



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 08596-21

AGENCY DKT. NO. 2022-33454

D.L.,

Petitioner,

v.

**RAMAPO INDIAN HILLS REGIONAL
BOARD OF EDUCATION,**

Respondent.

D.L., petitioner, pro se

Eric Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

BEFORE **MARGARET M. MONACO**, ALJ:

Record Closed: July 21, 2022

Decided: August 9, 2022

STATEMENT OF THE CASE

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., (the IDEA), and the implementing federal and state regulations. Petitioner asserts that the Ramapo Indian Hills Regional Board of Education (the District) failed to provide him a free appropriate public education (FAPE).

PROCEDURAL HISTORY

On or about October 4, 2021, petitioner filed a request for due process with the Office of Special Education (OSE). Petitioner, who was then eighteen years of age, alleges:

I am 14 classes or 72.5 credits of graduation. The District has known about my hesitancy to return to in-person school since as early as May of 2021. The District wants me to go to Ramapo High School and take freshman and junior classes with kids much younger than me. This is giving me anxiety and I do not want to be bullied.

Petitioner further alleges that he was a victim of a “Hate Crime” incident and requests “a totally independent child study team to step in and remove [his] case from the District and by doing so have that new team fully evaluate . . . [his] courses taken, . . . determine what is needed for graduation, provide a transition plan and path to graduation, job training, etc.” On or about October 13, 2021, the District filed its Answer to Petitioner’s Request for Due Process and Separate Defenses, and the OSE transmitted the matter to the Office of Administrative Law, where it was filed for hearing.

A prehearing conference was held on November 10, 2021, and a prehearing order was issued on November 16, 2021, which memorialized that the hearing was scheduled for January 28 and February 2, 2022. The hearing scheduled for January 28, 2022 was adjourned at petitioner’s request with the District’s consent. The hearing commenced on February 2, 2022. At the hearing, the District offered testimony by the District’s former supervisor of special services, Dr. Stuart Barudin, after which the District rested its case. Petitioner testified on his own behalf and presented testimony by Dr. Burton Seitler. On February 17, 2022, petitioner’s mother (Ms. L.) e-mailed a letter entitled “REQUEST to AMEND THIS DUE PROCESS TO ADD COMPENSATORY EDUCATION, MONETARY RELIEF.”¹ The District opposed petitioner’s request, and on March 4, 2022, I issued an Order denying petitioner’s request to amend his due process request. Petitioner, through

¹ Petitioner has authorized Ms. L. to act on his behalf regarding matters pertaining to his education, and petitioner confirmed in an e-mail sent on February 24, 2022 that he “agreed with all the emails” his mother sent on his behalf and that “it’s okay that she sends emails for [him].” See P-9.

his mother, also articulated his desire to call additional District witnesses and sent an e-mail on February 5, 2022 addressing that request. On February 7, 2022, the District filed a motion to bar testimony by petitioner's proposed witnesses predicated on five-day disclosure rule, which I granted by Order dated March 9, 2022. The hearing continued on March 15, and April 18, 2022, during which petitioner recalled Dr. Barudin, and Ms. L. testified. Subsequently, the parties filed post-hearing submissions in support of their respective positions, along with transcripts of the hearing. Oral summations were entertained on July 21, 2022, on which date the record closed.

FACTUAL DISCUSSION

Many of the facts surrounding this matter are largely undisputed. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following pertinent **FACTS** and accept as **FACT** the testimony set forth below:

Petitioner is currently nineteen years of age and eligible for special education and related services under the classification category of communication impaired.

Petitioner was initially evaluated by the Oakland Child Study Team (CST) just shy of his third birthday and found eligible for special education and related services under the classification category of Preschool Disabled. He attended a Preschool Disabled Program at a public school in Oakland for the 2006–2007 and 2007–2008 school years. At petitioner's five-year-old reevaluation, he was found eligible for special education under the classification category of autistic and the District placed petitioner at a school in Paramus for Kindergarten and first grade (2008–2009, 2009–2010.) The District transferred petitioner to a self-contained program at a public school in Hawthorne for the 2010–2011 and 2011–2012 school years, and placed petitioner at the RISE Program in Ridgewood for third, fourth and fifth grades. Petitioner attended the District's middle school for sixth, seventh and eighth grades (2015–2016, 2016–2017, 2017–2018), and his classification category was changed to mild intellectual disability in middle school. For high school, the parent objected to petitioner's placement in the life skills program at Indian Hills High School, and the parent disenrolled petitioner from the District in

September 2018. The parent privately placed petitioner at the American Christian School in Wharton, where he attended part-time and participated in the school's Arrowsmith program. Petitioner was homeschooled the remainder of the day with tutors and online courses during his ninth and tenth grade years. (See R-5, R-7.)

On March 13, 2020, petitioner was enrolled in Ramapo High School (RHS) for the 2020–2021 school year and petitioner's eleventh-grade year. During the summer of 2020, and in or around July 2020, the director of student personnel services, Michael Marano (Marano), contacted Stuart Barudin (Barudin), the then supervisor of special services, about petitioner's enrollment in the District. Marano, who is in charge of the special services and the guidance departments at the high school, informed Barudin that petitioner had left the District two years earlier, petitioner had been homeschooled and was attending the Arrowsmith program at the parent's expense, and the parent was now interested in having petitioner return to RHS. The parent sought a program which would allow petitioner to attend RHS in the morning and to continue the Arrowsmith program in the afternoon. A schedule was developed for the 2020–2021 school year that would allow petitioner to take English, math, history, and gym at RHS in the morning and attend the Arrowsmith program in the afternoon.

The District conducted an initial evaluation of petitioner. Barudin explained that it was agreed that the District would treat petitioner as a new referral, noting that petitioner did not have a current IEP to review and his assessments were over a year old.

On August 3, 2020, the school social worker conducted a social history and issued a report dated August 30, 2020, and revised on December 8, 2020, and January 5, 2021. (R-7.)

On August 12, 2020, a speech-language evaluation of petitioner was performed. The report regarding that evaluation indicates that on the Clinical Evaluation of Language Fundamentals (CELF-5), petitioner's core language score, which "is most representative of [his] language abilities," was in the 2nd percentile for his age group and "indicative of a severe language impairment." (R-4.) On the CELF-5 sub-tests, petitioner scored in the average range for recalling sentences; the low range for formulated sentences and

semantic relationships; and the very low range for understanding spoken paragraphs. On the Test of Semantic Reasoning (TOSR), petitioner's standard score placed him below the 1st percentile for his age group, which was "indicative of a severe impairment in semantic skills." The evaluator further reported that petitioner "struggles to use language in a pragmatically appropriate manner," and "struggles to provide detailed information, use questions to maintain conversation, and ask for clarification." He also "struggled to use various parts of speech in grammatically correct sentences"; he "demonstrate[d] weak semantic skills"; and he "struggled to answer recall questions, understand inferences and make predictions based on orally presented material." Petitioner's working memory and ability to repeat sentences were relative strengths for petitioner.

On November 4, 2020, the District's LDT-C, Lauren Gallo, conducted an educational evaluation of petitioner, and she issued a report dated January 5, 2021, regarding that evaluation. (P-5.) Ms. Gallo reported that petitioner's overall academic achievement, as measured by the Woodcock-Johnson IV Broad Achievement standard score, was in the low range of others his age. Among the test's achievement measures, petitioner's standard scores were within the average range for one cluster (academic fluency) and three tests (sentence reading fluency, math facts fluency and sentence writing fluency). His scores were within the low average range for five clusters (reading fluency, math calculation skills, written language, broad written language and written expression) and three tests (spelling, oral reading and number matrices). Petitioner's scores were within the low range for six clusters (broad reading, basic reading skills, mathematics, broad mathematics, math problem solving and academic skills) and five tests (letter-word identification, applied problems, calculation, writing samples and word attack). His scores were within the very low range for two clusters (reading and academic applications) and one test (passage comprehension).

On December 14, 2020, the school psychologist conducted a psychological assessment of petitioner, and she issued a report dated December 18, 2020, regarding that evaluation. (P-6.) The report indicates that petitioner's general cognitive ability, as estimated by the Wechsler Intelligence Scale for Adults—Fourth Edition (WAIS-IV), was within the upper end of the borderline range; his verbal comprehension and perpetual reasoning abilities were in the low average range; his ability to sustain attention,

concentrate and exert mental control was in the borderline range; and his ability in processing simple or routine visual material without making errors was in the low average range.

