



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

**FINAL DECISION**

OAL DKT. NO. EDS 07421-20

AGENCY DKT. NO. 2021-31854

**M.T. AND I.T. ON BEHALF OF M.T.,**

Petitioners,

v.

**RANDOLPH TOWNSHIP BOARD OF  
EDUCATION,**

Respondent.

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**Julie Warshaw**, Esq., for M.T. and I.T. on behalf of M.T. (Warshaw Law Firm,  
attorneys)

**Robin S. Ballard**, Esq., for Randolph Township Board of Education (Schenck,  
Price, Smith & King, attorneys)

Record Closed: January 14, 2022

Decided: February 22, 2022

BEFORE **ANDREW M. BARON**, ALJ:

**STATEMENT OF THE CASE**

Petitioners, M.T.. and I.T. (the parents) on behalf of M.T., filed a Petition for Due Process against the Randolph Township Board of Education (the Board or District), alleging that the District's proposed in-District program for M.T. for the 2019-20, and 2020-

21 school year was not appropriate, and that an out-of-district placement at the Hampshire School was appropriate.

Petitioners seek multiple forms of relief, including but not limited to a finding that the District failed to meet its educational obligations to M.T. under FAPE and IDEA for the 2019—2020 school years, and that that the Hampshire School was an appropriate unilateral placement for M.T. as of June 2020 to meet his special educational needs; that petitioners are the prevailing party in this action; that petitioners are entitled to full reimbursement for said placement; that the IEP be revised to reflect the placement; that petitioners be reimbursed for all expert fees and costs, including but not limited to reimbursement for the Morris Psychological threat assessment and that compensatory education be awarded to remedy the denial of FAPE, since January 14, 2020 through the end of the 2019-20 school year, for all out of pocket expenses incurred by petitioners, past, present and future, including but not limited to evaluations, counseling, enrollment in Stepping Forward, litigation costs and counsel fees, as well as punitive and other damages should petitioners be determined to be the prevailing party.

### **PROCEDURAL HISTORY**

On or about July 14, 2021 the parents filed a Petition for Due Process against the District, seeking placement at the Hampshire School, reimbursement for all fees associated with the matter and compensatory education. With the case still within the Department of Education, the parties participated in a resolution meeting which was unsuccessful.

On July 18, 2018, the matter was transmitted to the Office of Administrative Law, and a settlement conference was scheduled for August 20, 2020, September 17, 2020, October 15, 2020 and November 12, 2020, each time the matter was postponed due to the pandemic. At this point, both parties and counsel agreed to waive the mediation and proceed directly to a contested hearing.

Hearing dates were conducted on February 10, 2021, March 2, 2021 and March 3, 2021.

The hearings resumed on April 28 and 30, 2021, May 3, 2021 and were completed on July 19 and 21, 2021. The final transcript for the hearing was received on December 13, 2021. Post hearings submissions were simultaneously filed on January 14, 2022. Oral argument was waived by both sides.

### **TESTIMONY AND DISCUSSION**

Four witnesses testified for the District, including Cosette Sabota, a school psychologist and member of the child study team, Dara Patel, M.T.'s classroom teacher, Linda McGovern, who serves as clinical director of the District's Sage/Thrive program, and Walter Curioni, Director of Special Services for the District.

Ms. Sobota has been employed by Randolph for the last six years as a school psychologist. She testified that she was trained to administer and interpret cognitive assessments and functional behavioral assessments, as well as occupational, speech/language psychiatric and neuro developmental evaluations. She was admitted as an expert in her field.

At the time of her involvement with M.T., Ms. Sobota indicated she had responsibility for approximately thirty students, and she has case managed over 200 students during her career. She also indicated she has conducted approximately 300 IEP meetings as a case manager during her time in this position.

In 2015, Ms. Sobota said she first became familiar with M.T. while serving as a member of the Intervention and Referral Services Committee. She further indicated that M.T. was first classified in May 2016 as 'other health impaired,' based in part on a 2013 diagnosis by Dr. Kathleen Salvaggi-Fadden, and ever since she has served as his case manager.

According to Ms. Sobota, in third grade, with the support that was put in place, M.T.'s teachers, found that M.T. was making nice progress.

However, at the beginning of 4<sup>th</sup> grade, M.T.'s teachers and his parents, had some concerns about his academic performance, particularly in math. The IEP that year was delayed, so psychological, educational and speech re-evaluations could be conducted, and the parties could come together to address any concerns.

The IEP meeting during 4<sup>th</sup> grade was held on October 25, 2018. As a result of these considerations, Ms. Sobota indicated that supplemental math instruction was added two times a week.

Evaluations continued throughout the fall of 2018. Ms. Sobota testified that an educational evaluation was conducted by Linda Consales on November 30, 2018. The results of this evaluation showed that M.T. demonstrated low-average scores with a particular weakness in reading passage comprehension.

Continuing the re-evaluations during 4<sup>th</sup> grade, Ms. Sobota did her own psychological evaluation on December 12, 2018. Among her findings were that M.T.'s cognitive ability fell within the low-average range, as was his I.Q. and non-verbal ability.

What stood out though during Ms. Sobota's testimony was for the first time, during 4<sup>th</sup> grade, the teachers agreed with concerns expressed by M.T.'s parents that he was rated as "high risk" for anxiety, depression and attention deficit in the clinically significant range, as well as "at risk" for atypicality, withdrawal, behavior symptoms, social skills, leadership, functional communication and adaptive skills.

The parties met again on December 17, 2018 for an IEP Revision meeting. According to Ms. Sobota, as a result of the recent educational and psychological testing, recommendations were made to M.T.'s programming.

Among other things, M.T. would now attend resource replacement classroom for reading, language arts, and math. In addition, weekly counseling was added because he was not producing work in the classroom, and the parents were reporting negative behavior at home in addition to the risks observed at school.

As such, the consensus of the child study team during mid-year 4<sup>th</sup> grade was that it was in M.T.'s best interests to transition to a smaller class size, with a lower student teacher ratio that moves at a slower pace sooner rather than later to be more responsive to M.T.'s needs.

Initially, Ms. Sobota said that even though the mid-year change meant less mainstream involvement for M.T., his performance improved and he was engaged in the work.

Ms. Sobota concluded that it was appropriate to maintain M.T. with services, and that his classification should remain "other health impaired- primarily tied to his ADHD."

As a result, for the rest of fourth grade and beginning of fifth, resource replacement classroom was recommended for reading, language arts, math and in class supports for science and social studies. It was determined that M.T. needed a smaller class size with individualized academics "in a slower pace to meet his academic needs."

Also added at this time was counseling once a week, speech and language twice a week, and Extended School Year, (ESY) which was offered when the school year ended in June. The next witness to testify was M.T.'s teacher Ms. Patel. Ms. Patel indicated this was her third year as a special education teacher in Randolph. She has a Master's Degree from N.Y.U. and has K-6 general education certification teaching students with disabilities, as well as a certification teaching students using the Wilson reading program.

Ms. Patel stated that she uses a multi-sensory approach when teaching, does project-based learning with her students and she modifies curriculum and assessment to meet individual student needs.

In 2018, Ms. Patel was contacted by the child study team and advised that a new student, M.T. would be entering her classroom based on the belief that he would benefit from small group instruction. M.T. entered her classroom in 4<sup>th</sup> grade in the middle of the 2017-18 school year. On a typical day, Ms. Patel stated that she would start the day with a mini lesson, then assign the students independent study work so students could use a

skill taught during the mini lesson. She had seven students in the class, including M.T. who entered in the middle of the marking period.

After M.T. entered her class, Ms. Patel stated she was in regular communication with his parents and received multiple emails from them listing concerns they had about challenges he was having with writing. She did not recall receiving emails that M.T. refused to get up, seemed upset about going to school, and that he was upset about not being able to do his homework.

Ms. Patel had a different view of M.T.'s progress than his parents. While acknowledging that he was easily distracted, he was given a phone device to read aloud so he could hear himself. She also said he was frequently engaged in classroom discussions, and that his transition into the class went well.

