to impair both listening and reading comprehension for complex sentences. She notes that although E.H. has the language skills to receive and comprehend complex language, he has significant difficulty in those aspects of language important in reading acquisition and fluency; and he "will require an intensive reading program that is structured and systematic, and that explicitly points out connections between spoken and written language."

In regard to language production, E.H. showed significant variation in ability. He obtained an Oral Expressive Composite in the Average Range and an Oral Language Composite in the Above Average Range. However, E.H.'s ability to retrieve specific numbers and letters was poor. She notes that he still confuses letter and number labels on the page, confuses letter sounds, and needs to track with his finger to move rapidly on the line. Lakin wrote that "phonological processing difficulties and rapid naming difficulties have more likely contributed to E.H.'s difficulty in reading skill development. Individuals who have deficits in both rapid naming and phonological awareness are at much greater risk of reading problems as compared to individuals with deficits in only one of the two areas."

In assessing E.H.'s memory and learning, Lakin's findings suggest "significant challenge in the recall of rote verbal information" and that he "demonstrates better ability to retain meaningful, thematic, and contextual material than . . . unrelated and rote information."

With respect to E.H.'s reading and writing skills, Lakin noted that E.H. showed a significant discrepancy between his oral language skills (93rd percentile) and his basic reading skills (1st percentile); and between his listening comprehension (98th percentile) and reading comprehension (>0.1 percentile). Lakin concludes that E.H. demonstrates a significant ability - achievement discrepancy in reading, written expression, and math. Lakin notes that E.H. is "basically unable to read text independently at the current time" and that he is "quite challenged to recognize and decode by phonology alone." Lakin noted E.H. to be "challenged to recognize words on the page, and has a very small sight word vocabulary." She notes that he is still acquiring reading skills and is not yet able to read independently for learning.

With respect to math, Lakin concludes that while E.H. has a "basic sense of math concepts and operations and math skills are developing, math fact retrieval, writing of numbers, and spatial planning on the page are not automatic and impede independent output."

With respect to his social emotional functioning, concerns were noted in regard to anxiety. He was noted to get easily upset and frustrated, and to have problems with attention. Lakin describes E.H. as an articulate child who is frustrated, embarrassed and at times angry, and very aware of his learning struggles.

Lakin's 2018 report also documents her April 2019 observation of a second-grade classroom at District's Woodland School, which consisted of a mix of general education students and students with IEPs. She documented that this was the classroom that E.H. would join. There were eighteen students, with one general education teacher, a special education teacher, and a student teacher.

Concerning E.H.'s progress at the Craig school, Lakin notes that "[a]lthough progress is incremental, he is making meaningful academic progress in the immersive and intensive learning environment" She concludes that E.H. has profound dyslexia, and that he is unable to function independently in the classroom, and requires significant individualized, modified, and accommodated learning strategies with technology and tools to assist with learning. She describes him as an emerging/beginning reader who is

significantly below grade level and unable to work on his own when reading and writing activities are involved.

Lakin diagnosed E.H. with SLD, dyslexia, and with impairment in both reading and writing; dysgraphia; developmental coordinated disorder; dyspraxia; ADHD; generalized anxiety disorder and sensory integration disorder. She writes:

[E.H.] is in need of a comprehensive, highly organized, integrative and sequentially based curriculum in light of his profound and severe dyslexia. He needs an intensive and immersive program with special education techniques and tools embedded in the curriculum and in the classroom to meet his learning needs. [E.H.] requires a program that can provide him with small group, individuated, multi-sensory instruction in Language Arts (VAKT based, such as O-G, Linda-mood Bell, Wilson) and Mathematics to remediate his learning disability. The curriculum needs to be focused on the needs of a dyslexic youngster throughout the entire day in each and every subject, with specialized instruction in reading, writing, spelling, and mathematics. Needs related to sensory integration disorder, dysgraphia, and dyspraxia also need to be incorporated into the classroom in regard to a sensory diet, listening system, and assistive technology tools for learning engagement. He needs both OT and speech/language services. In addition, [E.H.] needs to have a program that incorporates school wide behavioral management, social skill development, and positive incentives and rewards as part of the schoolwide curriculum. He needs well organized and structured reinforcement of learning on an ongoing basis.

Lakin opines in her report that a regular inclusion classroom as proposed by the District, or even a modified curriculum in Resource Room, or an LLD class, cannot provide the immersion and intensity of instruction and support required across the curriculum in a classroom of fifteen or more students, and his cognitive functioning would preclude placement in a self-contained class. She opines that he requires “intensive and individuated remediation” in order to overcome his profound dyslexia and associated learning problems. She concludes that E.H. should remain at the Craig School, where he has made slow but steady learning progress and appears happy in their intensive,

immersive, and comprehensive special education program for children of average or above-average intellectual functioning with language-based learning disorders.

By letter dated April 15, 2019, the parents through their counsel provided the District with Lakin's 2018 report, and requested that the District place E.H. at the Craig School. (J-19.)

June 2019 Meeting and IEP

An IEP meeting was held on June 19, 2019 and an IEP was proposed by the District for the end of the 2018–2019 school year (2nd grade) and the 2019–2020 school year (June 2019 IEP). The June 2019 IEP provides in-class resource support for Language Arts, Math, and Reading (each for 40 minutes daily); and individual OT, group OT, individual counseling, and group counseling (each for 30 minutes every six-day cycle). The modifications included in the June 2019 IEP contain those found in the December 2018 IEP, as well as allowing E.H. extra time for task completion, and verbal responses to demonstrate understanding.