According to petitioner's May 2021 IEP, on November 23, 2020, the CST determined that petitioner was eligible for special education and related services and held an initial IEP meeting on that date. (See R-8 at 1.) The IEP for the 2020–2021 school year was not introduced at the hearing. Either in that IEP or in the May 2021 IEP, petitioner's classification category was changed to communication impaired. (See Id. at 5.) During the 2020–2021 school year, petitioner attended RHS in the morning and continued to participate in the Arrowsmith program, at the parent's expense, in the afternoon. His later IEP reflects that petitioner's special education program that year consisted of in-class resource replacement classes in World Civilizations, Integrated Algebra and Geometry, English 1 and Applied Study Skills. (Id. at 1.)

In January 2021, someone hacked into petitioner's school account, obtained access into his English class during remote instruction, and sent bias messages to the class. (See P-4, P-11.) Petitioner was then attending the Arrowsmith program and was not a participant in the class when it occurred. This incident is the alleged "hate crime" referenced in petitioner's due process request.

On May 6, 2021, the CST held an annual review IEP meeting. At the time of that meeting, petitioner was less than one month away from his eighteenth birthday. According to the IEP, the participants at the meeting included petitioner's case manager (Lauren Gallo); Guidance Counselor Jennifer Perry; petitioner's special education English 1 teacher (Monica Archer); petitioner's special education Integrated Algebra and Geometry and Applied Study Skills teacher (Giuseppina Monterey); a general education teacher; Barudin; petitioner; and Ms. L. (R-8 at 2.) At the hearing, petitioner's then case manager, teachers and guidance counselor did not testify.

The IEP resulting from that meeting, which is the subject of the current dispute, provides that for the period of September 8, 2021 to May 5, 2022, petitioner's special education program would consist of in-class resource replacement classes in US History

1, Algebra 1, Biology and English 2, and in-class resource for reading. (R-8 at 1.) The listed classes are ninth and tenth grade level classes. Petitioner's program that year represented a full-day schedule at RHS.

The IEP includes a summary of the evaluations and social history conducted in 2020. (R-8 at 2-4.) In the "Present Levels of Academic Achievement and Functional Performance" (PLAAFP) section, the World Civilizations resource replacement teacher reported that petitioner was "pleasant and always brings a good attitude to class"; he "completes his assignment on time"; he "benefits from redirection and clarification with assignments"; and "he will advocate for understanding when uncertain of directions or procedures." (Id. at 5.) The English 1 resource replacement teacher noted that petitioner was presently in the teacher's English 1 resource replacement class; he was in that class in September but transferred to English 3 for the rest of the first marking; and petitioner transferred back to the teacher's English 1 class at the start of the second marking period. According to the English teacher, petitioner is "a regular participant in class"; he "will attempt to answer questions"; he "has struggled with a lack of prior knowledge of vocabulary terms related to themes of texts read in class, as well as with the pace of the class, often asking that instruction 'slow down'"; he "benefits from access to class notes, rephrased and restated directions, frequent teacher check-in, one-on-one conferencing, and chunking assignments"; he "consistently turns in his work on time"; and he "is a polite and respectful student." (Id. at 5-6.) The Integrated Algebra and Geometry teacher noted that petitioner was transferred into the teacher's class sometime after the first marking period. According to that teacher, petitioner is "a motivated student who wants to do well"; he "participates in class, completes all assignments on time and will ask questions when he needs clarifications"; he "struggles with multi-step concepts and multi-concepts on assessments"; and he "benefits from guided notes, study guides, calculator use, extra time, positive reinforcement, checking in for understanding, breakdown of multistep concepts, and clarifications and rereading of directions." (Id. at 6.) The Applied Study Skills teacher reported that petitioner "completes [the teacher's] study skills assignments on time"; he "uses the paraprofessional in the class to help assist with his assignments"; and he "uses his time to complete work for his other classes." (Ibid.)

According to the IEP, petitioner “needs a replacement curriculum, direct instruction, and small classes,” and petitioner “would also benefit from speech/language therapy/support.” (R-8 at 7.) The IEP sets forth a variety of modifications and supplementary aids in the general and/or special education classrooms. (Id. at 13.) According to the IEP, the IEP team considered the need for an extended school year (ESY) and, “[b]ased on all relevant factors, including the issue of regression and recoupment, it was determined that an [ESY] program is not required as there is no evidence of significant regression during a standard school calendar.” (Id. at 14.) The IEP indicates that on March 25, 2021, the District “received an email from parent waiving Speech Therapy Services.” (Id. at 5.) In the “Related Services” section, the IEP states, “Considered but not applicable” and “As Needed for consultation.” (Id. at 14.) In the “Graduation Requirements” section, the IEP provides that, “[b]ased on [petitioner’s] evaluations and Communication Impairment, the district/state language requirement is waived.” Petitioner was not exempted from the “Credit Hours” or any other graduation requirement, and the IEP indicates that a student must earn no less than 135 credits. (Id. at 16.)

The “Concerns of Parent” section lists parental concerns noted from the May 6, 2021 meeting. (R-8 at 5.) The listed concerns include whether petitioner could receive credit for certain programs/activities (i.e., credit for Arrowsmith, credit for Landmark Summer Program, PE credit for outside activities, health credit for Landmark); whether petitioner could be exempt from the two-year World Language requirement; ESY for 2021/2022; and add reading support to the 2021/2022 program. The IEP also lists parental concerns submitted in writing on May 6, 2021, which states, among other things, that a transition program is needed; that “[g]iven the pandemic with virtual learning, [petitioner] needs an [ESY]”; and “[w]hat accommodations can be used” for petitioner’s difficulty in auditory processing noted in the speech evaluation. (Ibid.) Although the “Concerns of Parent” section further states, “See attached requested IEP revisions from parent submitted on 5/6/21,” there is no attachment to the IEP. (Ibid.) In the “Describe any options considered and the reasons those options were rejected” section, the IEP states that “[o]n 5/6/21, the District received a draft IEP with revisions made by parent” and that “[t]his annual review IEP includes those requests that are appropriate.” (Id. at 17.)

The record includes correspondence between the parties after the May 6, 2021 IEP meeting. On May 12, 2021, Ms. L. sent an e-mail to the District requesting the credits that petitioner still needed to graduate. (P-13.) Guidance Counselor Perry responded by e-mail on May 13, 2021, which listed petitioner's proposed schedule of classes for the next two years. She further advised that "[w]ith [petitioner's] IEP, there are courses and/or graduation requirements that can be modified/exempted as we discussed at the meeting last week," and noted that the State requires 120 credits for graduation, whereas RHS requires 135 credits. (ibid.) On May 14, 2021, Ms. L. sent an e-mail to Ms. Perry, which, among other matters, noted that the proposed schedule includes World Language even though they spoke about an exemption based on petitioner's language-based learning disability and that she had asked the District to consider an alternative route to fulfil PE credits, which is "[s]till pending." (ibid.) On May 17, 2021, Ms. Perry sent an e-mail to Ms. L., which advised that "[t]he proposed schedule is in place until the proposed exemptions and adjustments would be reviewed and confirmed as per [petitioner's] IEP"; "[t]he potential scheduling options discussed at the last meeting would require further review and approval" by Marano and the District Director of Curriculum, Mr. Sutherland; and she could not evaluate the curriculum of Arrowsmith in relation to the State's standards, which must be done by Mr. Sutherland. (ibid.) Ms. Perry further explained the State's requirements for laboratory science, PE, and Health, along with the State's and the District's graduation credit requirements. She informed Ms. L. that if she was requesting alternatives to the State-based course graduation requirements, Marano would be the best point of contact and, if petitioner is unable to meet the District's credit requirement, "then this can be discussed and potentially adjusted as part of his IEP." On May 17, 2021, Ms. L. sent an e-mail to the former superintendent in which she expressed concerns and requested that petitioner's "case" be "presented to an unbiased 3rd party for review and consideration." (ibid.; P-12).

On June 17, 2021, an attorney retained by the parents e-mailed a six-page letter to Barudin. (P-6.) The letter advised, among other things, that petitioner "will not agree, for obvious reasons, to go back to the High School"; "[t]here is no way he would ever decide to re-live that traumatic portion of his life and face the ridicule of being an 18-year-old being gawked at by students who were previously two or three years behind him"; and

“[t]herefore, the [CST] must look at alternative ways and places to help [petitioner] obtain the credits he needs to get his high school diploma[.]” (P-6.) The attorney set forth examples of alternative schools and options, and advised that petitioner “also needs to be provided additional speech and language learning[.]”