At the January 24<sup>th</sup> 2020 IEP meeting, she indicated she felt M.T. would benefit from the Oasis program due to its small class size and therapeutic component. Following Ms. Patel, the District produced Mr. Walter Curioni as its next witness.

For six years, Mr. Curioni has served as the Director of Special Services for the District. Prior to moving into an administrative position, Mr. Curioni, was a History and English teacher certified in special education. He also has a master's degree in programming, and IEP development. Previously, he served as Assistant Superintendent for Curriculum with the North Arlington school district. His first involvement with M.T. and his family was in 2015, which was the year he joined the District. Much of Mr. Curioni's testimony focused on the incident which occurred on January 14, 2020, and the events that followed through the onset of the Pandemic through the the end of the school year in June.

On the day of the incident, he received a call from the secretary to the principal of the Center Grove school, alerting him that a student had eloped (left) the building. Arriving a few minutes later, he observed M.T. close to Schoolhouse Road outside the school. Both Mr. Curioni and the principal found it necessary to restrain M.T. as a safety

precaution, and M.T. was returned to a vacant classroom in the building until his parents could be contacted.

The events that followed are somewhat unclear. Even though M.T. was observed waving pencils, overturning a desk and throwing a stapler, Ms. Sabota indicated in her opinion the elopement and M.T.'s behavior was not severe enough to constitute a suicide threat. In fact, no written report of the incident was filed, even though M.T. was not allowed to return to school until he received medical clearance, which had to be approved by the District physician Dr. Ciufalo.

According to Mr. Curioni, the family was offered the opportunity to take M.T. to the District designated St. Clares Behavioral Health Center, which would be paid for by the District. The alternative was for the parents to take M.T. to their own mental health professional, which is the avenue they chose, and so they took M.T. to Dr. Stuart Leeds.

At first, Dr. Leeds said M.T. could return, on the condition the District would provide a 1:1 aide for M.T. When that option was rejected by the District, he revised his report to remove that recommendation, but did not specify a date for M.T. to return.

Mr. Curioni indicated that in the eyes of the District, and particularly its own medical physician, Dr. Leeds findings were not sufficient for M.T. to gain clearance to return. (The school physician Dr. Ciufalo tried but was not able to communicate with Dr. Leeds, so it was determined that for the time being M.T. would be placed on home instruction of ten hours a week, which is the statutory minimum. It is unclear why there were no further attempts by Dr. Ciufalo or the District to clear M.T. to return to school prior to the onset of the Pandemic sixty days later when all schools were closed. Although the word suspension was not used, Mr. Curioni admitted while preparing for his testimony that M.T. was listed as suspended, but because the District did not consider M.T.'s removal to be a suspension, it did not follow the process which calls for a manifestation determination/hearing after ten days away from school.

Under District policy 5450, there are sequential steps to secure medical clearance to return to school, including the option for parents to seek an evaluation from their own

psychologist, which in this case petitioners did. Mr. Curioni indicated that the District told petitioners if St. Clare's was not used, the District would not reimburse the parents for the evaluation.

What happened next is also somewhat confusing as to why M.T. was never cleared to return to school during the sixty days leading up to the Pandemic if in the eyes of the District, the elopement behavior was an isolated incident, which Mr. Curioni emphasized throughout his testimony.

Mr. Curioni testified that neither of Dr. Leeds' reports were sufficient to give M.T. medical clearance to return to school. He indicated that the second letter from Dr. Leeds, (which removed the recommendation for a 1:1 aide) was turned over to the Randolph counseling department which led to the development of a home instruction program.

Although there was conversation about the District having a relationship with Stepping Forward, which petitioners chose to work with M.T., there was no explanation about why there were no further efforts by the District during this time for M.T. to return to school, even though his removal was not deemed a suspension. Recognizing the need for some form of counseling combined with education and home instruction without a path to return to school, M.T.'s parents enrolled him in Stepping Forward.

There is also no explanation about why, if the District was not concerned about M.T. being a long-term behavioral problem in school, and did not deem a full Behavioral Evaluation necessary following the January 2020 elopement, it did not make more of an effort to bring the District's physician into collaborating with Dr. Leeds for a faster return to school prior to the onset of the Pandemic.

Mr. Curioni provided his recollection of what occurred following the determination to place M.T. on home instruction. He indicated that any further medical treatment would be up to the family, and by choosing Stepping Forward, they had assumed responsibility for the educational component as well.



He further indicated that placement at Stepping Forward does not indicate that a student's educational program is not appropriate since it is usually temporary and because most students return to the District. He and other District staff were in contact with Stepping Forward at the beginning of the placement, but he admitted there was no follow up thereafter to determine M.T.'s progress. There was also no discussion between the District and Stepping Forward as to a timeline for M.T. to get clearance to return to the District, even though sometimes Stepping Forward provides medical clearance in its discharge paperwork. In fact, Mr. Curioni's next communication with Stepping Forward was not until he was preparing to testify at this hearing.

When the last IEP meeting was scheduled for January 24<sup>th</sup>, ten days after the elopement, Mr. Curioni indicated that it wasn't necessary to change M.T.'s current IEP, since his current situation was temporary. Thus, the primary focus of the meeting was to discuss what the program the District would provide for M.T. in 6<sup>th</sup> grade, as he transitioned to middle school.

He strongly believed that the District's Oasis program could meet all of M.T.'s needs. He also concurred with the child study team's rejection of Dr. Zeisz's autism diagnosis, which was not incorporated into the IEP. The District declined to conduct its own evaluation as to whether M.T. was on the spectrum. And because the January 2020 elopement was considered an isolated incident, Mr. Curioni testified that a behavior plan was not necessary, nor was a safety and elopement plan required. Still, there was no discussion about a timeframe for M.T. to return to school.

Mr. Curioni's testimony then shifted to the onset of the pandemic and the closure of schools as of March 13, 2020. Like most Districts throughout the State, initially there was confusion about how to continue offering education from a completely virtual platform. At first, the District obtained materials and resources and deployed them to students' homes. Thereafter, it shifted to a combination of live meetings using Microsoft Teams software in an effort to mirror a typical day, albeit without anyone physically being in school.

Students like M.T. who were receiving home instruction were required to shift to the virtual platform everyone else was using. To maintain some level of consistency, the District was able to add an additional two hours a week of instruction from Ms. Mott and Ms. Dawson, teachers that M.T. had a rapport with, but when the parents asked for more hours from these two educators, the District was unable to accommodate M.T. because they also had a full virtual schedule for a different grade level of students. In an effort to increase the level of educational support for M.T., the District also added a paraprofessional, Ms. Hodi to his teaching team.

Mr. Curioni was aware that M.T. had great difficulty adjusting to a fully virtual platform. The District experienced an uptick of absences during this time, with many students like M.T. not signing onto their computers. Even for students who were not participating, Mr. Curioni explained that an internal decision was made within the District not to file truancy charges, and not to refer cases to DCF for neglect investigations. The combination of the elopement in January 2020, home instruction, and the switch to virtual instruction in March 2020, made it challenging for M.T.'s teachers to assign hm grades for the 2<sup>nd</sup> and 3<sup>rd</sup> marking periods.

Throughout this time, the members of the child study team were in agreement that there was no need to change anything about M.T.'s IEP, since they felt all of the goals and objectives were still attainable. Meanwhile, Mr. Curioni was aware that M.T.'s parents continued to maintain that following the removal from school in January 2020, they did not believe he was making meaningful progress with the combination of home instruction and Stepping Forward, and believed he had regressed during that time, and certainly from March 13<sup>th</sup> 2020 through the end of the school year with virtual instruction due to the Pandemic. As far as Mr. Curioni knew, M.T.'s parents did not avail themselves of virtually every service the District offered during the pandemic. These services included personal calls to help access all live classes, speech therapy and telehealth counseling services.

He indicated that the State encouraged Districts to provide compensatory education to its special education students, for which he set aside extra money, but there is no indication that such services were offered to the family once they initiated requests to look at alternate placements.

