State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 01242-22

AGENCY DKT. NO. 2022-33901

J.L. ON BELHALF OF J.L.,

Petitioner,

v.

STERLING HIGH SCHOOL DISTRICT,

BOARD OF EDUCATION,

Respondent.

J.L., on behalf of J.L., petitioners, pro se

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

Record Closed: July 11, 2022 Decided: August 17, 2022

BEFORE **CATHERINE A. TUOHY**, ALJ:

STATEMENT OF THE CASE

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1415 to 1482, petitioner, Mr. J.L., has requested a due process hearing on behalf of his son, J.L., who is classified as eligible for special education and related services. Petitioner disputes Sterling High School's (the District's) proposed individualized education program (IEP) of February 10, 2020, which placed his son on homebound instruction pending an out-of-district placement.

Petitioner seeks to have his son returned to school in the district. At issue is whether the district provided J.L. with a free and appropriate public education (FAPE.)

PROCEDURAL HISTORY

On February 15, 2022, petitioner filed an expedited due process petition with the Office of Special Education (OSE), seeking placement of J.L. in his current program and placement in school. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed as a contested case on February 16, 2022, pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. An initial prehearing conference was conducted on March 3, 2022, wherein the parties both agreed that the matter should not proceed on an expedited basis. A pre-hearing order was entered on April 28, 2022. The hearing was conducted on July 11, 2022, via Zoom audio/video technology due to the continued COVID-19 emergency and the suspension of in-person hearings at the OAL. The record closed following the hearing on July 11, 2022.

FACTUAL DISCUSSION

Debra Sukinik is supervisor of special services at Sterling Regional High School and has been employed there for four years. Previously she had been employed by the Millville Board of Education as the district supervisor of special education. She obtained her bachelor's degree in elementary education from Florida State University in 2003 and a master's degree in educational administration/leadership in 2006. She completed the Rowan University Graduate Endorsement Program for Teacher of Students with Disabilities in 2011. Ms. Sukinik also completed a 150-hour internship for School Administrator certification from New Jersey City University in 2013. She holds State of New Jersey professional certifications as a K–5 Elementary School Teacher; K–12 Teacher of Students with Disabilities; K–12 Principal; K–12 Supervisor; and School Administrator. (R-13.)

Part of her responsibilities as supervisor of special education is that she confers with the child study team (CST), including the learning disabilities teacher consultant, social worker, and the school psychologist to draw on their expertise to determine the best

placement for students, whether in or outside of the district. She constantly uses her expertise in special education in conferring with the CST, case managers, parents, and students. It is customary to rely on the various expertise of CST members in evaluating and interpreting test results. For example, she relies on the school psychologist to interpret the test results for the Woodcock-Johnson evaluation, since the school psychologist has specific expertise in that area. She reviews all of the IEPs to make sure the students are in the least restrictive environment (LRE) and provided with the necessary supports. She consults with CST members regarding the appropriateness of out-of-district placements.

Ms. Sukinik was accepted as an expert in special education based on her education and work experience.

She has knowledge of J.L.'s previous educational history prior to J.L.'s coming to Sterling High School from a review of his records and prior IEP. Prior to the 2020–2021 school year, respondent was not responsible for the education of J.L. because he was a student in the Stafford School District, which is a K–8 district. Sterling High School is a 9–12 school district which receives students from Stafford. J.L. was an eighth-grade student in Stafford during the 2020–2021 school year and had been placed in an out-of-district placement at the Burlington County Special Services School District, Lumberton Campus. In May 2021, his case manager, Stacey Diduch, sat in on the annual review meeting with J.L.'s current case manager and CST at the Burlington County Special Services School District. Ms. Diduch reported that J.L. was not welcome back for ninth grade at the Burlington County Special Services School District and that they had to find another placement for J.L.

J.L. was initially terminated from the Burlington County Special Services School District in March 2020, because they were unable to provide appropriate programming due to his noncompliance, danger to himself and others, and physical aggression toward peers and staff. Burlington agreed to keep him for the remainder of his eighth-grade year once they were on all remote instruction due to COVID. (R-6 at 6.) Ms. Diduch reported that J.L. had issues with physical and verbal aggression, problems on the school bus, and making threats to staff. The records indicated that J.L. was

socially promoted to ninth grade, but academically in eighth grade he did not have a successful year. He required a 1:1 aide when he attended school in person due to issues with behavior, social relationships, and completing assignments. Due to these behavioral issues, his placement was terminated in 2020 prior to the COVID-19 shutdown. He was allowed to continue placement as long as he was fully remote, but they stated that a new placement for 2021–2022 would be necessary, as Lumberton was no longer appropriate for him. Ms. Sukinik pointed out that this was concerning given that this out-of-district placement was experienced with handling students with emotional-regulation impairment and behavioral issues such as oppositional defiant disorder and attention deficit hyperactivity disorder (ADHD.) J.L. had been in six prior out-of-district placements and none were able to successfully return J.L. back to an in-district program. She explained that when a child is placed out of district the hope is that they will get the appropriate programming to allow them to return back to the district. Based on this history, it was felt that Sterling High School could not provide appropriate programming for J.L. in its self-contained program due to his behavioral and discipline issues, although Sterling could academically meet his needs. Discipline-wise, they could not provide programming for him.