The June 2019 IEP included a supplemental direct instruction reading program to be implemented daily for forty minutes. It describes the program as “scripted and scaffolded, in which [E.H.] will receive immediate and ongoing feedback following each response opportunity Skills targeted include phonemic awareness, letter sound correspondence, word recognition, vocabulary, oral reading fluency and comprehension.” It also notes that a BCBA will consult with E.H.'s teachers and school staff to address any transition, sensory or attention concerns; and that a sensory area in the school will be provided as needed. Other Supplementary Aids and Services listed include flexible seating, including standing desks, rocking chairs, and bean bag seating. School counseling and access to counseling groups was also provided, as well as various forms of Assistive Technology. A number of Goals and Objectives were included in the June 2019 IEP in the areas of Reading, Writing, Math, Social/Emotional/Behavioral, and Motor Skills, including OT.

Parents' Rejection of the June 2019 IEP

By letter dated July 9, 2019, petitioners through counsel informed the District that they and Lakin considered the proposed IEP and that they do not believe the District's proposed program would be appropriate for E.H. and that he "requires the consistent use of a multisensory approach such as Orton-Gillingham implemented with fidelity across his entire school day." In the letter, the parents reiterate their request for the District to place E.H. at the Craig School. E.H. has continued to attend the Craig School.

Expert Testimony

For Respondent

Danae Heywood

Heywood is the supervisor of pupil services, grades pre-K through 5, for the District. She was admitted as an expert in special education and as a learning disabilities teacher consultant (LDTC). She holds a certificate in O-G, which she described as one of the scientific-based approaches for students with dyslexia. She has been employed with the district for approximately ten years.

Heywood became involved in the case upon the retirement of Graham in the spring of 2019. Heywood spoke with Graham before her retirement, reviewed E.H.'s file and became familiar with the case when she became a member of the CST. Heywood has never met E.H., but acknowledged that he has a significant case of dyslexia and needs intensive reading remediation as well as writing instruction by a special education teacher.

Heywood testified as to the assistive technology recommended by the District, which was based on the February 2019 Assistive Technology Assessment report. She testified that the assistive technology described in the report would have been beneficial for a student with E.H.'s learning disability because it would allow ease of access through greater speed and access to reading and writing. Book Share would allow him to enjoy a book that he would otherwise not be able to read because it would be narrated.

Heywood attended the June 19, 2019 IEP meeting as the LDTC. Her role was to discuss Graham's testing and to act as a member of the CST. She agreed that based on E.H.'s basic reading skills score, E.H. had a tremendous amount of difficulty as compared to others his age in reading site words and being able to break down words phonetically. E.H. also scored in the very low range in "word attack" which identifies a child's ability to understand how to break down words phonetically. She agreed he would have difficulty reading at, and even below, grade level and that he had significant needs that had to be remediated through systematic teaching of phonics, site words and being able to generalize these skills.

Heywood is familiar with the multiple reading programs offered to students in the District, including the Corrective Reading program. She opined that this was an appropriate program for E.H. at the time it was offered. She testified that E.H. was being provided multi-sensory reading instruction both at Chatham Day School and at the Craig School and that he had not made the kind of progress with this instruction that they would have liked to see for a child with E.H.'s cognitive profile. Heywood testified that E.H. had received a "tremendous amount of multi-sensory reading instruction" but still tested in the very low range. For this reason, the District felt that they needed to try something different, through the use of the Corrected Reading Program, in order to demonstrate progress.

Heywood testified that in response to E.H. confusing "b" and "d", and their sounds, the District addressed that concern in Goal 1 of the IEP's Goals and Objectives. Concerning the section of the PLAAFP that indicates that E.H. has weaknesses in abstract reasoning and needs concrete examples in math, Heywood testified that this is addressed with the modifications/accommodation provided, such as the one requiring that he be provided with visuals, models and manipulatives.

When questioned about the discrepancy in E.H.'s verbal comprehension score (92%) and working memory (12%, low-average range), Heywood noted that E.H. has a high verbal IQ, which means that auditorily and verbally he is able to express his thoughts

but that his working memory is likely impacted by his ADHD diagnosis. She also opined that low working memory indicates that it is generally harder to generalize new concepts.

Heywood confirmed that Lakin's report was considered when working to create the June 2019 IEP. Because Lakin reported anxiety in her report, the District included counseling in E.H.'s IEP.

When asked about how the District addressed deficiencies in E.H.'s phonological memory in the IEP, Heywood testified that this was addressed in Goal 1, and in the broken-down objectives. Heywood agrees that addressing phonological memory is important as it is a prerequisite for reading fluency. She testified that the District did not, however, include a reading fluency goal in E.H.'s IEP because he does not yet have the prerequisite skills (phonological memory).

In response to Lakin's recommendation that E.H. receive multi-sensory instruction in language arts and math, Heywood testified that the modifications and accommodations sections of the IEP include multi-sensory techniques, even though the IEP does not explicitly use the term "multi-sensory." She provided examples of multi-sensory techniques included in the IEP: providing visuals, models and manipulatives, underlining, highlighting, and color-coding of directions and concepts on the page. Heywood testified that the IEP does not propose O-G because that techniques showed "minimal progress with E.H." She testified that, for example, E.H.'s standard scores in reading were still significantly impacted after being at Craig for six months. She also testified that E.H. was not even able to take the baseline assessment for reading when he arrived at Craig. As an LDTC, she opined that E.H. needs a different approach.

Heywood was questioned about a recommendation found in the NJ Dyslexia Handbook, which reads: "The NJDOE strongly recommends a minimum of 90 minutes of uninterrupted literacy instruction daily for grades K through 5, . . . [with] no other classes . . . scheduled that would break the block into smaller units." Heywood pointed out that the IEP provides for 40 minutes of reading instruction with support as an intervention, and the language arts literacy blocks are 120 minutes a day. She agreed there was interrupted time in the schedule because of a lunch break.

Heywood testified that the District's program is the least restrictive environment for E.H. Students in the in-class support classes have varying abilities, strengths and weaknesses, and students with severe disabilities have better outcomes when educated with neurotypical peers rather than placed in a setting with students with their disability.

