



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 09151-20

AGENCY DKT. NO. 2021-32018

G.L. and C.L. ON BEHALF OF W.L.,

Petitioners,

v.

VERONA BORO BOARD OF EDUCATION,

Respondent.

Andrew I. Meltzer, Esq., for Petitioners (Sussan, Greenwald & Wesler, attorneys)

David B. Rubin, Esq., for respondent (David B. Rubin, P.C., attorneys)

Record Closed: October 7, 2022

Decided: November 17, 2022

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, G.L and C.L. (Petitioners or parents) have requested a due process hearing on behalf of their son, W.L. (W. or student), who is classified as eligible for special education and related services. Petitioners' contend that the Verona Board of Education (the Board or District), through its child study team (CST), failed to timely identify their son as eligible for special-education services, and upon doing so, failed to offer him an individualized education program (IEP) that delivered a free and appropriate

public education (FAPE) for the 2020-2021 school years. Petitioners' have unilaterally placed W.L. at the DATA Group, in Livingston, New Jersey, private school; and seek reimbursement for their expenses there; and ask for compensatory education.

PROCEDURAL HISTORY

Petitioners filed a petition for due process ("petition") with the Office of Special Education Programs (OSEP)¹ on August 28, 2020. OSEP transmitted the contested case to the Office of Administrative Law (OAL), on September 30, 2020, under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.5.

Following the filing of the within matter with the OAL on September 30, 2020, the parties continued attempts to resolve their dispute. Unfortunately, the matter could not settle, and this matter was assigned to me on November 10, 2020.

An initial telephone conference was held on November 18, 2020, at which time the parties requested additional time for the Board to conduct observations of the student at the DATA Group, in a continued attempt to resolve this matter. On January 26, 2021, the Board had conducted the observation of the student at the DATA Group, and continued to discuss a possible resolution.

Initial hearing dates were scheduled for March 15, and 19, 2021, but were adjourned by consent. Hearing dates were then scheduled for April 23 and 26, 2021, and May 14, 2021. However, the April hearing dates were subsequently adjourned due to an unknown conflict when originally scheduled. Hearing dates were then scheduled for May 14, 2021, June 29 and 30, 2021. On April 27, 2021, following a telephone conference,

¹ OSEP is now known as the Office of Special Education but will be referred to as OSEP in this decision as it was known at the times in question.

Petitioners, and the Board the parties agreed to adjourn the May 14, 2021, hearing due to outstanding discovery requests from the board. Hearing dates were then scheduled for June 23, 29, and 30, 2021, and July 21, 2021.

On June 2, 2022, following a telephone conference, the Board informed the undersigned that they had recently received discovery from Petitioners concerning recordings made by Petitioners of school District personnel, without the Board's knowledge and consent. On June 9, 2021, prior to the commencement of the first hearing scheduled for June 23, 2021, the Board filed a motion to bar introduction of certain recordings made by Petitioners while the student was on school property. Said recordings were made without the Board's knowledge and consent. On June 21, 2021, Petitioners filed their opposition thereto.

On August 17, 2021, an Order was entered granting the District's motion barring the admission of Petitioners' secretly made recordings on school property, because they violated District policy, as well as the New Jersey Wiretapping and Electronic Surveillance Act, N.J.S.A. 2A:156A-2, -3. (Order dated August 17, 2021).

Zoom hearings were held on the following dates: June 23, June 29, June 30, July 21, 2021, August 18, 2021, and September 22, and 23, 2021. Petitioners and the Board requested time to obtain the hearing transcripts and file written summations thereafter. On July 11, 2022, Petitioners and the Board submitted their written summaries. On August 18, 2022, the final transcripts were provided, along with confirmation of the hearing exhibits.

This case has produced a voluminous record, including seven-days of testimony, resulting in more than 1,500 pages in hearing transcripts, more than 800 pages in joint exhibits, another 100 or so pages in individual exhibits, and nearly 150 pages in post-hearing briefs, and on October 7, 2022, I closed the record.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The following facts are not in dispute, and I **FIND** them as **FACT** herein:

W.'s attendance at the Montclair and Glen Rock School Districts

W. is an eight-year-old male diagnosed with Autism Spectrum Disorder, Childhood Apraxia of Speech, a Mixed Receptive/Expressive Language Disorder, Specific Developmental Disorder, and Motor Dysfunction. W. has poor danger awareness and is a constant threat of elopement, which necessitates 1:1 supervision. W. is functionally non-verbal. While he can speak in short utterances, due to his diagnosis of apraxia, his speech is often unintelligible. As a result of his language difficulties, W. has demonstrated the following conduct: tantrums, crying, screaming, and sometimes has become aggressive when he has trouble expressing himself. (T.8.18.21).

W. was considered to have global delays following his birth. At nine-months old, W. began receiving direct instruction as well as speech therapy, occupational therapy, and physical therapy through Early Intervention. (T8.18.21). Upon aging out of Early Intervention, W. was found eligible as a Preschool Child with a Disability, and commenced attending the Developmental Learning Center in Montclair, New Jersey, where he received a mixture of inclusion and ABA programming. (T8.18.21 Page 14).

In July 2018, W. and his family relocated to Glen Ridge, New Jersey, and he began attending the full-day preschool disability program in the Glen Ridge School District (Glen Ridge). (T8.18.21; J-16). Glen Ridge maintained W.'s eligibility under the category, Preschool Child with a Disability. While at Glen Ridge, W. was placed in a full-day preschool disabilities class, with individual physical therapy one (1)x for thirty (30) minutes in a 6-day cycle, individual speech/language therapy one (1)x for thirty (30) minutes in a 6-day cycle, individual integrated speech/language therapy two (2)x for fifteen (15) minutes in a 6-day cycle, integrated group (5:1) speech/language therapy one (1)x for fifteen (15) minutes in a 6-day cycle, individual behaviour intervention services thirty (30) minutes one (1)x per 6-day cycle, and individual behavior intervention consultation fifteen(15) minutes per 6-day cycle. W. was also recommended for a full-day 1:1 aide, including during playground activities for safety purposes. (J-16).

While attending Glen Ridge W. was able to follow rules and routines of the classroom; sit for twenty (20) minutes during large group time; imitate motor movements; participate in checking the schedule, calendar time, name recognition games, and being the job person for the day. He was also in the process of toilet training. Glen Ridge collected data to monitor the effectiveness of behavioral interventions.

W.'s attendance in the Verona School District

W.'s family moved to Verona from Glen Ridge in March 2019 as W. was aging out of preschool. His last IEP in Glen Ridge, dated October 17, 2018, prescribed a split-day program—half in a self-contained class with applied behavior analysis (ABA) and half in an inclusive setting.² Since W. had just turned five when he entered the Verona District, he required new evaluations before moving on to kindergarten. The parties met on April 9, 2019, and agreed on a battery of assessments, which were completed that spring. (J-20).

Pending the outcome of the assessments, W. was placed in a full-day preschool disabilities class in the District's Learning, Sensory and Social (LSS) program, with physical, occupational, and speech-language therapy, a personal aide, and behavioral intervention consultation. The specifics of the program are spelled out in the IEP dated April 10, 2019. (J-21). W. was to be in a self-contained kindergarten class—a combination kindergarten-first grade classroom with four students, including two rising first graders whom the District thought would be good peer models for W. The teachers assigned to W.'s class, Tina Stokes (Ms. Stokes), was a Board-Certified Behavior Analyst (BCBA), and Brooke Raskin, (Ms. Raskin) a District Behavior Analyst who is also a BCBA and had previously worked with Petitioners as their home therapist, supervised the program.

After observing the LSS class, petitioner C.L., who is a special education teacher, expressed concern that the two older peers in the class demonstrated a much higher level

² The Glen Ridge child study team recommended a full-day self-contained program. W.L.'s parents favored a more inclusive setting, so they compromised on a split day. (J-16).

of functioning than W., and Petitioners voiced their concerns about the proposed program. Specifically, they were concerned W. would not have enough peers with whom he could associate appropriately and that he would not have enough exposure to neurotypical peers.³

Nevertheless, at a follow-up meeting on June 4, 2019, after the reevaluation was completed, the parties developed an IEP for the 2019-2020, which deemed W. eligible to receive special education and related services under the classification category, Autistic. The IEP proposed that the District place W. in a self-contained kindergarten program. (J-24). Specifically, the District sought to increase W.'s placement in the LLS classroom to 4-3/4 hours (285 minutes) per day, group physical therapy, group occupational therapy, individual speech/language therapy, individual behavioral consultation, and an individual full-time aide. (Id.). Petitioners were advised that the program was largely a small group of W.'s peers ranging from 2-4 students and that the rising first grade students would be good peer models for W.

The IEP also provided for extended school year (ESY) programming for the 2019 summer. However, Petitioners chose not to send W. to the District's ESY program but arranged for services to be provided to him privately through Hand Over Hand, an agency that also provided them with a BCBA, Tracy O'Keefe (Ms. O'Keefe), who worked with W. at home throughout the 2019-2020 school year.