After the annual review meeting and learning that they did not have a school placement for J.L., his case manager over the summer advised Ms. Sukinik that they did not have a placement for J.L. Ms. Sukinik telephoned the father to see where he would like J.L. to attend so the family could look at the school and be comfortable and be on board with a placement. The first telephone call did not go well, as the father was volatile and refused an out-of-district placement. There were other telephone calls, which also did not go well, as the father was uncooperative, made racist comments, and hung up on her. She felt uncomfortable speaking with the father because of this and reached out to the Camden County CST supervisor, Dr. Catherine Thomas, for advice. Dr. Thomas inquired whether they had up-to-date evaluations for J.L., which they did not. Ms. Sukinik then advised the father that they would like to do up-to-date evaluations to see where J.L. stood, including a psychiatric evaluation, and requested his consent. She requested permission from her superintendent to allow her to use outside evaluators. They decided to use outside evaluators because she did not want it to come back on her team based on the father's negative perceptions. She wanted the

evaluations to be independent and neutral, so that if any unfavorable information was revealed, it was from a neutral evaluator. Therefore, they retained independent evaluators, including Dr. Thomas O' Reilly from Medford Family Psychiatry, to do the psychiatric evaluation, and Thomas Lodge, Ph.D., of Educational Diagnostics, to do the psychological evaluation, which he did for Sterling High School. (R-3.) Dr. Lodge also interviewed J.L.'s father as part of his evaluation.

The learning assessment was done by Kenneth Hall, a learning disabilities teacher consultant. (R-4.) The psychiatric evaluation was done by Dr. O'Reilly on September 24, 2021. (R-5.) There were several prior missed appointments, which was why the evaluation was not done during the summer. In Dr. O'Reilly's report, he indicates that Mr. J.L. was not willing to sign a release for his son's treating psychiatrist's medical file to be released to the school district. (R-5 at 2.) This is not standard operating procedure, in that usually a child's medical records are released to the school. Dr. O'Reilly's report indicates that J.L. had a previous psychiatric hospitalization two years ago at Jefferson Hospital. J.L. had a diagnosis of ADHD. Sterling High School is capable of handling students with ADHD in district. The diagnosis of oppositional defiant disorder gave her cause for concern, as she looked into J.L.'s school history regarding how the diagnosis presents itself in the school setting. J.L.'s school history was considered in deciding what would be the least restrictive environment for his educational needs. Dr. O'Reilly indicated in his report:

> I agree that J.L.'s behaviors in on grounds out-of-district settings do not warrant a return to an in-district setting. Typically, students must show that they are able to return to an in-district setting through improved behaviors. However, given the unique time that we are in of the continuous pandemic and that J.L.'s previous aberrant behaviors were prior to the pandemic, I do think an attempt to return to district is warranted with accommodations in place.
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> [R-5 at 4.]

Based on this report, they looked at what accommodations had been in place previously and they offered J.L. a 1:1 aide and a modified schedule. While they were awaiting the psychiatric report, they had offered homebound instruction for J.L., which

the father initially refused. J.L. picked up his tablet on September 20, 2021, and was online with homebound instruction. His first day in person at Sterling High School was October 4, 2021.

Dr. O'Reilly made six recommendations on the final page of his report. The sixth recommendation was directed to the father, Mr. J.L. and indicated that he should arrange for a therapist and that J.L. should continue with outside-the-District psychiatric care. The other five recommendations were directed to the school district, and the district tried to follow them. Recommendation number four indicated that "if J.L. struggles and reverts back to previous behaviors of significant disruptive behaviors, physical aggression or threats of harms to others/self, he should be removed from that setting and placed on virtual/homebound instruction with another alternative out-of-district placement sought." (R-5 at 5.) In February 2022, the District offered homebound instruction pending an out-of-district placement, but the father did not agree to recommendation number four and filed for due process.

A change-in-placement IEP, dated October 1, 2021, was written incorporating Dr. O'Reilly's recommendations. J.L. was to attend Sterling High School for ninth grade in the self-contained, emotional-regulation-impairment (ERI) class. J.L.'s classification was "other health impairment." (R-6.) The IEP called for J.L. to receive school counselling and a 1:1 aide for the 2021–2022 school year. (R-6 at 2.) The IEP was signed by the parent and the student. J.L. was to receive language arts and mathematics each day for 80 minutes each class, for a total of 160 minutes of instruction per day. There were no other classes because they are on a block schedule, and it was agreed by the father that J.L. would have a modified schedule for blocks two through four, two academic classes a day. The district was prepared to increase his courses upon a thirty-day review. Initially, the District did not have the necessary note from J.L.'s doctor regarding the administration of medication. J.L takes his medication in the morning, and it takes a while to kick in, so they offered a modified schedule, which is not unusual for someone new to the district.

