



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 08237-21

AGENCY DKT. NO. 2022-33331

S.K. AND S.K. ON BEHALF OF S.K.,

Petitioners,

v.

BERNARDS TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Staci J. Greenwald, Esq., for petitioners (Sussan, Greenwald & Wesler, attorneys)

Cherie L. Adams, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: December 1, 2022

Decided: December 21, 2022

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioners contend that their son, S.K., who is eligible for special-education services, was denied a free and appropriate public education (FAPE) by respondent, Bernards Township Board of Education (hereinafter "District"), because the program and

placement offered by the District was inappropriate and not reasonably calculated to confer significant educational benefit or enable him to make progress in light of his individual circumstances. Having reached this conclusion, petitioners unilaterally removed S.K. from his in-District high school and enrolled him in the Center School, a school outside the District. They seek an Order finding that the District denied S.K. FAPE; finding that the Center School is the appropriate placement for S.K.; directing the District to revise S.K.'s individualized education program (IEP) to place him at the Center School; directing the District to reimburse them for all costs associated with his past and future enrollment at the Center School; and ordering compensatory education.

The Board contends that it appropriately assessed and reported S.K.'s cognitive abilities and provided him a FAPE in the least restrictive environment. It further contends that petitioners' unilateral removal of S.K. from school and placement at the Center School was unjustified.

PROCEDURAL HISTORY

On August 25, 2021, petitioners filed a due-process petition. The matter was transmitted by the Department of Education, Office of Special Education (OSE), to the Office of Administrative Law (OAL), where it was filed on October 5, 2021, as a contested case. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. A prehearing conference was held on November 22, 2021, during which the hearing was scheduled to be conducted on March 23 and 29, 2022, and April 6, 2022. Status conferences were held on February 2 and 7, 2022, and March 15, 2022. The hearing was conducted on March 23 and 29, 2022, and April 6, 2022. Due to witness availability, the parties required additional days of hearing, which were conducted on June 3, 2022, August 4, 2022, October 17, 2022, and December 1, 2022. The record closed on December 1, 2022.

FACTUAL DISCUSSION AND FINDINGS

The following is undisputed and, therefore, I **FIND** the following as **FACT**:

1. S.K.'s¹ family moved to the District from California in the spring of 2019 during his seventh-grade year. S.K. had an IEP from California that provided educational services to S.K. in a small-group setting and included related services for speech-language therapy.
2. While in California, S.K.'s school district administered cognitive-functioning evaluations and petitioners obtained private evaluations. All of the evaluation test results indicated that S.K.'s IQ was in the 70s range.
3. In California, he was classified as eligible for special education based on the diagnosis of autism. His placement there was similar to a language/learning disabilities (LLD) placement in New Jersey, with speech services and a behavioral consultant.
4. S.K. started as a seventh-grade middle school student with the District in March 2019. He began eighth grade in September 2019. School closed due to the COVID-19 pandemic in March 2020. S.K. received remote instruction through the end of his eighth-grade year. Remote instruction continued when he entered high school as a ninth grader in September 2020. S.K. attended high school in-person, on a part-time basis, starting in October 2020. The high school resumed full-time in-person classes on or about February 2021.
5. The District prepared IEPs dated April 26, 2019, November 15, 2019, April 27, 2020, and March 30, 2021. J-1; J-3; J-5; J-8.

¹ S.K.'s parents have the same initials as him and each other. His parents are referred to here as Mr. K. and Ms. K.

6. Petitioners, through their attorney, retained Edna Barenbaum, Ph.D., and Carly Fog to evaluate S.K. S.K. was completing the ninth grade at Ridge High School at the time of the evaluations.
7. On July 11, 2021, petitioners, through their attorney, provided Dr. Barenbaum's evaluation report to the District and requested that the District agree to explore schools outside the District for S.K. and pay for all costs associated with such a placement. J-11.
8. On August 9, 2021, petitioners, through their attorney, provided Ms. Fog's evaluation to the District and restated their request for exploration of an out-of-district placement and payment by the District. J-12.
9. On August 23, 2021, petitioners, through their attorney, advised the District that they selected the Center School as an appropriate placement for S.K. and requested that the District place him there effective September 8, 2021. They advised that they would place him there unilaterally if the District refused. J-13.
10. Petitioners filed their due-process petition on August 25, 2021.
11. On September 8, 2021, Jean O'Connell, District director of Special Services, acknowledged receipt of the August 23, 2021, letter, and declined to effectuate S.K.'s placement at the Center School. J-14.

Testimony

The following is not a verbatim recitation of the testimony. Rather, it is a summary of the testimony and evidence that I found helpful to resolving the issues presented in this matter.

For respondent

Marjorie Murray is a learning consultant and serves on the child study team (CST) at Ridge High School. She obtained a master's degree in special education with Applied Behavioral Analysis (ABA) training and holds certifications in special education, learning disabilities teacher-consultant (LDTC), and health and physical education. She has been a learning consultant approximately nine years, during which she worked with students aged three through twenty-one. She has worked with the District approximately five years. Starting in September 2020, she was S.K.'s high school case manager.

When S.K. started at the District, his case manager prepared a thirty-day transfer IEP. J-1. Meetings were conducted on April 26, 2019, and June 5, 2019. Initially, the CST discussed the possibility of S.K. being in the District's CBAP² autistic program to receive intensive ABA services, but his parents wanted him to continue in the type of program he received in California. The IEP team agreed to the LLD placement and to continue to work on the speech-language goals that had been established in the California IEP. J-1; T1 78:7–22. The LLD program served students with learning and language deficits or disabilities and was not a self-contained class. Rather, each period, S.K. and the other students travelled to different classes and different special-education students were in each class. Some of S.K.'s electives were general-education classes. An extended school year (ESY) program was also recommended. Petitioners reviewed the goals and objectives enumerated in the IEP with the CST and additional goals and objectives were added. Petitioners agreed to the 2019–2020 IEP on June 16, 2019.

The IEP continued through the following school year, when S.K. was in eighth grade. His case manager that year was Jordan Marcus, the middle-school psychologist. In May 2020, Murray met with Marcus to prepare for S.K.'s transition to high school. Marcus advised that speech and language testing that was conducted in March 2020 showed that S.K. had language deficits. Marcus also advised that psychological and

² The Comprehensive Behavior Analysis Program (CBAP) is an applied behavior analysis program that provides services tailored to a variety of students. T6 41:5-8. "T1," "T2," "T3," "T4," "T5," and "T6" refer to the transcripts of the March 23, March 29, April 6, June 3, August 4, and October 17, 2022, hearing dates, respectively. They are followed by the referenced page and line numbers.

educational evaluations would be conducted in July 2020. Murray and Marcus would meet in September or October 2020 to discuss the evaluations.

Marcus conducted the July 2020 psychological evaluation, which reported S.K.'s IQ as 78. S.K.'s learning consultant conducted the education evaluation, which indicated that S.K. was in the "low to very low range in academic areas." T1 29:7–8. An evaluation conducted by a Children's Specialized Hospital psychologist confirmed the diagnosis of autism.

In August 2020, before high school began, petitioners sent Murray numerous messages in which they expressed their nervousness about S.K.'s transition to high school and asked to discuss his program. Murray scheduled a virtual meeting, which was conducted on September 1, 2020. Petitioners expressed their concern with the LLD program and the vocational-studies component, and their fear that S.K. would not be able to take electives and higher-level math classes. Murray assured them that S.K. would be able to take an elective if he did not want to take vocational studies. She provided a list and description of all of the courses offered by the high school, including electives. In response to petitioners' request that S.K. study algebra, Murray advised that the LLD math teacher, Joe Flynn, could provide instruction tailored to S.K.'s needs and abilities. Petitioners advised that they wanted S.K. to take word processing rather than vocational studies. His schedule was changed accordingly.

In September 2020, S.K. entered the District high school. His prior IEP, which recommended "LLD, special class mild/moderate learning and language disabilities class," related services, speech-language therapy, and adaptive physical education, continued when he entered high school. T1 27:25–26:1; J-5.

On October 1, 2020, the special-education students returned to in-person schooling. Prior to returning, students who were new to the high school were able to tour the school, see where their classes would be held, and meet teachers. S.K. attended the tour. The students attended school in-person for one-half day, from 7:30 a.m. to 11:45 a.m. The remainder of the school day was conducted virtually, until January 2021.

S.K. struggled in his word processing class. Petitioners discussed with the guidance counselor whether the class was appropriate for him. They queried whether the move from remote to in-person learning in a new school contributed to his difficulty. They ultimately decided to move him to vocational studies.

On October 8, 2020, Marcus and the learning consultant convened a meeting with petitioners to review S.K.'s evaluations and answer petitioners' questions. They had a good rapport, and the meeting was productive. Petitioners did not suggest that the testing was inaccurate and neither they, Marcus, nor the learning consultant concluded that S.K.'s program should be changed. S.K. thus continued with his LLD program. Murray noted that the LLD program is a "great program" that "models a typical high school program" and its "delivery of the instruction is very intense." T1 36:24–37:1. The students rotated classes over eight periods; had different teachers, and had elective classes. "[E]very student has a different dynamic in the classes." T1 37:6–7. S.K.'s core classes were taught by special-education teachers with aides; also, the speech pathologist would "push into the English class." T1 37:25–38-1. An instructional aide would provide support in S.K.'s elective classes.

Murray frequently visited classrooms, and she observed S.K. in his different classes "a couple" times per week. T 38:24. She "check[ed]" with S.K.'s teachers, the speech-language therapist, and the adaptive physical education instructor "throughout the year." T1 40:24–25. She usually met with the LLD teachers and their director twice per month to discuss progress and any concerns. The teachers, therapist, and instructor recorded S.K.'s present levels of progress. None expressed a concern about his program. Concerns were raised about his impulsivity and attention problem and the teachers' difficulty "keeping him focused for a long-sustained time." T1 41:17–18. Murray understood that these issues were also noted in California. She was not concerned about S.K.'s progress.

Petitioners' communication with Murray was limited after the beginning of the school year, when they were concerned about vocational training and math. After then, when Flynn provided the algebra education they requested, petitioners did not contact her to discuss concerns.