In fact, once the parents sent the required ten-day notice of their decision to place M.T in a residential setting outside the District, the District did not engage in any talks or factfinding with them. Instead, Mr. Curioni responded by saying: "...we will vigorously defend the District's position in litigation." He also conveyed to the parents that an out-of-district placement or residential placement was not needed.

There was no further dialogue between the parents and Mr. Curioni on this issue, either during the ten-day notice period, or throughout the rest of the summer of 2020. His testimony was silent on the issue of whether or not he or any member of the behavioral services team and/or child study team ever put together a re-entry plan for M.T. following the January 14<sup>th</sup> elopement after M.T. was placed on home instruction. The District prepared to physically re-open its schools in September 2020.

Also testifying for the District was Linda McGovern. Ms. McGovern has worked for the District for seven years and is employed by the Thrive Alliance Group as a clinical supervisor of the in-district program.

Ms. McGovern said her job includes collaborating with child study teams, guidance and teaching staff to assist students with mental health needs. She provides talk therapy to children with autism and has had great success with some of the students on the autism spectrum over the years. She also sees some students through her private practice that she has operated for six years. Her testimony did not include a discussion about whether she agreed with Dr. Zeisz's evaluation that M.T. was on the autism spectrum, which was rejected by the District outright.

Ms. McGovern testified that when she is able, she includes family therapy with children she is servicing because she believes it is integral to a child's success. Ms. McGovern has a BA in Psychology, a Master's of Education in counseling services, and is a licensed professional counselor.

She described Sage/Oasis, which was the IEP recommended program, had M.T. remained in the District for 6<sup>th</sup> grade. According to Ms. McGovern, the program is a small, structured learning environment classroom for emotionally fragile students. The program

model is set up with one main teacher, another language arts teacher for English, a one-to-one aide together with a Thrive clinician.

She also said the program has resulted in a significant decrease in hospitalizations for students who have returned from hospitalizations at places like St. Clare's, and a major decline in these students' needs for partial hospitalizations. Although she felt M.T. would benefit from Oasis/Thrive, Ms. McGovern did not explain why he made a good candidate for the program, since he was never hospitalized, and the District downplayed the elopement as an isolated behavioral incident.

Though it is unusual to offer these counseling services mid-year to 5<sup>th</sup> grade students, Ms. McGovern indicated that after she heard from Mr. Curioni, both she and Ms. Malatesta contacted petitioners to introduce some services to M.T. Although M.T.'s mother did come to school in late February 2020 to observe Oasis, petitioners did not follow up on Ms. McGovern's offer to participate in family counseling, or counseling for M.T.

Testifying first for petitioners was Dr. Jennifer Zeisz. Dr. Zeisz is a licensed clinical psychologist with expertise in autism and developmental trauma. She earned her Ph D. in clinical psychology from DePaul University in 1997.

Most of her testimony focused on her autism diagnosis. Dr. Zeisz indicated that she has been involved with approximately sixty students a year for the past ten years that fall into this category. She was aware that M.T. was not diagnosed as being on the spectrum at an earlier age, but that did not influence her opinion as many adolescents do not start to show signs of autism until they develop and grow, and parents of children with autism frequently ignore the signs or do not know where to go for an appropriate diagnosis. Her diagnosis was based on a number of factors, including but not limited to poor communications skills and difficulty in expressing thoughts. In her opinion, M.T. does not have the ability to socialize with his peers and does not appear to engage in activities and maintain peer relationships. She also noted that he struggles to interact appropriately with adults.

Dr. Zeisz further found that M.T. had a full-scale IQ only in the 80's and level 1 social communication deficits and Level 1 restrictive repetitive behaviors. She found that M.T. has difficulty in social-emotional reciprocity, non-verbal communication (empathy and understanding tone and facial expressions) development of friendships and expresses a lack of behavioral flexibility. Dr. Zeisz also found that M.T. has sensory processing challenges. She also confirmed that M.T. meets the criteria for attention deficit disorder and anxiety disorder, but not OCD. At the time of her evaluation, she was of the opinion that the parents still wanted to work with the District, and at the time she did not recommend a residential placement.

A couple of months later Dr. Zeisz revised her report to recommend that M.T. should enter a residential placement. Although it is not exactly clear why she changed her opinion, she indicated that she was influenced by the fact that in traditional academic settings, children still have to navigate a much larger environment, and M.T. was increasingly aware that he was being treated differently and had low self-esteem. After learning more about Hampshire, she was comfortable stating that she believed M.T. would benefit from such a residential setting. No one from the child study team contacted Dr. Zeisz after receiving her report to ask for more information about her autism diagnosis, nor did the team consider doing its own independent evaluation on this issue to consider or rule out how this might factor into M.T.'s IEP which was still being formulated. Also testifying as a witness for petitioners was Dr. Barry Katz.

Dr. Katz is a clinical forensic psychologist at the West Essex Psychology Center since 1993. He is the director of the practice and conducts evaluations of adults and children. He has a Ph.D. in psychology and is licensed to practice in New Jersey. After voir dire, Dr. Katz was admitted as an expert witness in forensic psychology, clinical psychology psychological evaluation diagnosis and treatment of children and adults with developmental disorders and autism spectrum disorder. In preparing his report on M.T., among other things, Dr. Katz reviewed the District's evaluations of M.T. from 2016-2019. He confirmed that M.T.'s I.Q. was in the low average range.

When looking at the BASC scores, he found multiple problems evident beyond ADHD, which could have also been consistent with M.T. being on the autism spectrum.

Dr. Katz expressed concerns about certain aspects of the District's Functional Behavioral Assessment which were indicative of M.T. not being able to hold himself together for situational demands, as well as losing focus and emotional control.

Dr. Katz concurred with Dr. Zeisz that it was unlikely that M.T. would respond to talk therapy, (which was an essential component on the District placement which was proposed for the next school year.).

Dr. Katz spent a great deal of time testifying about why he believed the District had failed to recognize over time M.T.'s level of distress, which culminated in the January 2020 elopement from school. And after home instruction was put in place, he indicated that the notes from the Stepping Forward counseling sessions for the less than two months M.T. was in that program showed the treatment and intervention from January 2020 through March 13, 2020 had little success, thus corroborating his belief as well as Dr. Zeisz that M.T. did not benefit from talk therapy, which again is an essential element of the program proposed by the District for 6<sup>th</sup> grade.

Dr. Katz emphasized that M.T. showed evidence through the Stepping Forward counseling notes of multiple challenges, including but not limited to disruptive mood regulation disorder, oppositional defiant disorder, generalized anxiety, obsessive compulsive disorder, autism spectrum disorder, in addition to ADHD and social communication disorder. In his opinion, since the focus.

In Dr. Katz's opinion, the interventions that had been implemented previously by the District were not appropriate and led to a downward spiral which culminated in the elopement from school. He concluded his testimony with the opinion that M.T. needs a higher level of care which could be provided by a residential placement geared towards children with developmental disorders, including but not limited to autism.

Elizabeth Bruno, serves as principal of the Hampshire School, where petitioners placed M.T. testified. Though called as an expert, she was not admitted in such a capacity and her testimony was limited to being a fact witness. She does not have a degree in special education.

Ms. Bruno gave some background on Hampshire. She indicated that Hampshire serves students who she described as “Neurotypical.” She said the school population is small, with fifteen students enrolled in various age groups. The philosophy of the school in educating students with autism is to avoid labeling those students. At Hampshire, the school relies on four pillars of learning, to be, to do, to know and to live well with others. According to Ms. Bruno, M.T. started his journey at Hampshire in late August 2020.

After an initial challenging transition period which is normal for new enrollees living away from home, the staff started to see big changes in his behavior in late October/early November. He carried a full schedule of reading writing, math history and science as well as two electives. She indicated that the staff had reported improvement in academics though M.T. continues to struggle in certain areas. However, what impressed her was M.T. was playing an active role as a member of the Hampshire community and was showing signs of less avoidance. She said at all times the staff tries to avoid putting M.T. in positions that would lead to “sensory overload.”