Heywood testified that O-G is not the only methodology that works for students with reading disabilities, and that the District provides research-based reading programs that have been effective for students with dyslexia. Based on the information available to the District at the time, including information received from Craig and E.H.'s standardized test scores, Heywood believes the Goals and Objectives in the IEP are appropriate.

Dr. Mary Ellen DiCataldo

DiCataldo is a school psychologist for the Morris School District. She was qualified as an expert in special education and as a school psychologist.

DiCataldo first became familiar with E.H. at the start of the 2018–2019 school year, when he did not appear for class the first week of school and she learned that he had been placed unilaterally. Graham was initially assigned as E.H.'s case manager, and DiCataldo assumed that responsibility in about June 2019 upon Graham's retirement. She was, however, also part of the CST with Graham during the 2018–2019 school year.

DiCataldo testified that at the December 2018 meeting, the District only had some documentation on E.H., but she was aware that he had dyslexia and other issues and was determined to have a SLD.

DiCataldo observed E.H. at the Craig School for about an hour. A portion of that was in his pull-out reading program and the other portion was in his oral language class. DiCataldo prepared a written observation, in which she noted that E.H. was engaged, seemed to be trying his best but was off-task at times. (J-16.)

At the time of the June 2019 meeting, there were only a couple of days left in the school year. If E.H. had begun in the District in June 2019, he would have finished second grade at the Woodland School, and then attend third, fourth and fifth grades at Thomas Jefferson School. At the Jefferson School, E.H. would receive in-class support (ICS) services in a general education classroom, with a general education and special education teacher. DiCataldo testified that an ICS setting was recommended in consideration of E.H.'s strengths, including his intellectual ability and level of knowledge, and to have access to general education peers and the general education curriculum with modifications. She also testified as to the benefit of interacting with non-disabled children and being able to learn from those relationships and develop social skills.

DiCataldo testified that the District considered Lakin's evaluation and results of assessments she conducted, and more recent evaluations, in creating the IEP. Lakin's testing demonstrates that E.H.'s verbal comprehension skills are very high, better than 92% of children his age, while several other skills fall well within the average and high-average range. DiCataldo acknowledged that E.H. showed a weakness in the area of working memory and fluid reasoning. She testified that a low working memory score is often seen in children who have difficulties with executive function, attention, focusing and manipulating information and remembering that information to be able to use it. In her opinion, the assessments show that listening to and manipulating information is challenging for E.H.

DiCataldo testified that Graham created the Goals and Objectives in the IEP, and that the Modifications section noted that Lakin's recommendations would be integrated into the co-teaching classroom. DiCataldo testified that the modifications offered in the IEP were multi-sensory in the sense that they allowed for the presentation of information in a visual, auditory, kinesthetic and tactile fashion in the classroom. The Corrective Reading Program was proposed by the team because there was concern that E.H. had been receiving O-G over a long period of time but had not been making significant progress. She explained that the 2018 IEP expressly referenced receiving multi-sensory services because at the time they tried to match what E.H. was getting at the Chatham Day School, which was O-G instruction, but in 2019 the CST proposed direct instruction

(Corrective Reading) because they determined that E.H. had not made significant progress with the O-G method and that it would be “worthwhile to switch gears.”

As a school psychologist, DiCataldo felt that the program offered to E.H. through his IEP was appropriate. It addressed his needs in the area of reading, his ADHD diagnosis, anxiety, and sensory integration and OT issues through specific services, and goals and objectives, while in the neighborhood school where E.H. would have a richer curriculum and be among non-disabled peers.

DiCataldo testified that the class schedule of J-25 exceeds the 90-minutes of uninterrupted reading program in the NJ Handbook. She testified that the 30-minute gap in the District schedule is a break that the students need. She later testified that this schedule was for the Woodland School, not Thomas Jefferson School, where E.H. would have gone for third grade and where the times for classes would differ.

The District did not conduct any speech language testing of E.H. She testified that not all children who have dyslexia qualify for speech and language services, and here there were no concerns in this area, and none that had been brought to their attention. She testified that the parents never requested a speech language evaluation at the December 2018 IEP meeting, and she has no memory of the parents requesting it at the June 2019 meeting. While Lakin’s report recommends it, they did not receive that evaluation until much later in the process, after the evaluation plan had been put in place, and DiCataldo disagrees that this evaluation was necessary.

DiCataldo testified that Craig is accredited but she does not believe it is approved by the State Department of Education for the education of students with disabilities.

Dr. Jennifer Weber, BCBA

At the time of the hearing, Weber was employed as a professor in the Education Department at Columbia University and was consulting for the Morris School District. She is licensed in behavior analysis in New York and is board certified in behavior analysis at the Doctoral level. She was admitted as an expert in special education as a BCBA, with

a specialty in reading instruction and interventions for grades K-5. She oversees the supplemental reading interventions offered in the District for grades K-5, trains teachers of those students who needed direct instruction, and works with the team to make decisions concerning other types of reading programs or interventions that the students may need, including multi-sensory instruction like O-G and Wilson.

Weber first became involved in this case in the spring of 2019 when she was asked by the District to observe E.H. at the Craig school, and his reading program. She was asked to determine whether he was making progress and whether it was an appropriate program compared to what the Morris School District could offer. She did not review any information concerning E.H. prior to her observation on June 7, 2019 because, she testified, she wanted to be as objective as possible. She testified that she was only given an hour for the observation by Craig and had no opportunity to ask questions. She subsequently documented her observation in a report. (J-26.)

Weber noted that E.H. required redirection several times, and she testified that having some type of reinforcement system would be a benefit to keep him motivated and engaged, and to maximize the instruction being presented. She testified that from a data perspective, E.H. did well overall on each exercise, but he did not appear to be generalizing the information learned. Based on her observation, she recommended a token economy or reinforcement system, and a change in programs related to focusing on a different scope and sequence that would allow for generalization of words. Another recommendation was to ensure a measurement system, a data collection system and intensive progress monitoring for reading. On cross-examination, Weber conceded that although she recommended a token economy be provided, this was not in the IEP. She also conceded that during her observation at Craig, E.H. was able to respond correctly to questions even without behavioral supports in place.