During the fall of 2019, Petitioners raised questions about the LSS program from time to time regarding unsupervised stimming behavior in the morning before classes began; use of an iPad, which Petitioners believed had no educational value and resulted in W. having dependency of the same; W. exhibiting school refusal behavior, and Petitioners' request that W. have greater interaction with neurotypical peers.

The parties met for an IEP meeting in October 2019, and Petitioners reiterated their concerns regarding the lack of appropriate peers, lack of inclusion, and a request for

³ *Neurotypical*-adjective; neuro·typ·i·cal | \ ,nūr-ō-'ti-pi-kəl, ,nyūr- \Definition of neurotypical: not affected with a developmental disorder and especially autism spectrum disorder : exhibiting or characteristic of typical neurological development (<https://www.merriam-webster.com/dictionary/neurotypical>)

a communication evaluation concerning their concern of W.'s use of the iPad. The District did respond to some of the Petitioners' concerns. For example, in response to Petitioners request for more exposure to typical peers, the District developed a reverse inclusion model whereby general education students would come into the LSS classroom to interact with W. and his classmates. Petitioners also requested an assistive technology evaluation, which the district did not feel was necessary at the time but agreed to the same.

Despite the October 2019 IEP meeting, Petitioners believed that the District did not address their concerns other than advise them that W.'s needs would be met in the kindergarten program that would be highly individualized. The District, however, believed Petitioners' concerns were addressed and resolved amicably with the assistance of Petitioners' non-attorney advocate, Susan Verrico (Ms. Verrico), who had been representing Petitioners since they moved to Verona. Frank Mauriello, the Director of Special Services, informed Petitioners there would be no changes to the student makeup until at least November 2019. Despite their concerns, Petitioners allowed the District's proposed program to go into effect.

As the school year progressed, Petitioners remained concerned that W. continued to come home dysregulated and engage in school refusal, and they continued to express concern over the lack of exposure to neurotypical peers as well as the progression in W.'s behavior. Consequently, Petitioners decided to retain their own independent evaluators to test and observe W. in his program. Petitioners retained the services of Board-Certified Behavioral Analyst, Dr. Carol Fiorile, Ph.D., BCBA-D (Dr. Fiorile), and Speech Language Pathologist, Ms. Carly Fog, M.S., CCC-SLP (Ms. Fog), to evaluate W. and conduct observations.

On December 13, 2029, Dr. Fiorile conducted a direct observation of W. in the District for a period of just over two hours. In addition to her observation of the District program, Dr. Fiorile reviewed various records, spoke with District staff members, and observed additional programming that W. participated in. Ms. Fog conducted her observation of W. on December 19, 2019.

On December 23, 2019, following the in-District observations by both Dr. Fiorile and Ms. Fog, Petitioners' attorney wrote to the District to advise that, while their reports were pending, both evaluators verbally advised Petitioners that W.'s program was inappropriate and not meeting his needs, necessitating a change in program and placement. Specifically, Petitioners' attorney stated that Dr. Fiorile and Ms. Fog informed them that the District program did not provide W. with "...*an appropriate peer group and consistent behavior management strategies*. The experts recommended that [W.] be placed in a program with more intensive ABA implemented with fidelity, which could simultaneously provide explicit social skills instruction with exposure to appropriate peer models." (J-27).

Petitioners requested that the District agree to send records to potentially appropriate placements, including but not limited to: Hand Over Hand ABA inclusion program in Little Learner Academy located in Denville, New Jersey, and Hearts to Hand ABA inclusion program at Bridges to Learning located in Rockaway, New Jersey. Petitioners advised that they would be open to considering other placements as well. (Id.).

The District responded on January 2, 2020, to advise that W. was placed with appropriate peers and that the District's data showed he was progressing. (J-45). The District advised that the programs cited by Petitioners were not appropriate for W. as they were preschool programs. The District offered to meet with Petitioners to discuss their concerns.

At a meeting on January 10, 2020, with counsel present, while there was no agreement to change W.'s placement, the District was open to increasing his exposure to non-disabled peers which was a particular concern of his parents. The district also provided petitioners with a copy of W.'s program book. Petitioners agreed to continue with W.'s IEP program.

W. made "steady" to "satisfactory" progress toward achievement of the goals and objectives in his 2019–20 IEP, but he was only able to fully achieve one of them (J-39). Over the course of the school year, W. was absent sixteen (16) days and tardy for five (5)

more (R-5). Along the way, he missed fourteen (14) speech therapy sessions by the time of the pandemic shutdown in mid-March 2020. Complicating matters further, his home ABA services with Ms. O’Keefe were suspended for a few months starting in November 2019 due to a lapse in insurance coverage, and W.’s routine was disrupted by the departure of a longstanding nanny.

Further disruptions occurred when schools closed for in-person learning on March 18, 2020, by Executive Order of the Governor, due to the COVID-19 pandemic (J-51). The district implemented a program of remote instruction. Packets of instructional material were sent to Petitioners’ home, but there was a delay in W. receiving his packets because Petitioners relocated to their shore home without notifying the District. Petitioners G.L. and C.L., also had to live separately for some time that spring because G.L. is a physician and had to avoid cross-contamination with his family. Also, the District could not commence W.’s speech therapy as Petitioners informed the District they were not ready to resume those services until late April.

W. struggled with the remote academic programs being implemented by his teacher. W. also continued to experience functional and behavioral regression in his remote learning program. For example, W. would refuse to participate in lessons, and the negative behavior began spilling over into the home. Petitioners were forced to restrain W. in a chair for him to sit and attend the lessons. The District confirmed the existence of this decline in functioning as seen in remote lessons. For example, when staff were on the computer screen, W. completely shut down and exhibited similar refusal behavior. At the end of May 2020, Petitioners ended W.’s remote instruction with the District, at the recommendation of his at-home BCBA, Ms. O’Keefe. The case manager requested a letter from Ms. O’Keefe explaining her reasons so the district could address her concerns, but the letter did not arrive until July 2020 (J-35).

An IEP meeting was scheduled for June 18, 2020, to address W.’s program for the 2020–21 school year. On June 12th, six months after Petitioners’ two experts conducted their observations, Petitioners’ attorney forwarded their reports to the Districts legal counsel. (J-28 (Ms. Fog) & J-31 (Dr. Fiorile). Dr. Fiorile’s report was dated April 12, 2020, and Ms. Fog’s report was undated, but her testing of W. occurred on February 24 and 25,

2020. Both reports were submitted on June 12, 2020 (Id.). Petitioners also advised that it was their intention to place W. at The DATA Group effective June 24, 2020 and to seek retroactive reimbursement (J-32).

At the June 18, 2020, IEP meeting, the District declined to place W. at The DATA Group and recommended that he move forward to first grade in the LSS program. After further discussions between the parties, the district proposed a more enhanced IEP on July 7, 2020, incorporating many of the recommendations from Petitioners' experts. (J-48). On August 28, 2020, petitioners filed a due process hearing request seeking reimbursement for their unilateral placement at The DATA Group.

Testimony

The District called the following individuals to testify: Dr. Frank Mauriello, Director of Special Services; Ilissa Abovitz, Speech-Language Pathologist and Brooke Raskin, Behavior Analyst.

Petitioners, G.L. and C.L., each testified, and they called upon to testify as experts: Dr. Carol Fiorile, Ph.D., BCBA-D and Carly Fog, M.S., CCC-SLP, Speech Language Pathologist, Stacey O'Keefe, of Hand Over Hand, and Tara Sheerin of The Data Group.

Dr. Frank Mauriello, testified on June 23, 2021 and as rebuttal witness on September 23, 2021. Ilissa Abovitz, testified on June 29, 2021. Brooke Raskin, testified as rebuttal witness, on September 23, 2021.

G.L., testified on September 22, 2021, and C.L. testified on August 18, 2021. Carly Fog, testified on June 29, 2021. Tara Sheerin, testified on June 30, 2021. Dr. Carol Fiorile, testified on July 21, 2021, and Stacey O'Keefe, testified on September 22, 2021.

Dr. Frank Mauriello

Frank Mauriello (Dr. Mauriello), the Director of Special Services, was presented as the District's first witness as well as a rebuttal witness. Dr. Mauriello became familiar with

petitioner parents and W., in March of 2019 when W. was first registered in the district until his unilateral placement in the Data Group in June 2021. Dr. Mauriello testified that W. initially presented as a student with autism, apraxia, expressive and receptive language disorder, and need a scaffolding approach, breaking down the skill sets to achieve his goals.

Dr. Mauriello stated that the IEP proposed in June 2019, for the 2019-2020 school year was based on evaluations conducted by the child study team in May 2019 as W. was aging out of the preschool program, and that a VB-MAPP conducted, which is an assessment for students with an autism diagnosis to determine their developmental age and skill sets, it contained a full range of services and modifications to address W.'s unique needs.