Mrs. T., MT.’s mother testified. She indicated that as early as pre-school, she and her husband sought professional help for M.T. on their own, which involved several therapists. They consulted with Harmony Pediatric Therapy. Throughout the years, talk therapy did not work with several therapists, a conclusion that was corroborated by both Dr Zeisz and Dr. Katz. One therapist, Dt. Thom discharged M.T. due to the severity of his behavior which she believed was better suited to an intensive outpatient program. Other therapists he saw were Dr. Gates, Kelly McLaughlin Warren Ververs and Dr. Bell. Mrs. T. did not understand why the District did not reach out to any of the other therapists, at least two of whom, Dr. Ververs and Dr. Bell thought M.T.was best suited for a residential placement.

Following the elopement in January 2020, she and her husband selected Stepping Forward to work with M.T. after he was placed on home instruction and unable to get clearance to return to school. She indicated that Stepping Forward also recommended a residential program would be appropriate for M.T. which Dr. Katz had testified to from his review of their clinical notes. Mrs. T. indicated that this recommendation came from Dr. Nouri Ghahary, Stepping Forward’s clinical psychologist and their therapist Sarah Green.

Mr. T. advised that these Stepping Forward staff members believed M.T. would be most successful in an out of home placement where his individual needs could be targeted and reinforced in order for more significant change to occur, and this information had been conveyed to the District. According to Mrs. T. other letter from M.T.'s neurologist, Dr. Cargan were also ignored by the District regarding the M.T.'s educational and psychological needs. Mrs. T stated that with the onset of the pandemic in March 2020, Stepping Forward closed, and M.T. essentially shut down as he was unwilling to converted to the new virtual method of learning that had been set up by Randolph.

Mrs. T. further indicated that she was troubled by the fact that the District refused to pay the transportation costs associated with Stepping Forward, which was recommending ten hours of academic instruction. As M.T. continued to struggle after Stepping Forward closed, and M.T. essentially shut down and declined to sign on, she expressed her frustration that the District and particularly Mr. Curioni refused to even consider an out of district placement and continued to close the door on considering this option even during the ten-day notice period in June 2020. The only response she got was that the District would "vigorously defend the District's position in litigation."

M.T.'s father, Mr. T. also testified. He indicated that in October 2019, he and his wife decided they had to do something further for M.T., so they consulted with an educational consultant Lucy Pritzker. Initially, Mt. T. indicated they did not go this route for the purpose of seeking a residential placement for M.T. According to Mr. T., they were simply trying to get additional information about alternative ways to address his needs. As the situation evolved and all school closed, he said they considered Cherokee Creek and Hampshire. He was aware Ms. Pritzker is a board member at Hampshire. According to Mr. T., he and his wife settled on Hampshire because they wanted a program for him that functioned 24 hours a day, and since his enrollment there, even through Covid, they have noticed a marked improvement in their son.

The final witness called was Mr. Curioni for rebuttal. He indicated again that from January 2020 through March 13, 2020, M.T. was not medically cleared to return to school, but after the school went entirely virtual, he was again allowed to participate. He emphasized that a referral to Sage counseling was made within 24 hours of the elopement



incident, but the parents did not follow up. He never answered questions about why the District and/or the school physician did not make more of an effort to help secure medical clearance for M.T. to return to the District during the sixty days he was on home instruction before the onset of the pandemic. He did not dispute his comments in June 2020 about defending the District's position in litigation during the ten-day notice period, and did not deny that the District was not open to other alternatives as he remained of the opinion that the in district, Oasis/Sage program which was proposed for sixth grade was appropriate for M.T.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

### **FINDINGS OF FACT**

1. M.T. is a sixth-grade student at the Hampshire School, a private school residential school which specializes in meeting the educational and behavioral needs of students with learning disabilities.
2. While in pre-school, M.T. showed early signs of learning disabilities.
3. In 2013, petitioners brought M.T. to Dr. Tara Gleason, a Neurodevelopmental Pediatrician and Dr. Kathleen Selvaggi Fadden.
4. Dr. Gleason and Dr. Selvaggi diagnosed M.T. as having ADHD, and the diagnosis was shared with the District.
5. Almost three years went by before in 2016, the District was referred to the child study team for evaluation and classification for eligibility to receive special education services.
6. Petitioners were advised in 2016 that M.T. would receive services under the classification "Other Health Impaired", and an I.E.P. was prepared to reflect these findings.
7. In third grade, M.T. participated in general education subjects, reading, language arts, math, science and social studies which were co-taught by general education and special education teachers.

8. At the beginning of fourth grade, M.T. started to exhibit signs of difficulty in the general education classroom, even with the supports in place from the prior academic year.
9. As a result, another I.E.P. meeting was held on October 25, 2018 which led to the addition of supplemental support for math two times a week.
10. The parties met on November 20, 2018 to plan M.T.'s reevaluation.
11. Linda Consales, M.Ed. conducted educational testing of M.T. on November 30, 2018.
12. The outcome of the educational evaluation showed that he had difficulty with comprehension, his writing skills fell in the low average range, and that M.T. appeared in the evaluator's words, "anxious and angry," when called upon to do a timed writing task.
13. The educational evaluation was followed by a psychological evaluation, which was conducted by Cosette Sobota on December 12, 2018.
14. Ms. Sobota, a psychologist and member of the child study team found that M.T. was a student of low average intelligence as shown on the Wechsler Intelligence Scale.
15. Ms. Sobota's evaluation also supported specific behavioral concerns as reflected on the Behavioral Assessment Scale for Children.
16. After continued advocacy by petitioners, while M.T. was in 4<sup>th</sup> grade, based on a combination of factors, another IEP meeting was scheduled on December 17, 2018 before M.T.'s reevaluation was completed to review MT's placements for reading, language arts, and math.
17. A speech and language evaluation were conducted by Kristen Halikias, M.S. CCC-SLP and a report of the same were provided on January 7, 2019. The testing revealed that M.T.'s core language abilities fell at the 7<sup>th</sup> percentile, and his listening comprehension skills were at the 12<sup>th</sup> percentile on the Clinical Evaluation of Language Fundamentals. His score on the Oral Passage Understanding Scale was also at the lower end at the 12<sup>th</sup> percentile.
18. The outcome of this meeting was to place M.T. back into a pull-out resource class for reading, language arts, math and to add in-class support for science, social studies individual speech and language therapy twice a month, and counseling services once a week.

19. Although counseling services were added, there was no formal Behavioral Intervention Plan as part of this revised IEP.
20. On January 17, 2019, the parties met again as part of M.T.'s annual reevaluation in order to determine M.T.'s continued eligibility for special education services. The meeting took place during mid-year 4<sup>th</sup> grade and looked ahead to 5<sup>th</sup> grade for M.T.
21. As she had several times before, M.T.'s mother continued to express concerns about his speech, his lack of performance in reading, and his lack of social skills.
22. Prior to the January 19<sup>th</sup>, 2019 reevaluation, a psychological assessment conducted by Ms. Sobota showed that a majority of M.T.'s scores were in the clinically significant range, including some areas which were deemed "at risk." M.T.'s teachers, who were consulted in connection with this evaluation concurred that M.T.'s behavior was in the "clinically significant" range.
23. Although the Team did not see negative behaviors by M.T. in school, a Functional Behavioral Assessment was conducted by Barbara Gontarski, M.A.T. BCBA.
24. A month before the January 2019 reevaluation, M.T.'s mother expressed concern to the District that he was "melting down while trying to do assignments and keep up with his work.
25. When M.T.'s mother raised the possibility of alternative settings for M.T., she was told that the District needed to try "every avenue possible" before considering such a move, and she was further told by Mr. Curioni "there was no need for it" because the District could properly take care of M.T.'s needs.
26. A week before the January 2019 reevaluation meeting, M.T.'s mother wrote to the team that M.T. was hysterical in the morning because he refused to do his homework and didn't want to go to school.
27. On February 27, 2019, she again wrote to the team, this time to Ms. Webster and the case manager indicating that M.T. is increasingly agitated, is sad, and is not understanding/growing with the material being presented in school.
28. This was followed up with another communication in mid-March 2019 that a pattern was developing with M.T. who continues to get upset and frustrated by his inability to complete the work and is worried about getting in trouble at school for not finishing his assignments.