On June 18, 2021, Barudin sent an e-mail to Ms. L. addressing matters raised in her recent e-mail. (P-14.) He informed Ms. L., among other things, that the District would not accept the State’s versus the District’s credit requirement and that the May 2021 IEP provides that petitioner is exempt from the world language requirement. Regarding credits for the Arrowsmith program, Barudin advised that the e-mail sent to her on May 26, 2021 provided a response from Mr. Sutherland, who is the District administrator that makes the determination of whether credits received from another school district can be substituted for the District’s graduation requirements. He further advised that there are no substitutes for Health/PE, which is required for each year a student is enrolled at RHS.

Petitioner completed the 2020–2021 school year and received passing grades in all of his classes. Petitioner attended his classes remotely that year. Petitioner did not return to in-person instruction at RHS when, at some point during that school year, petitioner was given the option of in-person instruction.

On June 24, 2021, District counsel informed the parent’s attorney that his request for a change in placement was forwarded to petitioner’s case manager and that, as is required, an IEP meeting will be scheduled. (P-15.) Additional correspondence transpired between the attorneys on June 22, June 23, June 24, and June 25, 2021, which addressed the scheduling of the IEP meeting and included District counsel’s advice that he asked “the District to schedule an IEP meeting forthwith.” (ibid.) On June 28, 2021, Barudin e-mailed Ms. L., indicating his understanding that she was requesting an IEP to discuss petitioner’s program and placement for the 2021–2022 school year and inquiring whether, pending attorney availability, she was available for the meeting on July 7, 19, 20 or 21. The e-mail further states, “Since the [CST] and teachers are not working over the summer, I will ask your consent to waive their attendance at the meeting” and that he and Guidance Counselor Perry were available on those dates. (ibid.) On July 1, 2021, the parent’s attorney sent an e-mail to Barudin in which the attorney objected to, and could

not agree with, Barudin's letter to Ms. L., "which sets out only one early July date for an IEP meeting[.]" The attorney advised that petitioner "needs to start taking the required courses now, and we would be derelict in our duties to wait until late July if, as is apparently the case, . . . [the July 7 date] is not able to work." The attorney requested Barudin to "reply as soon as is possible to remedy this." (P-7.) The record includes no further correspondence prior to the start of the 2021–2022 school year regarding the requested IEP meeting. However, Marano's later letter on August 27, 2021, refers to some type of meeting on July 20, which was one of the dates that Barudin had proposed for the IEP meeting in his June 28, 2021 e-mail. (See also P-17, e-mail from Ms. L. to Barudin which states, "you said that . . . consideration was presented to my attorney by the District attorney shortly after the last IEP meeting (on 7/20/21 or about)").

On or about July 28, 2021, Ms. L. submitted to the District a report of an Auditory Information Processing Re-assessment conducted on May 14, 2021. (See P-10.) According to that report, "[a]uditory processing disorders" were found "at the levels of auditory temporal (speed of) processing, integrating the pieces of linguistic information taken in to form the meaningful whole for comprehension and understanding (auditory lexical integration), and analyzing sounds (phonemes) in words (auditory phonological integration)." The evaluator noted that "a problem filtering background noises was found which may be related to some other underlying factors including possible self-regulation and executive functioning issues," and that "[t]hese problems can affect [petitioner's] abilities to 'get' what he hears (and reads since reading uses phonological and linguistic material)." The evaluator opined that interventions were needed and addressed various recommended interventions.

On August 27, 2021, Marano sent a letter to Ms. L. "as a follow-up to [her] emails to Mr. Barudin requesting that a third party propose a program for [petitioner's] 2021–2022 school year, to answer [her] questions about [petitioner's] course requirements, and to address [her] comments that [petitioner] does not want to attend Ramapo High School or Indian Hills High School next year." (P-8.) Marano advised, among other things, that the District was not granting her request to utilize a third party to develop petitioner's IEP, noting that the District has a legal obligation to develop and implement petitioner's IEP; the District did not find any reason to waive petitioner's participation in Physical Education

for the upcoming year; and the District believed that a study hall period will be beneficial for petitioner but, “as set forth by Mr. Barudin there are other options for the IEP team to consider” (e.g., consider if it is appropriate to waive the District’s science requirement). The letter further states:

In closing, the District looks forward to welcoming [petitioner] back for the 2021–2022 school year and anticipates that the proposed IEP will meet his needs. However, it appears based on your recent communication with Mr. Barudin that [petitioner] does not intend to return to [RHS]. Please let us know if [petitioner] is disenrolling from the District or if you or he have any specific requests for the IEP team to consider. If you share those with us in writing, the IEP team will consider them. Furthermore, as Mr. Barudin stated, he can arrange an IEP meeting to discuss your and [petitioner’s] concerns.

Petitioner did not attend RHS during the 2021–2022 school year. Petitioner testified that he likes to learn and wants to graduate. Petitioner explained that he did not go back to RHS in September 2021 because he was afraid of being bullied and he did not want to attend classes with students younger than him. He would not feel comfortable being in a class with fifteen-year-old classmates. Petitioner noted that he never attended RHS in-person, and he did not make any friends at the school. He would “not feel happy” if he had to attend RHS in-person and he would not go.

According to later correspondence, it appears that an IEP meeting took place on September 21, 2021, which, according to Barudin’s September 20, 2021 e-mail, was for the purpose of “discuss[ing] [petitioner’s] request to have virtual instruction and any other issue impacting him not starting the school year at [RHS].” (P-18; see P-16.)

On or about October 4, 2021, petitioner, who was then eighteen years of age, filed his request for due process.

THE TESTIMONY

At the hearing, the District offered one witness; Dr. Stuart Barudin, who previously served as the supervisor of special services. Petitioner testified on his own behalf and

offered testimony by his treating therapist, Dr. Burton Seidler, and Ms. L. Petitioner also recalled Dr. Barudin. Apart from the evidence that forms the foundation of the above findings of fact, a summary of other pertinent testimony follows.

Dr. Stuart Barudin

Barudin was qualified as an expert in special education. Barudin previously served as the supervisor of special services at the District for twenty-four months prior to his retirement on December 31, 2021. He served as the interim supervisor of special services specific to RHS for most of his tenure and as the supervisor of both high schools for approximately the last four months of his employment. Barudin's basic responsibilities included the supervision of the CST members and ensuring the implementation of students' IEPs at the high school. He holds a doctorate in special education and previously served in the positions of, among others, director of special services and interim director of special services in various school districts. Barudin was the principal of Garden Academy for two years, which is a New Jersey school for the disabled specializing in students with autism. He was also the principal of the Regional Day School for seven years and has worked in special education administration since 1990. (See R-9.)

Barudin was involved in the development of petitioner's IEP, and petitioner's placement in the appropriate classes, for the 2020–2021 school year because it was “unique” with the morning and afternoon program, and only to the extent of trying to develop that hybrid program. He explained that “normally . . . as a [s]upervisor or a [d]irector [he] is not involved in the development of an IEP” (e.g., a recommendation by the CST for an inclusion class versus a self-contained class).

Petitioner's May 2021 IEP for the 2021–2022 school year was prepared by petitioner's case manager (Lauren Gallo) under his supervision. Barudin testified that, “[b]ased on [his] experience with petitioner, based on . . . the recorded [PLAAFP], based on [petitioner's] evaluations, . . . I felt that [the IEP] was an appropriate . . . totally appropriate IEP with regard to FAPE and LRE [least restrictive environment].” He formed his opinion that the IEP offered a FAPE in the LRE appropriate to petitioner's needs at

the time the IEP was offered and no information was ever brought to his attention that prompted him to change his opinion. Petitioner's 2020 evaluations were obtained in furtherance of the preparation of the IEP and partially relied upon in the formation of the IEP. Based on the feedback that was received from petitioner's teachers during the 2020–2021 school year, Barudin believed that the IEP accurately reflected how petitioner had been performing in his classes. Regarding the reason why speech services were not included in the IEP, Barudin testified that when the CST included speech in the previous IEP, Ms. L. decided that she did not want it, "so we decided not to continue it in the new IEP." Barudin did not recall if he asked Ms. L. to continue speech. He further explained, "because [petitioner] had not had [s]peech . . . the previous school year . . . there was no current level of [s]peech[,] and there was no indication he needed another [s]peech [e]valuation, so we did not feel the need to include a Speech-Language Specialist in this IEP Team." Barudin admitted that it "would be unusual" not to include speech services for a child who is classified as communication impaired. The District was aware of petitioner's revised homeschool transcript (P-5) when it developed the IEP for the 2021–2022 school year. According to Barudin, "we probably did review . . . [the revised homeschool transcript] and consider this in developing . . . [that] IEP." Barudin testified that, during all the meetings he had with the CST regarding petitioner, at no point did Ms. L.'s position with the District come up in conversation, and Ms. L.'s position had no impact on petitioner's May 2021 IEP or the District staff's conduct regarding petitioner's education.