A draft IEP, which was to be effective starting March 30, 2021, was prepared but the meeting to discuss it was postponed until S.K.'s mother returned from an overseas trip. The IEP proposed continuation of the LLD placement, with an extended school year, and, if S.K. wanted, electives. On May 25, 2021, petitioners were given an updated statement of S.K.'s present levels of performance prior to the meeting. J-10 at 127. They did not contact Murray after they received the statement of S.K.'s present levels.

The CST's recommendations were based on his progress and its assessment of the skills that he needed to work on. Murray noted that he had "a lot of challenges." T1 56:21–22. The primary challenges included S.K.'s "very difficult time with higher order thinking, higher level thinking comprehension, his impulsivity, his attention to task." T1 56:25 to 57:2. Murray explained that he is "very prompt dependent so he doesn't really have a lot of independent work. He has to have someone sitting with him a lot to prompt him to get the [work] completed. He's very off task." T1 57:2–6. The LLD program offered very small classes, with five or six students, with a special-education teacher and aide who were able to provide "a tremendous amount of support" to S.K. T1 57:11. The staff members unanimously agreed that continuing S.K. in that classroom, with support from other staff members who worked with S.K., was appropriate.

In May 2021, petitioners advised that they wanted to bring evaluators into the school. Murray understood that they did not believe S.K. was being properly challenged. She was surprised because petitioners had not addressed their concerns to her. Had petitioners communicated with her about their displeasure with S.K.'s program, she would have taken a number of steps to address their concerns. This would have included sharing samples of his work, having them observe him in classes, and offering new electives and programs, such as multiple clubs and extracurricular activities and peer mentors. S.K. had only "tapped into a minuscule part" of the school, and Murray "wish[ed]" she had known of their displeasure. T1 53:25 to 54:2.

Murray attended Dr. Barenbaum's observation and facilitated Ms. Fog's observation. Dr. Barenbaum asked to observe S.K.'s English class. Murray arranged for this observation, as well as part of a science class. Because the school had recently

returned to in-person classes, there was a specific amount of time allotted for the observations. Murray reviewed Dr. Barenbaum's report and found numerous "inaccuracies." T1 58:17. While the doctor wrote that the English lesson was juvenile and not at S.K.'s level, it was, in fact, appropriate, engaging, and "had a lot of scaffolding to it." T1 58:22. Also, the doctor administered an assessment that was intended for non-verbal students, which was inappropriate because S.K. was "completely verbal." T1 59:10. Further, she administered the Diagnostic Achievement Battery, Fourth Edition (DAB IV), an educational evaluation that was intended for children aged five to fourteen. S.K. was fifteen and one-half years old. P-1 at 9. Ms. Fog conducted a speech-language evaluation of S.K. It did not cause Murray to change her opinion that the District's program was appropriate.

In August 2021, Murray learned that S.K. was to be removed from the District and placed at the Center School. She observed S.K. at the Center School on November 1, 2021, and wrote a report. R-2. She first observed him in his physical education class, where he did not participate in the volleyball game that the students were playing. Rather, he paced back and forth along the wall of the room. S.K.'s biology class had four male students, including S.K. The lesson was "one dimensional," and utilized a cartoon image to review the elements of cells. The students were to make a flash card using their laptops and only words, not images. S.K. did not engage in the lesson. Although the teacher tried to engage him by asking him questions, he did not respond. Rather, he "stared out into space," played with his computer keyboard and "wigg[ed] around." T1 66:19–20. He "was very, very off task, was not getting engaged in creating this flash card just with the vocabulary, no pictures to surround it." T1 67:3–5. He did not respond to the teacher's other efforts to engage him and did not engage with the other students. He offered one-word answers to questions or comments and demonstrated "learned helplessness" by repeatedly saying he did not know something. T1 67:20. He did not collaborate or interact with the other students, even when they had a break between classes. He "really required one-to-one" instruction." T1 66:18.

S.K. and the other students remained in the same classroom when the course was changed to math. All of the students other than S.K. attempted to solve an algebra problem that the teacher had written on the board. S.K. could not transfer it in writing so

that he could attempt to solve it. Murray observed that he “had no interest in doing that.” T1 69:18. The teacher brought him to the front of the class, where he “literally just stared at the white board” and said, “I need help.” T1 69:19–20. The teacher showed him how to solve the problem, step by step. Murray described the problem as “basic.” T1 69:22. When S.K. returned to his seat, he drew on his tablet and was disengaged from the math class. The teacher approached him and tried to reengage him, to no avail. He looked at his desk and doodled. At one point he laughed, but wouldn’t answer the teacher when she asked what was funny. The teacher helped him solve the problems at his desk, showing him each step of the solution.

Murray noted that Dr. Barenbaum and Ms. Fog recommended that S.K.’s instruction should be rooted in language. However, she observed that his biology and math classes at the Center School were “very one dimensional,” lacked peer interaction, and focused solely on memorization, without generalization of skills. T1 71:3–4. Mere recall of facts and memorization is “the lowest level of learning,” without “synthesizing of information” or relating it to real-world circumstances. T1 71:7–9. This differed from the District’s LLD program, which utilizes real-life applications of the lessons. For example, the math class would apply math skills to budgeting for shopping, purchasing of items in a store, and evaluation whether there was sufficient money to buy all of the desired items. “It’s very real-life focused but it’s infused with all the skills that you would learn in a math class.” T1 71:22–24. Similarly, rather than discuss an “abstract” cell, the students in the District’s science class learned about biology through hands-on learning. They would work in the greenhouse and work with plants, which helped them learn about chemistry, photosynthesis, and other subjects.

Murray concluded that the Center School was not appropriate for S.K. and that the District’s program was appropriate for him. She noted that her son is autistic, and she knows that “[o]ne of the most important skills that people with autism can learn is the ability to social [sic] appropriately. Keeping a student in a school where everybody there has social issues is not going to help him in the real world. He has to learn to focus, and he has to learn how to interact socially.” T1 72:24–73:4. The District high school has students across the range of abilities and social capacities. Also, the Center School’s IEP did not reference Dr. Barenbaum’s or Fog’s evaluations and its goals were “so basic

compared to the goals” in the District’s IEP. T1 74:21–22. Murray opined that it was “almost like they just lowered the standard of criteria of success.” T1 74:22–23.

On cross-examination, Murray acknowledged that S.K.’s IEPs for the 2019–2020, 2020–2021, and 2021–2022 school years included identical goals or objectives and there were instances in which reports of S.K.’s achievement were inconsistent. For example, the IEPs included, “when presented with a text at [S.K.’s] instructional level, [he] will identify the main parts of the story and/or summarize the story.” Also, “when presented with a text at his instructional level, [S.K.] will answer five whom, what, where, when and why questions about the text with fading prompting.” J-1 at 15; J-5 at 69–70; J-8 at 304.³ Another goal that was in all three IEPs is, S.K. “will brainstorm and use an outline when writing to aid his paragraph organization with 75% success with moderate assistance.” J-1 at 15; J-5 at 15; J-8 at 305. The 2019–2020 IEP differed to the extent that it did not provide for assistance. J-1 at 15. Another goal provided that S.K. would capitalize holidays and proper names with 80 percent success when given a writing assignment. The objectives in each IEP that were associated with this goal were also identical. J-1 at 15; J-5 at 70; J-8 at 305. The progress report for 2019–2020 indicated that S.K. progressed satisfactorily with respect to the goal. J-16 at 171. Another objective, concerning use of three adjectives in a writing assignment, was included in all three IEPs. J-1 at 16; J-5 at 70; J-8 at 305. With respect to another objective, concerning use of past-tense verbs in writing assignments, found in the 2019–2020 IEP, S.K. was found to have been progressing satisfactorily in November 2019 and March 2020. The progress report indicated that he was expected to achieve the objective. J-16 at 172. The goal was not continued in the latter two IEPs.

Other examples included, but were not limited to:

- For the objective of demonstrating appropriate turn-taking skills, which was in all three IEPs (J-1; J-5; J-8), a June 2020 progress report indicated that S.K. had demonstrated 90 percent success and achieved the objective. J-16 at 167. Despite this, the goal was included in his subsequent IEP.

³ The November 2019 IEP provided for a nominal amendment to the April 2019 IEP. J-3.

- The “Present Levels of Academic Achievement and Functional Performance” (PLAAFP) section of the 2021–2022 IEP, dated March 30, 2021, reported that S.K. had mastered the objective, “S.K. will maintain appropriate social distance when speaking, to make excuses for interrupting a speaker.” J-1; J-5; J-8. Murray acknowledged that the IEP nonetheless included this as an ongoing objective. She also acknowledged that an April 29, 2021, report of S.K.’s then-present levels of performance indicated that he was meeting this objective 60 percent of the time. J-10 at 132.
- For the objective “organize his thoughts for expression and apply ‘stop-think-speak’ during speech sessions” (J-1; J-5; J-8), the 2021–2022 PLAAFP statement reported that he achieved this 50 percent of the time. J-8 at 300. From the date of that IEP to the April 29, 2021, progress report, he regressed to 30 percent success. J-10 at 132.
- The objective of being able to “attend, give eye-contact to person’s [sic] speaking without becoming distracted” was in all three IEPs. J-1; J-5; J-8. The 2021–2022 IEP reported that S.K. had “achieved” this objective. J-8 at 300. Murray acknowledged that this objective was continued in the IEP although S.K. had mastered it. An April 29, 2021, report, however, indicated that he achieved this objective 50 percent of the time. J-10 at 132.

Murray surmised that some of S.K.’s speech objectives “may have remained” because he “faltered or regressed in those areas” due to the transition to a new school, new teachers, and overall new environment. T1 98:13–18. However, she deferred to the speech pathologist.

She explained that S.K.’s ongoing challenges necessitated that he continue to work on these goals and objectives. Comprehension goals, in particular, are “imperative to functioning in life.” T1 111:7–8. Multiple factors are evaluated, in addition to progress

on goals and objectives, to measure his progress. The factors include but are not limited to how S.K. functions in class; his application of skills to assignments, tests and quizzes; whether he generalizes his skills; whether he has conversations with peers and teachers and uses pragmatic language and more descriptive story telling. Murray further explained that S.K. “has significant cognitive challenges. . . . [T]his is real life. We need to learn how to write. He still struggles with it every year. We’re not going to omit [a goal or objective] from the document if it still needs to be addressed. . . . [H]e may need to work on this until he’s twenty-one. Until he’s able to do the skill, we have to keep it in the IEP, so it may be repeating itself but that’s part of his disability.” T1 119:23–120:7.