Weber recommended the Corrective Reading program, which is part of Direct Instruction, a methodology that came out of a behavioral model of education. She described the Corrective Reading Program as a reading intervention program designed with a specific scope and sequence that builds on different objectives, and uses different modalities to teach. She testified that although this is the program recommended by the

District, Morristown does utilize several reading intervention programs, and if a child does not make gains after six weeks, the interventions would be changed.

Weber recommended Corrective Reading after considering E.H.'s obstacles with reading and decoding the words within a sentence, his difficulty with generalization, and because there is a very stringent scope and sequence provided that is constantly building in the generalization pieces. She later conceded on cross-examination that E.H. did generalize during her observation with one activity and that she was unaware of how often E.H. had been exposed to the words that she claimed he failed to generalize.

Weber testified that the Corrective Reading Program has a data collection component and many opportunities for students to respond within one lesson, and with protocols in place to intervene if the child was not generalizing instruction. She testified that staff administering the program in the District are trained on how to take data, and there are mastery tests every few lessons so that the data is monitored. Weber testified that she considers Corrective Reading to be multi-sensory in the sense that multi-sensory is a teaching technique and that these techniques are built in as part of the instruction—for example, by using auditory and tapping.

Weber also recommended Corrective Reading because some of the data from Craig has not shown that E.H. has made progress. (P-13.) From November through March, the skills that had been achieved with some support had still remained needing that same level of support, and the skills that needed reinforcement remained at that same level. Looking at the data, she recommended a different program as E.H. had not mastered the foundational reading skills that school year at Craig.

At the June 2019 IEP meeting, Weber recommended having supplementary reading intervention support using the Corrective Reading Program and that E.H. participate in an inclusion class with ICS in addition to his supplemental reading interventions. The proposed classroom would consist of fifteen to twenty students. E.H. would first take a placement test to determine the level of instruction needed, and he would then be placed with other students at the same level. This would consist of 40 minutes of uninterrupted direct instruction by a special education teacher, to be overseen

by Weber or another BCBA-D. Teachers administering this instruction would be trained. Since the program is scripted, no part is left for interpretation. It is “scaffolded” in that it starts out where there is a lot of modeling and it gradually pulls back to allow for more independent responding. Every ten lessons there is a mastery test to ensure the student is generalizing. Per the IEP, E.H. would be using Corrective Reading for decoding, and Reader Workshop for comprehension, which Weber confirmed was a mainstream program.

For Petitioner

Debra Reese

Debra Reese (Reese) has been E.H.’s reading teacher for two years, and has worked at Craig for eighteen years. She was qualified as an expert in special education and reading disabilities.

Reese described the schedule at Craig and testified that the instruction provided is individualized and multi-sensory. Reese testified that at Craig, they use different O-G methods in teaching a child, and she opined that E.H. benefited from the Lindamood Phonemic Sequencing (LiPS) program, which consists of methods incorporated throughout the day. She also testified that they use a token economy to address E.H.’s distractibility.

Reese testified that when E.H. came to Craig, he did not know his alphabet nor his vowel sounds. He would get angry and embarrassed that he could not read, but that he is not like that now. When he first arrived, E.H. was provided one-to-one instruction for a time until he was matched up with another student. She described him as having “severe difficulties,” including difficulty with phonological memory, phonological awareness, rapid naming, anxiety and ADHD. Reese testified that E.H. was unable to take the standardized reading test (P-11) when he arrived there. In September 2019, he was at least able to take the test but scored very poorly, less than the first percentile in word efficiency and phonemic decoding. This demonstrated to her that E.H. is extremely disabled because,

in part, he had been taught many of these words and has significant memory issues. She testified that she believes he is slowly improving and that he is making progress at Craig.

Reese testified that Present Levels of Education Performance are done two to three times a year. In January 2019, she noted that E.H. did not take any test such as the Woodcock Reading Mastery or the GORT, because she did not feel comfortable enough that he was able to take the test at that time. While at Craig, E.H. became able to write a dictated simple sentence with five words with 90 percent accuracy, and is able to capitalize the beginning of a sentence. He has also made progress in math.

Reese reviewed the results of standardized tests (GMADEs) administered in October 2018, where E.H. scored a 49, and then a 67 in May, which she described as a “significant improvement.” Reese testified that E.H. needs phonological awareness instruction every day, and he has made progress in this area, but that long-term memory is difficult for him. She testified that he has outstanding listening comprehension.

In response to DiCataldo’s observation, Reese testified that even though E.H. may have appeared silly or distracted, she believes he was able to continue with the lesson and benefit from it. She testified that he has “pretty bad ADHD” and has problems staying focused. He requires prompting, which she provides about 25 percent of the time.

In response to Weber’s report that E.H. failed to generalize new words after a ten-minute exercise at Craig, Reese testified that E.H.’s memory issues require daily reinforcement.

Regarding the District’s proposed program, Reese testified that she does not believe that E.H. will make progress in a class of twenty students with two teachers because he will become overly stimulated and unable to focus, and this would cause him to either shut down or act out. She also does not believe E.H. will be able to make progress if he is taught using the Corrective Reading Program because E.H. would have nothing to connect the concepts to and he needs that connection. Reese testified that she is familiar with the Corrective Reading Program, and testified that it is not a multi-sensory approach in her opinion because it is a scripted program and not an approach.

On cross-examination, however, Reese conceded that her knowledge of the Corrective Reading Program is limited to a 45-minute telephone conversation with the publisher of the program, and her own internet research. She has only implemented O-G, and has never been trained in Corrective Reading, nor has she ever seen Corrective Reading being implemented.