After the issuance of the IEP, there were some disputes over credits and classes that were needed for petitioner to receive a diploma. Barudin explained that the Board of Education sets the number of credits and the required courses, and he is not the person that fortifies the requirements for graduation. Those discussions did not change Barudin's opinion that the May 2021 IEP offered petitioner FAPE in the LRE appropriate to his needs. Barudin noted that there was no proposal to end petitioner's public-school career before he obtained his diploma. Barudin did not grant petitioner's request for an independent CST since the New Jersey Administrative Code does not allow a parent to request an independent CST to evaluate the current IEP and to make recommendations. He noted that petitioner was misconstruing N.J.A.C. 6A:14-5.1, and a request for an

independent CST has never come up in his role as a special education director and supervisor for over twenty-five years in ten different districts.

Barudin learned in the Spring of 2021 that petitioner was hesitant to return to in-person instruction. Barudin understood that petitioner did not want to return to school because he did not want to wear a mask during his classes and he was concerned about taking classes with younger students. Barudin was not presented with any expert report that petitioner should not be attending school under these circumstances. In Barudin's opinion, the IEP remained appropriate notwithstanding that information. Regarding the District's response to petitioner's hesitation to return to school in-person, Barudin described that there were a series of correspondence between either the principal or Marano responding to those comments. That correspondence was not introduced at the hearing.

Barudin explained that the District required all students, staff and anyone in the building to wear a mask in the building. According to Barudin, the District received documentation from petitioner's psychologist indicating that it was problematic for petitioner to be in-person and that accommodations should have been made for him to sit in class (i.e., sit behind plexiglass), which the District rejected based on the current situation in the building. Barudin did not remember the outcome of the District's rejection or the exact timelines. Regardless of the mask issue, petitioner participated in school during the 2020–2021 school year. The only correspondence in the record from petitioner's psychologist addressing the mask issue is a letter dated October 23, 2020, in which the psychologist proposed the use of a plexiglass screen and/or a plexiglass facemask during petitioner's evaluation. (See P-20.)

Barudin testified that he was first aware that petitioner was having hesitancy about coming into the District in September 2021, when petitioner submitted an e-mail to Ms. Gallo saying that he was not going to attend school. The record does not reveal when petitioner submitted that e-mail, which was not introduced at the hearing. After looking at the June 17, 2021 letter from petitioner's attorney, Barudin had a "vague recollection" of the letter. He described that the letter is "just basically telling us [the attorney's] opinion of the events"; Barudin did not "see any request for action"; and Barudin did not feel the

need to respond, and “probably did not respond,” to the letter. Barudin did not interpret the letter as asking the CST or him to look at alternatives and in his opinion the letter did not “trigger a request for an IEP meeting.” He did not recall whether the letter was his first indication that petitioner was not returning to school.

Barudin addressed the protocol when a special education student exhibits school refusal. He testified, “certainly I would say that we need to exhaust every possible avenue to get the student to come to school, whether it’s a review and revise [of] the IEP, whether it’s counseling, [or] whether it’s a change in the accommodations or modifications . . . so the protocol would be to review and revise the IEP if . . . necessary.” As to the protocol done when the District realized that there was a refusal by petitioner, according to Barudin, the District “offered to have an IEP meeting to discuss the school refusal and . . . [t]he student rejected the request to have an IEP meeting.” He described that there were e-mails back and forth regarding that issue, which he did not possess at the hearing. The record does not include any e-mail from petitioner rejecting an IEP meeting.

Barudin explained that the IEP was developed before the District received the parent’s independent auditory processing evaluation, which the District received after the school year had ended and probably in the summer of 2021. Barudin opined that the auditory processing evaluation would have “zero impact” on the courses petitioner needed to take to graduate. The evaluation “might impact the accommodations and modifications” in the IEP. Barudin indicated that the District would have considered the evaluation when it received it, and at any point could have reconvened the IEP team to review and revise the IEP, and that the District developed the May 2021 IEP based on the most current information at that time. He testified that the District “tried to reconvene the IEP Team” after the District received the auditory processing evaluation but “we were not able to do that.” Barudin did not recall the reason why an IEP meeting did not take place but noted that the CST does not work in the summer. He did not recall the exact attempts to reconvene the IEP team prior to the school year or at the beginning of the school year. On recall, Barudin then testified that when the District received the report sometime during the summer “we requested to reconvene the IEP team and . . . you guys denied it.” According to Barudin, the District’s IEP meeting request “happened around the same time that the student informed the District that he was not going to come to

school,” and “when we tried to hold an IEP meeting with the student and the parent to discuss that and to try to deal with that they all rejected . . . the idea to have a meeting [s]o there was no forum in which for us to discuss [petitioner’s] school refusal and/or the Audiological Evaluation that came in.” He further testified that when petitioner did not return to school in September, the District made numerous attempts to hold an IEP meeting to discuss the reasons that he refused to come to school, and petitioner rejected the request to hold an IEP meeting.

Barudin is not certified as a CST member specialist (i.e., school psychologist, LDT-C, school social worker, speech language specialist) and has never worked as a guidance counselor. He did not believe that there is any one person in the District who is the most knowledgeable person regarding petitioner’s educational plan. He explained that it is a “team effort” and he believed that all the individuals involved (i.e., teachers, CST, administrators) are “very knowledgeable.” The IEP team, and not one individual, has the final say regarding petitioner’s educational program. Regarding whether petitioner was ever tested for reading, math, or English, Barudin explained that the LDT-C’s evaluation includes math and language components. He was not aware of any other testing. Barudin did not know if petitioner was tested using a Naviance Assessment but explained that this assessment would come from the guidance department and does not test math or English.

Dr. Burton Seitler

Seitler testified on behalf of petitioner and was qualified as an expert in psychology. He is a licensed clinical psychologist in New Jersey and Pennsylvania. He previously worked as a school psychologist and served as a member of the CST at a New Jersey public school (grades 4 through 12) and in New York (grades K-12). He is the head of a psychoanalytic institute and the founder and editor-in-chief of a psychoanalytic empirical research journal.

Seitler has been petitioner’s treating therapist for approximately the last four years and has seen petitioner on a weekly basis during that period. He authored a letter on January 17, 2022. (P-1.) In the letter, Seitler stated that “either the specific type, or an

excessive amount of stimuli can sometimes be overwhelming” for petitioner, and “a number of events can provoke and generate over-reactions on his part.” “In particular, [petitioner] is still highly sensitive and reactive to pressure or *feeling under the gun*, especially in the face of certain queries or forms of questioning” and, “[s]pecifically speaking, those things that have to do with anything that may preclude and interfere with his ability to verbally express himself are usually problematic.” Seitler reported that this was “consistent with [his] observations during his psychotherapy sessions, as well as formal evaluations that describe [petitioner] as exhibiting severe expressive language limitations.” In the letter, Seitler opined that petitioner “still needs a program that provides important modifications to fit his individualized needs in the least restrictive environment” and that “time is of the essence in terms of his educational, psychological, social, cognitive, and conative growth.”

Seitler testified that petitioner “has particular levels of sensitivity that are extraordinary and beyond the pale.” His “emotional skin sensitivity is extraordinarily high and he is particularly reactive to stimuli that he regards as excessive and which he internalizes as bombarding him.” Seitler explained that petitioner is “particularly sensitive to an excessive amount of stimuli or particular types of stimuli that are potentially overwhelming to him and as a result of that he is skittish about attending school[.]” “On those occasions he is reactive, with the pressure he feels under the gun, and his tendency is to . . . back off.” Seitler noted that some people would call that “school refusal,” but he did not “like that particular term because it almost sounds like the child is oppositional, defiant, or negativistic and that’s not the case” with petitioner. “He is just being overloaded and he is just trying to do the best he can to shield himself.”