It was not unusual for a student’s goals to be repeated from one IEP to another, as they were for S.K. The closure of schools due to the COVID-19 pandemic, and virtual instruction, created additional challenges for students like S.K. who require individual instruction, “proximity in the classroom,” group discussion, and generalization of skills. T1 172:20–21. Home instruction disrupted their schedules and, overall, made education more difficult.

Murray noted that S.K.’s transition from middle school to high school in September 2020 added a challenge for him. The high school was new to him and was much larger than the middle school. After all of the high school students returned to in-person classes, there were 2,500 students. He had to learn skills to function well in this new setting.

When asked about the failure to continue a goal that S.K. had not mastered or generalized, Murray explained, “[I]t’s a year plan so the teachers need to determine where the most important deficits are and then address those accordingly. It’s not something that would be completely neglected. It could be infused in other aspects but . . . it’s a one-year document so we have to focus on where the most significant gaps are.” T1 121:4–10. She noted further that, even if a goal was not included in an IEP, it could have been included in S.K.’s instruction.

Murray was asked about S.K.’s electives. In September 2020 petitioners told her that they did not want him to take vocational studies. She replied that he did not need to take vocational studies, and provided descriptions of all of the electives. Petitioners

indicated that they wanted S.K. to try the word processing elective. S.K. attended the class remotely⁴ and an aide assisted him and other students, also remotely. Soon after starting the class, S.K.'s teachers and parents indicated that he was having difficulty. Murray noted that the class involved "hard concept[s]" and was a "hands-on class." T1 146:16–18. It was, thus, even more difficult because it was conducted remotely. Murray recommended that he continue in the class but be graded on a pass-fail basis, rather than receive a specific grade. She noted that this would permit the teacher to make necessary modifications for S.K. J-24 at 256. Given "the rigor of the curriculum" due to the fact that the elective was a general-education class, pass-fail grading was an appropriate response. T1 145:5–6. When asked if S.K. could have been given an alternate curriculum or alternate goals and objectives for the class, Murray replied that this could have been done in conjunction with pass-fail grading. His IEP provided for "modified curriculum down to learner's level." T1 144:24–25. The 2021–2022 IEP provided for "guided instruction," which contemplated modified curriculum. J-8 at 308. Because petitioners did not agree to converting the class to pass-fail grading, S.K. was moved from the word processing class to vocational studies.

Another elective, social skills art, is a general-education class with modifications of assignments and projects for the special-education students. Other general-education electives were offered, with the expectation that they would be modified in accord with S.K.'s IEP. See, e.g., J-24 at 262.

Petitioners expressed concern about S.K.'s program on April 1, 2022, and their attorney sent a letter about their concerns. An IEP meeting that was scheduled then had to be postponed until S.K.'s mother was able to participate. Murray asked a behaviorist to observe S.K. in his program, with the goal of determining if additional strategies could be implemented to aid him or if other factors, such as "the environment," were contributing to any problems he was experiencing. T1 158:23. Murray advised the behaviorist that the behavioral strategies in S.K.'s IEP were being implemented. She was aware of this based upon her regular engagement with his teachers and observations of his classes.

⁴ The special-education students returned to in-person classes before other students. They were in the school until 11:45 a.m., after which they would have remote classes at home until 2:20 p.m. T1 156:19–22.

Among the strategies were constant “brain breaks,” feedback, provision of processing time, and deep breathing, all of which were intended to help him “stay on task.” T1 160:21–23. S.K.’s ability to maintain attention was a “pretty big theme across most of the content of his inability or his challenge with staying on task and staying focused.” T1 162:21–24. A “behavioral contract” was not required for the teachers to implement these strategies.

Accommodations and modifications would have been implemented for any of S.K.’s extracurricular activities. The Unified Athletic Program, which is run by a special-education physical education teacher, enables special-education students to play on sports teams with general-education students during weekends. S.K. was offered the after-school social-skills club, which was run by Wendy Schlosser, the speech-language therapist, and Kristen Winters, the transition specialist. Special-education and general-education students participated in the club and played games and went on social outings. Murray believed that S.K. did not participate.

Wendy Schlosser was S.K.’s District speech-language therapist. She has a master’s degree in education and speech pathology communication services and holds a certificate of clinical competence in speech-language. She also serves as the coordinator of the social-skills program at the high school; has a private speech pathology practice, and previously worked at Children’s Specialized Hospital and Kessler Rehabilitation. She testified concerning the speech-language services and social-skills instruction provided to S.K. while he was at the high school.

S.K. was diagnosed with autism spectrum disorder and speech and language delay. His greatest difficulties were his inability to sustain attention, whether information was being relayed visually or verbally, and his impulsivity. These were his “greatest area[s] of challenge” and they “impacted everything for” him. T2 3–4. His goals were to maintain appropriate social distance and eye contact; to organize thoughts by stopping, thinking, and speaking; and to decrease incidents of repetitive phrases. To achieve the goals and objective in his IEP, staff needed to address his ability to sustain attention. A variety of tools were used to do this, which involved using his “stronger visual skills to help facilitate his language function while addressing that issue of attention.” T2 13:14–

16. This included the use of visual cues, video modeling, movement throughout the classroom, and graphic organizers. Material was presented in “very small chunks and scaffolded through every session” and interaction “to make connections and develop” his language and social skills. T2 13:18–20.

With respect to social skills, S.K. needed assistance in initiating and attending to social interactions. The social-skills club, which Schlosser ran, met three days each week and once per month on a Friday. It offered various activities, such as music, cooking, and board games. Students were able to participate while attending school remotely. Although Schlosser spoke with S.K.’s mother about his joining the club, he never did. He also did not participate in Unified Sports, which offers three seasons of sporting options.

Schlosser met with S.K.’s teachers every month and worked with him in his functional English class every day. He made inconsistent progress. Even when S.K. mastered a goal, he did not consistently demonstrate achievement of the goal. For this reason, the goals remained in place and continued to be addressed so they could be achieved consistently. Schlosser noted that for students with autism spectrum disorder, these types of issues are pervasive, as they are inherent in the diagnosis.

While school was conducted remotely, she used the same materials but was limited in some respects. For instance, students could not directly role play with each other. Due to the remote technology, S.K. mastered visual attention, but this was likely due to the virtual-attendance technology, as, later, he did not maintain this skill.

When S.K. returned to in-person instruction, Schlosser noted that his lack of attention and impulsivity were “impacting every aspect” of his functioning. T2 21:3–4. She added methods to address these “fundamental foundational skills,” as a student cannot function without them. T2 21:8. She broke down information into small parts, required demonstration of understanding, and utilized graphs, charts, and drawing because S.K. enjoyed it and was more engaged when he expressed himself in this manner. Schlosser noted that she could not change S.K.’s goals until an IEP meeting was conducted; however, she implemented these additional techniques to help him achieve his IEP goals.

Prior to the March 2021 IEP meeting, the case manager reported that S.K.'s parents had concerns about his goals, objectives, and progress. Schlosser intended to discuss with them the new goals that she wanted to propose. However, the meeting ended after only five minutes because the parents wanted more information about S.K.'s speech-therapy progress. Schlosser sent information to them on March 31, 2021, and invited them to meet with her via Zoom. J-10 at 113. Because S.K.'s parents did not respond, she wrote a statement of S.K.'s then-present levels of performance for each of his speech-language goals and proposed new goals in the same document. J-10 at 132–133. She noted his poor attendance, problems with impulse control and attention, perseveration on three topics, and failure to engage with his peers. She wanted to amend the goals to address these issues, because they are fundamental to all other skills. Neither parent followed up to request a meeting.

Schlosser explained her intention with respect to the amended goals:

In order to improve the ability to process language, the fundamental first step is attending. So, this goal of following a spoken direction was teaching S.K. to stop so he would address the impulsivity. Stop, listen, do not act before you hear the whole direction and then repeat it back. So those were the first two goals. So, if you can repeat . . . the direction back before you act, that tell[s] me you have taken in the information and you can process it. And then it also addresses the ability to follow a direction. . . . [I]t's important to say that so much of the program in high school . . . [is] academic, but it's also functional. At this point in the lives of our students . . . you want them to be able to do as much as possible. Not just sit in a classroom and take in information which is absolutely critical but also interact, socialize, begin to be ready to work. And that ability to follow directions and control impulsivity are imperative to every single skill that we do.

[T2 25:12–26:8.]

These new goals, which Schlosser included in her written statement, were “a little more structured and really broke down those bigger goals” that were in place at the start of high school. T2 26:23–25; J-10 at 133. She recommended speech-language therapy

three times per week in a group setting for thirty minutes per session; individual speech-language therapy once per week, thirty minutes per session; and social-skills group once per week, thirty minutes per session. J-10 at 133.

Schlosser was present during Fog's evaluation. She was working with S.K. for half of the time in the classroom while Fog observed. Fog misrepresented S.K.'s work as mostly verbal because S.K. worked at the smart board; he helped develop a chart that was used to compare animals; and visual cues were utilized.

Schlosser disagreed with Dr. Barenbaum's use of non-verbal testing to evaluate S.K. because S.K. is verbal. Although he has receptive- and expressive-language delays, he can speak and uses expressive language. Research has demonstrated that it is inappropriate to use non-verbal tests to evaluate academic and social achievement. Dr. Barenbaum used the non-verbal tests to conclude that S.K.'s cognitive function is at an average level and he should interact with students at that level. However, all other testing reported that S.K. tested below average in language and cognition and he was in the lower to mid-range of the students in the class. He was, therefore, in the class with students at his level.