Both J.L. and his father signed a behavior contract dated October 1, 2021, before J.L. started school (R-7), which outlines expectations for students to follow. This is a

specific behavior contract for J.L. that they decided to do based on his previous behaviors to highlight specific things that were a concern to the school. This was presented at the same meeting as the IEP was signed. There were no objections by the parent, as everyone was hopeful things would go well and he was attending in-person in the high school.

A thirty-day-review IEP dated December 6, 2021, was done, which added on additional classes for J.L. This IEP was signed by the father. (R-8 at 39.) In Ms. Sukinik's expert professional opinion, the October 1, and December 6, 2021, IEPs offered J.L. a FAPE in the LRE appropriate to his educational needs, based on the information they had at the time. The basis for her opinion is that a student with his medical diagnoses, academic levels, and past behavioral issues warranted a small-class environment with a 1:1 aide and keeping him separate from the majority of the school population. This was the most appropriate and least restrictive environment for J.L. At the thirty-day-review meeting, the teachers were working with him and heavily modifying the academic work, and so he was showing success with the academic modifications and working for the teachers. He had some downtime built in with his tablet and listening to music.

On J.L.'s first or second day of school she had an interaction with J.L. regarding an issue wherein he tried to "jailbreak" the tablet at home. He had googled how to jailbreak a tablet. Ms. Sukinik pulled him out of class and told him he needed to sign in using his Sterling password and username. She was speaking firmly to him but not yelling at him. J.L. was disrespectful and threatened her by saying, "watch what happens" and "that's how you can get hurt." She had to call for the aide to come. She reported J.L. to the principal. J.L. received a one-day external suspension for threatening staff. This incident happened on October 5, 2021, and he was suspended October 6, 2021.

J.L. had some negative interaction with peers and use of profanity during the fall, which was cause for concern, but this was nothing out of the ordinary and not something they could not handle. J.L. was in an ERI self-contained class with a content-certified experienced special-education teacher. There were five students in

the class, and three professionals in the class, including the content-certified special-education teacher, a general classroom aide, and J.L.'s 1:1 aide. There was an incident in the beginning of February 2022 that caused a change in placement due to a violation of the behavior contract. (R-9.) J.L. was coming in for the fifth block for health and physical education and there was an incident in the gym which Ms. Sukinik did not respond to since she is not the disciplinarian. The vice principal, school resource officer, and case manager all responded, and they were not able to de-escalate J.L. The February 10, 2022, change-of-placement IEP put J.L. on homebound instruction until an out-of-district placement could be secured. (R-9.) They were following the psychiatrist's fourth recommendation set forth in the psychiatric report. The February incident resulted in the change of placement. J.L. threatened another student in the gym class and was verbally aggressive and using profanity to the vice principal and the school resource officer. Following the development of the change-in-placement IEP, the District found and offered the parent two placements: the Pinelands Learning Center and the Mary Dobbins School. They proposed these two options to the parent. The case manager emailed the two options to the father but did not hear back. She asked her principal to follow up. The principal followed up with the father, since Ms. Sukinik and the father were not in contact. Mr. J.L. indicated that the two placements were too far away and rejected them. The father did not make contact with either of the placements. After the February 10, 2022, IEP was offered, J.L.'s father did not want him on homebound instruction on remote learning with virtual instruction on Microsoft Teams, so J.L. was not learning at all during this time. There were various emails going back and forth regarding homebound instruction, and J.L.'s father did not agree to the homebound instruction. Due to COVID, the homebound instruction was only offered virtually through Microsoft Teams.

Following a settlement conference in April 2022, a renewed attempt was made to provide homebound instruction to J.L. for the remainder of the school year, each day from 2:30 p.m. to 4:30. p.m. for all content areas with Sterling teachers. The father complained to the history teacher, questioning the history curriculum, and then the homebound instructor did not want to do homebound instruction any longer. A few days later, the father then did not want any of the Sterling High School teachers to provide homebound instruction, so the district agreed to use the Walsh Legacy company to

provide the homebound instruction. Later in May, Walsh Legacy said they would not be providing homebound instruction since the father was questioning the delivery of the material and the content being taught. The father was not happy when they went to the home to deliver a packet. The father also complained to Walsh Legacy about the lack of focus on black history, although ninth grade focuses on world history. The teachers have to follow the curriculum standards.

There is nothing the district could have done in the realm of special education to force the parent to accept either the homebound instruction or the proposed out-of-district placements. In Ms. Sukinik's expert opinion, the February 10, 2022, IEP (R-9) would have provided J.L. with FAPE in the LRE. They were, in good faith, attempting to find a program that met J.L.'s needs out of district and offered homebound instruction in the interim. They did quickly find and offer the two out-of-district placements to the father.

The annual review IEP meeting was conducted on March 9, 2022, and the district, on the advice of their solicitor, offered an IEP with an out-of-district placement of Mary Dobbins/Legacy Treatment Services. (R-10.) In her expert opinion, this IEP offered J.L. a FAPE in the LRE since they were not able to provide programming for J.L.