In terms of addressing E.H.'s anxiety at Craig, Reese testified that they have a licensed social worker on staff who is available on an as-needed basis. She does not know whether the social worker meets regularly with E.H.

Reese testified that E.H.'s progress would be affected if he was not provided with a multi-sensory program. She testified that multi-sensory instruction is the "most effective instruction out there for children that are dyslexic, let alone as dyslexic as E.H."

Phyllis Lakin, Ph.D.

Lakin was qualified as an expert in special education, psychology and neuropsychology, and in developing programs for students with language-based learning disabilities. The majority of her experience developing these programs has been for students in a private-school setting. Lakin is licensed as a school psychologist in New York and served as a consulting psychologist for the Craig School for over twenty-five years. In that capacity she made program recommendations for students with language-based learning disabilities.

Lakin testified at length regarding her experience with E.H., her assessment and reports. With respect to Lakin's initial evaluation of E.H., as documented in her 2017 report, she testified that she observed him at Chatham Day School and spoke with his teachers, and that he appeared sad and overwhelmed. She testified that he had "dyslexia stress anxiety reaction," which occurs when bright and capable children who are constantly exposed to material that is difficult for them develop a fight or flight response and become paralyzed. At that time, she recommended that E.H. remain at Chatham Day School because it was a small classroom, he seemed to be overall happy, he was receiving a significant amount of remedial services, OT, speech, and he was getting most

of the services he needed. She believed he should stay there for first grade since he was receiving all these supports, rather than go to Morristown and get pull-out support 40-minutes a day in reading and writing. At the end of first grade, however, he was becoming more anxious, difficult and unhappy and the teachers felt that the program was not meeting his needs. She testified that the parents were going to go back to the District to look at programming for him and she recommended that he go to Craig for the summer because she felt that a change was necessary.

Lakin testified that E.H. did not enter the public school because they felt the program was not sufficient to meet his needs and he did well in the summer program at Craig. Until a program was put together for him in Morristown, it was felt that he would be better off staying at Craig.

Lakin observed a classroom at the Woodland for 45 minutes in April 2019, after writing her 2018 report. She noted that there was a lot of noise in the classroom of eighteen, and that there were three different lessons going on at the same time. She testified that a class of this size would not be an appropriate environment in which E.H. could be capable and available for learning because he has “tremendous difficulty differentiating background and foreground” noise. She also opined that the lesson had no individualization, was just scripted, very auditory and without the ability to really have any kind of visual supplements. Lakin testified that E.H.’s ADHD and anxiety also impact his learning.

Lakin testified that, as a neuropsychologist, she is familiar with the District’s proposed Corrective Reading/Direct Instruction Program, and testified that it is auditory and lacks the multi-sensory component. She testified that the flexibility with Direct Instruction is limited and it is taught in homogeneous groups, and while the Direct Instruction/Corrective Reading program tells a student how to spell a word, and the lesson is repeated and reinforced, O-G explains to the student why a word is spelled a certain way. O-G is also multi-sensory, and she testified that E.H. performs better and requires this approach. She testified that Corrective Reading is more of an auditory-based program, and that E.H. does not do well with this because he is severely dyslexic and needs an approach, not a script.

Lakin testified that E.H. is self-critical and becomes angry and embarrassed when he feels he is not performing as he should, and this makes him unavailable for learning. She also noted that his listening skills were inconsistent and he often struggled with multi-step directions and is also spatially disorganized and needs tasks broken down for him. She testified that he would need one-to-one support to address these needs, but also testified that he would become very embarrassed by this in a classroom where other students are not receiving one-to-one instruction, and that this would make him unavailable for learning.

Lakin's testing demonstrates that E.H. is very bright, and his higher-level skills are "quite good." He did not score so well in working memory, which is typical for children with attention disorders, auditory processing disorders, and oftentimes dyslexia, and he requires a lot of repetition, review, reinforcement, and paraphrasing.

Lakin testified that E.H. showed significant difficulty in phonological awareness and phonological memory, meaning that he could not understand sound-symbol association. Her testing revealed a significant discrepancy between his oral language skills (93%) and his basic reading skills (1%); and his listening comprehension (98%) and reading comprehension (less than 1%). She explained that while E.H. would be able to hear and understand, he would be unable to work at his desk independently. She also testified to E.H.'s below-average written language due to his significant orthographic confusion. She testified that his disability goes beyond reading, as it affects all subjects and he would need support throughout the day in every subject.

Lakin testified that, in light of his severe and profound dyslexia, E.H. requires a comprehensive, highly organized, integrated and sequentially-based curriculum that is incorporated throughout the day. She testified that because his dyslexia is co-morbid with other difficulties—such as his growing depression, ADHD, and auditory processing disorder—E.H. requires a program that is immersive and multi-sensory. She opined that having 40 minutes of reading is not sufficient when he also has to attend science or social studies. She also does not feel that the program proposed by the District is appropriate

in providing 40-minute ICS sessions in reading and math without the kind of generalization and transfer of training that E.H. requires.

Lakin testified that Craig is providing E.H. with an appropriate program, based on her own observation and years of working there and her understanding of the program. She testified as to the small class sizes where E.H. could have one-to-one support in reading; the listening system in the classrooms to address auditory encoding; and the multi-sensory approach that Craig offers. She described Craig as “state of the art” in terms of programming for dyslexic students, based on the O-G approach.

With respect to the June 2019 IEP, Lakin testified that the addition of OT, counseling, and additional reading instruction does not change her opinion regarding the appropriateness of the program as it still does not provide a comprehensive and immersive environment for E.H. While she conceded that the District incorporated several of her recommendations into the IEP, she testified that those accommodations do not address the comprehensive nature of E.H.’s needs.