Schlosser reviewed the Center School IEP. She noted that S.K. had the same teacher for every class except art and speech. At the high school, he had different teachers for several subjects. She noted that the Center School's goals for speech-language were the same as the goals that she had recommended should be revised. Its IEP provided for only two individual speech-language sessions and one group session per week. There also appeared to be a variety of seemingly "incongruous" goals listed together and they did not "scaffold" or relate to each other. T2 35:11; T2 39:5. There was not a "structured, organized way of addressing S.K.'s deficits and bringing him to his highest level." T2 39:8-10. The high school's IEP provided this. Also, the objectives relied upon verbal modeling, which could increase S.K.'s dependency upon prompts. As S.K. has difficulty in this area, there must be a plan to reduce verbal modeling over time. However, scaling back of verbal modeling was not listed as a goal. Moreover, the IEP suggested that S.K. had not improved, given the IEP's focus on fundamental aspects of

entering a classroom and preparing himself for class. Data was not provided concerning goal monitoring and, thus, how his progress would be measured. P-5 at 149.

Schlosser noted that on February 7, 2022, the Center School speech therapist, Kolb, indicated that S.K. was struggling with attending and participating and was reading at a third-grade level. He was reading at a third-grade level when he left the District. Importantly, the therapist did not provide data to explain S.K.'s progress. P-5 at 165.

On cross-examination, Schlosser acknowledged that she did not observe the Center School program or discuss it with personnel there. Also, she did not evaluate S.K.

Schlosser responded to Fog's assertions in her report that S.K. did not make progress and that the IEP inconsistently reported whether S.K. mastered a goal. She reiterated her earlier testimony that, for students with autism, like S.K., inconsistencies are inherent. Although he may have mastered a goal at one time, he did not necessarily generalize the skill. Her May 7, 2021, statement of S.K.'s present levels of performance documented S.K.'s inconsistency. Her statement "spoke to the need to break information down to address the attention," which was "crucial" for S.K. T2 52:12–15. Although three- to four-step directions may have been a goal in 2019, in high school "[t]here was no point to put three- to four-step directions when he wasn't attending long enough to follow three- to four-step directions." T2 52:15–17. She changed the way the goals were addressed, pending a formal change via the IEP, "so they included [S.K.'s] other areas of deficit." T2 53:3.

Schlosser distinguished mastery, which demonstrated when a student meets a goal's criteria over two sessions, from generalization, when a student consistently and independently demonstrates the act or function in a variety of settings. Generalization is the ultimate goal, which cannot be achieved alone in one setting.

Jordan Marcus was S.K.'s case manager and the school psychologist at S.K.'s middle school. Marcus first spoke with S.K.'s parents at the start of the school year, September 2019. They discussed the parents' goals, S.K.'s school program, and that there would be a meeting in October during which they would discuss S.K.'s progress

and transition to the following year. The parents did not express concerns during this meeting.

S.K.'s IEP was amended in November 2019, without a meeting, to add dynamic learning maps assessment for science. This was necessary due to the State assessment for eighth-grade students. J-3.

Marcus was frequently present in S.K.'s classroom and observed him there. S.K. "demonstrate[d] in some areas that he was . . . maybe higher when it came to actually doing a little bit of the work. But cognitively and what he was able to do behaviorally, he was certainly in line with what we were seeing there. He worked incredibly well with every staff member there." T2 81:7–10. He "constantly" required assistance, redirection, and "a lot" of prompting, which he accepted. T2 81:14–18.

Re-evaluations of S.K. were conducted after consent was obtained in March 2020. His speech evaluation was conducted before the school closed due to the pandemic. The other evaluations, cognitive and educational, could not be conducted until the summer, given ongoing pandemic restrictions. Marcus conducted the cognitive evaluation using the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V). He observed that S.K. frequently required redirection, as well as prompting to continue working. S.K. often asked when the test would be done or asked for assistance because the test was difficult. He delayed completion of the test when he used hand sanitizer while he was to have been working on the test. He scored in the extremely low range for verbal comprehension, and his ability to utilize words to express knowledge was "definitely limited." T2 84:9. He performed better when explaining how things are connected, as opposed to providing clear, concise word definitions. He scored in the average range for visual-spatial ability. Marcus knew that this was an area that S.K. enjoyed. He scored in the low-average to the middle-high end of the low-average range for fluid reasoning, working memory, and processing speed. His full-scale IQ and cognitive proficiency scores were in the low-average range. With respect to S.K.'s ability to quickly and accurately process information, he fell within the low-average range, "which meant that he could certainly understand material at a good rate, but some of those other skills and abilities were a limiting factor." T2 85:7–10. Marcus noted, "due to the variance across

[S.K.'s] individual index scores, one would be best to view them individually when determining supports and needs, rather than viewing his overall cognitive score." J-6 at 2. He also noted that these test results should be interpreted with "some caution" because, due to the pandemic, safety procedures that may have negatively impacted the standardization of the evaluation were instituted. Ibid.

Marcus explained that a verbal assessment was necessary because "[v]erbal aspects are required in all areas of schooling [and] life. . . . And all of his instruction, at least in some capacity, is going to be provided verbally." T2 98:4–8. However, Marcus viewed this component as a "very, very minor aspect of who S.K. is as an overall student and as a person only looking at the non-verbal skills." T2 98:10–12. A "lot of it's based on his functional abilities, what we're watching him do in the classroom. How we're seeing him respond to peers and adults and how we're seeing him take to the support and . . . what level of support he actually requires. . . . It's not just testing." T2 98:25–99:6.

Based upon these results, Marcus determined that S.K.'s instruction should involve more in the way of visual tools while also explaining things verbally, which is integral to instruction and communication.

S.K.'s educational evaluation was conducted by a middle-school learning consultant who administered the Woodcock-Johnson Test of Achievement, Fourth Edition. It evaluated reading, writing, and mathematics skills. S.K. scored in the very low range for reading; basic reading was low average; reading comprehension was very low; and reading fluency was low average. There was not a significant deficit in his pace and accuracy of reading. Application of math problems and skills was in the very low range and broad math was very low. Written language was low average and written expression was low. Spelling was one of his strengths, and his ability to identify nonsense words was in the average range. While he scored from very low to average, his scores were primarily in the low-average to very low range. R-7.

All students, including S.K., attended school virtually through the end of the school year. Marcus sent to S.K.'s parents a report of S.K.'s progress toward meeting his goals as of November 2019 and March and June 2020, as reported by his teachers. J-16. S.K.

made progress in a vast number of areas. However, it was very difficult or impossible to measure some areas while students attended school virtually. It was, thus, not surprising that S.K. did not achieve the goals originally projected for him. Each goal was “valuable” and, thus, the staff wanted him to continue working on them. T2 80:17.

An IEP annual review meeting was conducted in April 2020, to plan for S.K. to enter high school and to reconfirm S.K.’s eligibility for special-education services. Marcus, the speech pathologist, S.K.’s teacher, and his parents met and reviewed his progress, skills, speech-language evaluation, and deficits. The cognitive and educational evaluations were not yet available. S.K.’s goals and objectives, which were written by S.K.’s teachers and service providers, were reviewed. Some goals and objectives were carried over from the prior IEP (2019–2020 school year) because it had been developed late in the school year due to S.K. having recently moved to the school district. S.K. had made progress in a number of areas, but some had not been achieved and were still being addressed. The next progress report would be issued in June. S.K.’s instructors recommended continuation of the LLD program with continued speech-language, adaptive physical education, social skills, and an extended school year. Marcus agreed that continuation of S.K.’s program was appropriate and S.K.’s parents did not object to continuing his program. They requested a progress-update meeting with the case manager and at least one teacher in mid or late October to discuss S.K.’s transition to high school and his progress with respect to the IEP’s goals and objectives. They also requested intervention by a District behaviorist if behavioral concerns were identified. The IEP dated April 27, 2020, noted that this intervention would be discussed by the parents and the high school case manager. J-5 at 63. The parents also indicated that they preferred that S.K. not be enrolled in vocational studies in high school. Rather, they wanted him in general-education electives. This was discussed during an October 2020 meeting during which the cognitive and educational evaluations were discussed. At that time, Marcus was no longer S.K.’s case manager, as he was enrolled in high school.

Marcus reviewed Dr. Barenbaum’s report and questioned her use of a non-verbal assessment because S.K. is not non-verbal, even though he has expressive and attention deficits. He participated in classes and was able to express information and his needs verbally. Marcus observed him do so “countless times in the classroom.” T2 96:25. The

non-verbal assessment offered a very narrow view of S.K. and was not a complete review of his strengths and weaknesses. Dr. Barenbaum's report did not cause Marcus to question his determination about the appropriate program for S.K. In assessing the program, he considered functional information derived from observations, S.K.'s teachers, and his parents, as well as test results. Fundamentally, he assessed S.K.'s demonstrated functional abilities, including his interactions with peers and adults; his engagement with support; and the degree of support he actually required. S.K.'s program would allow his teachers and special-education specialists to adjust the work so that it would be appropriate for him given his demonstrated abilities.

The IEP prepared by the Center School was "incredibly similar" to what the District provided and was able to provide. There were no meaningful differences. Marcus noted that Dr. Barenbaum referenced the Center School's plan to address social skills, but that nothing had been established. S.K. was afforded counseling but was mostly observed not communicating with his peers. Dr. Barenbaum did not address S.K.'s work or what he was capable of, although she did note that he required a lot of prompting from his teachers. It appeared he was just given work to do that was not rooted in any kind of language and had no significant social opportunities other than Special Olympics.

On cross-examination, Marcus acknowledged that the results of his testing were consistent with the Test of Nonverbal Intelligence administered by Dr. Barenbaum, "minus the verbal score." T2 107:16–17. S.K. scored extremely low on verbal comprehension, average on visual spatial, and low average on fluid reasoning, working memory, and processing speed. J-6 at 86. There was a significant difference between his verbal and visual-spatial scores. Marcus explained that he and the staff knew "well beforehand" that visual-spatial ability was "absolutely a strength for S.K." and that he "had an affinity for it." T2 109:18–20. This "solidifie[d] the need for having these visual modalities when we're providing him instruction. Not to say that he's . . . incapable of the receptive or expressive language. But if we're going to make that be the only way he's going to be able to demonstrate knowledge, that would be inappropriate. . . . [T]o have that expectation of him would be . . . not best practice." T2 109:20–110:3. Marcus explained further that their intention was to "boost [his] strengths to help him in those areas" where he has deficits by giving him the tools he can benefit from. When asked if the verbal capacity

should be “taken away” in order to evaluate what S.K. is capable of, Marcus replied that it is “not a matter of taking out the verbal. That would be in a situation where . . . you’re basically just looking at the full-scale IQ score and nothing else.” T2 110:13 to 111:7. Rather, he looks at each of the individual scales and sub-test scores. For instance, S.K. performed better when the test involved a hands-on component than when he had to do the work in his head. This indicates that S.K. benefits from not just visual tools but, particularly, hands-on visual tools. That is, he learns when he is able to try something first. Marcus underscored that “under no circumstance should the verbal component be the guiding aspect of how we’re supporting him, his education. Not that we’re removing it, but . . . it should not be the guiding focus. It should be utilizing his strengths in these other areas with the verbal comprehension as like that [sic] additional. [Because] obviously we still need him to develop in that area.” T2 113:6–13.