29. The dialogue between M.T.'s mother and the District continued over the same areas of concern in May 2019 because M.T. was having difficulty with executive functioning and unable to comprehend the materials in the packets that were coming home with him.
30. On May 17, 2019, M.T.'s IEP was amended to change his supports for science and social studies because Ms. Sobota and petitioners agreed that the teacher who was scheduled to provide the in class supports would not be a good fit for M.T.
31. M.T. was offered admission to the District's Summer 2019 ESY Program, but petitioners determined that M.T. would benefit more from social encounters at summer camp, so they did not enroll him in ESY.
32. Additional communications expressing continued escalation of M.T.'s anxiety and challenges with schoolwork were sent in November 2019 and early January 2020.
33. When M.T. started the 2019-20 school year, his poor behavior at home accelerated, and petitioners enrolled him in counseling with Perform Care after he went after his father with a knife.
34. In November 2019, there was a bullying incident against M.T. on the bus, which was handled internally by the District with assistance from the school psychologist.
35. Although the situation was resolved, it left a lasting impact on M.T.
36. In January 2020, M.T.'s behavior at home declined further and he became verbally abusive to members of the family, would not complete routine household chores, and did not focus on his work for school.
37. On January 14, 2020, after giving his parents a hard time about going to school, M.T. left (eloped) from the school building and ran towards a busy street.
38. M.T. had to be restrained by the school principal Mr. Rodas, and Mr. Curioni who arrived shortly thereafter.
39. After he was returned to a nearby classroom, the District invoked a series of protocols it was required to follow when such situations occur.
40. Petitioners were contacted and asked to pick up M.T. from school
41. Because the incident involved threats by M.T. to do harm to himself and others, the parents were given a choice of having him evaluated by the designated school mental health facility at St. Clare's, or in the alternative by their own psychologist.

It would require clearance by one of these medical officials before M.T. would be allowed to return to school.

42. Not trusting of the District's preferred evaluation in a hospital setting, petitioners, took M.T. for an evaluation by their own physician, Dr. Leeds.
43. Dr. Leeds determined that M.T. could return to school, but only if the District added a 1:1 aide, which the District rejected.
44. Although Dr. Leeds prepared a second report which was amended to remove the 1:1 aide recommendation, the school physician, Dr. Ciufalo, who is required to be involved before M.T. could return to school was not satisfied and did not sign off on M.T. being cleared to return.
45. Dr. Ciufalo attempted to reach Dr. Leeds to seek clarification on some of the information in his reports, but the two never connected.
46. During this time, the District did not conduct a manifestation determination hearing, although the District argued M.T. was not suspended, so this type of hearing was not necessary.
47. Although the District argued that the elopement incident on January 14<sup>th</sup> was an isolated situation and M.T. that had not often exhibited behavioral challenges while in school, the District made no further attempts to have him return to school instead of home instruction which continued for a period of sixty (60) days up to the onset of the Pandemic.
48. It was petitioners, not the District who enrolled M.T. in Stepping Forward, after it became apparent that the District was not taking further steps to secure medical clearance for M.T. to return to the classroom, even though they represented that the elopement was an isolated incident.
49. Without medical clearance to return, on January 29, 2020, two weeks after the incident giving rise to M.T.'s removal from school, the school implemented a home instruction program for M.T. with a minimum of ten hours of instruction per week.
50. M.T. was also enrolled by petitioners at this time in a program known as Stepping Forward, but the District never inquired of Stepping Forward about M.T.'s progress while enrolled in the program.
51. In fact, from January 14, 2020 through the onset of the Pandemic in mid-March 2020 when all schools were shut down for in person learning, there were no further

attempts by the District to engage with Dr. Leeds and/or petitioners to determine if there was a way M.T. could be medically cleared to return to school.

52. On January 24, 2020, ten days after M.T.'s removal from school, the parties met for the next IEP meeting.

53. The District did not ask the school physician, and/or Dr. Leeds for input on what circumstances M.T. could return to the classroom, which would have been the Least Restrictive Environment, instead of home instruction.

54. The District never proposed a re-entry plan for the remainder of the 2020 school year in the two months while M.T. was on home instruction before the onset of the Pandemic.

55. It is undisputed that although the District would not allow M.T. to return to school because there was no medical clearance, the District did not believe that a Functional Behavioral Assessment was necessary for this IEP, since they believed that M.T.'s elopement was an isolated incident and had only occurred once before.

56. The District did not make an effort at the January 2020 IEP meeting to develop a method for M.T. to return to school in the short term, and no timeline was discussed for a physical return to school.

57. Instead, most of the meeting focused on the expectations and program for middle school, through the Oasis program, which M.T. would be entering in September 2020.

58. The 6<sup>th</sup> grade program proposed by the District was identified as the Oasis program, which consisted of a classroom with a student-teacher ratio small, complemented by counseling through the SAGE therapeutic program, in the form of what is commonly referred to as "talk therapy."

59. This program was recommended due to the recognized need for higher clinician care after the January incident, as well as the small student-teacher ratio for math and language arts. Still, the District continued to refer to the January 14<sup>th</sup> elopement as an "isolated incident," which did not require a full Functional Behavioral Assessment. There was no discussion of a route to return to the classroom for the remainder of the 2020 school year, even before the onset of the Pandemic.

60. In the interim, even though M.T. was on home instruction, SAGE counseling services were offered, and Linda McGovern, the director of the program was introduced. Family counseling is a prerequisite to SAGE, and it is unclear if the family ever engaged in such counseling.
61. For its participants, SAGE staff develops a plan based on identified problem areas, but it requires a level of cooperation with the family. The primary component of this form of counseling is “talk therapy.”
62. Petitioners did not avail themselves of what SAGE was offering while M.T. was on home instruction, and instead relied on whatever services were being provided through Stepping Forward.
63. Prior to the IEP meeting, petitioners had M.T. evaluated by a psychologist Dr. Jennifer Zeisz.
64. Among other things, Dr. Zeisz determined that part of M.T.’s behavior issues, and his challenges in school could be explained because she was of the belief that he was on the autism spectrum.
65. Dr. Zeisz did not believe that M.T. would benefit from “talk therapy “ which is an essential element of the Sage/Thrive program that was being recommended for M.T.’s sixth grade placement in the District.
66. Although Dr. Zeisz’s report was provided to the IEP team in advance of the meeting, the District did not accept the finding that M.T. was on the autism spectrum, and refused to include it in the IEP.
67. In so doing, the District relied on a pediatrician’s determination from years earlier that M.T. did not have autism.
68. Part of the district’s concern about the autism diagnosis was that Dr. Zeisz is not a medical doctor, and its belief that only a medical doctor can diagnose autism.
69. There are several professionals who have training to diagnose autism, including but not limited to medical doctors, developmental pediatricians, psychiatrists, neurologists and counseling psychologists, school psychologists and clinical psychologists.
70. Dr. Zeisz has a Ph.D. in clinical psychology, thus giving her the background to diagnose autism.
71. Everything changed with the onset of the Pandemic on March 13, 2020.

72. An Executive Order signed by the Governor prohibited in person instruction, and all school statewide including Randolph were closed.
73. With no precedent for how to deal with this situation, Randolph procured materials and resources and deployed them to students' homes, and then set up a virtual schedule for students using Microsoft Teams software.
74. M.T. hardly participated in the online learning which was implemented by the District after March 13, 2020.
75. Under this learning method, the District did its best to mirror a typical day, as if the students and staff were physically in the building.
76. Although a directive dated March 23, 2020 was issued requiring districts to offer special education services to the "most appropriate extent possible," very little guidance was offered about how to achieve this goal.
77. Upon learning that Stepping Forward was fully closed, the District stepped in to offer remote learning to M.T.
78. M.T. hardly ever willfully participated in the online learning that was provided by the District through the end of the 2020 school year.
79. There is no indication that after Stepping Forward ceased operations, the District ever attempted to learn if M.T. had made any progress as a participant in that program.
80. There was no request by the District for petitioners to sign a release to get the Stepping Forward records, or to speak with his counselors.
81. Thus, at the start of all remote learning in March 2020, there was no basis for District and school officials to determine M.T.'s educational, and/or psychological status for the remainder of the school year.
82. As the online instruction ensued after Stepping Forward closed and the schools closed, M.T. had a hard time transitioning back to the class he had not been a part of for two months.
83. He essentially refused to sign on and participate, and his mother felt he was "embarrassed" to rejoin his peers. He also refused to participate in speech services which the District offered to resume in accordance with his IEP.
84. Before the pandemic, M.T. preferred working with his home instruction teachers, Ms. Dawson and Ms. Mott.