DISCUSSION

I found Lakin’s expert testimony concerning E.H. and his educational needs compelling. She has been following E.H. since 2016, conducted thorough assessments and arrived at a diagnosis that the District does not contest. She is a seasoned neuropsychologist who has many years of experience making program recommendations for students with language-based learning disabilities, and is very familiar with the type of instruction provided at the Craig School. I **FIND** Lakin’s testimony credible and more compelling than the testimony offered by the District’s witnesses and, therefore, I afford more weight to her expert opinions. I also **FIND** that S.R. presented as a credible witness when she testified concerning E.H.’s challenges, his experience at the Craig School, and her exchanges with the District.

It is undisputed that E.H. not only has profound and severe dyslexia, and a SLD with impairment in reading and writing, but ADHD and generalized anxiety disorder that negatively impact his ability to function in the classroom. Also, while E.H.’s level of

intellectual functioning is noted to be at least in the average range, he has an auditory processing disorder and a poor working memory that necessitates significant repetition, review, reinforcement and paraphrasing. When entering the third grade, E.H. was still an emerging reader, who read at a kindergarten level, and I **FIND** that he requires intensive and individualized remediation in reading and writing to address his learning disability.

While the District's witnesses testified that the CST proposed the Corrective Reading Program because they felt that they should try something new since E.H. was not making sufficient progress at Craig and had not progressed at Chatham Day despite receiving O-G instruction, the evidence does not establish that any lack of progress, or more speedy progress, was due to the use of multi-sensory instruction. I did not find Weber's opinions following her observation at Craig reliable as she only observed for one hour, had no information concerning E.H. prior to her observation, did not have the opportunity to speak with his teachers, and she reached conclusions concerning her observation that proved difficult to defend on cross-examination. She could not, for example, convincingly defend her opinion that E.H. was unable to generalize instruction through the O-G approach provided at Craig. She also criticized the Craig Program for not providing E.H. with a reinforcement system such as a token economy, even though Reese convincingly testified that one was being implemented. She also could not explain why such a reinforcement system was not included in the June 2019 IEP if she agreed it was required.

Given the testimony offered by Reese and Lakin, coupled with my review of the Craig School records, I **FIND** that E.H. has been making slow but steady and meaningful progress at the Craig School with the use of intensive multi-sensory instruction which E.H. requires. I also **FIND** that while the June 2019 IEP provides for the use of some multi-sensory modifications, the Corrective Reading Program itself, which provides reading instruction in a sequenced, scripted and auditory format, is not a multi-sensory program. Lakin convincingly testified that E.H.'s severe dyslexia affects every subject in school and that a 40-minute per day reading session using the proposed Corrective Reading Program is insufficient to generalize skills throughout the day. While the June 2019 IEP includes many of the supports and modifications recommended by both the District's and parents' experts, and while the June 2019 IEP is robust in many ways as it includes

counseling services, OT, the use of assistive technology and several modifications, I **FIND** that it is lacking as it does not provide for the intensive multi-sensory reading program that E.H. requires given the severity of his dyslexia, together with his auditory processing disorder and ADHD, as well as his need for intensive remediation. The testimony provided by the District's experts simply fell short of convincing me that 40 minutes per day of a reading intervention program that is not multi-sensory is appropriate for a student with E.H.'s profile.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

This case arises under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities. Receipt of those funds is contingent upon a state's compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). As a recipient of Federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities will receive FAPE. 20 U.S.C. §1412. FAPE includes Special Education and Related Services. 20 U.S.C. §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). To meet its obligation to deliver FAPE, the school district must offer an IEP reasonably calculated to enable S.L. to make progress appropriate in light of his circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. ____ (2017); 137 S. Ct. 988; 197 L. Ed. 2d 335.

Procedural violations on the part of a school district may justify compensatory education or tuition reimbursement when the procedural defects caused such substantial harm that a FAPE was denied. C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 66-67 (3d Cir. 2010). When a procedural violation is alleged, "an administrative law judge may decide that the child did not receive a FAPE only if the procedural inadequacies: (1) [i]mpeded the child's right to a FAPE, (2) [s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) [c]aused a deprivation of the educational benefit." N.J.A.C. 6A:14-2.7(k).

Did the District deny E.H. a FAPE for the 2018 ESY
and the 2018–2019 School Year?

Petitioners argue that the District's delay in providing E.H. with an IEP when he registered with the District in June 2018, constituted a procedural violation rising to the level of a substantive violation that denied E.H. a FAPE. I agree with the petitioners that the District unreasonably delayed in offering E.H. an IEP in 2018. The parents initiated the registration process with the District in late June 2018 and advised the District staff that E.H. had an IEP from 2016, and staff responded to petitioners that they would be in touch. Petitioners did not hear from the District that summer, prompting petitioners' counsel to send the District a letter in August 2018, formally requesting a CST referral for E.H. During that time, E.H. had attended the Craig School's summer program and petitioners opted to keep E.H. at the Craig School for the 2018–2019 school year at least in part because the District had not yet developed a program for E.H. It was not until early November 2018, after petitioners sent the District a second letter in mid-October 2018 requesting that the District develop an IEP, that the District responded to petitioners' request and scheduled a meeting for December 10, 2018, more than four months into the school year and five months after petitioners registered E.H. and informed the District that E.H. had been classified two years earlier. No reasonable explanation was provided by the District's witnesses to explain why an IEP was not prepared for the start of the 2018–2019 school year or why a meeting was not held until December 2018.

The IEP is an agreement between the parties that specifies how special education and related services will be delivered. 20 U.S.C.A. §1414(d)(1)(A). It is the vehicle through which a child receives FAPE. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (2010); Lascari, 116 N.J. 30. A meeting to develop the IEP must be held within thirty calendar days of a determination that a student is eligible for special education and related services. N.J.A.C. 6A:14-3.7(a).