Also on cross-examination, Marcus clarified that an IEP meeting could be convened if there were a need to amend goals and objectives. Alternatively, the IEP’s goals and objectives could be amended.

Marcus explained that the pandemic and resultant remote learning caused S.K.’s progress to stall to some extent. Given the nature of remote learning, in-person instruction was lacking, and instruction did not always occur with the same frequency as compared to in-person instruction. Nonetheless, Marcus acknowledged that in some instances in which it was reported that S.K. progressed well notwithstanding the pandemic.

Marcus explained that an objective is deemed to have been achieved when the student performs it consistently. Generalization occurs when the skill is carried over to other areas, including other academic and social areas. Some objectives and goals must be generalized. The 2019–2020 progress report indicated that, by June 2020, S.K. had achieved the objective of demonstrating appropriate turn-taking skills; keeping to a topic in a discussion, and following three- and four-step instructions. J-16 at 167–69. After speaking with S.K.’s related-service providers, Marcus learned that, while there were a number of instances in which S.K. achieved an objective, a determination was made to continue the related services because they involved “really crucial skills” that the service

providers wanted to continue working on in the next school year. Continuation of the objectives in the next IEP was intended to reinforce the skills. T2 124:5.

Marcus was asked about a record that indicated that S.K. mastered the objective of maintaining “appropriate social distance when speaking, to make excuses for interrupting a speaker.” J-16 at 167. The pandemic adversely impacted S.K.’s progress with this objective because it was difficult to measure success when the students and teachers were not allowed to be near each other. With respect to the objective “S.K. will decrease the incidence of repetitive phrases/questions,” the 2019–2020 progress report indicated that he had progressed satisfactorily in March and June 2020. Ibid. Marcus noted that S.K. had not yet mastered the objective and, thus, it was continued so that he could progress to mastery. The progress report indicated that S.K. had progressed with respect to other objectives; however, he had not yet fully achieved them.⁵ Thus, continuation in the next IEP was warranted. Finally, for other objectives, S.K.’s progress was gradual or inconsistent or he had regressed from earlier progress. J-17 at 185–88. Marcus acknowledged that S.K.’s progress was consistent or improved in some areas.

Joseph Flynn was S.K.’s high school math teacher for the 2020–2021 school year. There were six students in the class, including S.K., and two instructional aides in addition to Flynn. For S.K., he added algebraic concepts to the course curriculum, which was consumer-based math. The curriculum addressed time, scheduling, money, and banking and budgeting, which is most likely encountered in the real world. He also taught operational math skills (addition, division, subtraction, and multiplication), word problems, and other math concepts. S.K.’s goals came with him with his eighth-grade IEP, which included banking, working with money, and algebraic math such as variable expressions and equations and order of operations.

⁵ “Decrease the incidence of repetitive phrases/questions” (progressing satisfactorily); “organize thoughts for expression and apply ‘stop-think-speak’ during speech sessions” (progressing satisfactorily); “attend, give eye-contact to person’s [sic] speaking without becoming distracted” (progressing satisfactorily). J-16 at 167–68. S.K. also progressed satisfactorily, but did not master, the reading objectives including: “identify the main parts of a story or summarize the story” and “answer five who, what, where, when and why questions about a text with fading prompting.” J-17 at 185.

Although the entire class learned the same subjects, the instruction was tailored to each student's specific skill level and needs. Thus, each topic was presented differently to each student, with "varying degrees of difficulty." T5 97:7.

S.K. was rather shy when the class was conducted virtually and less so in-person. He required frequent redirection. He required less redirection when he worked independently and most when he worked one-on-one with a teacher, when he would frequently speak quietly to himself and giggle. Over time, he started to communicate more with the other students and appeared to like to be with them. Flynn believed his social skills improved over time, as he became more comfortable in his school and classroom, and with the students in his class.

In late September or early October, petitioners asked Flynn whether this was the proper placement and his views about math education in the future. Flynn, who was still getting to know S.K., believed the class was appropriate, as it involved important subjects that everyone should learn, and noted that S.K.'s goals and objectives are at the core of algebra. He agreed to work with S.K. on algebraic concepts, but noted that, until he achieved the goals and objectives, it was not appropriate to move on to other algebraic topics. He provided a lot of algebraic work for S.K. to do at home with his mother as well as links to websites that teach algebra and provide practice for different algebra skills. This covered "most of the most basic of algebraic skills." T5 80:14–21. Some of the topics S.K. worked on at home may have overlapped with his classwork. S.K.'s parents thanked Flynn for addressing and responding to their concerns and they did not communicate with him again about algebra.

S.K.'s IEP goals included order of operations. J-5 at 14. Flynn began S.K. with the simplest, one-step, operations. S.K. could solve one-step problems but not multi-step equations. Flynn discovered that S.K. benefitted from videos and examples and a "manipulative" that provided the order of operations. T5 83:23. Flynn sat with him and went over the manipulative and worked through modeled practices, after which S.K. completed the work. Over the year, he progressed to needing less prompting, although he still required the manipulative and "would also not perform as well if not given an example or two prior to the independent practice." T5 85:3–5. As the year progressed,

he required less prompting; however, he still used the manipulative. “By the end of the year he was getting a little more successful, but he would still need to use the manipulative or at least have a couple models be given to him prior to the practice before completing this.” T5 85:12–16. Flynn described his progress as “moderate . . . throughout the year,” as the manipulative was used less or another step was added to an equation. T5 85:24. When working independently, S.K. did not work at a rapid pace, as he completed ten problems in twenty to twenty-five minutes and required redirection “as he would become off task for various reasons.” T5 86:14. In all, Flynn worked with S.K. on multi-step equations and order of operations for approximately five months. In contrast, instruction on these subjects would be covered in no more than two weeks for ninth-grade students without IEPs.

Flynn believed S.K. benefitted from the consumer math class because scheduling and time were particularly important for navigating a new school and reading a new school schedule as independently as possible. From there, they progressed to work and personal schedules, which is an essential skill that should be practiced “for many years, not just a day or two especially when working with individuals with special needs.” T5 87:17–18. Also, although S.K. was familiar with and was good at identifying money, he “needed a lot of work with” manipulating and counting money and providing examples of utilizing it. T5 87:25. He required a lot of practice in this area and word problems and practice in the classroom store were utilized to help in this area. They also worked on banking and budgeting, which are essential skills. S.K. had not mastered these skills prior to Flynn’s instruction. T5 89:7–10.

Flynn noted that mastery can be “increased.” T5 89:11. For instance, even if a student is able to perform the basic functions, such as make change, they may still have room to learn more, such as making change in the most efficient manner. “So, where the skill is mastered, . . . a lot of the time the level at which the skill can [sic] still be increased.” T5 89:16–18.

Flynn intended to recommend that S.K. continue with consumer math because he believed he had not mastered all of the topics and he believed they were important for independent living. He intended to continue working with S.K. on algebra and, “at the

minimum[,]” the goals in his IEP “to help him become more independent and proficient at completing those goals by himself with the use of less manipulatives and less prompting in order to gain complete independence in those areas [as well as] . . . other areas that the parents might want to be addressed.” T5 91:7–14. He anticipated this would be discussed during a meeting with petitioners. He did not write his placement recommendation in his progress report because he expected to also discuss this with petitioners and solicit their thoughts.

Flynn reviewed a summary of the Center School’s math instruction and observed that some of it was similar to what he taught. One of the goals was order of operations, but without the application of the operations, which is the level S.K. was working at in Flynn’s class. Other goals, like functions and finding the greatest common factors, were akin to manipulating numbers and variable equations, which S.K. worked on in Flynn’s class. He opined that the algebraic goals were not of a higher level than those in his class. He noted that the Center School reported that S.K. was distracted; engaged in the same behaviors, such as giggling; and frequently required redirection in class.

Flynn stressed that his goals for S.K. focused on “direction, being able to stay on task, things . . . in addition to the regular math goals.” T 93:70–9. He believed this would benefit S.K. overall as well as help him learn mathematical concepts more quickly and more accurately.

Flynn was asked on cross-examination if he knew that S.K. had been “scheduling” at home since he was five years old. T5 97:15. He was not aware of this; however, in class, S.K. was not able to follow and implement his school schedule and demonstrated that he needed additional support in reading and creating schedules. He eventually progressed in those areas. Also, while he was strong in addition and subtraction, he was “still working in multiplication and division.” T5 98:5–6. Although his eighth-grade IEP reported that he could do all four math functions, Flynn explained that it did not indicate how many digits he could manipulate; whether he was able to do it with decimals; and the extent to which he could perform any of these operations. He acknowledged that a parent could not interpret this information from the IEP.

Flynn further explained that learning to read a paycheck should not be deferred until S.K. had a job. Rather, he should know how to do this before he gets a job. Not only would this help him become an independent adult sooner, but he also did not know when he would get his first job and believed it would be unwise to wait until that time.

Flynn acknowledged that S.K.'s eighth-grade math teacher indicated that she started to work with him on the concept of elapsed time. Flynn continued to work on this subject with S.K., "working all the way to minutes." T5 100:19. He clarified that math goals could be found in sections of the IEP that did not fall under the "math" heading. For instance, "tasks related to banking" was under "Daily Living Skills" in the March 30, 2021, IEP. J-8 at 307. He also clarified that instruction concerning paychecks evolves as the students get older and have more experiences. As they advance through school, they will engage with jobs and they will "dive deeper into the paycheck world and understanding them and utilizing them when appropriate." T5 108:22–24. Finally, he clarified that use of money and banking were part of his regular curriculum; thus, they need not have been listed as specific IEP goals.