Seitler opined that the issue of petitioner attending RHS is “problematical.” It was problematic when he attended on a part-time basis during the 2020–2021 school year “in terms of his emotions,” not in terms of his grades, and petitioner “would be upset.” As to whether petitioner could attend school with lower age students, he testified that petitioner “has already expressed to me that he has . . . a great deal of hesitancy about that, he would feel like a fish out of water,” and Seitler opined that it “would be a severe drawback.” Regarding how petitioner would respond to questions from his peers that he was eighteen years of age, Seitler opined that it “would make him feel very self-conscious,” noting that

petitioner had “already said that to [him] when [they] talk about the prospect of returning to school[.]” He explained that “this is a young man who is moving on with his life and trying to . . . do things that young men do, drive and things of that nature,” and petitioner “is very, very aware of . . . wanting to fit in and doesn’t necessarily feel like he does[.]” Seitler did not believe petitioner “would feel like he was fitting in with a lower age group[.]” He opined that petitioner would have a “tough time” if he physically went back to school both “socializing” and “with the material itself” because the courses in the IEP are “tough courses.” Petitioner shared with Seitler that he is afraid of being bullied and that he has been picked on before. Petitioner told Seitler that “he worries about being bullied, he worries about being with younger kids and that he wouldn’t fit in, and . . . it’s hard for him to tell people[.]” Seitler opined that “the socialization by itself . . . might exacerbate any anxiety level he had to begin with and produce [the] very thing you don’t want to happen which is a negative reaction . . . to school.” He noted that it is “not always predictable when [petitioner] is going to show that he . . . has anxiety until he had already moved and . . . when he is running from it you already know he is in flight and it’s too late to intercept it,” and “up until this point he might be feeling it and it’s not visible.” Regarding petitioner’s expressive language limitations, petitioner at times “struggles for words” and “struggles for the meaning of words.” He described that petitioner thinks someone says “x, y, and z” when they really said “a, b, and c.”

Seitler did not attend the May 2021 IEP meeting and had not seen petitioner’s IEP from that meeting. He did not conduct any formal testing to arrive at his determination that petitioner should not receive his educational services at a public high school. Seitler determined “a year or more” before his testimony that it was not appropriate for petitioner to return to RHS for twelfth grade. He explained the need to accumulate data and that he had not made the determination that the District’s program was inappropriate “until this accumulation of [his] experiences with [petitioner] until lately[.]” After Seitler made this determination, he did not prepare a report for submission to the District and did not have contact with the District about the May 2021 IEP. He agreed that one thing an individual needs to do in the United States to move on with his/her life is to obtain a high school diploma.

Seitler had previously authored a letter to the District in the midst of COVID about petitioner's sensitivity to wearing a mask and requesting an allowance for petitioner regarding masking. Seitler was aware that petitioner attended the entire 2020–2021 school year remotely and that when petitioner had the option of attending school in-person that year he chose not to physically go into the school. Petitioner did not want to go into the school based on the same kind of hesitation and regardless of the mask issue.

D.L.

Petitioner testified that he really did not know, and “maybe 10 times or 20,” he spoke to individuals at RHS regarding how he was feeling about not coming to school. He spoke to his teachers virtually about not going to school and to Guidance Counselor Perry. He also spoke with Barudin about not going back to school but did not recall when this occurred.

Ms. L.

Ms. L. testified that petitioner's middle school years in the District were filled with bullying by his peers. She indicated that during the 2020–2021 school year petitioner was in ninth-grade level classes with fourteen- and fifteen-year-old students and “got teased about it from his peers.” The IEP for the 2021–2022 school year includes ninth and tenth grade classes.

Regarding the May 2021 IEP, Ms. L. described that the IEP contains discrepancies, which she brought to the District's attention but were not corrected (e.g., referral and consent for evaluation dates). She also articulated other issues regarding the IEP including, among others, those addressed below. Ms. L. noted that the IEP states that on March 25, 2021, the District received an e-mail from her waiving speech therapy services. Ms. L. explained that the reason she waived speech therapy services was because petitioner's “schedule was so complicated at that time with the hybrid back and forth”; she was self-funding speech services for petitioner; and she “didn't want them to pull him out of any classes that he was going [to] in the morning, which is what they wanted to do in order to provide speech services” and which Ms. L. believed “would be

another disruption to [petitioner's] learning.” Ms. L. testified that this did not mean that she waived speech services for the 2021–2022 school year. During the 2021–2022 school year, petitioner would then be attending RHS full-time with no Arrowsmith program and Ms. L. did not waive his rights to speech. Although the IEP states “Naviance Assessments,” Grades 9, 10, 11 and 12, “ongoing” in the “Functional Vocational Evaluation” section, Ms. L. indicated that petitioner “has never taken a Naviance, he’s never been assessed for his reading, writing, math skills, so it says ongoing, but . . . we have never done any of that.” The IEP states “n/a” in related services section. Ms. L. testified that this was never discussed, petitioner is communication impaired, and “the notion that he will not get [s]peech . . . is outrageous.” The “Annual Measurable Academic and Functional Goals” in the IEP were never reviewed, and Ms. L. did not know how the District reached these goals. Ms. L. testified that, “[a]ccording to [the] IEP, [petitioner] was never assessed for his levels of reading, writing, he was never assessed other than his evaluations, there was no testing done,” so she was not sure how Barudin could determine that the IEP was appropriate with regard to FAPE and LRE and “how the IEP reflects that.” She agreed that the educational evaluation tested petitioner for reading.

In Ms. L.’s view, the May 2021 IEP does not offer petitioner FAPE “because it never considered specifically and individually what [petitioner] needed,” it is “not individualized to him,” and it does not “consider his social and emotional needs as an 18-year-old.” The IEP does not consider petitioner’s eighteen-year-old age in the sense that the District proposed that he attend freshman and sophomore classes. The IEP also does not “talk about transition or real transition plans” and “what [petitioner] is going to do for vocational or college prep[.]” Ms. L. had questions about the curriculum, and there were “no real talks” about his “home school transition,” just constant e-mails back and forth regarding what the District would not accept or consider. Regarding whether she expressed during the IEP meeting an alternative other than going to RHS or the issue regarding petitioner’s age, Ms. L. responded, “[a]bsolutely, . . . we clocked in real early with my lawyer at the time” and did not hear alternatives from the District until after petitioner did not attend school in September 2021. Ms. L. described that in approximately April/May 2021, she was “getting very frustrated with the District,” and she retained a lawyer in May 2021. She also described that “[w]hen we were going through the IEP and I was saying these things

that they were providing were inappropriate,” the District did not explore or discuss alternatives. In her view, the District “never collaborated.”

LEGAL DISCUSSION

The IDEA provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179–80 (1982). One of the purposes of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] 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. § 1400(d)(1)(A). To qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rest with the local public-school district. N.J.A.C. 6A:14-1.1(d). The district shoulders the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

A FAPE includes both “special education” and “related services.” 20 U.S.C. § 1401(9). “Special education” is “specially designed instruction . . . to meet the unique needs of a child with a disability” and “related services” are the support services “required to assist a child . . . to benefit from” that instruction. 20 U.S.C. § 1401(26)(A) and (29). The FAPE mandate requires the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley, 458 U.S. at 203.

In order “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S.Ct. 988, 999 (2017). The United States Supreme Court has recognized that “this standard is markedly more demanding than the ‘merely more than de minimis’ test,” and “a student offered an educational program providing ‘merely more than de minimis’ progress from year to year can hardly be said to have been offered an education at all.” Id. at 1000–01.

In addressing the quantum of educational benefit required, the Third Circuit has also made clear that more than a “trivial” or “de minimis” educational benefit is required and articulated that the appropriate standard is whether the IEP provides for “significant learning” and confers “meaningful” educational benefit to the child. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003); T.R. v. Kingwood Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988), cert. den. sub. nom. Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030 (1989). The determination of whether a given IEP has satisfied the required standard must be assessed in light of the individual potential and educational needs of the student. T.R., 205 F.3d at 578; Ridgewood, 172 F.3d at 247–48.