I **CONCLUDE** that the District's failure to offer E.H. an IEP for the start of the 2018–2019 school year not only constituted a procedural violation, but a substantive one that denied E.H. a FAPE. E.H.'s right to a FAPE was impeded when the District did not have an IEP or any services ready for him at the start of the school year despite the fact that

the District knew, or certainly should have known, that E.H. had been classified by the District in 2016, that the parents informed staff in late June 2018 that he had an IEP in 2016, and that the parents wrote to the District in August. The District never reached out to the parents that summer, they inexplicably failed to respond to the August letter, and only responded to the parents' request for a meeting after they sent a second letter to the District in November 2018 requesting to meet with the CST, at least two months after the start of the school year. Had E.H. presented himself to the District school in September, there would have been no services in place for him.

With respect to the 2018 ESY, however, I **CONCLUDE** that the District did not deny E.H. a FAPE, and petitioners are not entitled to any relief for their unilateral placement of E.H. in the Craig summer program for 2018. Petitioners only began the registration process with the District in late June 2018, when E.H. was already enrolled in the Craig School summer program, and the parents did not provide the District with any notice of their unilateral placement prior to mid-August. The District is under no obligation to reimburse petitioners for a unilateral placement for which they were not even provided reasonable notice.

Was Placement at the Craig School appropriate and are Petitioners Entitled to Tuition Reimbursement for the Craig School for the 2018–2019 School Year?

N.J.A.C. 6A:14-2.20(a) provides that a district board of education shall not be required to pay for the cost of education, including special education and related services, of a student with a disability if they made available FAPE and the parents elected to enroll the student in a nonpublic school, an early childhood program or an approved private school for students with disabilities.

However, having concluded that the District denied FAPE to E.H. at the start of the 2018–2019 school year, I am authorized to “grant such relief as [I determine] is appropriate.” 20 U.S.C. § 1415(e)(2). A parent who is compelled to unilaterally place a child in the face of a denial of FAPE need not unilaterally place the child in a school that meets state standards. Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15 (1993); L.M. ex rel H.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp 2d 290 (D.N.J. 2003). Rather,

“when a public-school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ (IDEA) if the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” Florence, 510 U.S. at 11 (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)). Since the Florence decision, the Supreme Court in Andrew F. has redefined FAPE. I therefore **CONCLUDE** that the placement made by petitioners is proper if, and only if, it was “reasonably calculated to enable [E.H.] to make progress appropriate in light of [his] circumstances.” Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. ____ (2017);137 S. Ct. 988; 197 L. Ed. 2d 335.

I **CONCLUDE** that the petitioners’ placement of E.H. at the Craig School for the 2018–2019 school year was proper as it was reasonably calculated to enable him to make progress in light of his circumstances. To address his dyslexia, impairment in reading and writing and other needs, E.H. received individualized and multi-sensory O-G instruction in a small classroom setting, where he could be easily redirected and where instruction can be repeated and reinforced as often as needed. He also received OT and speech and language therapy, and counseling was available to address his anxiety. E.H. responded well to the program in the summer of 2018 and had started to make some educational progress. Even when the CST did meet in December 2018, there was an understanding that several evaluations had to be conducted in order for the District to develop what it considered to be an appropriate program for E.H., and while the District conducted its evaluations and observations it was reasonable and appropriate for E.H. to remain at Craig.

Given the District’s neglect in failing to provide E.H. with an IEP at the start of the 2018–2019 school year, and its failure to even respond to petitioners’ requests for a CST referral until November 2018, compelling petitioners to keep E.H. at the Craig school, I **CONCLUDE** that petitioners are entitled to reimbursement for E.H.’s expenses at the Craig School for the 2018–2019 school year.

Burden of Proof

As a recipient of federal funds under the IDEA, 20 U.S.C.A. §1400 et seq., the State of New Jersey has a policy that assures all children with disabilities the right to a FAPE. 20 U.S.C.A. §1412. The responsibility to provide FAPE, including special education and related services rests with the local public school district. 20 U.S.C.A. §1401(9); N.J.A.C. 6A:14-1.1 et seq.; N.J.A.C. 6A:14-1.1(d). In accordance with N.J.S.A. 18A:46-1.1, the burden of proving that FAPE has been offered likewise rests with the school personnel. The District will have satisfied the requirements of law by providing E.H. with personalized instruction and sufficient support services “as are necessary to permit [him] ‘to benefit from the instruction.’” G.B. and D.B. et rel J.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009) (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)). In January 2008, New Jersey adopted legislation that placed the burden of proof and the burden of production in special education matters with the respective school district, regardless of which party seeks relief. N.J.S.A. 18A: 46-1.1. Accordingly, I **CONCLUDE** that the District has the burden of proof regarding the petition at issue.

Does the June 2019 IEP offer E.H. a FAPE for the 2019–2020 School Year?

The June 2019 IEP was proposed following several evaluations of E.H., two classroom observations at the Craig School, and after the District received and considered Lakin’s report. The District does not dispute that E.H. is severely and profoundly dyslexic or that he requires most of the supports listed in Lakin’s report. Where the District and the petitioners disagree is on the type of program E.H. requires and the effectiveness of the education E.H. has received at the Craig School. The District maintains that E.H. has only made minimal progress at the Craig School where E.H. received multi-sensory O-G instruction, and that the Corrective Reading program was proposed by the District as an attempt to achieve progress using a different approach. The District’s witnesses testified that the June 2019 IEP was appropriate for E.H. because it addressed many of his needs in the area of reading as well as his ADHD diagnosis, anxiety, sensory integration and OT. Petitioners, on the other hand, maintain that E.H.

has made meaningful progress, albeit slow, at the Craig school, and that his program at the school—which provides intensive, multi-sensory reading intervention in a small classroom throughout the day-- is the appropriate program to meet his needs. Petitioners maintain that the June 2019 IEP is not uniquely tailored to E.H.'s individual needs and fails to provide FAPE in part because it places E.H. in a large general education classroom with grade-level peers far above his current ability; it only provides in-class resource support for language arts, math and reading for 40 minutes each; and it does not provide for multi-sensory reading instruction throughout the day.