Lisa Vitale-Stanzione is the District's supervisor of Special Education for kindergarten through fifth grade. She also supervises the speech pathologist, the resource room and in-class-support classes, the general-education students who have IEPs, and some intervention classrooms for general-education students. Her primary responsibility in the District is its reading program for general- and special-education students.

When S.K. entered the District in 2019 he was reading at an approximate third-grade level with respect to "comprehension and looking at the whole picture." T6 9:9. Testing conducted by the District produced results similar to those from California. Based upon her review of records, S.K. has expressive- and receptive-language difficulties that impact his reading ability. He is able to "accurate[ly] and fluid[ly]" decode words, e.g., read a word and say it accurately; however, he requires assistance with reading comprehension. T6 10:2–3. That is, he needs help interacting with, summarizing, and applying the text. Vitale-Stanzione worked with his high school teacher to address his curriculum.

Dr. Barenbaum agreed with the above assessment of S.K.'s difficulties, as she highlighted that he "needed to focus on the comprehension specifically through self-regulation, executive functioning and comprehension strategies." T6 10:19–21.

The District's curriculum focused on this via a "gradual release of responsibility" protocol, which is called the "95 Percent" program. T6 11:1; T6 13:16. She trained the staff on this program. The program first involves direct instruction by the teacher; then guided practice where the teacher and student work together; followed by modeling; and, finally, the student works independently. The District's curriculum is "woven into" the gradual release of responsibility. T6 10:10. It focuses on "evidence-based comprehension strategies such as making connections, questioning, determining importance as well as visualizing and verbalizing." T6 11:11–14.

In direct instruction, the teachers do a lot of "think alouds" to demonstrate how they are making connections and comprehending. Because students often continue to read even though they don't understand what they're reading, the teachers stop reading at various times to explain how they are comprehending the material. They translate what is happening in their minds to the students, who observe this and use it as a model. With guided practice, the teachers and students work on the same thing simultaneously. When the students work independently, they also have the benefit of a scaffold or prompt from the teacher when needed. At that stage, the teachers utilize materials that are more interesting and relatable to the students, and they incorporate materials selected by the students. The students at that time are able to "decode the words with fluency and accuracy" and display proficiency and eventually mastery of specific comprehension strategies. T6 15:14.

Easier books are used prior to independent practice, to allow the focus to be on the skills being taught. It is important to use materials that address subjects already familiar to the students, such as riding a bike or swimming, so as to avoid new vocabulary that would interfere with their ability to fully engage. The materials, which are identified by the 95 Percent program, are "handpicked and sometimes handwritten specifically for

that comprehension strategy.” T6 13:19–20. The materials must focus on the comprehension strategy to be learned; otherwise, the students will not be successful.

Graphic organizers, or “maps,” are used for each comprehension strategy, such as making connections, determining importance, questioning, and visualizing and verbalizing. The maps break down the process as a scaffold and are used during direct instruction and guided practice. When in independent practice, the map is available to be used as a prompt when necessary.

The District’s reading program also employed a multi-sensory approach, which involved visual, auditory, and kinesthetic aspects of learning, because students can learn better auditorily, visually, or tactilely and can have weaknesses in these areas. Instruction is provided in areas of weakness and strength to facilitate growth. For S.K., when he is reading a book, this could involve incorporating drawing a picture relating to the book; listening to an audio version of the book; and also acting out different parts of the book. These methods, together, would improve his ability to retain and comprehend. These “comprehension strategies” are useful in many areas. T6 27:1. They have been used to prepare for SATs and have been applied to other subjects such as science, social studies, and math word problems.

The District also uses Strategies That Work, a book that applies these concepts to nonfiction reading comprehension. These approaches would be used when the students are reading TIME for Kids, a news magazine written at a student level, or Sports Illustrated, or watching the news.

These instruction methods were provided to S.K. by the District and were appropriate for him based upon his reading-comprehension needs.

Vitale-Stanzione responded to Dr. Barenbaum’s critique of the book used by the District. The story was about children planning a birthday party for a grandmother and addressed each of the stages of planning and everyone’s emotions while planning and enjoying the party. It was being used as part of the direct-instruction and guided-practice component of the comprehension program. It focused on a topic familiar to the students

so that they could practice the strategy of making a “self-to-text connection” between themselves and the book’s text. T6 16:18.

Vitale-Stanzione responded to Dr. Barenbaum’s statement that the gap between S.K.’s word identification and reading comprehension indicates that he had not developed executive-functioning skills such as visualizing and verbalizing. She agreed that while S.K. could read words with accuracy, his comprehension was lacking. Visualizing and Verbalizing is one of the primary strategies used for students like S.K. and it is part of the 95 Percent curriculum. It involves starting with a word all students understand and can visualize. Other words that the students can visualize are added to create sentences and then structure words, such as what, where, color, size, and shape, which can also be visualized, are added. District personnel had “extensive training” in Lindamood-Bell, which “really coined the Visualizing and Verbalization program,” and the program was used to instruct S.K. T6 18:17–18. When Dr. Barenbaum observed S.K.’s class, they were working on the connection strategy, which is at the beginning of the process.

Vitale-Stanzione disagreed with Dr. Barenbaum’s characterization of the instruction she observed at the Center School. Watching a movie and using a modified version of the book of the same story is not the same as Visualizing and Verbalizing and does not utilize the comprehension strategy. Providing the image to the students is contrary to the concept. It is appropriate to instead show the movie after the students have engaged in Visualizing and Verbalizing, to allow them to compare their visualized image to that of the movie. Similarly, a movie review does not involve the steps of comprehension strategy. Rather, it involves offering an opinion about why the student liked or disliked the movie and is not a research-based strategy for demonstration of the capacity for comprehension. However, she acknowledged that she did not read S.K.’s movie review.

On cross-examination, she acknowledged that she did not test S.K. She did not observe him in his District classroom or at the Center School. She attended staff meetings about him but did not meet his parents and did not attend his IEP meetings. She did not speak with Center School personnel.

Dr. Allyson Read, a District supervisor of Special Education, oversees the ABA program and speech-language services. She holds multiple licenses as a speech-language specialist and as a doctoral-level behavior analyst, and has worked as a speech-language therapist. She did not observe S.K. at the high school or attend his IEP meetings; however, she was involved in discussions about him, including about behavioral interventions.

For speech-language services, data is collected weekly to assess students' achievement of skills in different teaching environments and, at least once a week, to gauge progress on discrete skills.

Dr. Read reviewed Carly Fog's report and S.K.'s prior speech evaluation. She agreed with Fog that S.K. has significant difficulty with basic language skills and comprehension, which adversely impacts his ability to access all areas of curriculum. Language must, thus, be addressed in all areas. When a student gets to high school, the goal is to generalize skills across all curricula and to access social opportunities within the classrooms. S.K.'s therapist recorded those areas where he had success during the push-in sessions and others where he had difficulty. The latter was addressed during individual sessions. Dr. Read testified that the District utilizes many of the materials and programs recommended by Fog, such as Everyday Speech, social thinking, News2you and discrete social-skills instruction. S.K. has access to these tools via his IEP.

For petitioners

Dr. Edna Barenbaum, Ph.D., is an educational consultant and was qualified as an expert in psychology, educational programming for special-education students, and test construction. In May 2021 she reviewed S.K.'s evaluations and all of his IEPs; observed him in a District class for one hour; and administered assessments.

In an evaluation report, Dr. Barenbaum noted that petitioners were pleased with S.K.'s placement in the LLD classroom while in middle school. It was the most appropriate classroom option for him and his teacher was kind, compassionate, cared for his needs, and provided individualized instruction to meet his needs. P-1 at 2. Petitioners

were concerned about his placement in high school, as it focused on functional skills with an emphasis on consumer education and life skills rather than reading, writing, and math. Petitioners believed that S.K. had regressed, particularly in math, and demonstrated limited progress in reading comprehension and writing. Id. at 2–3.

The WISC-V administered by Jordan Marcus indicated an IQ of 78, which is in the very-low range. Because the WISC-V is a verbal test, it tested his disability rather than his true ability. The WISC-V instruction manual addressed this: “[I]t is important not to attribute low performance on a cognitive test to low intellectual ability when in fact it may be related to physical, language, or sensory limitations. Depending on the nature of the difficulty and the test administered, the child’s performance may result in scores that underestimate intellectual ability if the test is administered in standard fashion.” P-1 at 11 (quoting Weschler, 2013 at 18).

Dr. Barenbaum thus tested S.K.’s nonverbal ability to learn what he was capable of outside the realm of verbal skills, and used the Test of Nonverbal Intelligence (TONI-4). A “language free intelligence test,” it “minimize[d] bias created by [S.K.’s] severe language/learning disability.” P-1 at 11. Dr. Barenbaum explained in her report that the test was appropriate when a “subject’s cognitive, language or motor impairments rendered traditional tests of intelligence inappropriate or ineffectual.” Ibid. The test indicated that S.K. functioned in the average range of intelligence (103 IQ) when he is not required to use language.

The WISC and TONI results were inconsistent. Also, the WISC test indicated significant differences between S.K.’s verbal comprehension score and his other scores. This suggests that the WISC results are inaccurate and Marcus’s evaluation should have progressed further. Dr. Barenbaum wrote:

[W]hen the psychologist discovers large differences between index scores or between some index scores and the Full-Scale IQ (FSIQ), the FSIQ cannot and should not stand alone as the overall summary of the child’s cognitive abilities. The psychologist may elect to not report the FSIQ because it does not portray a clinically meaningful picture of the child’s diverse abilities. In fact, reporting [an] FSIQ comprised of subtest

scores within and between factors that show considerable variability could lead to an inaccurate picture of the child's abilities.

[P-6 at 13 (citation omitted)].

She added that S.K.'s "visual spatial score of 92 and his verbal comprehension score of 68 yields a 24-point difference. The school psychologist essentially failed to accurately represent [S.K.'s] true cognitive abilities by neglecting to conduct further cognitive testing. The conclusion by the school psychologist that [S.K.] is functioning in the very low range of cognitive abilities placing him at the 7th percentile rank for individuals his age is inaccurate and misleading and potentially harmful." Ibid.