The IEP has been described as “the centerpiece of the statute’s education delivery system for disabled children.” Honig v. Doe, 484 U.S. 305, 311 (1988). It is the means by which special education and related services are “tailored to the unique needs” of a particular student. Rowley, 458 U.S. at 181. An IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C. § 1414 (d)(2) and (4); N.J.A.C. 6A:14-3.7(a)(1) and (i). It must “be drafted in compliance with a detailed set of procedures,” which “emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances.” Andrew F., 137 S.Ct. at 994. The IEP team shall review any lack of expected progress toward the annual goals and in the general curriculum; the results of any reevaluation; information about the student, including information provided by the parents, current classroom-based assessments and observations, and the observations of teachers and related-services providers; the student’s anticipated needs; and other relevant matters. N.J.A.C. 6A:14-3.7(j).

An IEP must also include various elements. See 20 U.S.C. § 1414(d)(1)(A); N.J.A.C. 6A:14-3.7(e). It must include a statement of the student’s present levels of academic achievement and functional performance and a statement of measurable annual academic and functional goals. N.J.A.C. 6A:14-3.7(e)(1) and (2). The annual academic and functional goals must be “measurable and apprise parents and educational personnel . . . of the expected level of achievement attendant to each goal” and include

benchmarks or short-term objectives related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(2) and (3). The IEP must further include a statement of the special education and related services and supplementary aids and services that will be provided for the student, along with any program modifications or supports. N.J.A.C. 6A:14-3.7(e)(4). It must include, beginning with the IEP in place for the school year when the student will turn age sixteen, "appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, if appropriate, independent living, and the transition services including a course of study needed to assist the child in reaching those goals." N.J.A.C. 6A:14-3.7(e)(12). Additionally, beginning at age fourteen, the IEP must include "a statement of the State and local graduation requirements that the student shall be expected to meet," which shall be reviewed annually. N.J.A.C. 6A:14-3.7(e)(9). "If a student with a disability is exempted from, or there is a modification to, local or State high school graduation requirements, the statement shall include . . . [c]onsistent with N.J.A.C. 6A:14-4.11, a rationale for the exemption or modification based on the student's educational needs; and . . . [a] description of the alternate proficiencies to be achieved by the student to qualify for a State-endorsed diploma." Ibid. In turn, N.J.A.C. 6A:14-4.11(a) provides that a student with a disability "shall meet the high school graduation requirements pursuant to N.J.A.C. 6A:8-5.1, except as specified in the student's IEP," and "[t]he IEP shall specify which requirements would qualify the student with a disability for the State-endorsed diploma issued by the district board of education responsible for his or her education."

In the words of the New Jersey Supreme Court, "[w]ithout an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP." Lasari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 48 (1989). The case manager, who must "[b]e knowledgeable about the student's educational needs and program," is charged with the responsibility of "coordinat[ing] the development, monitoring and evaluation of the effectiveness of the IEP," "facilitat[ing] communication between home and school," and "coordinat[ing] the annual review and reevaluation process." N.J.A.C. 6A:14-3.2(b) and (c).

“The IEP must aim to enable the child to make progress,” and the “‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials.” Endrew F., 137 S.Ct. at 999. The issue of whether an IEP is appropriate is fact sensitive in nature. In connection with this determination, “the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined.” Lascari, 116 N.J. at 30. It is necessary to “determine the appropriateness of an IEP as of the time it was made[.]” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564–65 (3d Cir. 2010). “[E]vidence acquired subsequently to the creation of an IEP” should “only” be used “to evaluate the reasonableness of the school district’s decisions at the time that they were made.” Id. at 565. “Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” Fuhrman v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993). In other words, “the appropriateness of a student’s placement must be assessed in terms of its appropriateness at the time it is created and not at some later date when one has the benefit of the child’s actual experience.” Id. at 1041.

The adequacy of a given IEP will turn “on the unique circumstances of the child for whom it was created.” Endrew F., 137 S.Ct. at 1001. The Endrew F. Court observed that the “absence of a bright-line rule . . . should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” Endrew F., 137 S.Ct. at 1001 (quoting Rowley, 458 U.S. at 206). This “deference is based on the application of expertise and the exercise of judgment by school authorities,” who are vested “with responsibility for decisions of critical importance to the life of a disabled child.” Endrew F., 137 S.Ct. at 1001. In this regard, “[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” Id. at 1002.

The IDEA’s FAPE requirement also includes a mainstreaming component, requiring education in the LRE. S.H., 336 F.3d at 265; 20 U.S.C. § 1412(a)(5)(A). “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).

There is a two-part inquiry when reviewing alleged violations of the IDEA: whether the district “complied with the procedures set forth in the Act” and whether the IEP “developed through the Act’s procedures [is] reasonably calculated to enable the child to receive educational benefits.” Rowley, 458 U.S. 206–07. Not all procedural violations will rise to a substantive deprivation of FAPE. Rather, this forum may find that a child did not receive a FAPE “only if the procedural inadequacies . . . impeded the child’s right to a free appropriate public education”; “significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child”; or “caused a deprivation of educational benefits.” 20 U.S.C. 1415(f)(3)(E)(ii); see N.J.A.C. 6A:14-2.7(k).

ANALYSIS AND CONCLUSIONS

Prior to addressing the critical issue concerning whether the District offered a FAPE to petitioner, it is necessary to discuss the scope of the claims in this proceeding. To the extent that petitioner has raised issues regarding the District’s failure to afford him course credit for certain programs or activities, and the District’s failure to include science in his 2020–2021 schedule, these matters do not involve special education related matters and are not properly before this forum. Further, although petitioner’s brief asserts various claims concerning events that preceded the May 2021 IEP, such as the untimeliness of the District’s evaluations, the issues for disposition are limited to the claims set forth in the petition. 20 U.S.C. § 1415(f) (3)(B); see N.J.A.C. 6A:14-2.7(c). In short, petitioner’s challenge to matters relating to his evaluations and his initial IEP for the 2020–2021 school year are beyond the scope of petitioner’s due process request. I **CONCLUDE** that petitioner’s claims and any appropriate relief are limited to those relating to the May 2021 IEP.

The pivotal issue is whether the IEP for the 2021–2022 school year was reasonably calculated to provide petitioner with the opportunity for significant learning and meaningful educational benefit. At a due process hearing, the obligation of the parents

is to “merely to place in issue the appropriateness of the IEP.” Lascari, 116 N.J. at 46. The District shoulders the burden of establishing, by a preponderance of the credible, competent evidence, that it provided a FAPE to petitioner. In evaluating whether the District has satisfied its required burden, it is necessary for me to assess and weigh the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness’s testimony. It requires an overall assessment of the witness’s testimony in light of its rationality, internal consistency and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself,” in that “[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony as “inherently incredible” and may also reject testimony when “it is inconsistent with other testimony or with common experience” or “overborne” by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The nature of the evidence presented must also be considered. Hearsay evidence is admissible in administrative proceedings and “shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.” N.J.A.C. 1:1-15.5(a). Notwithstanding the admissibility of hearsay evidence, the “residuum rule” requires 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); see Weston v. State, 60 N.J. 36, 51 (1972) (a “fact finding or a legal determination cannot be based upon hearsay alone” and “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.”).

It is further necessary to evaluate and weigh the competing expert testimony offered at the hearing. It is within the province of the finder of facts to determine the credibility, weight, and probative value of the expert testimony. State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied, 127 N.J. 321 (1990); Rubanick v. Witco Chem.

Corp., 242 N.J. Super. 36, 48 (App. Div. 1990), modified on other grounds and remanded, 125 N.J. 421 (1991). It is well settled that “[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated.” Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted). An expert’s opinion must be “supported by factual evidence or other data.” Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (citation omitted); see N.J.R.E. 703. The expert must “be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.” Townsend, 221 N.J. at 55 (citation omitted). An expert’s conclusion may not be “based merely on unfounded speculation and unquantified possibilities.” Ibid. (citations omitted). In other words, the expert must “give the why and wherefore of his or her opinion, rather than a mere conclusion.” State v. Townsend, 186 N.J. 473, 494 (2006) (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401(App. Div. 2002); see also Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)(explaining that “an expert’s bare conclusion[], unsupported by factual evidence, is inadmissible.”). Our courts have recognized that “[a] party’s burden of proof . . . may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert’s speculation that contradicts that record.” Townsend, 221 N.J. at 55; see Polzo v. County of Essex, 196 N.J. 569, 584 (2008).