Dr. Mauriello testified that the Petitioners' voiced their preference that W. remain in another year of preschool but otherwise they did not raise any other concerns at the time the June 2019-2020 IEP was created, and it therefore went into effect commencing September 2019. At the hearing, Dr. Mauriello reviewed an extensive list of modifications and related services also included in the IEP.

Dr. Mauriello testified that although Petitioners wanted the student in a mainstream experience program, the District did not offer a full-day integrated program. Dr. Mauriello stated that a review of available information concerning the student led the District Child Study Team (CST or child study team) in determining that the Districts LSS program would be appropriate for kindergarten because it was designed to support children who needed behavior modalities to access the curriculum. Dr. Mauriello testified that the program was based on the principles of ABA using an evidence-based program called "ReThinkEd", which helps support scaffolding instruction for the population of students served.

Dr. Mauriello stated further that the LSS program also integrated related services such as speech and language therapy and occupational therapy into the program, and was overseen by Dr. Mauriello, a special education supervisor and Ms. Raskin, the

District Behaviorist, who worked closely with the three LSS classrooms, at Laning Elementary School.

Dr. Mauriello testified that the proposed class featured a certified special education teacher and Ms. Raskin, the district behaviorist, who oversaw the classroom. Dr. Mauriello stated that every child who needed an aide had one assigned. The paraprofessionals were supervised by the behaviorist and had training on students' programming and data gathering. There were "push in" and "pull out" services, and opportunities to interact with general education peers through music, art and physical education instruction as students became ready.

Dr. Mauriello testified that during the 2019-2020 school year, the Board introduced a reverse inclusion model. However, the general education students would only participate with the LSS between ten (10) and twenty (20) minutes a day. Dr. Mauriello was unable to recall how often the general education students attended in the student's classroom.

Dr. Mauriello testified further that W. is a non-verbal student and that an assistive technology evaluation would have allowed the District to explore any devices that would help the student's communication so he could better access his peers and education. However, Dr. Mauriello stated that said evaluation was not proposed by the District until February 2020. Dr. Mauriello stated that he was aware that during remote instruction W. struggled with the academic programs being implemented by his teacher, as remote learning was challenging.

On cross-examination, Dr. Mauriello was questioned regarding sections of the New Jersey Administrative Code (the "Code" or the "NJAC"), which were stipulated in the record. Dr. Mauriello testified that he does not have any input into the goals and objectives of the IEP, as typically, he attends IEP meetings when there is a non-attorney advocate or attorney present. Dr. Mauriello agreed that a progress report indicates how a student is progressing with their IEP goals and objectives and serves as a guide to educators and parents as to what the student is working on. Dr. Mauriello testified

acknowledged that W. achieved one (1) out of his IEP thirty-eight (38) goals during the 2019-2020 school year.

During his rebuttal testimony, Dr. Mauriello testified that he did not become aware of the communications between Petitioners and the Board's staff members until he reviewed the documentation in preparation for trial. Dr. Mauriello testified W. did not exhibit spikes in poor behavior prior to the commencement of home instruction in April 2020, that the Board never reached out to Petitioners' home BCBA, Ms. O'Keefe during said time.

As to email communications between C.L and the District staff, Dr. Mauriello testified that he was not copied on the email communications and became aware of the same in preparation for the hearing. Dr. Mauriello also testified that data on W.'s daily class lesson progress was not taken on the date of instruction.

Dr. Mauriello stated that when a child is educationally ready, there are opportunities for interaction with non-disabled peers. However, because the student did not participate in the ESY program, the District was not able to gauge whether he could be infused in September.

Illissa Abovitz

Illissa Abovitz (Abovitz), the District's Speech Language Pathologist, testified on behalf of the District. Abovitz testified that prior to September 2019, she did not have any interaction with W. because he was in the pre-K program. She works with students at the Laning Avenue School, once they are in Kindergarten and that is when W. joined her case load. She also stated that she is not normally involved in the development of her students IEP, and that she was not involved in W.'s IEP for the 2019-2020 school year. She also testified that she reviewed W.s speech and language assessment completed at the end of W.'s pre-K year.

Abovitz testified that from September 2019 until March 2020, W. missed fourteen (14) speech sessions with her due to his absences and tardiness. Abovitz testified

concerning the “Genesis portal” which she stated is an online attendance program used by the teaches and administration in the District (R-5) to keep track of attendance.

Abovitz also testified that at the beginning of the 2019 school year she was made aware by the CST that C.L. had requested that W. be retained in pre-K and not attend Kindergarten and that they were unhappy that W. was advanced to Kindergarten.

Abovitz acknowledged that the District had approved an iPad for W.’s IEP program. Abovitz testified that Petitioners requested W. be provided with an alternative communication system (AAC System). Abovitz stated that she did not believe W. needed an AAC system as he is a verbal communicator, and he is also a strong imitator, so given a model he’s able to repeat much more successfully. Abovitz testified that C.L. had requested the use of the AAC system called PECS instead of Proloque2Go, which the District used, due to C.L.’s concerns about using an electronic device.

Abovitz testified that C.L. authorized an AAC evaluation plan for W. in December 2019, the evaluation took place on February 27, 2020, the report is dated March 26, 2020. Abovitz testified that once the AAC evaluation is received by the District CST they plan to meet with the parents and the evaluator who is to be trained on this specific device. However, Abovitz stated that because of the COVID lockdown on March 13, 2020, the meeting could not take place.

Abovitz testified that at some point in December 2019, the parents engaged Carley Fog (Fog), a speech language pathologist to come in and conduct an evaluate W.’s IEP program. Abovitz stated that she was present for Fog’s evaluation and that Fog did not ask to see a speech language therapy session but instead, asked to see a group setting and an English and language arts activity. Abovitz testified that she was provided with a copy of Fog’s written evaluation (J-39) on June 12, 2020, three-days prior to an IEP meeting scheduled for June 18, 2020. Abovitz stated that the District was able to provide a side-by-side analysis of the Fog’s report (R-1), but she was not able to conduct a through review because there were only several days between receipt of Fog’s report and the IEP meeting. Abovitz testified that she agreed and disagreed with some of the findings and recommendations made in the report. (Id.).

Abovitz testified that when the District closed on March 13, 2020 due to COVID, she had to wait for State authorization for tele-therapy, which took several weeks. She stated that C.L. then reached out to the District in mid-April 2020 ready to resume speech language therapy sessions, and that sessions actually commenced on April 22, 2020. She stated that tele-therapy sessions were scheduled at three (3) times a week for thirty (30) minutes per session for three weeks. She recalled some challenging session due to W's "elopement" from the table during the session, which she described as W. was getting up and running away from the computer screen.

Abovitz testified that W. made progress during the 2019-2020 school year (J-39), despite his attendance record pre-COVID and the interruptions in sessions due to COVID in March 2020.

On cross-examination, Abovitz testified that many of W.'s IEP speech and language goals were not met in school year 2019-2020, and that the District re-wrote them in his IEP for 2020-2021, with more support and prompting. Abovitz testified that W. required a different level of support than what his IEP goals indicated, and she provided visual, verbal, and tactile support. Abovitz also testified to areas of struggle William needed to work on that were not included in the goals of his IEP.

Brooke Raskin

The final witness to testify for the District was the District's BCBA, Brooke Raskin, (Raskin), who testified as the final rebuttal witness. Ms. Raskin was qualified as an expert in ABA and the development of ABA based programs for children with autism. Raskin testified that prior to Petitioners moving into the District, she worked with W., and Petitioners as a behavior analyst in a supervisory role. Raskin stated that she created programs for W. and his family to be taught by a behavior technician and provided some parent training.

Raskin testified that W.'s IEP from the Glen Rock District, which was incorporated by the District when the family moved there in April 2019, was a split program of half self-

contained and half not self-contained in an integrated class, as the parents wanted. (J-16). She stated that when Petitioners moved into the District in April 2019, W. transitioned from a split day, half self-contained, half-integrated class in Glen Rock, into a full day of self-contained LSS instruction. (Id.). Raskin recalled that Petitioners did not object to the District's proposed self-contained full day program, in the June 2019 IEP meeting, but that they did have concerns that W. was being advanced from Pre-K to Kindergarten in the same program. Raskin testified that W. was transitioned to Kindergarten because he had "aged out" of the District's Pre-K program. Raskin stated that she was in constant contact with LSS program teaches everyday and that she personally instructed W. for thirty (30) minutes five (5) times a week.

Raskin testified that she became aware of C.L.'s concerns of W. exhibiting school aversion issues in email exchanges between C.L. and staff members in late October 2019. Raskin state that she had a "positive" conversation with C.L on October 30, 2019, and that W. was then attending classes until the issue occurred again in January 2020 (R-5). Raskin testified that she had witnessed W. having "tantrums" during this time, which she said was normal for children like W.