85. Once the pandemic ensued, home instruction in person was no longer an option, and M.T. fell even more behind, and could not handle the large packets of material that were being sent home.
86. There were several communications by M.T.'s mother to the District in March and April seeking additional help and guidance. The communications continued into May 2020, as M.T. became more and more disengaged and essentially "shut down." He would not meet with his teachers on camera, and no alternate means of teaching was offered.
87. Frustrated with M.T.'s lack of progress and concerned about his future education, in April 2020, M.T.'s mother reached out to the case manager requested that the District consider out of district placements, including four specific schools.
88. On April 17, 2020, Mr. Curioni, the Director of Special Services responded that M.T.'s mother would first have to ask the four schools to document in writing the items they would need to review for the placement process and a release would need to be signed. The District took no further action with regard to considering alternative out-of-district placements, either day or residential.
89. Among the four schools on under consideration for M.T. by his parents, Cherokee Creek and other out-of-district placements requested more specific information from the District, but nothing else other than the latest IEP from 1-24-20 was provided.
90. With nothing else transpiring between the District and M.T.'s parents, his parents made a decision to leave a deposit with the Hampshire School, an out-of-state residential placement.
91. On June 23, 2020, seeing no further alternative, M.T.'s parents sent the required ten-day notice to the District that they were enrolling M.T. at Hampshire.
92. Instead of considering alternatives or engaging in a dialogue with petitioners about what might work for M.T. within the ten-day period after receipt of the notice, Mr. Curioni wrote back on June 24, 2020 saying that the proposed IEP for M.T. to switch to Oasis will "absolutely meet his needs", and for reasons unknown added that the District would "zealously defend the program." There was no effort to address the lack of educational participation from January 14<sup>th</sup> through the end of the school year in June, nor was any effort made during the ten-day statutory

period to engage in a dialogue with petitioners about alternative day programs outside the District.

93. Approximately thirty days later, petitioners filed their due process petition. Based on a series of actions by the District following M.T.'s elopement on January 14, 2020, I **FIND** that the District did not provide FAPE to M.T. in the least restrictive environment following the incident, which the District itself deemed isolated. I **FIND**, that the once the District's physician indicated that Dr. Leeds' report was not sufficient for M.T. to return to school, placing M.T. on home instruction for an indefinite period, without a re-entry plan, put him in a more restrictive environment than the IEP which was in place at the time, and I **FIND** it denied M.T. FAPE. I **FURTHER FIND** that the District's unwillingness to consider a diagnosis of Autism for M.T., and/or the failure to seek an independent evaluation on this diagnosis also constitutes a violation of FAPE, as it may have changed the IEP which was proposed on January 24, 2020, and I **FURTHER FIND**, that since talk therapy was a key component of the Oasis/Sage program being offered by the District for sixth grade, and with evidence throughout that M.T. did not benefit over the years from talk therapy that this program did not meet the District's obligations to M.T. under FAPE.

I **FURTHER FIND**, that the District failed to meet its FAPE obligations to M.T. following the January 14<sup>th</sup> elopement, by virtue of its failure to make additional attempts to have the school physician communicate with Dr. Leeds and petitioners, so that clearance could be obtained leading towards re-entry to the school before the onset of the pandemic on March 13, 2020.

And, while the District did not identify M.T.'s time away from school as a suspension, once the initial ten day period passed after the elopement, no hearing, formal or informal was offered to determine if M.T. could return to school, instead of remaining on home instruction, which constitutes a violation of his due process rights, and the District's obligations under FAPE.

I **FURTHER FIND** that during the "ten-day window" after proper notice was given by petitioners to the District in June 2020 about the placement, the District took no actions

to learn more about the placement, and/or to propose an alternative either within or outside the District. I **FIND** that the only action the District took during this statutory mandated period was to prepare itself to defend its position in litigation instead of entertaining an open dialogue with petitioners about other placement options that might be less costly and would have allowed M.T. to remain closer to home. Again here, I **FIND** that M.T.'s due process rights were violated and the District ignored its obligations under FAPE, by virtue of its failure to discuss options with the family during the ten day notice period.

As such, I **FIND** petitioners are entitled to full reimbursement of their placement cost at Hampshire commencing August 2020, including but not limited to tuition and travel expenses. I also **FIND** petitioners are entitled to reimbursement for travel and any related expenses while M.T. was enrolled in Stepping Forward, from January 2020 through March 13, 2020. It is unknown and not part of the submissions as to whether M.T. continued his enrollment at Hampshire for the 2021-21 school year, and whether or not the District convened another meeting with the parties during this time, and whether another due process petition was filed. As such, the finding applies to the 2020-21 school year placement, subject to further review in another forum if appropriate.

I further **FIND** that the District violated FAPE under IDEA and under Section 504. Therefore, petitioners are entitled to reimbursement of all cost related to the private evaluations and expert witnesses identified herein. As such, I further **ORDER** that petitioners be reimbursed for these expenses.

I **DO NOT FIND** that petitioners and M.T. are entitled to compensatory education for the period of March 13 2020 through June 2020 when schools were closed as the Department of Education created uniform instructions to districts on how to handle virtual instruction, and both M.T. and petitioners did not avail themselves of the services and education that was being offered by the District in this three month period after schools were closed.

## **LEGAL ANALYSIS AND CONCLUSIONS**

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures 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, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A “child with a disability” means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). M.T. has been diagnosed with ADHD and autism, but the District contested the autism diagnosis.

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a free “appropriate public education.” 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Each district board of education is responsible for providing a system of free, appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A “free appropriate public education” (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 school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, 458 U.S. 176. Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A), (B).

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(14); 20 U.S.C. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for

the student's educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). Annually, or more often, if necessary, the IEP team shall meet to review and revise the IEP and determine placement. N.J.A.C. 6A:14-3.7(i). FAPE requires that the education offered to the child must be sufficient to "confer some educational benefit upon the handicapped child," but it does not require that the school district maximize the potential of disabled students commensurate with the opportunity provided to non-disabled students. Rowley, 458 U.S. at 200. Hence, a satisfactory IEP must provide "significant learning" and confer "meaningful benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577-78 (3d Cir. 2000).

The Supreme Court discussed Rowley in Endrew F. v. Douglas County School District RE-1, \_\_ U.S. \_\_, 137 S. Ct. 988 (2017), noting that Rowley did not "establish any one test for determining the adequacy of educational benefits" and concluding that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Id. at 996, 1001. Endrew F. warns against courts substituting their own notions of sound education policy for those of school authorities and notes that deference is based upon application of expertise and the exercise of judgment by those authorities. Id. at 1001. However, the school authorities are expected 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.

In Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 46 (1989), the New Jersey Supreme Court concluded that "in determining whether an IEP was appropriate, 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." Further, the New Jersey Supreme Court stated:

As previously indicated, the purpose of the IEP is to guide teachers and to insure that the child receives the necessary education. Without 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. Furthermore, an IEP that is incapable of review denies parents the opportunity to help shape their

child's education and hinders their ability to assure that their child will receive the education to which he or she is entitled.

[Id. at 48-9. (citations omitted).]

In accordance with the IDEA, children with disabilities are to be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur 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. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to require that a disabled child be placed in the LRE that will provide the child with a “meaningful educational benefit.” T.R., 205 F.3d at 578. Consideration is given to whether the student can be educated in a regular classroom with supplementary aids and services, a comparison of benefits provided in a regular education class versus a special education class, and the potentially beneficial or harmful effects which placement may have on the student with disabilities or other students in the class. N.J.A.C. 6A:14-4.2(a)(8).