The foundation of the District’s case that the May 2021 IEP was reasonably calculated to confer meaningful educational benefit to petitioner is predicated solely on the testimony of Barudin. The District contends in its post-hearing submission that it “demonstrated through unchallenged expert testimony that the May 2021 IEP . . . offered [petitioner] a free, appropriate public education in the least restrictive environment appropriate to his needs,” and that, “[a]s this testimony was credible and supported by competent evidence, the District has carried its burden of proof and compliance with the IDEA.”

In this regard, Barudin testified that, “[b]ased on [his] experience with petitioner, based on . . . the recorded [PLAAFP], based on [petitioner’s] evaluations, . . . I felt that [the IEP] was an appropriate . . . totally appropriate IEP with regard to FAPE and LRE.” Although Barudin possesses vast experience in realm of special education in his roles as special education director and supervisor, he has never served as a member of a CST

and does not possess the credentials necessary to be a school psychologist, an LDT-C, a school social worker or a speech-language specialist. Accordingly, Barudin lacks the qualifications to opine on matters within the scope of those specialties. Barudin also did not detail his “experience” with petitioner which, based on Barudin’s limited employment with the District, only encompassed the period beginning with the prior school year. Although Barudin testified that based on the feedback that was received from petitioner’s teachers during the 2020–2021 school year, he believed that the IEP accurately reflected how petitioner had been performing in his classes, the record does not disclose the nature of the “feedback” received from petitioner’s teachers, which is plainly hearsay, and no evidence suggests that Barudin verified the accuracy of any information he may have received through observations or a review of documentation. Significantly, Barudin did not explain the factual foundation for his conclusion, or the rationale and reasons that logically supported his opinion, that the May 2021 IEP offered a FAPE in the LRE appropriate to petitioner’s needs.

A canvas of Barudin’s testimony further raises doubt as to the accuracy and reliability of his testimony and the weight to be afforded to his rendition. Barudin was unable to recall many events and the timeline when events occurred. Other testimony was either unsupported by the record or inconsistent with evidence in the record and Barudin’s own testimony. For example, Barudin testified that he was first aware that petitioner was having hesitancy about coming into the District in September 2021, when petitioner submitted an e-mail to Ms. Gallo. The record does not reveal when petitioner submitted that e-mail, which was not introduced at the hearing. Barudin later admitted receiving the June 17, 2021 letter from petitioner’s attorney, but did not recall whether the letter was his first indication that petitioner was not returning to school. Although Barudin testified that the letter did not “trigger a request for an IEP meeting,” the evidence indicates that shortly after that letter District counsel informed the parent’s attorney on June 24, 2021 that an IEP meeting will be scheduled regarding the attorney’s request for a change in placement. (P-15.) Although Barudin initially testified that the District “tried to reconvene the IEP Team” after the District received the auditory processing evaluation but “we were not able to do that,” and he did not recall why an IEP meeting did not take place or the exact attempts to reconvene the IEP team prior to the school year or at the beginning of the school year, on recall he offered irreconcilable testimony, which is also

not supported by other evidence in the record. On recall, Barudin then testified when the District received the auditory processing report sometime during the summer “we requested to reconvene the IEP team and . . . you guys denied it”; the District’s IEP meeting request “happened around the same time that the student informed the District that he was not going to come to school”; and “when we tried to hold an IEP meeting with the student and the parent to discuss that and to try to deal with that they all rejected . . . the idea to have a meeting [s]o there was no forum in which for us to discuss [petitioner’s] school refusal and/or the Audiological Evaluation that came in.” He further testified that when petitioner did not return to school in September, the District made numerous attempts to hold an IEP meeting to discuss the reasons that he refused to come to school and petitioner rejected the request to hold an IEP meeting. Ms. L. offered undisputed testimony that she submitted the auditory processing report to the District on or about July 28, 2021 or over month after the June 17, 2021 letter from petitioner’s attorney that made clear that petitioner would not be attending RHS. The record also does not include any correspondence from petitioner or Ms. L. rejecting the District’s IEP meeting requests but, instead, includes correspondence addressing the scheduling of that meeting in July (see P-7, P-15), other correspondence that suggests that an IEP meeting was held on July 20, 2021 (see P-8, P-17), and correspondence evidencing that an IEP meeting took place on September 21, 2021. (See P-16, P-18.) Simply put, although this testimony involved events that occurred after the May 2021 IEP meeting, the testimony casts a cloud of suspicion as to the overall accuracy of Barudin’s recollection and testimony.

At the hearing, the District did not offer testimony by Ms. Gallo, who served as petitioner’s case manager, and had direct involvement in the IEP meeting and the preparation of the IEP in issue. The District did not present the teachers who attended the IEP meeting, the teachers who addressed petitioner’s performance in the PLAAFP, Guidance Counselor Perry, and/or the individuals who conducted the evaluations in 2020. The record is bereft of testimony by a District representative who possessed first-hand knowledge regarding petitioner’s progress or lack of progress, and petitioner’s needs at the time of the offered IEP, in support of the appropriateness of that IEP. Further, other than the information recited in the PLAAFP, the District offered no documentation, such as report cards, classwork, testing, progress reports and the like in support of the offered IEP and no evidence regarding petitioner’s progress in meeting his goals and/or the

development of the goals in the May 2021 IEP. The PLAAFP lends little guidance on petitioner's progress during the 2020–2021 school year and reveals that petitioner had been transferred to lower-level English and math classes after the first semester. Apart from this, the recounted reports in the PLAAFP by petitioner's teachers, who cannot be cross-examined, are plainly hearsay and insufficient to support an ultimate finding of fact as to petitioner's performance under the residuum rule.

The District's proofs do not disclose the matters addressed at the May IEP meeting, including options considered, determinations made, and the basis for the various IEP components. For example, no testimony was offered to support the appropriateness of petitioner's placement in in-class resource replacement classes for his academic subjects and in-class resource for reading, or the appropriateness of the listed modifications and supplementary aids, including how those classes, modifications and aids would address petitioner's needs as identified in the PLAAFP and petitioner's evaluations. Inasmuch as petitioner's IEP from the prior school year was not introduced, it is also impossible to ascertain if additional supports were added to petitioner's May 2021 IEP or if items were removed from his earlier IEP. Equally lacking is testimony or other evidence to support the IEP team's determination that an ESY program was not required "as there is no evidence of significant regression during a standard school calendar" or the rejection of the listed parent concern that, "[g]iven the pandemic with virtual learning, [petitioner] needs an [ESY]." (R-8 at 5,14.) The individual(s) responsible for implementing and/or developing petitioner's academic and/or functional goals did not testify, and Ms. L. offered undisputed credible testimony, which I accept as **FACT**, that the goals in the IEP were not reviewed during the IEP meeting. The District offered no testimony regarding the IEP goals, including the required "appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, if appropriate, independent living, and the transition services including a course of study needed to assist the child in reaching those goals" (N.J.A.C. 6A:14-3.7(e)(12)), which are not apparent from a review of the IEP.

The extent and nature of the parent's concerns cannot be ascertained from the IEP since the described "attached requested IEP revisions from parent submitted on 5/6/21" was not offered by the District. Further, the District offered no testimony regarding how

the IEP team addressed the parent's concerns and the reasons supporting any action taken. The IEP lends little guidance and simply states, in the "Describe any options considered and the reasons those options were rejected" section, that "[o]n 5/6/21, the District received a draft IEP with revisions made by parent" and that "[t]his annual review IEP includes those requests that are appropriate." (R-8 at 17.) Likewise, the evidence fails to demonstrate the basis for the determination in the IEP that petitioner should not be exempted from the credit hours or other graduation requirements except for world language. See P-13 (Guidance Counselor Perry's e-mails on May 13, and 17, 2021 in which she advised Ms. L. that "[w]ith [petitioner's] IEP, there are courses and/or graduation requirements that can be modified/exempted as we discussed at the meeting last week" and, if petitioner is unable to meet the District's credit requirement, "then this can be discussed and potentially adjusted as part of his IEP"); P-8 (Director Marano's August 27, 2021 letter to Ms. L. which refers to "other options for the IEP team to consider," such as whether it is appropriate to waive the District's science requirement).