Raskin testified that in January 2020, C.L, sent an email to the staff regarding renewed concerns about W. having school aversion. Raskin then spoke with Stacey O'Keefe, ("O'Keefe) and they were trying to ascertain the cause of W.'s conduct. Raskin stated that O'Keefe expressed to her that there were some changes going on at home for W. and she suspected that this might be the reason for his school refusal behavior. Raskin testified that she and O'Keefe collaborated on a morning schedule for W. to help reduce his school aversion behavior, and that the same appeared to work as W.in attendance most days between mid-January 2020 and the mandated COVID closure on March 16, 2020.

Raskin then testified concerning Dr. Fiorile's evaluation of W. in April 2020, and her report received in June 2020 (J-31). Raskin went over areas of concern expressed in Dr. Fiorile's report and addressed each, including the issue that data collection "did not occur on a daily basis." (Id.) Specifically, Raskin testified that Dr. Fiorile's recommendations were being addressed in the District's proposed June 2020 IEP, as the

District was attempting to collaborate with the Petitioners and include the recommendations in the IEP (R-3 and J-33), and that the collection of data can be done daily when it pertains to the student's behavior, or periodically, when it involves task and goal achievements, as it is a matter of "preference."

Raskin also provided testimony concerning data collected and inputted in the Data Book (J-49). Raskin conceded that data should be collected daily concerning W.'s daily performance in achieving the program goals and objectives. However, Raskin clarified that while the data may not have been collected on the date it occurred, it was inputted weekly by the teacher.

Raskin also testified regarding another concern of Petitioners, concerning an instance when a substitute teacher (Ms. Decato) used the credentials of the regular teacher (Ms. Stokes) when inputting data, which Raskin stated should not have been done in that manner.

During cross-examination, Raskin agreed that accurate data is critical for an ABA program to be appropriate and function properly and agreed with Dr. Fiorile's report that fact data was not recorded at any time during the observation. Further on cross, Raskin Reviewed the District's graphs (J-49) and acknowledged that there was more than a week between each point that was graphed.

Raskin agreed that W.s behavior in dropping to the floor and requiring an hour of redirection could significantly interfere with learning. Raskin also did not implement a behavior intervention plan.

Carly Fog

Carly Fog, (Fog) M.S., CCC-SLP, is a Speech Language Pathologist. Fog testified as to her education and professional credentials and confirmed that the same was contained in her CV (P-6). Fog stated that she is a speech pathologist and holds licenses and certifications in the area of speech pathology. Fog testified that since August 2017, she has been affiliated with the Princeton Speech Language & Learning Center

(Princeton Learning Center). Fog testified that her professional work experience has been as a language pathologist in an elementary self-contained ABA program, and as part of her current practice, she consults with school districts in New Jersey seeking to create appropriate IEP for their students. She is also retained by parents as well. She testified that part of her work is conducting independent speech language evaluations.

Fog was qualified as an expert in the areas of communication disorders and speech and language pathology.⁴ Fog testified regarding the evaluation that she conducted of W. at the Laning Elementary School on December 19, 2019, and at the Princeton Learning Center on February 24 and 24, 2020 (J-28). Fog testified to the battery of tests administered to W. over the two days of evaluation at the Princeton Learning Center, and she stated that she found W.'s language is going to affect him across the board in all settings. She testified that W. is going to struggle to understand communication and language everywhere. Fog stated further that W. is going to struggle to express himself and use language, as W. does not have the functional use of language to effectively get his needs known. (Id.).

Fog then testified concerning her observation of W.'s in-District program environment. Fog stated that she observed W. in the classroom, rather than his speech language therapy, as it was indicated to her by the District that his classroom was a language rich program. Fog stated that she did not find the District's program to be appropriate. In support of her conclusion, Fog testified that her observation revealed that visual strategies were used ineffectively, language was not used effectively, supports and scaffolding were not evident, and there were no visual supports to support his language or help him communicate. Fog recommended that W. be placed out of district and provided with 1:1 direct language instruction throughout the day staffed with professionals who have specific training with both ASD and language disorders. (J-48).

On cross-examination, Fog testified that she relied upon the 2019 IEP when conducting her in District evaluation in December 2019, and the two-day evaluation in

⁴ Following the *voire dire* of Fog by respondent's counsel concerning her expertise in "communication disorders and speech and language pathology", Fog stated that both terms are synonymous and that she is a speech language pathologist.

February 2020. Fog also testified on cross-examination that she was aware in both December 2019 and February 2020, that Petitioners had already expressed their desire for W. to be placed out of district.

In response to questioning from the undersigned, Fog stated that after the in-District December evaluation, she did not ask any questions of District staff who participated in the evaluation, as she did not need further information from the District. On cross-examination, Fog stated that following her evaluations of W., she sent the Petitioners a copy of her report for them to “fact check” and then they meet before submitting the evaluation report to the District. Fog testified that the meeting with Petitioners occurred in May 2020. Fog also testified that although she did not list the District’s evaluation in 2019 of W. when he was transitioning from Pre-K to Kindergarten in her evaluation (J-28) she did review the same in preparing her report.

On re-direct, Fog testified that she normally does not ask questions of District staff when conducting her evaluation and preparing her report; the Petitioners informed her that they wanted to conduct an evaluation of W.’s program with the District to “assess their concerns for the program and determine the best educational setting. So they wanted to know what was appropriate and what was inappropriate. (T6.29.21, 263:1-5).

Tara Sheerin

Tara Sheerin (Sheerin), the Executive Director of The DATA Group, testified on behalf of Petitioners. Sheerin was qualified as an expert in the areas of ABA, special education, and designing programs for students with Autism. Sheerin testified that ABA is the science of behavior that uses data-based teaching techniques to improve socially significant behavior.

Sheerin testified that The DATA Group has a generalization criterion to make sure students are demonstrating skills in multiple settings, multiple instructions and with multiple materials. As director of the DATA Group, Sheerin testified that she develops and implements programs, and also supervises all of the BCBA’s and is the lead BCBA for a few students.

Sheerin stated that the DATA Group works with both parents and school districts. and that when a student is placed in the program with an IEP, the BCBA reviews the IEP, implements the IEP, and makes adjustments within thirty (30) days. She stated that after thirty (30) days in the program, the DATA Group then meets with the school district in order to make recommendations.

Sheerin stated she became familiar with W. when he became a student at Early Start Academy at the Data Group in June 2020, and she sees W. in his program on a daily basis. Sheerin stated that when W. entered the program, he was a child in “crisis” who was very disconnected and unable to manage his frustration or his behavior, he presented as a very non-responsive child and did not engage in any communication behaviors one would need to understand him. (T6.30.21, Pages 52-53).

Sheerin testified that to create a program for W. they reviewed his IEP’s, the progress reports, reviewed private evaluations, conducted assessments, and used data from those assessments, as she opined that the assessments were required because the goals and objectives in the IEP were not appropriate for him. (T6.30.21, Pages 61-62).

Sheerin next testified concerning W.’s progress at The DATA Group. She testified that upon commencing his program at The DATA Group, W. was issued a Pre-Test to indicate his baseline. (P-4). Sheerin testified that W.’s baseline indicated that he was not demonstrating counting one (1) to two (2) objects at a level that was a criterion level, and as a result, teaching procedures were implemented and monitored with data. On this specific program, Sheeren testified that W. began to work on it in September 2020. And he mastered it in April 2021, which took him seven (7) months to achieve.

Sheerin testified that The DATA Group provides an average of five hours of direct BCBA supervision with a supervising BCBA working directly at least 1x per week for 3 hours. She stated that when W. came to the program, he had major behavioral needs that required the development of a specific behavior plan in order for him to successfully move through the program. Sheerin further testified once The DATA Group was able to

get W.'s behavior under control, he was able to successfully learn to use expressive language to communicate.

Sheerin testified that The DATA Group provided W. with speech language therapy services two (2)x per week for forty-five (45) minutes, and the BCBA is a part of the speech therapists that work with William at least one (1)x per week. Sheerin testified that the therapist also works with W. on his apraxia of speech, articulation, motor planning, and trains the ABA team how to implement those skills, and goals and objectives from the occupational and physical therapists are then integrated into his daily schedule.

Sheerin testified that in reviewing W's IEPs, she saw many goals that were present in the IEPs that were not mastered or there was no movement or progress. Since being at The DATA Group, Ms. Sheerin testified that William has made significant progress and the data supports the areas he has made significant progress in. Sheerin testified that when W. is ready to transition back to the public school, The DATA Group is involved to assist in transitioning and there is an appropriate team to implement the plan.

On cross-examination Sheerin testified that W. did not master numerous goals in in The DATA Group program over the course of the 2020-2021 school year, and there's nothing inappropriate about carrying goals over to a subsequent year. Sheeren conceded that evaluation of a student on a single observation is "a pretty dangerous thing to do" since a student may just be having a bad day. (T6.30.21, 110-7 to 115-19).

Sheerin stated that Petitioners had applied to The Data Group and W. already had been accepted before Mr. Meltzer sent his letter on June 2020. (T6.30.21, 120-22 to 121-10).

Further on cross-examination, Sheerin stated that the student's program book was a very important to know in evaluating a student's program and progress.