By letter dated April 5, 2022, the District offered to provide J.L. with up to two hours of instruction daily for the remainder of the 2021–2022 school year, from 2:30 p.m. to 4:30 p.m., Monday through Friday, via Microsoft Teams. (R-11.)

Petitioner's due-process petition states that he was disputing his child's placement of virtual instruction for the remainder of the school year. (R-1.) The district only had J.L. on virtual instruction in early September when they were awaiting the completion of the evaluations and in February when they were looking for an out-of-district placement, and then again following the settlement conference. Ms. Sukinik believes J.L. should be educated "in person." However, the District cannot force an out-of-district placement if the parent does not consent to the placement.

J.L. had a doctor's note that was faxed to the school that would allow J.L. to get his medication in school without the father being present. However, the school needed a specific form with the specific dosage set forth, and that is why the principal required the school form. J.L. was to have a certified 1:1 aide. Chris Gephardt was his 1:1 aide at Sterling High School, and he was certified by the board of education. Ms. Sukinik was not aware of the curriculum being taught by Walsh Institute and did not know they were teaching J.L. the U.S. Constitution for very young children when J.L. was in high school. She did advise Walsh Institute that J.L was at a third grade reading level and provided the contact-information telephone number and email address, but did not provide them with J.L.'s home address.

No police report was filed by the District after the February incident. Mr. J.L. did go to the police department and did call his senator. Ms. Sukinik said that the incident happened at the end of the day, and she was not aware if any of the district personnel knew that Mr. J.L. was waiting for his son that day. It is their policy that the team debrief after an incident, and this happened at the end of the day.

Mr. J.L., the father, testified on behalf of the petitioners. He first heard about Sterling High School when he was contacted by his son's previous case manager at his last school. When he first spoke to Ms. Sukinik, they were on a Zoom meeting, and she said that they do not want his son there and that they were going to place him out of district. Mr. J.L. asked how she could say that when she had never met his son, and right away she was stereotyping him. The meeting ended before it got started. She was talking about something that had happened with his son two and a half years before, and he did not want to hear about it and hung up. J.L. had had an argument in his old school with another student. Mr. J.L. stated that right away he felt the hostility from the school personnel and that they did not want his son there, and that they did not care for Mr. J.L. either, as he was sticking up for his son. Mr. J.L. made a complaint to the institutional-abuse unit regarding how Sterling was treating his son and denying him his medication, and told Ms. Sukinik that she would find out once the institutional-abuse unit contacted her. The principal called Mr. J.L. and advised him that he should not speak to Ms. Sukinik like that, to which Mr. J.L. responded, "yeah, whatever." He did not threaten her.

The Sterling High School principal, Mr. Claybourn, made all the decisions, and not the CST. He was present at a majority of the meetings and should not have been present unless there was a danger, according to Catherine Thomas, the County CST supervisor. Every time Mr. J.L. turned around, the district would say that his son did this or his son did that. His son would deny it and he did not know whom to believe and tried to remain impartial. They would tell his son to shut up right in front of him, and Mr. J.L. said, "wait a minute, you can't talk to him like that," as if he is a nobody, when his father is standing there and that is his job. Some of the problems the district has brought upon itself, as it is ill-equipped to deal with special-needs students. They claim they are experts in special education, yet all they do is put down a fifteen-year-old child and ridicule or suspend him. They did not follow the discipline guidelines to be used for special-education students with an IEP. He spoke to Ms. Thomas and said they just threw J.L. out of school without following the guidelines after an incident between J.L. and another student in the gym. Both students were just yelling at each other in a yelling match, but the district suspended his son and not the other student. He does not know what happened in the gym since he was not there. Another time his son told one of the staff members to stop standing over him.

His son's doctors at Cooper Hospital provided the school with a doctor's note for his medication to be administered in school. The principal is not a doctor and did not follow it. His son is not on trial for murder. He has a few problems that are not serious. The special-education teachers are not properly trained, and they need more training. The principal is not trained in special education and should not be involved in special education. His son is much bigger than the principal, and if the principal feels threatened by a fifteen-year-old child he should change professions. Mr. J.L.'s personal opinion is that the principal is prejudiced against his son, due to the way he acted towards his son. The principal was talking down to his son and talking trash to him and his son would stand up for himself.

Following the incident in the gym, J.L. was put on homebound instruction for the rest of the year or given the option of transferring out of the district. Mr. J.L. believes his son is being targeted and he wants him moved out of the district. During the first Zoom

meeting he had with Ms. Sukinik, she said she did not think the school district was good enough for J.L. and that they did not want him in their school, when she had never even met his son. Mr. J.L. believes the district has overblown the incident, and that children playing basketball may sometimes argue and get into heated disagreements, but that is no reason to suspend them. Teachers are supposed to help and guide a child with mental illness. Ms. Sukinik is a supervisor and supposed to be trained to handle these situations and handle the children. However, they made a decision to put J.L. on remote instruction and isolate the child and labeled him as a troublemaker. This does not reflect well on them as educators.