The undisputed evidence demonstrates that the District recognized petitioner's need for speech services in his IEP for the 2020–2021 school year, and that no speech services were included in the May 2021 IEP despite petitioner's classification as communication impaired and the results of the District's speech-language evaluation in 2020. In that evaluation, petitioner's core language score on the CELF-5 was in the 2nd percentile for his age group, which was "indicative of a severe language impairment"; petitioner's standard score on the TOSR placed him below the 1st percentile for his age group, which was "indicative of a severe impairment in semantic skills"; and the evaluator detailed various other struggles that petitioner exhibited (i.e., "to use language in a pragmatically appropriate manner"; "to provide detailed information, use questions to maintain conversation, and ask for clarification"; "to use various parts of speech in grammatically correct sentences"; "to answer recall questions, understand inferences and make predictions based on orally presented material"). (R-4.) Indeed, the May 2021 IEP explicitly states that petitioner "would . . . benefit from speech/language therapy/support," but indicates in the "Related Services" section, "Considered but not applicable" and "As Needed for consultation." (R-8 at 7, 14.) Barudin candidly admitted that it "would be unusual" not to include speech services for a child who is classified as communication impaired. And the District offered no evidence that petitioner's speech-related disability

had improved to a point during the 2020–2021 school year that he no longer needed speech services during the 2021–2022 school year. Rather, the only explanation Barudin articulated concerning the reason why the IEP did not offer speech services was that, when the CST included speech in the previous IEP, Ms. L. decided that she did not want it, “so we decided not to continue it in the new IEP.” Ms. L. offered a believable explanation regarding why she had waived speech services for the 2020–2021 school year, and she offered uncontested credible testimony, which I accept as **FACT**, that she did not waive petitioner’s right to speech services during the 2021–2022 school year and that related services were not discussed at the IEP meeting.

According to Barudin, he learned in the Spring of 2021 that petitioner was hesitant to return to in-person instruction; Barudin understood that petitioner did not want to return to school in part because he was concerned about taking classes with younger students; and there were a series of correspondence between either the principal or Marano in response to petitioner’s hesitation to return to school in-person. Barudin’s testimony does not reveal whether he or any other District representative was apprised of petitioner’s hesitancy to return to school before the May 2021 IEP meeting. The District did not offer any correspondence in the Spring of 2021 regarding that issue or offer the principal or Marano as witnesses. Although the precise date that petitioner put the District on notice of his hesitancy to attend in-person classes at RHS with younger classmates cannot be determined, the District was plainly aware at the time of the IEP meeting that petitioner had not returned to in-person instruction, that petitioner had never attended in-person classes at RHS, and that petitioner would be eighteen years of age during the 2021–2022 school year. The May 2021 IEP provides that petitioner would attend ninth and tenth grade level classes at RHS. The record is devoid of evidence that the District considered petitioner’s hesitancy to return to school and/or the age disparity between petitioner and his classmates when it developed the May 2021 IEP. It is further devoid of evidence that the District considered petitioner’s social and emotional needs when it determined that petitioner should attend in-person classes at RHS, notwithstanding the age disparity and the fact that petitioner had never attended RHS in-person, or that the District considered alternatives other than in-person instruction at the high school.

At the hearing, petitioner's treating therapist, who has also served as a member of CSTs, offered credible and persuasive testimony, which I accept as **FACT**, concerning his treatment of petitioner and petitioner's needs, including petitioner's articulated fears and concerns relating to attending RHS, and that petitioner's attendance at RHS would be problematic from a social and emotional standpoint. No evidence was offered in opposition to the conclusions reached by petitioner's expert or in support of the appropriateness of petitioner attending RHS in-person as proposed in the May 2021 IEP.

In sum, the District failed "to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable . . . [petitioner] to make progress appropriate in light of his circumstances." Andrew F., 137 S.Ct. at 1002. The District's proofs, and the District's unexplained reasons for making the decisions that it did, fall significantly short of satisfying the District's required burden of proof.

Based upon a consideration of the testimonial and documentary evidence presented and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following additional **FACTS**: The evidence fails to demonstrate that the IEP offered by the District adequately and appropriately addressed petitioner's individualized academic, social, behavioral, and emotional needs. The evidence fails to demonstrate that the IEP offered by the District is reasonably calculated to enable a petitioner to make progress appropriate in light of his circumstances, or that the IEP provides for significant learning and confers meaningful educational benefit to petitioner. A program/placement other than in-person instruction at RHS is necessary to enable petitioner to make academic progress and to confer meaningful educational benefit to petitioner. The provision of speech services is a necessary support service to address petitioner's needs and to enable petitioner to benefit educationally from his instruction.

Based upon the foregoing, I **CONCLUDE** that the District failed to sustain its burden of proving, by a preponderance of the credible, competent evidence, that the IEP offered for the 2021–2022 school year was appropriate and provided a FAPE to petitioner. I further **CONCLUDE** that, to the extent there were any procedural shortcomings on the part of the District, which petitioner did not assert in his request for due process, the

evidence fails to establish that any such procedural violation impeded petitioner's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process or caused a deprivation of educational benefits.


Petitioner seeks an independent CST. Succinctly stated, neither N.J.A.C. 6A:14-5.1 nor the credible evidence supports such relief. Rather, I **CONCLUDE** that the parties should meet within thirty days of this Decision to develop an IEP that includes an appropriate alternative program/placement, other than in-person instruction at RHS, to enable petitioner to obtain the credits he needs to graduate. I **CONCLUDE** that the IEP should further include the provision of speech services, the amount and frequency of which should be determined at the IEP meeting. It is further urged that the parties consider at that IEP meeting the impact, if any, of the Auditory Information Processing Re-assessment report; whether any other related services are necessary to address petitioner's needs; whether petitioner should be exempted from any graduation requirements; and whether the goals in the IEP should be revised or supplemented. These recommendations, however, are not being required by this Decision.

ORDER

I **ORDER** that petitioner and the District shall meet within thirty days of this Decision to develop an IEP for petitioner that includes an appropriate program/placement, other than in-person instruction at RHS. I further **ORDER** that the IEP shall include the provision of speech services, the amount and frequency of which should be determined at the IEP meeting. I **ORDER** that any remaining claims of the request for due process are **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2021) 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 (2021). 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.

August 9, 2022
DATE



MARGARET M. MONACO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

jb

APPENDIX

List of Witnesses

For Petitioner:

Burton Seitler
D.L.
Stuart Barudin
Ms. L.

For Respondent:

Stuart Barudin

List of Exhibits in Evidence

For Petitioner:

- P-1 Letter from Burton Seitler to Judge Monaco dated January 17, 2022
- P-2 E-mail and social media posts
- P-3 Letter from Michael Marano to Ms. L. dated September 16, 2021
- P-4 Incident Report dated February 4, 2021
- P-5 Home School Transcript
- P-6 Letter from James Rothchild, Jr., Esq., to Stuart Barudin dated June 17, 2021
- P-7 E-mail from James Rothchild, Jr., Esq., to Stuart Barudin dated July 1, 2021
- P-8 Letter from Michael Marano to Ms. L. dated August 27, 2021
- P-9 Letter from D.L. to Ramapo High School dated June 2, 2021
- P-10 Auditory Information Processing Re-Assessment dated May 14, 2021, and e-mail from Jay Lucker dated June 29, 2021
- P-11 E-mails
- P-12 E-mails
- P-13 E-mails dated May 12, May 13, May 14, and May 17, 2021
- P-14 E-mail from Stuart Barudin to Ms. L. dated June 18, 2021

- P-15 E-mails dated June 22, June 23, June 24, June 25, June 28, and July 6, 2021
- P-16 E-mail from Ms. L. dated September 22, 2021
- P-17 E-mail to Stuart Barudin from Ms. L. dated September 17, 2021
- P-18 E-mails to and from Stuart Barudin and Ms. L. dated September 17 and 20, 2021
- P-19 Curriculum Vitae of Michael Marano
- P-20 Letter to Michael Marano from Burton Seitler dated October 23, 2020

For Respondent:

- R-1 to R-3 No Exhibit Admitted
- R-4 Speech-Language Evaluation Report dated August 12, 2020
- R-5 Educational Evaluation; date of testing on November 4, 2020
- R-6 Psychological Assessment dated December 18, 2020
- R-7 Social History dated August 30, 2020, and revised on December 8, 2020, and January 5, 2021
- R-8 IEP; date of meeting on May 6, 2021
- R-9 Curriculum Vitae of Stuart I. Barudin, Ed.D.