Sheerin confirmed that The Data Group offers no opportunities for interaction with non-disabled peers. On cross-examination it was pointed out to Sheerin that in crafting

her proposed program for W. she was relying on the June 2019 IEP and not the July 2020 IEP, as she had thought she was doing (T6.30.21, 122-10 to 126-14).

On further cross-examination, Sheerin testified that students from the school districts of Roseland and Montclair, had been placed in The Data Group on District IEPs.⁵

Sheerin testified that her colleague Mr. Domanski was mistaken in June 2020 to inform Dr. Mauriello that W. would not be accepted at The Date Group due to his age.

Dr. Carol Fiorile

Dr. Carole Fiorile (Dr. Fiorile), Board Certified Behavior Analyst, testified for the Petitioners. Dr. Fiorile was qualified as an expert in the areas of ABA and developing programs for students with autism. Dr. Fiorile testified that she became involved with the Petitioners due to their concern regarding W.'s "school refusal", social functioning and his ability to interact with peers in school. (T7.21.21,59). Dr. Fiorile testified that she chose not to administer a VB-MAPP assessment as one had been completed by the District's BCBA in May 2019.

Dr. Fiorile testified that in reviewing W.'s 2018 Glen Rock IEP and the District's 2019 IEPs quite a number of goals required W. to be prompted, whether it was verbal prompting or tracing prompting. There were many goals written with the expectation W. would require a prompt in order to perform the particular skill. Dr. Fiorile testified that when writing an annual goal, it is important to have an observable skill that the student is going to be able to produce and that it be set to a specific criterion level. Dr. Fiorile testified that the expectation is that the student will perform that skill at an independent level, and that was not occurring with W. in the 2019 IEP.

⁵ Subsequent to Sheerin's testimony, in a joint stipulation entered into the record (J-50), The Date Group stipulated that : *that the only student attending there with an IEP from a public school district was one preschool student from the Roseland School District who already had been attending the Data Group before enrolling in Roseland, and whose placement was continued there for a year through an IEP until the Roseland district recommended its own program. The student continues to attend the Data Group today as a private parent placement.*

Dr. Fiorile stated that in an ABA program you start with prompts, there is a systematic prompt fading where you systematically fade prompts based on data collection and data is collected on a regular basis. Dr. Fiorile testified that all instructional decisions need to be driven by data collection and without accurate and frequent data collection there is little expectation for meaningful progress.

Dr. Fiorile testified further that goals should be written so they can be achieved within one academic year. She stated that there are some goals that do not get completed within that one year, the preponderance of the goals, if written appropriately, should be achievable by the student at an independent level.

Dr. Fiorile testified that the VB-MAPP is a tool that is utilized in developing ABA programs for students. Dr. Fiorile stated that the expectations of the VB-MAPP are for children up to age forty-eight (48) months (or four years old), and W. was five (5) years and two (2) months at the time of the District's administration, which she said is not unusual to identify language deficits in students with autism.

In reviewing the District's VB-MAPP (J-17), performed by Raskin, Dr. Fiorile noted that W. had 76 percent of the skills up to a child of eighteen (18) months, 53 percent of the skills up to a child of thirty (30) months, and only 11 percent of the skills up to a child of 48 months. Dr. Fiorile testified that William was extremely impaired and functioning like a pre-K student. (T7.21.21, Page 63). She opined that W. was well below where he was expected to perform, and his behavior were referenced that negatively impacted his ability. Dr. Fiorile acknowledged that Raskin did identify quite a number of areas that W. had presented with behavior problems.

Following her review of the VB-MAPP, Dr. Fiorile testified that she would have expected a functional behavior assessment to have been conducted to identify the problem behavior and develop an intervention plan with the intention of remediating W.s problem behaviors. Dr. Fiorile testified that the level of behavior intervention consultation provided to W. in the 2019-2020 District's IEP was well below what would be expected for a behavior analyst. She stated that the minimum, the Behavior Analytical Certification Board certifies that consultations by BCBA's, BCBAD's, BCABA's, and RBT's be at least a

minimum of two (2) hours per week, and Dr. Fiorile stated that she would have recommended a least five (5) hours per week of direct instruction in the principles of behavior analysis as well as monitoring how the program would be implemented.

Dr. Fiorile testified that she did not see any data being taken during her observation, and that she is not sure how anyone would know what was occurring in the sessions. Dr. Fiorile stated that the purpose of an ABA program is for data to be recorded frequently, that it is recorded accurately, and it is based on the outcome of the child's performance. She testified that the data provides for a visual inspection to see whether or not there is progress or not, and if there is a failure for the student to progress within five or six sessions, there is an expectation that an intervention is applied, and you change whatever it is you are teaching.

Dr. Fiorile also testified to her concern over the way teaching strategies were implemented by the classroom teacher. Dr. Fiorile testified that a good ABA program is very dense in developing language repertoires or verbal repertoires for children, not only for the words they are using, but why they are using them. Dr. Fiorile consistently testified to her concerns regarding W.'s motivational system, and she stated that for W., his motivational system should be consistently applied both to related services and any special subjects that he is attending. Dr. Fiorile testified that she saw this as a problem as motivation was an issue for W.

Dr. Fiorile testified that following her observation, she made verbal recommendations to Petitioners, which is not something that she normally does before submitting her written report. Dr. Fiorile testified that the reason she made the oral report to Petitioners was that she strongly felt that W.'s time was being wasted in the program, that he was not receiving meaningful instructional opportunities and that he should have a change in placement. Dr. Fiorile was concerned as based on her observation and review of previous IEPs, she saw many goals repeated and many goals were written with prompting. (T7.21.21, Page 121-122).

When asked on direct examination if she believed W.'s program was appropriate, Dr. Fiorile testified:

A I do not.

Q And your basis for that?

A My basis for that was based in large part of my observation that it was evident that the teacher, Ms. Decaito [sp] was – she was not accurately implementing instruction, number one. Number two, there were interfering behaviors and for those interfering behaviors, a behavior intervention plan was not recommended on his IEP. There was insufficient amount of BCBA supervision for a child with autism and with W's Diagnoses of verbal apraxia and autism spectrum disorder as well as motor deficits that 30 minutes a week for her to supervise a program is well below what would be anticipated. At least by 75 percent, by the basic two hour a week minimum for a full day school program and that, you know, there was inconsistency in the way that instruction was being implemented, so I had no confidence that during my observation that W. was able to make progress to a meaningful degree within that program and that I recommended that his parents consider looking for alternative placements...

(T7.21.21, Pages 146-47).

On cross-examination, Dr. Fiorile stated that her observation of W. on December 13, 2019, was the only classroom observation that she had, and she never gathered any further information from the District thereafter. She did not recall when the Petitioners engaged her services, but stated it was several months prior to December 2020. Dr. Fiorile agreed that her evaluation provided for extended school year training, and that the Petitioners did not do the same in the summer of 2020.

Dr. Fiorile testified further that her conclusions contained in her report was comprised of her classroom observation, various documents listed in her report, and information received on February 2020, subsequent to her report. In addition, Dr. Fiorile stated that she had several questions concerning her evaluations, which she asked Raskin on December 13, 2019, and she did not ask anyone else at the District. (T7.21.21, 173-174).

On cross-examination, Dr. Fiorile admitted that she did not request the District's program book for W. (J-49), and that she "regretted" not doing the same, as it would have helped her assess the data collection made by the District. (T7.21.21, 189).

cross-examination, Dr. Fiorile testified that the District was doing some things correctly:

Q Dr. Fiorile, I meant to ask you this question earlier. You told us everything the district was doing wrong. Is there anything the district was doing right here?

A In terms of just in general?

Q In terms of W.'s education. You told us everything they were doing wrong.

A There were a low number of students in the class, so that was good. He did have a certified special education teacher, so that was good. He did have OT. I liked the art opportunity for art therapy, I thought that was good. My biggest concern was that he needed an ABA program and it did not really seem to be an ABA program.

(T7.21.21, 191-191).

G.L. and C.L.

G.L., the father and C.L., the mother, testified at length concerning the facts that forms the majority of the undisputed facts in this case, which addresses W.'s attendance in the school districts of Glen Rock and Verona. C.L. testified on August 18, 2021, and G.L. testified on September 22, 2021. C.L. does not work and is responsible for the bulk of the communications with the District, the expert witnesses retained in this matter, and THE DATA Group, concerning W.'s special education needs. G.L. is a physician and surgeon in New Jersey, and his involvement in W.'s day-to-day special education needs and communications with the District is best explained in his testimony below responding to why he did not attend the District transfer student initial IEP meeting (J-19):

So, as a surgeon, my hours are early mornings and, late nights, very often weekends and, unfortunately, emergencies do arise. So, I was unable to make this meeting but, you know, K.[sic] (C.L.) and I are a team and we discuss everything together before making any decisions. Every document that comes through is reviewed by all of us, and every e-mail that goes out is reviewed by both of us.