Debra Sukinik, on rebuttal, testified that she did not prejudge or stereotype J.L. She was not at the annual review meeting for J.L. in eighth grade. Her first telephone call with Mr. J.L. was over the summer, regarding where the placement would be. After the incident in the gym, there was a meeting scheduled with the principal for February 9, 2022, at 9:00 a.m. to go over what had happened. She was not sure if the meeting occurred. She is aware that Mr. J.L. had said that they could not discipline his son for that incident. There was no manifestation-determination meeting since it had not reached that level. J.L. had only been suspended one day before this incident. However, there was a violation of the code-of-conduct agreement, and they were following the recommendations of Dr. O'Reilly and the CST.

Discussion

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

inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Mr. J.L. was a credible witness but vague in his testimony regarding his son's mental-health history and past problems in school. It is clear he is protective of and a zealous advocate for his son; however, he is not a special-education teacher and had no firsthand knowledge as to what transpired in school. He was credible in his testimony that the district, from the beginning, did not want his son at Sterling High School and that there was some personal conflict between petitioner, his son, and the principal, Mr. Claybourn, as well as Ms. Sukinik.

Ms. Sukinik, the supervisor of special services, was the only witness produced by the district. There was no testimony offered by the district from the school psychologist and J.L.'s case manager, Stacey Diduch. There was no testimony offered by the District from J.L.'s 1:1 aide, Chris Gephardt. There was no testimony offered by the district from the school principal, Mr. Claybourn, the vice principal, or the school resource officer. There was no testimony offered by the district from any of J.L.'s special-education or general-education teachers. There was no testimony offered by the District from J.L.'s counselor. There was no testimony offered by the district from the general classroom aide in the ERI class. The lack of any testimony from those persons who would have the most knowledge of the facts of this case and would have been the most familiar with J.L. at Sterling High School is disconcerting.

I am not persuaded by Ms. Sukinik's testimony that the district provided J.L. with FAPE. Her opinions were conclusory and not supported with facts or data. From the beginning, Ms. Sukinik believed that Sterling High School could not program for J.L. since he had been in several prior out-of-district placements. There was no testimony as to why J.L. did not have up-to-date evaluations/triennials as of his annual review meeting in May 2021, which the case manager from Sterling attended. There was no testimony as to what IEP was in place when J.L. started school in September 2021 at Sterling High School. No IEP dated prior to the October 1, 2021, IEP was produced, although the October 1, 2021, IEP is labeled a Change in Placement IEP.

Ms. Sukinik testified that she had an incident with J.L. on his second day in school, October 5, 2021, where he threatened her after she reprimanded him regarding his school tablet. J.L. received a one-day suspension for that incident. There was no other discipline imposed on J.L. until the February 8, 2022, incident in the gym, which Ms. Sukinik testified she did not respond to since she was not the school disciplinarian. J.L. allegedly threatened another student in the gym class and was verbally aggressive and using profanity to the vice principal and the school resource officer. The vice principal, school resource officer, and case manager all responded, and they allegedly were not able to de-escalate J.L. There was no testimony from any of these individuals or any eyewitnesses as to what specifically happened in the gym that day. There was no mention of the incident in the February 10, 2022, IEP. There were no incident reports regarding this incident, yet the district removed J.L. from his placement as a result of this incident. Ms. Sukinik's testimony was not credible that a manifestation-determination hearing was not necessary since J.L. had only been suspended one day before this incident, yet it resulted in his removal from school for more than ten days.

Ms. Sukinik's testimony that J.L. violated the behavior contract and that they were following the recommendation of Dr. O'Reilly in changing J.L.'s placement to homebound instruction pending an out-of-district placement is not credible and is contrary to the procedural safeguards of the IDEA regarding disciplining a student with a disability. Furthermore, I question the appropriateness of a behavior contract for a child with a behavioral disability and an IEP containing various behavioral counselling goals. There was no testimony or proof offered that a functional behavior assessment was conducted for J.L. and a behavior intervention plan implemented.

Ms. Sukinik's testimony that the district was not able to provide appropriate programming for J.L. in district was not credible, as it is contrary to the evidence reflected in the Present Levels of Academic Achievement and Functional Performance (PLAAFP) entries prepared by J.L.'s teachers contained in the December 6, 2021, IEP and the February 10, 2022, IEP, both of which indicate that after an initial adjustment period, J.L.'s behaviors had actually improved and he was doing well in the self-contained ERI class.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

J.L. did not have an IEP in place when he started at Sterling High School in September 2021.

J.L. is eligible for special education and related services under the classification "other health impairment" and was placed in the ninth-grade emotional-regulation-impairment (ERI) self-contained classroom at Sterling High School during the 2021–2022 school year, pursuant to his IEP dated October 1, 2021. (R-6.) This placement put J.L. in the presence of general-education students for less than 39 percent of the school day. (R-6 at 1.)