Dr. Barenbaum cited to studies that concluded that test scores can cause teachers' expectations for the student to be lower, in line with the test results.

It is not appropriate to place a student functioning in the average range of cognitive ability with average daily living skills in adaptive behavior in a classroom curriculum with a life skills/work study focus. This placement does not provide an education for his individualized needs. It appears that the district does not have an appropriate placement to meet [S.K.'s] educational needs and has failed to provide the necessary education he deserves necessitating an out-of-district placement.

[Ibid.]

Dr. Barenbaum noted that Marcus did not account for S.K.'s "time-wasting behaviors" during two timed subtests. Marcus should have stopped the tests or not counted the test results. Also, Marcus did not identify the records he reviewed and merely reported scores rather than interpreted this data. The IEP that followed the evaluation thus indicated that S.K. had cognitive deficits. Marcus should have noted that this was incorrect, as S.K. was within the average range in many areas. Also, S.K. reported that he has trouble when his teachers talk too quickly; he has difficulty understanding words; and he has difficulty making friends. The District's evaluations did not consider this.

Dr. Barenbaum administered the Diagnostic Achievement Battery, Fourth Edition (DAB-4) to assess S.K.'s academic achievement and specific strengths and weaknesses. It is the only achievement test that is curriculum-based; thus, it provides the most information about how a student performs school-related tasks and can be used to identify appropriate services for S.K. Dr. Barenbaum does not use the test the District administered, Woodcock-Johnson, because it does not test reading. Rather, it uses a fill-in-the-blank format, and it is not curriculum based. Although the DAB-4 is standardized for students up to fourteen years, nine months, of age, she asserted that it was appropriate for S.K., who was fifteen years, ten months, old. She supported this assertion by referencing discussions she had with an education authority who said it had been appropriately used for students aged nineteen or twenty.

The DAB-4 tested listening, which is also referred to as receptive language. S.K. scored at the "kindergarten-7th month level." P-1 at 12. He was able to answer questions after listening to very short stories comprised of two or three sentences. However, for longer stories, such as those involving six to eight sentences, he was unable to answer questions related to details, provide sequence, or make inferences. Ibid.

The Peabody Picture Vocabulary Test, Fifth Edition (PPVT-5) also addressed receptive language. S.K. was shown pictures and was asked to point to a specific thing in the picture. For instance, he was directed, "show me the island." Ibid. He was unable to point to the island. He scored 77, which was in the below-expected range for listening comprehension. This indicates that he does not understand what is being said to him and correlates with his self-report that he does not understand his teachers and others. Dr. Barenbaum wrote, "What we do know from the oral language section of the DAB-4 and PPVT-5 is that [S.K.] performs well below average in language related testing reflecting a significant disability that impacts his ability to profit from instruction in large group settings." Ibid.

This difficulty impacts S.K.'s class performance and he requires special strategies. An instructor cannot simply read a story to him. Rather, S.K. requires content and pictures to be able to understand. Also, the instructor should stop and ask him questions to make

sure he understands and tell him what he will read beforehand. Dr. Barenbaum did not see these strategies implemented during her observation of the classroom in the District.

The spoken-language tests revealed that S.K. tested at a third-grade level, which was equivalent to an eight- or nine-year-old child. He had an insufficient vocabulary, which must be recognized when he is instructed. Instructors should ensure that he understands and ask him to explain or answer in his own words. Dr. Barenbaum concluded that he had a receptive- and expressive-language disability.

Testing revealed that S.K. read at a fifth-grade level. He did not use techniques such as sounding out words to help identify words that were more difficult for him. He tested at a fourth-grade level for reading comprehension. He recalled factual information and drew inferences from the material. He read fluently but did not stop for punctuation and did not use expression. Dr. Barenbaum testified that he was a good reader but did not understand what he read, as his reading-comprehension score was much lower. “The gap between [S.K.’s] word identification and reading comprehension provides evidence that [S.K.] has not developed Executive Functioning skills such as visualizing and verbalizing as he reads.” Id. at 13.

Executive functioning is important because it involves self-regulation that is applied to learning. For instance, knowing when to stop to check comprehension or to read out loud if not understanding. S.K. does not have these skills and needs to be taught them and how to apply them. Dr. Barenbaum observed some executive-functioning strategies employed during her in-District observation. For instance, S.K. was asked to make a connection while reading. She also observed this at the Center School, when the students read The Odyssey, then watched the film version and wrote a movie review. This engaged different ways to comprehend.

She recommended a “language/reading/writing program that requires Visualizing and Verbalizing, such as Lindamood-Bell’s program, where students are taught to create images through cognitive processing. This specialized instruction in turn improves not only reading comprehension and vocabulary but also listening comprehension, memory, critical thinking and writing, all areas defined in [S.K.’s] disability.” Ibid.

Dr. Barenbaum also administered the Writing Section of the DAB-4, which included spelling, punctuation, and capitalization. Ibid. S.K.'s ability to spell words was at the 6.4 grade equivalent. He was unable to complete any of the items correctly on the punctuation/capitalization subtest.

Dr. Barenbaum explained in her report that difficulties in reading comprehension are frequently associated with oral-language deficits such as vocabulary, morphology, and syntax, as well as listening comprehension. Further, “[r]esearch also supports that poor comprehenders have not developed executive functions that are involved in reading comprehension including planning, organization, and self-monitoring. Weaknesses in these executive functions result in difficulties with higher-order comprehension skills[.]” P-1 at 13.

S.K. was also administered mathematics subtests of calculation and reasoning. He scored a 5.2 grade equivalent on calculation. For reasoning, he was required to view pictures at the “lower end” and make calculations. Id. at 14. “At the upper end he was required to listen to mathematical problems (word problems) presented orally without pictorial clues. He was required to retain information and solve problems without paper or pencil. At the lower end [he] was able to tell time on an analogue clock and correctly identify coins and their values.” Ibid. The upper end of the test was difficult for S.K., but Dr. Barenbaum did not provide a score. She wrote that his overall score was at the 2.4 grade equivalent. Ibid.

Dr. Barenbaum also administered a learning evaluation that she developed. She asked S.K. to answer if scenarios that were read to him were “very true for me, a little true for me, or not true for me.” P-1 at 14. He said he gets embarrassed when playing sports and has more trouble playing on a team. He struggles when teachers give long or complicated instructions and when they use words that most students his age know. He acknowledged that he does not know as many words as other students and has difficulty expressing himself. Teachers do not give him enough time to complete his work and he believes that many students are smarter than he is. Ibid. Dr. Barenbaum noted that, when she observed S.K. at the Center School, he sat next to another student during lunch.

She described this as a significant accomplishment. She acknowledged that she did not observe S.K. when he was at lunch at the District school.

Dr. Barenbaum opined that S.K.'s classroom placement was inappropriate for him "intellectually, socially and emotionally." P-1 at 18. She wrote in her report that his class was "highly segregated"; the students in the class "presented with significant cognitive and language delays making his program a 'step down curriculum' rather than a typical Language Learning Disabilities classroom (LLD) to assist him in learning how to participate in peer related learning activities so he can meet the challenges in the community." Id. at 18. She also commented that the "curriculum as observed was not age or grade appropriate[,] including the reading materials that were very juvenile (early elementary level) rather than high interest/low vocabulary." Ibid.

Dr. Barenbaum noted further that S.K.'s classroom teacher stated that he was functioning at a third-grade level in reading comprehension. However, "[c]urrent testing revealed that in fact he is reading at a fourth grade level supporting the premise that he is in a step-down curriculum. His current classroom instruction will not in any way advance his current academic skills nor prepare him for the IEP team goal 'to explore college.'" Ibid. Dr. Barenbaum observed that the "lack of peer reciprocity within the class impeded [S.K.'s] ability to learn how to engage in meaningful activities, collaboration, and leisure skill development with peers moving toward transition as well as advancing his educational skills." Ibid. She found that his placement was "highly isolated" and there was "no emphasis on attempting to promote generalization such as social skill development across the various environments." Ibid. She concluded that S.K. required a "small school environment that provides instruction across the curriculum by highly qualified individuals who have extensive experience working with children who present with significant academic disabilities and adaptive behavior deficits as well as autism to ensure that skills are generalized across school, the home and community environment." Ibid.

In contrast to the apparently juvenile level materials that the District used, Dr. Barenbaum referenced the many books that have low vocabulary and high interest for teenagers and adolescents, such as a modified version of The Odyssey which was

being used at the Center School. The book was appropriate for tenth-grade students who could read it at their different levels. Dr. Barenbaum opined that the Center School's curriculum placed a lot of demands upon S.K. and was properly aware of his reading levels.

Dr. Barenbaum also had concerns about life-skills instruction. She administered the Vineland-3 assessment, which measured how S.K. functions in everyday life, and navigates in the home and community. Id. at 15. It indicated that he functioned in the average range and did not need life skills. She noted that at home he packs his lunch, gets himself ready for school, takes himself off to school, and is totally independent. Thus, functional living skills are not needed. Rather, he needs to work in the areas of social skills, social-skill development, and working with other people. She opined that the District did not provide adequate social-skills instruction because its provision of thirty minutes per week of social skills was not enough.

Dr. Barenbaum recommended the following reforms to S.K.'s education program:

- Intensive carefully calibrated academic instruction in a small school atmosphere free from the distractions of a typical school environment. The curriculum needs to be comprehensive, and language focused across the entire curriculum with specialized instruction in reading, writing, mathematics, as well as addressing pragmatic social skills. Implementation of a Language-Focused Curriculum requires that teachers make a set of comprehensive modifications in both activity contexts and instructional processes within their classrooms.
- Immediate placement in an out-of-district school that is designed to provide specialized language-based, multi-sensory, research-based instruction to students with language-based and mathematics disabilities. He requires such instruction to be delivered not just in direct instruction literacy classes but also throughout his entire day (including lunch) so that whatever literacy demands are present he is supported by teachers who are trained and experienced in working with students with literacy disabilities.