(T9.22.21, 128)

G.L. and C.L. provided testimony concerning the reasons why they believe the District did not provide W. with FAPE and why he should attend The DATA Group. Specifically, the Petitioners provided testimony concerning the following alleged failures by the District: alleged failure to address known school refusal issues; alleged failure to address assistive technology concerns; alleged difficulties during remote instruction; alleged difficulty in scheduling remote instruction with Ms. Stokes upon her return from leave; allegedly false or inadequate data collection, and the allegedly inappropriate goals and objectives in 2019-2020 IEP.

Concerning the Petitioners' decision to place W. in The DATA Group, C.L. testified that when their attorney sent the June 2020 letter (J-32) to the District informing them that they would be placing W. in The DATA Group, C.L. denied that they had already decided to place W. in The DATA Group. C.L. stated that they were willing to give the District a chance and decided on meeting with the CST in June 2020. (T8.18.21, 109-111).

C.L. testified that it wasn't until they received the District's proposed June 2020 IEP (J-48), and she conferred with the two experts, Dr. Fiorile and Fog, that Petitioners decided to place W. in The DATA Group. C.L. stated:

Q Based on your reading of the expert reports, did there — in your opinion did the proposed program match with the expert recommendations?

A No.

Q Why would you say that?

- A. My opinion of that was that the IEP that they proposed and the LSS program remains inappropriate for W. It was essentially the same program that they already determined was inappropriate for him and I was not only concerned that it was the same program, but at the beginning of the school year the LSS classroom was not what the district presented to us in June of 2019. I was concerned that they would do the same thing. Our trust with them was lost and I just didn't have faith in that.

(T8.18.21, 112)

C.L. testified that she did not discuss the June 2020 IEP with the District. C.L. also stated that they wanted W. to succeed in public school but that they no longer had trust in the District and the proposed programs as W. had regressed since enrolling in March-April 2019, C.L. stated:

Q. Okay. Now, let me ask you this, did you always want W. out of district?

A. Absolutely not.

Q. Why do you say that?

A. Not at all. If you look through every prior IEP starting from when W. entered school, I had always wanted W. to succeed in public school and be exposed to peers. Public school is where you have access to peers, so I have always sought to have him in public school. I need public school. Sadly, he regressed so much in this particular program that we needed to place him in a specialized placement like the Data Group. That's not something I particularly would have wanted, but I'm not in control of that for what W. needs. He needs the tools to be able to go back into an integrated educational setting with neurotypical peers and he needed that because he regressed in Verona's program, so G. [L.] and I needed to follow the advice of the experts because their LSS program was not working, categorically not working.

(T8.18.20, 113-114)

On cross-examination, C.L. stated that her attorney's June 2020 letter (J-32) provided the two evaluation reports of Dr. Fiorile and Fog to the District for the first time

and communicated Petitioners' intention to place W. in The DATA Group, and that Petitioners would discuss the same with the District at the scheduled June IEP meeting.

Further on cross-examination, C.L. testified that she had not informed the District that W. was attending the Little Learner Center.

Stacy O'Keefe

Stacy O'Keefe, (O'Keefe), a Board-Certified Behavior Analyst, was the final expert witness to testify for Petitioners. O'Keefe was qualified as an expert in ABA and teaching students with autism. O'Keefe testified that she began working with W. in July 2019, and works with him once weekly supervising the behavior technician who works with W. O'Keefe testified that she oversees W.'s home program and works with Petitioners.

O'Keefe testified that the parent training provided consisted of working with Petitioners on their concerns, training them to collect data, which O'Keefe stated she would then review to confirm that they were implementing everything properly. O'Keefe testified that the data collection is important as it allows her to examine the data to ensure minimal maladaptive behaviors. (T9.22.21, 27). O'Keefe stated that during her work with W. data was collected and was then immediately charted on a graph. O'Keefe testified that immediate and consistent data is important in order to determine the status of the program lessons for W.

In her initial meeting with W., O'Keefe testified that he presented with many maladaptive behaviors, and that her goal was to help him in order to facilitate his learning. O'Keefe testified she believed that instead of attending ESY, W. would benefit from a full-day ABA instruction with a 1:1 behavior technician. O'Keefe testified that W. tends to become obsessed and dependent on the i-Pad with tantrums that last in excess of 30-minutes. (T9.22.21, 35). She further testified that she has found that the i-Pad is not successful in terms of communication or being a reinforcer. (Id.).

O'Keefe testified that she worked with the Petitioners during the week W. began to display school refusal behaviors, and she was providing home services before school

in order to assist with correcting W.'s behavior. O'Keefe testified that there were a few days over the week in October 2019 where it was impossible to get W. to school. As he engaged in excessive crying, and he verbalized "no school" and "no friends." (T9.22.21, 40).

O'Keefe testified there was a lapse in her services to W. and the family due to reported issues with the insurance company. O'Keefe testified that during her month absence, the family was carrying through with W.'s programs successfully.

O'Keefe testified that due to the COVID closures in March 2020, she had to transition to remote services for W. and the family. O'Keefe testified that she utilized a high level of visual supports, W. was provided tangible visual materials, and reinforcers changed based on interest. O'Keefe testified that W. did an "excellent job" during the remote instruction she provided and he had very little maladaptive behaviors. (T9.22.21, 60-61).

O'Keefe testified that based on the Petitioners reports to her W. was displaying many "novel behaviors" during remote instruction with school staff that would carry over into her sessions when they were close in proximity. (T9.22.21, 65). At this juncture O'Keefe testified that she recommended the family discontinue remote instruction with the District, as she believed W.'s progress was being stunted due to the more frequent and longer maladaptive behaviors that happened during school and carried over into his home programming, which O'Keefe stated was detrimental to his learning. (J-35).

O'Keefe testified that when W. commences at The Data Group during the 2020-2021 school year, he appeared extremely happy, more regulated, and his body was "more available for language." (T9.22.21, 72). He engaged in a lot less self-stimulatory behavior, his social interactions increased, and he displayed more spontaneous language. O'Keefe testified that while at The Date Group, she was able to stop collecting data on W.'s maladaptive behaviors. Overall, since starting at The DATA Group, O'Keefe testified there has been an increase in William's verbal communication, his social interaction, his availability for learning, and a decrease in his maladaptive behaviors.

On cross-examination O’Keefe testified that she had some email communications with Raskin and one telephonic communication with Raskin prior to February 2020, and no communication thereafter. On re-cross examination, O’Keefe conceded that W.’s maladaptive behaviour was localized to home instruction. (J-35).

I make the following additional **FINDINGS** concerning the testimony of the individuals who have testified herein, which includes the witnesses’ personal recollections and reliance on evidentiary documents in their respective testimony:

It is within an Administrative Law Judge's "province to determine the credibility, weight, and probative value of the expert testimony." State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied. 127 N.J. 321 (1990). The weight to be given to an expert's testimony depends upon "[sic] candor, intelligence, knowledge, and especially upon the facts and reasoning which are offered as foundation of [their] [sic] opinion." County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). Further, "the weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984).

A trier of fact may reject testimony as “inherently incredible,” and may also reject testimony when “it is inconsistent with other testimony or with common experience” or it is “overborne” by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, “[t]he interests, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

I **FIND** the testimony of Dr. Mauriello, Abovitz and Raskin to be credible and reliable inasmuch as their testimony reveals that they do not want to deprive W. of any programming to augment his educational opportunities but they must also work within the parameters of the law, regulations and facts as presented. I **FIND** the District’s witnesses’ testimony also credible that they collaborated with Petitioners in implementing an appropriate program for W. and even sought to include in the 2020 IEP many of the

recommendations put forth by Petitioners' two experts and that already included many of the expert's recommendations therein.

In determining the reliability of Dr. Fiorile and Fog, I **FIND** that the testimony they provided offered no expert opinions about the adequacy of the IEP proposed in July 2020, or why the district's incorporation of some of her recommendations would not have been sufficient. I **FIND** that while Dr. Fiorile's opinions were limited to W.'s program during the 2019-2020 school year, even they were flawed because she relied on a single observation several months into the school year, which petitioners' own witness, Sheerin, agreed was not a proper thing to do. I further **FIND** Dr. Fiorile's opinion having no credibility as she did not even review, much less opine on, W.'s progress reports over the remainder of the school year following her observation in December 2019, and she never requested to see his program book, which she testified was a mistake on her part.

I **FIND** that Dr. Fiorile also made erroneous assumptions during her classroom observation and in her report which were noted, and refuted, by Raskin who accompanied her during her observation. Raskin detailed these errors in her testimony, and also in a written "accept/reject" report in the record. I **FIND** that many of these errors could have been rectified had Dr. Fiorile submitted questions to the District following her observation, that she failed to do.

I also **FIND** Fog's testimony concerning her December observation to have little weight inasmuch as she is a speech-language expert but never requested to observe any speech therapy sessions, only W.'s LSS classroom. I **FIND** that there were errors and misunderstandings in Fog's testimony concerning her report which could have been addressed had she submitted written questions that needed clarification. I **FIND** Fog's testimony to be further unreliable and not credible as she conceded that the only documents she reviewed were the ones listed in her report, which did not include any data on W.'s progress throughout the year, and no input from any district staff on how they were approaching the issues of concern to her.