J.L. has been diagnosed with attention deficit hyperactivity disorder, combined type, unspecified mood disorder, and oppositional defiant disorder. (R-5 at 5.) J.L. takes three medications, specifically, dexmethylphenidate ER 50 mg per day, Focalin XR 40 mg, and Depakote. (R-6 at 13.)

Pursuant to the October 1, 2021, IEP, J.L. received special-education services in language arts and mathematics instruction daily for 80 minutes each, for a total of 160 minutes of instruction, and related services of school counseling once per week for 20 minutes and a direct 1:1 aide daily. (R-6 at 2.)

The October 1, 2021, IEP indicated that J.L. exhibits behaviors that impede his learning or that of others. "Appropriate strategies, including positive behavioral interventions and supports, are included in the Behavioral Interventions section." (R-6 at 13.) Under the Behavioral Interventions section of the IEP, it states: "Student does not evidence behavior that warrants a behavior intervention plan." No targeted behavior, prior interventions, description of positive behavior supports, procedures to evaluate the effectiveness of the interventions, or other positive supports or considerations are listed. (R-6 at 31.)

The counselling goals set forth in J.L.'s October 1, 2021, IEP stated: "Student will come to school and class every day with 80% success." The benchmark for this goal was that the student will attend school for at least five days each week. The evaluation procedure was observation.

The second counselling goal stated: "When student expresses a negative emotion at school he will identify and appropriately use a coping skill to maintain acceptable school behavior with 80% success." The first benchmark or short-term objective stated: "When faced with a negative emotion student will accurately express a plan to change the situation and or thoughts that lead to the negative emotion. The second benchmark or short-term objective for this goal stated: "Student will express his negative emotions by appropriately using words to state feelings." The criteria for mastery of both of these objectives was 80 percent and the evaluation procedure for both was "charting of targeted behavior, observation." (R-6 at 18.)

The October 1, 2021, IEP also set forth a Study Skills goal that J.L. will complete homework and classroom assignments for all of his classes with 75 percent success, and listed seven benchmark or short-term objectives as follows: J.L. will accept appropriate assistance from teachers and other support staff without protest; J.L. will consistently hand in completed assignments on time; J.L. will correctly follow oral and/or written directions; J.L. will independently initiate and complete three class assignments; J.L. will independently seek out appropriate assistance from teachers and support staff; J.L. will self-check all school work for completeness, accuracy, and writing errors; and J.L. will turn in long-term projects on time. Mastery for these criteria was 75 percent and the evaluation procedure was class participation and observation. (R-6 at 25–26.)

The October 1, 2021, IEP also set forth numerous academic goals and objectives for English/language arts and mathematics. (R-6 at 18–25.)

Mr. J.L. consented to the implementation of the October 1, 2021, IEP on October 1, 2021. (R-6 at 39.)

On October 1, 2021, Mr. J.L. and J.L. signed an agreement to abide by all the rules and regulations of Sterling High School. J.L. signed the agreement, stating: "I promise to do my best to live up to these expectations to the best of my ability." (R-7.)

On December 6, 2021, a Revision—30-Day Review IEP meeting was conducted which resulted in a revised IEP dated December 6, 2021. (R-8.) This revised IEP added the additional courses of science, social studies, and physical education/health daily for 80 minutes each class. The related services and the goals and objectives remained the same as in the October 1, 2021, IEP. Likewise, it also states that J.L.'s behavior impedes his learning and that of others, but no behavior intervention plan is warranted. (R-8 at 12, 30.) Mr. J.L. consented to the implementation of this IEP on December 6, 2021. (R-8 at 39.)

The December 6, 2021, IEP set forth J.L.'s Present Levels of Academic Achievement and Functional Performance for the subjects of English and mathematics as follows:

Subject: English

> J.L. was enrolled in my Self-contained English class this year. While he had a bit of an adjustment period acclimating to school rules, he seems to have settled in and is doing well. He at times will volunteer to read aloud in class and typically participates in class discussions. He will answer questions and takes notes. At times, he is distracted and needs redirection to stay on task. His behavior has been appropriate for the most part. He functions better when engaged in work, and does well with down time as long as he has his tablet and headphones. The main behaviors are muttering profanities under his breath, but that is infrequent at this point. His interactions with his peers are typically appropriate and he at times is kind and helpful.
>
> [R-8 at 11.]

Subject: Mathematics

> J.L. is a new student and had trouble at first respecting his elders and his peers. He has now gained trust in his teachers and classmates. Moving forward, J.L. still needs to understand the importance of healthy peer relationships and continue to grow and show consistency in this area. I feel J.L. got off to a slow start because he was trying to "fit-in," and his immaturity got the best of him. This affected his behavior and his overall mathematical abilities. Fortunately, I feel J.L. has turned the corner and has improved behaviorally, academically, and socially. He has become a better classmate, works harder, and is now willing to do an extra task. His maturity and overall seriousness for mathematics has reflected in his behavior and his grade. He has not had any discipline issues with me or any other of the teachers in our class. I am extremely proud of the progress J.L. has made. If he can stay focused, keep this effort and attitude going daily, I feel he's going to have a great rest of the year."
>
> [R-8 at 11.]