The Third Circuit has adopted a two-part test to determine whether a child has been placed in the least restrictive environment under IDEA. First, a court must determine “whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.” See Daniel R.R. v. State Bd. of Educ. 874 F.2d. 1036 (5<sup>th</sup> Cir. 1989). Second, “if the court finds that placement outside of a regular classroom is necessary for the child to benefit educationally, then the court must decide whether the school has mainstreamed the child to the extent appropriate, such as whether the school has made efforts to include the child in school programs with nondisabled children wherever possible. In considering whether a child with a disability can be satisfactorily educated in the regular classroom, a court should consider: 1) the steps the school district has taken to accommodate the child in the regular classroom; 2) the child’s

ability to receive an educational benefit from regular education; and 3) the effect the disabled child's presence has on the regular classroom. N.J.A.C.6A:14-4.2 (a)(8).

The IDEA and its related New Jersey regulations describe a continuum of placement options. 34 C.F.R. 300.115 (2009); N.J.A.C. 6A:14-4.3.

Along the continuum of placements, from least restrictive to most restrictive, home instruction is one of the most restrictive.(emphasis added). In New Jersey, home instruction should only be the designated placement "when it can be documented that all less restrictive options have been considered and have been deemed inappropriate." N.J.A.C.6A:14-4.8 (a). A school district is required to provide the N.J. Department of Education with prior written notification before placing a child on home instruction and such notice is effective for a maximum of 60 days, at which time renewal of the notification may be made. In accordance with the regulations, instruction must be provided for at least ten hours a week by certified teachers on at least three separate days. N.J.A.C. 6A:14-4.8(a)(5). The District contends that it provided FAPE to M.T. in the least restrictive environment. But when a student who is already receiving special services in school is switched to home instruction, the District is obligated to make sure at least the same level of services is being provided. And home instruction, (in this case for two months) which was followed by another three months due to the State shutdown, can result in social isolation of a most restrictive environment. See: M.S. o/b/o K.E. v. Camden Bd. of Educ. OAL Dkt.. EDS 00698-07, Final Decision (Aug. 3, 2007). Although the pandemic was unforeseen at the time of the switch to home instruction, the District made little, if any effort to determine if medical clearance could be secured for M.T. to return to school during the sixty days from January 14<sup>th</sup> to the start of the pandemic on March 13<sup>th</sup>.

Petitioners contend that the District's proposed program was not appropriate to meet M.T.'s individualized needs and would not provide M.T. with a FAPE. The District bears the burden of proof and the burden of production whenever a due process hearing is held pursuant to the provisions of the IDEA. N.J.S.A. 18A:46-1.1.

There are several overriding factors that M.T. did not receive FAPE, and would not have done so had he returned to school in September 2020 and enrolled in Oasis.

The record is replete with evidence that the District's position starting in January 2020 was at best, inconsistent. The IEP that was offered did not include a Behavioral Assessment, and the District never offered to modify it ten days after he eloped, and even before the end of the 2020 school year while he was on home instruction before the Pandemic ensued. At the IEP meeting which took place ten days after the elopement incident, no re-entry program for a return date to school was proposed by the District and M.T. and home instruction is more restrictive than being in school. MT remained under home instruction without a path to physically return to his school for sixty days, until the onset of the pandemic, when all learning went virtual. I further **CONCLUDE** that with the District's refusal to engage in discussions about other out-of-district placement options after receipt of the ten day notice, petitioners were well within their rights to make the determination that M.T. should be enrolled at the Hampshire School, effective September 2020.

The continuation of an out-of-school placement after determining a District did not provide a student with FAPE is well-established: see M.F. and L.F. o/b/o N.F. v. Secaucus Board of Education EDS 10762-06 (2007) see also: D.B. and C.B. o/b/o D.B v Windsor Twp. Board of Education EDS 933-11 (2011). Each of these cases resulted in an award of reimbursement to petitioners for all charges and expenses related to the unilateral placement of a student in another school.

The process for parents who make a unilateral placement decision is codified at N.J.A.C.\_6A:14-2.10 (c) providing for a ten day written notice to the District, "to give the school district an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate IEP, and demonstrate whether a FAPE can be provided in the public schools.(emphasis added). See: J.B. & D.B. v. Watchung Hills Reg'l Sch. Dist. Bd. of Educ.2006 U.s. Dist LEXIS 250 (D.N.J. January 5, 2006) (citing Greenland School District v. Amy N. 358 F 3d. 150,160 (1<sup>st</sup> Cir. 2004). And see: H.L. o/b/o V.L. v. Marlboro Twp. Bd. of Educ.No. 16-9324, 2017 U.S. Dist. LEXIS 187828 2017 WL 5463347. I **CONCLUDE** the District failed to observed proper protocol and due process as required under N.J.A.C. 6A:14-2.10 (c), by virtue of its lack of action and statement that"...we will vigorously defend our position in litigation..."



In sum, the IDEA “was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations.” C.H. v. Cape Henlopen Sch. Dist., 606 F. 3d. 59 (3d Cir.2010).

Here, District officials, specifically the Director of Special Services were adamant that no other options needed to be explored, essentially waiving the intent of the ten-day rule. And the statement under oath, “.....**that we will vigorously defend the District program offered through litigation..**,” without at least entertaining a review of the choices petitioner had already explored is indicative of a close minded mindset that is not consistent with the intent of the statutes and code regulations. Here, instead of acting in good faith regardless of the District’s belief that its own program was best for M.T., it “personalized” the ten day window after receiving notice of petitioners’ intentions. Therefore, **I CONCLUDE**, that the District disregarded its legal obligations during the ten day notice period to at least explore other options in good faith with petitioners, and/or offering to revise the January 24<sup>th</sup> IEP, which was prepared before the State shutdown.

Several of the goals and objectives in the IEP were not appropriate because M.T. lacked the prerequisites for those goals and the criteria for mastery did not require independent mastery and therefore were not appropriate to establish meaningful progress. But after consideration of all the testimony and evidence, I **CONCLUDE** that the District did not sustain its burden that M.T. was receiving FAPE in the Least Restrictive Environment, and that M.T.’s rights under Section 504 were violated. I therefore **CONCLUDE** that petitioners, are the prevailing party in this matter.

Based upon the testimony and documentary evidence, I **CONCLUDE** that the District’s IEP was not appropriate to meet M.T.’s educational needs for the 2020—2021 school year, and did not provide him with a FAPE.

**I DO NOT REACH THE SAME CONCLUSION** that FAPE was denied for the school years prior to 2020, as there were IEP's in place for the preceding three years, and even though M.T.'s academic performance during those years was less than average, petitioners allowed for the implementation of those IEP's without objection.

Further, when the District offered M.T. enrollment in the Summer Extended School Year Program at the conclusion of the 2018-2019 school year to avoid regression at the start of the next school year, petitioners declined the offer and elected to send M.T. to summer camp instead.

As such, **I CONCLUDE** that M.T. is not entitled to compensatory services for the three years prior to the filing of the due process petition.

Finally, **I ALSO CONCLUDE**, that M.T. is not entitled to compensatory education from the onset of the pandemic, March 13, 2020 when schools first closed through June 2020, as the Department of Education sent out uniform protocols to districts throughout the State on virtual instruction, and M.T. and petitioners did not avail themselves of what was being offered, even if some of it did not meet M.T.'s needs during this time after home instruction was ended and he was allowed to return to the District as a virtual student.

Pursuant to 20 U.S.C. § 1412(a)(10)(C)(i), and subject to 20 U.S.C. § 1412(a)(10)(A), a local education agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in such private school or facility. See also N.J.A.C. 6A:14-2.10(a). However, if the parents enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or

hearing officer finds that the agency has not made FAPE available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii); see also N.J.A.C. 6A:14-2.10(b). When a state fails to provide a free appropriate public education, it must reimburse parents for resulting private school costs. See T.R., 205 F.3d at 577 (citing Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985)). Such reimbursement is subject to limitation as set forth in 20 U.S.C. § 1412(a)(10)(C)(iii).