I **FIND** Sheeren's testimony to have no weight in determining if the District has provided W. with FAPE, as she testified that she was relying on the 2019 IEP and not the

2020 IEP. In addition, I **FIND** Sheeren's testimony was inaccurate and thus not credible concerning the DATA Group being a legally compliant out of district placement, when she erroneously stated that The DATA Group had accepted two students from Roseland and Montclair, that had been placed there with district-sponsored approval. This testimony was later rescinded after her testimony (J-50).

I **FIND** that O'Keefe provided credible testimony concerning her ABA instructions of W. during the 2019-2020 school year, her interactions with the family and communications with the District.

I **FIND** the testimony of Petitioners G.L. and C.L. to be credible concerning their desire to have W. be in the best possible program and therefore, they have chosen to enroll him in The DATA Group. I **FIND** Petitioners' testimony not credible that their decision to enroll W. in The DATA Group was already made up when they met with the child study team on June 18, 2020, as the same is contradicted by the June 12, 2020 letter submitted to the District (J-32) and Shereen's testimony that W. was enrolled in The DATA Group's summer program in June 2020. Moreover, I **FIND** that C.L.'s testimony conceded that Petitioners had already decided to place W. in the DATA Group before the June 18 IEP meeting when she acknowledged the letter spoke for itself.

Issues

The primary issue in this case is whether the IEP proposed by the District for the 2020-2021 school year afforded W. the opportunity for a free appropriate public education. The witness testimony and evidence presented focused almost exclusively on how W. fared during the 2019-2020 school year when he was in kindergarten. What occurred that year is relevant only to the extent that explains the appropriateness of the 2020 IEP offered by the District for the 2020-2021 school year when Petitioners filed their due process petition. An ancillary issue is if the District did not provide W. with FAPE whether the unilateral placement at The DATA Group was appropriate, and if so, are Petitioners entitled to any reimbursement.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

This case arises under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities. Receipt of those funds is contingent upon a state's compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). As a recipient of Federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities will receive FAPE. 20 U.S.C. §1412. FAPE includes Special Education and Related Services. 20 U.S.C. §1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d). To meet its obligation to deliver FAPE, the school district must offer W. "an educational program reasonably calculated to enable him to make progress appropriate in light of his circumstances." Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017).

THE PROPOSED 2020-2021 IEP

Petitioners' argue that they filed for due process after years of attempting to work collaboratively with the District to develop a program for W., and that in defense of its program, the District repeatedly spoke of programming and supports that it could have offered, offered in the future, or were offered but were not part of the IEP. Thus, Petitioners posit that the District's case failed to meet the preponderance of credible evidence required to show it made FAPE available to W.

Petitioners' further argue that proofs presented in this matter clearly shows that the District's program not only failed to provide W. with a program in which significant and meaningful progress could occur but also shows that in fact W. did not make meaningful progress in light of his circumstances (he regressed) and therefore denied W. a free and appropriate public education.

Finally, Petitioners argue that the 2020-2021 IEP proposed by the District is not in accordance with the recommendations of Petitioners' expert reports provided by the

parents, and the IEP does not address deficits listed in the District's own IEP's. Petitioners contend that based on the testimony provided by both Petitioner's witnesses and Respondent's witnesses, it is clear that the District's proposed program is not uniquely tailored to address W.'s educational needs.

The District counters that its proposed IEP is based on ABA principles and integrates related services, such as speech and language therapy and occupational therapy, that are appropriate for W.'s needs as an autistic student. The District argues that the proposed IEP incorporates many of the recommendations put forth by petitioners' two experts and that the District was already doing much of what the experts recommended. The District presents a side-by-side comparison of the most recent IEP, with petitioners' expert reports to show that the District gave due consideration to petitioners' feedback.

In response to the District's alleged failures and petitioners' frustration that W. had regressed or stagnated during the 2019–20 schoolyear, The District argues that what occurred in 2019-2020 should only be looked upon when comparing the changes that are proposed in the 2020 IEP. The District counters that it was Petitioners' own actions, plus extenuating circumstances wrought by the pandemic, contributed to W.'s disappointing progress in 2019-2020.

Finally, the District argues that Petitioners' demonstrated unreasonable conduct when they produced their experts six-days prior to the June 18, 2020, IEP meeting. In making this argument, the District acknowledges that Petitioners did express dissatisfaction with W.'s 2019-2020 program as early as December 2019, by letter from their attorney, but they made no attempt to collaborate with the district thereafter in developing an in-district IEP that would have adequately addressed W.'s needs with input from their experts.

"The issue of whether an IEP is appropriate is a question of fact.", 336 F.3d 260, 271 (3d Cir. 2003); Carlisle Area Sch. v. Scott P. by and Through Bess P., 62 F.3d 520, 526 (3d Cir. 1995). The Board has the burden of proof and the burden of production to establish that it provided a FAPE to the student. N.J.S.A. 18A:46-1.1. At a due process

hearing, the obligation of the parents is merely to place in issue the appropriateness of the IEP. Lascari v. Bd. of Educ., 116 N.J. 46.

The record reveals that the District's IEP is based on ABA principles and integrates related services, such as speech and language therapy and occupational therapy, that are appropriate for W.'s needs as an autistic student. The record further discloses that the proposed 2020–21 IEP incorporated many of the recommendations put forth by Petitioners' two experts and that the District was already doing much of what the experts recommended.

For these reasons, I **CONCLUDE** that the District has met its burden of demonstrating that the IEP for 2019-2020 provided W. with a free appropriate public education and its proposed IEP for the 2020-2021 school year would have provided a free appropriate public education set forth in Andrew F. v. Douglas Cnty. Sch. Dist. 137 S. Ct. 988.

In considering the appropriateness of an IEP, case law instructs that actions of the school district cannot be judged exclusively in hindsight. The appropriateness of an IEP must be determined as of the time it is made, and the reasonableness of the school district's proposed program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564–65 (3d Cir. 2010) citing Susan N. v. Wilson Sch. Dist., 70 F. 3d 751, 762 (3rd Cir. 1995). An IEP is “based on an evaluation done by a team of experts prior to the student's placement.” Fuhrmann v East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3rd Cir. 1993) (emphasis in original). Thus, “in striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable [when] the IEP was drafted.” Ibid. Our courts have confirmed that “neither the statute nor reason countenance ‘Monday morning quarterbacking’ in evaluating a child's placement.” Susan N., 70 F.3d at 762, citing Fuhrmann, 993 F.2d at 1040.

The Third Circuit in Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 247 (3d Cir. 1999) stated that the appropriate standard is whether the IEP offers the opportunity for “significant learning and confers meaningful educational benefit.” The

benefit must be meaningful in light of the student's potential; the student's capabilities as to both "type and amount of learning" must be analyzed. Id. at 248. When analyzing whether an IEP confers a meaningful benefit, "adequate consideration [must be given] to . . . [the] intellectual potential" of the individual student to determine if that child is receiving a FAPE. Ibid. The IDEA requires an IEP based on the student's needs and "so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate." Scott P., 62 F. 3d at 534.

The record herein discloses that Petitioners provided proofs in their attempt to demonstrate alleged failures by the District concerning its failure to address known school refusal issues; alleged failure to address assistive technology concerns; alleged difficulties during remote instruction; alleged difficulty in scheduling remote instruction; allegedly false or inadequate data collection, and the allegedly inappropriate goals and objectives in 2019-2020 IEP. However, said alleged deficiencies when reviewed in real time as they occurred do not rise to the level of demonstrating that the District failed to provide W. with FAPE.

There is no dispute that Petitioners initially accepted the 2019-2020 IEP, despite whatever misgivings they may have had thereafter. The record is replete with instances of Petitioners failing to share information with the District in a timely manner. These include: not providing data from W.'s summer 2019 privately-provided programming, not disclosing that W. was attending Little Learners multiple times a week after school, not disclosing the significant changes at home that clearly had a likelihood of affecting W. negatively (lapse of home ABA services and departure of their nanny), not disclosing in a timely manner that they had relocated to their shore home in the spring of 2020, not providing the district with a timely explanation of why they were terminating remote instruction at the end of May, and not sharing their expert reports until several days before the June 2020 IEP meeting.

For the reasons stated herein I **CONCLUDE** that the failures by the District as alleged by the Petitioners, and the deficiencies noted by Petitioners' experts concerning the 2019-2020 IEP and by extension the proposed 2020-2021 IEP, did not deny W. a free appropriate public education, as the Third Circuit finds these allegations of

implementation even if true, to be “such de minimus failures to implement an IEP do not constitute violations of the IDEA.” Melissa S. v. Sch. Dist. Of Pittsburgh, 183 F. App’x 184, 187 (3d Cir. 2006) (citing Houston Indep. Sch. Dist. V. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000)).