There was an incident in the gym on February 8, 2022, involving J.L. No direct testimony, incident reports, or facts were introduced detailing specifically what transpired or the circumstances surrounding the incident.

J.L. was removed from school and placed on homebound instruction following this incident.

On February 10, 2022, an IEP meeting was conducted for a Change in Placement Revision—30-day Review, which proposed to place J.L. on homebound instruction until an out-of-district placement could be secured. (R-9.) The IEP stated that "J.L. is being placed on homebound instruction due to academic, behavioral and emotional needs until an out of district can be found." (R-9 at 5.) Under the Educational History section, last paragraph, it states: "J.L. began this school year at Sterling High School. At this time, the youth study team has determined that Sterling High School no longer has the ability to meet his needs academically and behaviorally and an out of district placement is being sought." Under the Special Education Determinations

section, it states: "Due to being placed on homebound instruction right now, J.L. will be provided with 2 hours of instruction per subject per week equaling 6 total hours right now for 3 subjects. All instruction will take place virtually on the Microsoft Teams platform." (R-9 at 5.)

The PLAAFP statement that was set forth in the February 10, 2022, IEP was the same PLAAFP statement set forth in the December 6, 2021, IEP. (R-9 at 11.)

The February 10, 2022, IEP states that J.L.'s behavior impedes his learning or that of others. (R-9 at 12.) The Behavioral Interventions section of the IEP states: "Student's behavior warrants a behavior plan" and "Please refer to file for behavioral plan." (R-9 at 30.)

No behavioral plan has been introduced into evidence.

No progress reports have been introduced into evidence regarding how J.L. was progressing towards his IEP goals.

Mr. J.L. did not consent to the February 10, 2022, IEP, and filed for due process seeking J.L.'s return to school in district in his previous placement.

LEGAL ANALYSIS AND CONCLUSION

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to ensure that all children with disabilities have available to them a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). This "free appropriate public education" is known as FAPE. In short, the Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C. § 1401(9). A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A FAPE means special education and related services that: a) have been provided at public

expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the state involved; and d) are provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public school district. N.J.A.C. 6A:14-1.1(d).

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 368 (1985). An IEP should be developed with the participation of parents and members of a district board of education's CST who have participated in the evaluation of the child's eligibility for special education and related services. N.J.A.C. 6A:14-3.7(b). The IEP team should consider the strengths of the student and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluations of the student; the student's language and communications needs; and the student's need for assistive technology devices and services. N.J.A.C. 6A:14-3.7(c). The IEP establishes the rationale for the pupil's educational placement, serves as the basis for program implementation, and complies with the mandates set forth in N.J.A.C. 6A:14-1.1 to -10.2. N.J.A.C. 6A:14-1.3, "Individualized education program."

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, among other things, 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, and a statement specifying the projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications. N.J.A.C. 6A:14-3.7(e)(4) and (8). 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." Lascari 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).

Parents who are dissatisfied with an IEP may seek an administrative due-process hearing. 20 U.S.C. § 1415(f). The burden of proof is placed on the school district. N.J.S.A. 18A:46-1.1.

The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, 458 U.S. at 189.

The Board will have satisfied the requirements of law by providing J.L. with personalized instruction and sufficient support services "as are necessary to permit [him] 'to benefit' from the instruction." G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671 at *5 (D.N.J. Feb. 27, 2009) (citing Rowley, 458 U.S. at 189). The IDEA does not require the Board to maximize J.L.'s potential or provide him

the best education possible. Instead, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). But an IEP must provide meaningful access to education and confer some educational benefit upon the child. Rowley, 458 U.S. at 192. To meets its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. ___,137 S. Ct. 988 (2017).

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

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

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school setting as least restrictive, to enrollment in a residential private school as most restrictive. 34 C.F.R. § 300.115 (2022); N.J.A.C. 6A:14-4.3. Federal regulations further require that placement must be "as close as possible to the child's home." 34 C.F.R. § 300.116(b)(3) (2022); N.J.A.C. 6A:14-4.2; Oberti v. Clementon Bd. of Educ., 789 F. Supp. 1322 (D.N.J. 1992).

Courts in this Circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. "The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." Carlisle Area Sch. v. Scott P., 62 F.3d at 535. In this case, the least restrictive environment for J.L. was his home district, Sterling High School, in the ninth-grade self-contained ERI class.