The New Jersey Supreme Court has also addressed the issue of reimbursement in Lascari as follows:

We are sensitive to the possibility that parents may select a private school that affords their child an education that is more elaborate than is required. Conceivably, parents might select a boarding school even though a day program would furnish their child with an appropriate education. It would be anomalous, however, to recognize the parents' right to reimbursement, but to deny completely that right merely because they selected a school that furnished an education beyond that which the district is obliged to offer. See Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d

As set forth above, the District failed to provide J.S. with a FAPE for the 2017-2018 school year. Having reviewed the criteria for reimbursement, I **CONCLUDE** that the District should reimburse petitioners for the cost of M.T.'s placement at the Hampshire School, together with reimbursement for the time and expense related to the retention of Dr. Ziesz, and Dr. Katz, and the costs associated with the Morris Psychological Group threat assessment, since the District took no steps thereafter to find a method of re-entry for M.T. up to the onset of the pandemic, almost sixty days after the initial incident.

I **DO NOT CONCLUDE**, that compensatory education should be provided as there is not measure to reach an appropriate conclusion in this regard, and no proofs were offered as supplemental costs incurred for tutoring and other related services incurred by the parents.

However, I **DO CONCLUDE** the parents are entitled to reimbursement, including but not limited to transportation expenses related to any costs they incurred by enrolling M.T. in Stepping Forward.

**ORDER**

Based on the foregoing, it is hereby **ORDERED** that the relief sought by petitioners related to the cost of tuition and related expenses for M.T.'s enrollment at Hampshire commencing August 2020 is hereby **GRANTED**. The request for compensatory education reimbursement for the three school years prior to the elopement incident in January 2020 is **DENIED**, as is the request for compensatory education for the period March 13, 2020 through June 2020 when petitioners decided to send M.T. out of district. It is further **ORDERED** that petitioners are entitled to be reimbursed for the costs of Dr. Zeisz and Dr. Katz's services, including but not limited to their testing, reports and testimony, as well as reimbursement for the expenses related to Dr. Leeds.

It is further **ORDERED** that petitioners and the District should meet within thirty days of this decision or as soon as practical to create an updated IEP for M.T. to reflect his continued placement with an independent autism and behavioral evaluation. **I DO NOT ORDER**, that the placement at Hampshire should continue through the end of 8<sup>th</sup> grade, which would be the 2022-23 school year as the parties are required to meet yearly, and there is insufficient information to make such a ruling at this time by either side. It is also unclear from the submissions if the placement at Hampshire continued for the 2021-22 school year, and if another due process petition was filed for this period of time, and/or if the District convened another meeting prior to commencement of the 2021-21 school year after the testimony in this case concluded.

However, if the placement at Hampshire was continued for the 2021-22 school year, and the District did not take any steps to propose an alternate placement, including but not limited to seeking updates on M.Ts. progress at Hampshire, then petitioners may be eligible to seek reimbursement for the 2021-2022 school year as well. Again, it is unknown if another due process petition was filed. M.T.'s placement for this school year was not addressed in the testimony or the post-hearing submissions.

As the prevailing party, counsel may apply for reasonable counsel fees and costs in the appropriate forum. Consideration of punitive damages, if any, are not the province of the Office of Administrative Law.

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 (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.

February 22, 2022 \_\_\_\_\_  
DATE

  
\_\_\_\_\_  
**ANDREW M. BARON, ALJ**

Date Received at Agency

February 22, 2022

Date Mailed to Parties:

February 22, 2022

mm

**APPENDIX**

**Witnesses**

**For Petitioners:**

Dr. Jennifer Zeisz

Dr. Barry Katz

Elizabeth Bruno

Mrs. T.

Mr. T.

**For Respondent:**

Cozet Sobota

Mrs. Patel

Linda McGovern

Walter Curioni

**Exhibits**

P-1- 1/27/16 Referral

P-2- 5/12/16 IEP

P-3- 5/3/17 IEP

P-4-10/2/17 IEP

P-5-4/12/18 IEP

P-6-10/25/18 IEP

P-7-12/17/18 IEP

P-8- 1/17/19 IEP

P-9-5/21/19 IEP

P-10 1/24/20 IEP(draft)

P-11-1/24/20 IEP

P-12- Progress reports

P-13 Sppech eval. 3/30/16  
P-14- Questionnaire  
P-15-4/18/18 Educ. Eval.  
P-16-4/29/16 Psych eval.  
P-17-4/14/16 Occ Eval.  
P-18-3/9/17 Progress report  
P-19-10/18/18 Progress report  
P-20-12/17/18 Progress report  
P-21- 5/21/19 Progress report  
P-22-2/10/20 Progress report  
P-23-1/7/19 Psych eval.  
P-24- 1/4/18 Ed. Eval.  
P-25-Speech and language re-eval.1/7/19  
P-26-PARCC results  
P-27-Letter 2/29/29  
P-28 Ms. Ervey virtual schedule  
P-29-Incident report  
P-30-Sage services  
P-31-Exit info 9/4/20  
P-32-9/13/13 letter  
P-33-Referral letters  
P-34-Harmony Pediatric report  
P-35-Harmony Pediatric report  
P-36-1/26/16 letter  
P-37-Cywin notes  
P-38 9/25/17 email  
P-39-West Morris summary 8/2/18  
P-40-Audiology report 8/29/19  
P-41- Dr. Leeds assessment  
P-42-Gates summary  
P-43-Stepping Forward Summary  
P-44- Stepping Forward letter  
P-45- Dr. Cargan letters

P-46- Dr. Eida notes  
P-47- McLaughlin summary  
P-48- Dr. Zeisz report  
P-49-Dr. Zeisz letter  
P-50- Ververs letter  
P-51- Dr. Bell letter  
P-52- System of Care treatment plan  
P-53- Hampshire agreement  
P-54-Hampshire IEP  
P-55- Hampshire mid-term report  
P-56- BASC results  
P-57-6/23/20 10 day notice  
P-58-Dr. Katz report  
P-59-Dr. Katz profile  
P-60-Zeisz initial report  
P-61- Zeisz file  
P-62- West Morris summary 1/25/21  
P-63- Hampshire trimester  
P-64- Bruno report  
P-65- BASC report  
P-66 Leeds CV  
P-67- Pritzker CV  
P-68- Videos  
P-69- Pritzker file  
P-70- Leeds file  
P-71 emails

RESPONDENT

R-1 Gleeson letter  
R-2 4/12/18 IEP  
R-3-10/25/18 IEP  
R-4-Re-eval.



R-5-10/31/18 Educ. Assessment  
R-6-12/12/18 Psych Assessment  
R-7-12/17/18 IEP  
R-8-12/18 Speech assessment  
R-9-1/17/19 IEP  
R-10-2/19/19 Sobota letter  
R-11-2/21/19 Action plan  
R-12-3/19 FBA  
R-13-Metro West assessment  
R-14- Request to amend 2017 IEP  
R-15-5/21/19 IEP  
R-16-Audiology report  
R-17-1/8/21 Psych eval.  
R-18-1/14/20 Incident report  
R-19-Leeds report  
R-20-1/24/20 IEP  
R-21-Leeds revised report  
R-22-Home instruction contract  
R-23-Conduct incidents  
R-24-9/4/20 exit information  
R-25- Test scores  
R-26- 4<sup>th</sup> grade report  
R-27-5<sup>th</sup> grade report  
R-28-2/10/20 email  
R-29- 5/19/20 email  
R-30-Sobota email  
R-31-Curioni CV  
R-32-Patel CV  
R-33-Sobota CV  
R-34-McGovern CV  
R-35-Patel tools  
R-36-Emails with petitioners 1/30/20-3/24/20  
R-37-R-65- Misc. emails between petitioners and District staff 1/7/20-6/27/20

Joint Exhibits:

U.S. Department of Education March 2020

New Jersey Department of Education March 5, 2020

New Jersey Department of Education update, March 23, and 24, 2020

Governor Murphy Press Release, May 4, 2020