UNILATERL PLACMENT

Having found that the District provided FAPE to W. in the 2019 IEP and proposed 2020IEP, it is not necessary for me to analyze whether placement at The DATA Group is appropriate under the IDEA. It is well-established that the appropriateness of an IEP is not determined by a comparison of the private school and the program offered by the District. S.H. v. State Operated Sch. Dist. of Newark, 336 F. 3d at 271. Rather, the pertinent inquiry is whether the District’s IEP offered FAPE and the opportunity for meaningful educational benefit in the LRE. G.B. and D.B. ex rel J.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., EDS 4075-06, Final Decision (June 13, 2007), <http://njlaw.rutgers.edu/collections/oal/>. Upon a finding that the district provided FAPE, the appropriateness of the private placement is irrelevant. Ibid. (citation omitted); Scott P., 62 F. 3d at 533.

Even assuming that the IEPs somehow fell short, I **CONCLUDE** that the parents are not entitled to reimbursement for their expenses at The DATA Group. A court may reduce or deny reimbursement costs based on the parents’ unreasonable behavior during the IEP process. 20 U.S.C. § 1412(a)(10)(C)(iii). New Jersey regulations specifically require that parents advise the district at the “most recent IEP meeting” that they were rejecting the IEP, and that they give written notice “of their concerns or intent to enroll their child in a nonpublic school” to the district at least ten business days’ prior to removal. N.J.A.C. 6A:14-2.10(c)(1) and (2). The cost of reimbursement may be reduced or denied “[u]pon a judicial finding of unreasonableness with respect to actions taken by the parents.” N.J.A.C. 6A:14-2.10(c)(4).

The record reveals that Petitioners did not collaborate with the District during W.’s 2019-2020 school year, which I will not repeat.

Particularly troublesome was the production of Petitioners' expert reports, just several business days prior to the June 2020 IEP meeting, and that Petitioners had already enrolled W. in The DATA Group in June 2020. Dr. Fiorile's report is dated April 12, 2020, two months before it was provided to the District with a transmittal letter from petitioners' counsel giving notice of their intention to unilaterally place W. at The Data Group if the district did not agree to place him there itself. The explanations offered by Petitioners for this delay is not convincing. But even if there were valid reasons for not turning the report over promptly, there was no valid excuse for predetermining the unilateral placement without first attempting to collaborate on improvements to the district's program.

For these reasons, I **CONCLUDE** that the Petitioners' conduct was unreasonable in the IEP process and therefore, they are not entitled to reimbursement for the unilateral placement of W. at The DATA Group. N.J.A.C. 6A:14-2.10(c)(1) and (2).

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the relief requested by Petitioners as set forth above and in their due process petition be and hereby is **DENIED**, and that the petition of appeal be **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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 (2018). 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.

November 17, 2022 _____

DATE

lr



JULIO C. MOREJON, ALJ

APPENDIX

Witnesses

For Petitioners:

Petitioners, G.L. and C.L.
Dr. Carol Fiorile, Ph.D., BCBA-D
Carly Fog, M.S., CCC-SLP
Stacey O'Keefe
Tara Sheerin

For Respondent:

Dr. Frank Mauriello, Director of Special Services
Ilissa Abovitz, Speech-Language Pathologist
Brooke Raskin, Behavior Analyst

Exhibits

Joint Exhibits:

- J-1 NJEIS Measurable Child Outcome
- J-2 Montclair BOE – Consent for Initial Evaluation
- J-3 Montclair BOE – Physical Therapy Evaluation by Jolene Jurkovic, PT, DPT
- J-4 Montclair BOE – Social History Evaluation by Rudy Campbell, MSW
- J-5 Montclair BOE – Speech-Language Evaluation by Denise Roche, MA, CCC-SLP
- J-6 Montclair BOE – Collaborative Evaluation (Psychological, Education & Behavioral) by Miya Thompson-Smith, LDTC, Marisa Klar, MS, CAGS and Sharon Balsamo, BCBA
- J-7 Development Learning Center – IEP

- J-8 Montclair BOE – Assistive Technology Summary & Plan by Cynthia Soder-Harven, MA, CCC-SLP, ATS
- J-9 Montclair State University – Speech & Language Re-Evaluation by Thomas Fahey and Diane Polledri, MA, CCC-SLP
- J-10 Montclair BOE – Speech & Language Evaluation by Denise Roche, MA, CCC-SLP
- J-11 Montclair BOE – Occupational Therapy Sensory Evaluation by Max Vinpa, OTR
- J-12 Montclair BOE – Behavioral Assessment by Sudha Ramaswamy, Ph.D., BCBA-D
- J-13 Montclair State University – Speech & Language Progress Report by Thomas Fahey & Diane Polledri, MA, CCC-SLP
- J-14 Developmental Learning Center – IEP
- J-15 Glen Ridge BOE – Invitation for Annual Review of IEP
- J-16 Glen Ridge BOE – IEP
- J-17 VB-MAPP Assessment Summary Notes
- J-18 Verona BOE – School Registration Forms
- J-19 Verona BOE – Invitation for Transfer Student 30 Day Review with IEP Development – Meeting Confirmation Form
- J-20 Verona BOE – Re-Evaluation Planning – Consent for Additional Assessment
- J-21 Verona BOE – IEP
- J-22 Verona BOE – Physical and Occupational Therapy Re-Evaluation by Andria Rosenberg, MS, OTR/L and Amy Quinn, PT, DPT
- J-23 Verona BOE – Speech & Language Pre-School Assessment by Gillian Betcher, MA, CCC-SLP
- J-24 Verona BOE – IEP
- J-25 Verona BOE – Occupational Therapy Sensory Profile Write-Up by Andria Teich Rosenberg, MS, OTR/L
- J-26 Verona BOE – Letter from Behaviorist, Brooke Raskin, M.Ed., BCBA to K Parents
- J-27 Letter from Andrew I. Meltzer, Esq, to Gabrielle Pettineo, Esq.
- J-28 Speech & Language Evaluation by Carly Fog, MS, CCC-SLP
- J-29 E-Mail from Brooke Raskin to CL
- J-30 Augmentative-Alternative Communication School Based Evaluation Report by Karen L. Gliniecki, MS, CCC-SLP

- J-31 Independent Educational Review by Carol A. Fiorile, Ph.D., BCBA-D, SAS, NYS, LBA
- J-32 Letter from Andrew I. Meltzer, Esq., to Gabrielle Pettineo, Esq.
- J-33 Verona BOE – IEP
- J-34 Verona BOE – Release of Information/Records
- J-35 Letter from Stacey O’Keefe, BCBA
- J-36 E-Mails
- J-37 Daily Notes
- J-38 NJAC 6A-14
- J-39 Verona BOE – Progress Report for IEP Goals and Objectives
- J-40 Verona BOE – Progress Report for IEP Goals and Objectives
- J-41 Verona BOE – Functional Collaborative Assessment by Elise Edelstein and Karen Tully, LDT-C
- J-42 Verona BOE – Request to Amend an IEP without a Meeting
- J-43 Verona BOE – Observation Report by Brooke Raskin
- J-44 Verona BOE – Observation Report by Ilissa Abovitz, MS, CCC-SLP
- J-45 Letter from Gabrielle Pettineo, Esq., to Andrew I. Meltzer, Esq.
- J-46 Letter from Andrew I. Meltzer, Esq., to Gabrielle Pettineo, Esq.
- J-47 Letter from Gabrielle Pettineo, Esq., to Andrew I. Meltzer, Esq.
- J-48 Letter from Gabrielle Pettineo, Esq., to Andrew I. Meltzer, Esq., and proposed IEP
- J-49 Verona BOE – Behavioral Data
- J-50 Letter from Mr. Rubin dated 9/17/2021, w/partial redaction of Sheerin testimony (Received on 9/22/2021)
- J-51 Executive Order No. 104 dated 3/16/2020

For Petitioners:

- P-1 Withdrawn
- P-2 Withdrawn
- P-3 Withdrawn
- P-4 The Data Group – records
- P-5 Curriculum Vitae of Carol A. Fiorile, Ph.D., BCBA-D, SAS, NYS, LBA
- P-6 Curriculum Vitae of Carly E. Fog, M.S., CCC-SLP

- P-7 The Data Group - Current Programming Graphs and Data
- P-8 Curriculum Vitae of Tara Sheerin
- P-9 Withdrawn
- P-10 CV Stacy O'Keefe

For Respondent:

- R-1 District Review of C. Fogg Report
- R-2 District Review of C. Fiorile Report
- R-3 District Review of Observation
- R-4 Rutgers Program Evaluation
- R-5 Color-Coded Attendance Record
- R-6 Withdrawn
- R-7 ReThink Data Sheets
- R-8 Withdrawn
- R-9 E-mails to/from S. O'Keefe and B. Raskin
- R-10 E-mails to/from C.L. and B. Raskin
- R-11 E-mails to/from C.L. and T. Stokes