The October 1, 2021, and December 6, 2021, IEPs placed J.L. in the ninth-grade self-contained ERI class. The PLAAFPs from the December 6, 2021, IEP and the February 10, 2022, IEP indicated that J.L. had improved behaviorally, academically, and socially. Following an incident on February 8, 2022, in the gym, a revised IEP dated February 10, 2022, removed J.L. from school and placed him on homebound instruction pending an out-of-district placement. The February 10, 2022, IEP is the first time that an IEP states that J.L.'s behavior warrants a behavior plan, yet no behavior plan has been introduced into evidence. The prior October 1, 2021, IEP and December 6, 2021, IEP both stated that J.L.'s behaviors impede his learning or that of others, but that J.L. does not evidence behavior that warrants a behavior intervention plan. No manifestation-determination hearing was conducted following the February 8, 2022, gym incident and no functional behavior assessment was done. The October 1, 2021, IEP set forth numerous goals and short-term benchmarks. The December 6, 2021, IEP included identical goals and benchmarks to those in the October 1, 2021, IEP, even though science, social studies and physical education/health were added to J.L.'s special-education services. There were no goals set forth for these three additional special-education subjects. No progress reports were introduced into evidence demonstrating that J.L. was progressing towards any of his IEP goals. No report cards were introduced into evidence.

I **CONCLUDE** that the district has failed to prove by a preponderance of the competent and credible evidence that the February 10, 2022, IEP offered J.L. FAPE with the opportunity for meaningful educational benefit and progress appropriate in light of J.L.'s circumstances, in the least restrictive environment.

The stay-put provision under the IDEA provides an automatic preliminary injunction, preventing a school district from making a change in placement from the last-agreed-upon IEP, during the pendency of a petition challenging a proposed IEP. 20 U.S.C. § 1400, et seq.; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996); Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982). The purpose of stay put is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

There are two exceptions to the stay-put provision. The first is if the parties agree to a different placement, otherwise "the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C. § 1415(k).

Pursuant to N.J.A.C. 6A:14-2.7(n):

> To remove a student with a disability when district board of education personnel maintain that it is dangerous for the student to be in the current placement and the parent and district board of education cannot agree to an appropriate placement, the district board of education shall request an expedited hearing. The administrative law judge may order a change in the placement of the student with a disability to an appropriate interim alternative placement for not more than 45 calendar days . . .

In this case, the district did not file a due-process petition seeking to remove J.L. from his current placement in the Sterling High School ninth-grade self-contained ERI class due to dangerousness. Therefore, stay put applies. Petitioner filed for due process following the February 10, 2022, IEP meeting. The last-agreed-upon educational placement at the time petitioner filed for due process was the ninth-grade self-contained ERI class and, therefore, that became J.L.'s stay-put placement pending the outcome of this due-process hearing.

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. at 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).

Therefore, I **CONCLUDE** that the procedural violation of "stay-put" in this case caused a denial of FAPE to J.L. If the District had abided by stay put, J.L. would have remained in his current educational placement, the ERI self-contained class. He was removed from his self-contained ERI class and put on homebound instruction pending an out-of-district placement. It impeded his right to a free appropriate public education in the least restrictive environment. It also significantly impeded his father's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to J.L., since the district unilaterally removed him from his current educational placement despite Mr. J.L.'s objection and filing of due process. Removing J.L. from the self-contained ERI class and putting him on homebound instruction caused a deprivation of educational benefits to J.L.

Compensatory Education

Our courts recognize compensatory education as a remedy under the IDEA, which should be awarded for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem. M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F. 3d 389, 391–92 (3d Cir. 1996). Compensatory education requires school districts to "belatedly pay expenses that [they] should have paid all along." Id. at 395. It is well established that the courts, in the exercise of their broad discretion, "may award [compensatory education] to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F. 3d 601, 625 (3d Cir. 2015).

I **CONCLUDE** that J.L. is entitled to compensatory education for the period of the deprivation, from February 10, 2022, until the end of the 2021–2022 school year.

ORDER

Based on the foregoing, petitioners' request for due process is **GRANTED**. It is **ORDERED** that an IEP meeting be conducted immediately, and an IEP developed placing J.L. in the ERI class at Sterling High School with the appropriate supports, including a 1:1 aide and counselling services. Furthermore, a functional behavior assessment is to be conducted as soon as practicable to determine the necessity for a behavior intervention plan for J.L. It is further **ORDERED** that J.L. is entitled to compensatory education.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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 17, 2022
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency

Date Mailed to Parties:

CAT/gd

APPENDIX

WITNESSES

For petitioner:

Mr. J.L.

For respondent:

Debra Sukinik

EXHIBITS

For petitioner:

None

For respondent:

R-1 Due Process Petition dated February 10, 2022
R-2 Answer, dated February 17, 2022
R-3 Psychological Evaluation dated July 12, 2021
R-4 Educational Assessment dated August 16, 2021
R-5 Psychiatric Evaluation dated September 24, 2021
R-6 IEP dated October 1, 2021
R-7 October 1, 2021, Agreement between parent and District
R-8 IEP dated December 6, 2021
R-9 IEP dated February 10, 2022
R-10 IEP dated March 9, 2022
R-11 April 5, 2022, correspondence with parent confirming home instruction
R-12 C.V. Stacy Diduch
R-13 C.V. Debra Sukinik