After considering the expert testimony and documentary evidence presented at the hearing, I **CONCLUDE** that the District has not met its burden of showing by a preponderance of the credible evidence that the June 2019 IEP offered E.H. an appropriate placement and that the proposed placement and program was reasonably calculated to enable E.H. to make meaningful progress in light of his disability. I recognize that the June 2019 IEP appropriately includes counseling services, OT, assistive technology and a list of several modifications that E.H. clearly requires, however, the District's witnesses did not convince me that E.H. would make any meaningful progress with a reading program that is limited to 40 minutes per day and is not multi-sensory. On the other hand, Lakin's expert testimony was persuasive in convincing me that given the profound and severe nature of E.H.'s dyslexia, and his impairment in reading and writing, together with his anxiety disorder, auditory processing disorder, ADHD, and poor working memory, E.H. requires an intensive and immersive program that provides him with small group, individualized and multi-sensory instruction to remediate his learning disability. The June 2019 IEP does not provide for such a program. Accordingly, I **CONCLUDE** that the June 2019 IEP is not tailored to E.H.'s individual needs and that the District, therefore, did not offer E.H. a FAPE for the 2019–2020 school year.

Was Placement at the Craig School appropriate and are E.H.'s Parents Entitled to Tuition Reimbursement for the Craig School for the 2019–2020 School Year?

As with the 2018–2019 school year, and for the reason stated above, I **CONCLUDE** that the petitioners' placement of E.H. at the Craig School for the 2019–2020 school year was proper as it was reasonably calculated to enable him to make

progress in light of his circumstances. Lakin testified credibly that E.H. was making meaningful progress at the Craig School and that that was the appropriate placement at least for the years at issue here. Given that the District’s proposed IEP for the 2019–2020 school year did not offer a FAPE, and that petitioners’ unilateral placement of E.H. at the Craig School was proper, I **CONCLUDE** that petitioners are entitled to reimbursement for E.H.’s expenses at the Craig School for the 2019–2020 school year.

ORDER

Based on the foregoing, it is **ORDERED** that the relief requested by petitioners as set forth above, and specifically reimbursement for the Craig School for the 2018–2019 and 2019–2020 school years, be and hereby is **GRANTED**.

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

January 7, 2021

DATE



SUSANA E. GUERRERO, ALJ

Date Received at Agency

Date Mailed to Parties:

jb

APPENDIX

LIST OF WITNESSES

For Petitioner:

S.R.
Deborah Reese
Dr. Phyllis Lakin

For Respondent:

Danae Heywood
Mary Ellen DiCataldo
Dr. Jennifer Weber

LIST OF EXHIBITS IN EVIDENCE

Joint:

- J-1 Battelle Developmental Inventory by Lafayette Learning Center dated January 19, 2016
- J-2 Morris School District Psychological Assessment dated March 3, 2016
- J-3 Morris School District Educational Assessment dated March 30, 2016
- J-4 IEP dated April 15, 2016
- J-5 ESC of Morris County – Report of Classification Conference & ISP Development Meeting dated May 10, 2017
- J-6 ESC of Morris County – Report of Classification Conference & ISP Development Meeting dated May 26, 2017
- J-7 ESC of Morris County – Individual Service Plan dated May 30, 2018
- J-8 Letter from Meltzer to Gilfillan dated August 15, 2018
- J-9 Letter from Meltzer to Gilfillan dated October 17, 2018
- J-10 Authorization for Morris County ESC
- J-11 Authorization for Craig School
- J-12 Authorization for Chatham Day School dated November 30, 2018
- J-13 Authorization for Chatham Day School dated December 10, 2018

- J-14 Authorization for Morris County ESC
- J-15 Morris School District – Initial Identification & Evaluation Planning-Proposed Action, Draft IEP dated December 10, 2018
- J-16 Morris School District Classroom Observation by DiCataldo
- J-17 Morris School District AT Assessment by Jeff Crane, OTR/L
- J-18 Morris School District Social History by Maher
- J-19 Letter from Meltzer to Gilfillan dated April 15, 2019
- J-20 Pediatric Neurodevelopmental Evaluation by Dr. Lanzkowsky
- J-21 Letter from Meltzer to Gilfillan dated May 9, 2019
- J-22 Morris School District IEP dated June 19, 2019
- J-23 Letter from Meltzer to Gilfillan dated July 9, 2019
- J-24 Report of Dr. Lakin, WISC-V, WIAT-III, KTEA-3
- J-25 Observation report of Joan Graham from Dr. Lakin’s observation
- J-26 Observation report of Dr. Weber
- J-27 CST Educational Evaluation dated February 21, 2019
- J-28 CV of Danae Heywood
- J-29 CV of Dr. Weber
- J-30 CV of Mary Ellen DiCataldo

For Petitioners:

- P-1 Report of Dr. Lakin
- P-2 Dr. Lakin’s CV
- P-3 Chatham Day School Kindergarten Report Card – First Trimester (2016–2017 SY)
- P-4 Chatham Day School Kindergarten Report Card – Second Trimester (2016–2017 SY)
- P-5 Chatham Day School Kindergarten Report Card – Third Trimester (2016–2017 SY)
- P-6 Chatham Day School Kindergarten Report Card – First Semester (2017–2018 SY)
- P-7 Chatham Day School Kindergarten Report Card – Second Semester (2017–2018 SY)
- P-8 PLAAFP by Deborah Reese
- P-9 Certifications of Deborah Reese
- P-10 The New Jersey Dyslexia Handbook
- P-11 Craig School Records

P-12 Craig School Curriculum

P-13 Craig School End of Year Reports, 2019–2020 SY