- Placement in a specialized school with other students with similar learning challenges will place him in a peer group with which he can relate; thereby, opening up his social world.
- There needs to be a strong focus on continued development of academic skills rather than life skills and vocational training as he moves forward in order for him to move toward independence.
- [A]n intensive remedial reading approach taught by a specialist who works with students with Language Based Learning Disabilities to appropriately support S.K. in the learning process. This remediation should be in the form of sequential, multi-sensory instruction in Language Arts (Orton-Gillingham/Wilson) and needs to provide explicit writing instruction (including vocabulary development, spelling, and composing) and mathematics to remediate his Learning Disabilities.
- An extended school year program.

[Id. at 19–22.]

Dr. Barenbaum observed S.K. at the Center School on February 15, 2022. She spoke with a teacher, who instructed three classes, and the principal. During the reading and language arts class, the teacher observed that S.K. was having difficulty staying on task. She spoke with him privately; said that she could tell he was agitated; talked about what was bothering him; and shared strategies to help anxiety. She deescalated his anxiety and he returned to his class work. Dr. Barenbaum was impressed by this. She contrasted this to when she observed S.K. in the District school, where he seemed anxious as he tried to walk amongst many students in the hallway.

Another difference between the schools is that at the Center School, unlike at the District school, he cannot leave the room when he is uncomfortable. Rather than be immediately excused to use the bathroom, the Center School staff attempts to first address the reason why he asked to leave the class. Further, the Center School math teacher worked independently with each student. Dr. Barenbaum did not observe the District math class but noted that it was consumer math, which is a lower level. Lunch at

the Center School is not with a large group of students, and S.K. sat with a group of boys. He reported that he did not have anyone to sit with and his teacher modeled language to use to initiate conversation. S.K. initiated conversation twice and a student responded. Dr. Barenbaum noted that S.K. did not speak with anyone during lunch at the District. Moreover, the Center School includes parents via monthly meetings and was open to their involvement.

Dr. Barenbaum acknowledged that the District recognized that S.K. had significant needs with respect to receptive and expressive language; that his last District IEP addressed his low cognitive abilities and his other needs, including his attention and distractibility; and that the WISC test is appropriate to test cognitive abilities and is widely used for this purpose. She further acknowledged that she had minimal information about the District, having read only its website. She did not review the curriculum and did not speak with District personnel or ask questions after her observation there. S.K.'s parents did not ask her to share her findings and recommendations with the District and she considered it outside her charge to initiate such a discussion.

Although Dr. Barenbaum asserted that S.K.'s adaptive-behavior strengths and needs were not listed in the District's IEP, she recognized that the IEP reported his needs, including in the areas of attention and distractibility. Although she opined that placement in a large classroom is problematic, she also recognized that his District class was comprised of only five students, one teacher and two aides. However, the room was physically large. Large rooms cause echoes and have open space, which are uncomfortable to children with autism. The room was not as comfortable as the Center School classroom, which had carpeting, dimmed lighting, and noise protection. There was also no hallway noise at the Center School.

Dr. Barenbaum clarified that she relied upon S.K.'s parents' account of the programming that was and was not available to S.K. in the District. P-1 at 2. She also relied upon the parents' report that S.K. regressed in math and showed little to no progress in reading comprehension and writing. P-1 at 3. This was also suggested by the IEP, which provided "no indication of growth." T3 88:20-21.

When Dr. Barenbaum was asked to compare the results of the tests she administered in May 2021, to the results of the District's July 27, 2020, testing, she observed that S.K. had, in fact, improved. In July 2020 he tested at a fourth-grade level for letter-word identification. J-7 at 95. In May 2021 he tested at a 5.4 grade level. P-1 at 10. He, thus, improved 1.4 grade levels in less than one year. Further, in July 2020 S.K. tested at a 1.6 grade level in reading comprehension. J-7 at 95. In May 2021 he tested at a 4.2 grade level. P-1 at 10. However, Dr. Barenbaum stressed that the scores could not be compared because different tests were used, and the Woodcock-Johnson test does not test reading. Rather, it uses a fill-in-the-blank format. The DAB-4, which she used, requires the student to read and answer questions, which is "more aligned with reading curriculum." T3 92:5. She believed it was to be expected that he would score lower on the Woodcock-Johnson test because it requires him to "give you one word and . . . his language disabilities prohibit him from being able to come up with that one word . . . so of course he's going to score lower on that." T3 92:7–11. She described this as "semantics" rather than reading comprehension and asserted that the test tested "his disability and not his ability in reading." T3 92:18–22. Although Dr. Barenbaum recognized that the Woodcock-Johnson test is used widely in New Jersey, she nonetheless maintained that it is inappropriate for "diagnosing and reading." T3 122:5–6.

In July 2020 S.K. tested at a 4.6 grade level for math calculation skills. J-7 at 96. In May 2021 he tested at a 5.2 grade level for math calculation. P-1 at 10. Again, Dr. Barenbaum testified that this does not demonstrate progress because different tests were used.

Dr. Barenbaum acknowledged that the District's language arts program addresses executive functioning by way of scaffolding and connecting questions with visual support, in line with her recommendations. P-1 at 13. She was asked if she was aware that the District's reading program utilized visualization and verbalization, with Orton-Gillingham-certified staff, and also a multi-sensory approach. She replied that she did not observe this and did not know what program was being utilized when she observed S.K. in class. She believed the books that were used by the District were inappropriate for S.K.'s age, as they were intended for early-elementary students. Even if the books were being used

to develop learning strategies, their content should have been appropriate for high school students, adapted to their lower reading levels. She suggested that a story about extreme sports, rather than a birthday party, would be appropriate, if written at a first-, second-, or third-grade level.

Dr. Barenbaum did not observe S.K.'s math class because the District limited her to one hour of observation, due to the restrictions required by the pandemic. She did not ask to return to the school for another visit because she had to travel two and one-half hours to get to the school. She was not offered an opportunity to view the class virtually. She did not follow up with S.K.'s teacher, his case manager, or District staff after her observation. She testified that she was "never" permitted to talk to teachers. T3 97:11.

Dr. Barenbaum was not aware of the District's social-skills program but asserted that it was insufficient because it was only thirty minutes per week. She was also not aware of the social-skills opportunities that were available to students with autism in the after-school club. While she was unfamiliar with the District's Unified Sports program, she testified that she has "never seen" a good program. She opined that they usually involve one-to-one support and do not involve true teams. She did not know whether S.K. participated in the District's Unified Sports program. However, because S.K. reported that he feels very inferior when playing sports, she speculated that he would be "very uncomfortable" in the program. T3 98:22.

Dr. Barenbaum was aware that the District provides opportunities for community-based instruction. However, she believed it was inappropriate for S.K. at that time. It could possibly be appropriate at another time. She was also unaware of S.K.'s elective classes, which were with typical peers.

The Center School's March 1, 2022, IEP was appropriate for S.K. It included appropriate goals that were measurable based on specific criteria. She contrasted it with the District's objectives, which were too general and did not include criteria or a basis for evaluation. She acknowledged that the Center School IEP neither reports S.K.'s present levels of performance nor includes data concerning his progress toward his goals. She

was told by a teacher, however, that he was reading at a third-grade level, although this was not reported in his IEP.

Dr. Barenbaum discussed her report of her observation of S.K. at the Center School. In her written description of his language arts class, she did not discuss scaffolding, which “is connecting personal experiences.” T3 108:15–16. However, the teacher connected the book the students were working with to a movie, compared and contrasted the differences between them, and made posters to advertise the movie. Dr. Barenbaum opined that this constituted scaffolding because they were visualizing, verbalizing, and “at the same time pulling all the information together from different angles.” T3 109:8–9. She did not see that at the District school.

The Center School did not have a social-skills club when she wrote her observation report. Although social skills was in S.K.’s IEP there, she did not observe the program. S.K. was in a counseling group and social skills were “in his speech and language.” T3 109:25.

Dr. Barenbaum was not aware that the District’s teachers were certified in their specific subject areas as well as special education. She acknowledged that, at the Center School, one person teaches all of S.K.’s major academic subjects. She did not know that teacher’s qualifications. She agreed that knowledge of the subject matter is important.

Dr. Barenbaum did not know that S.K. worked at his own level in the District math class. She acknowledged that she did not observe him in his math class. She added that, based upon her observation of the class that she did attend, she ascertained that S.K. was “above the other students cognitively in reading.” T3 107:8.

Dr. Barenbaum relied upon her observation and the IEPs to conclude that “critical components of programming” for functional communication, such as “graphic organizers, contrasting colors, and learning to take turns in games and conversation,” were not being provided by the District school. T3 112:11.

Dr. Barenbaum acknowledged that the records from California that she reviewed indicated that the findings of cognitive testing done there were similar to those of the District's testing.

Carly Fog is a speech-language pathologist and was admitted as an expert in speech and language pathology and education of students with speech and language disabilities. She met S.K. in May 2021 over two days; observed him in the classroom; met with his parents; and reviewed records provided to her, including the District's IEPs. She wrote a report, using background information provided by petitioners' attorney, which Ms. K. confirmed. P-3.

Fog observed that S.K.'s educational history shows progress over a period of years. However, he did not progress while at the District. The goals in his March 30, 2021, IEP have not changed since the November 15, 2019, IEP, which indicates that he did not progress. Goals should change annually because they should be written so that they can be achieved during a single academic year. Also, although the November 15, 2019, IEP indicated that he progressed and had mastered the social-distance and eye-contact goals, data provided by Schlosser reported 50 percent and 60 percent success as of April 29, 2021. P-3 at 3. These percentages do not equate to satisfactory progress. Similarly, as of April 29, 2021, S.K. achieved 40 percent accuracy with respect to the goal of decreasing incidents of repetitive phrases and 30 percent success with respect to organizing thoughts and utilizing "stop-think-speak" during speech sessions. J-10 at 132. This is a poor rate of progress.

Fog believed that S.K. failed to make sufficient progress because his goals were inappropriate and District personnel did not "truly understand the nature of his language disorder." T5 30:23–24. The goals highlighted social-communication skills such as turn-taking, social communication, and decrease of repetitive phrases. Children with autism often rely upon tools such as these to process information. Thus, foundational skills of information processing must first be addressed before the social skills could be achieved. The goals indicated to Fog that S.K.'s "profile [has been] misunderstood . . . for the past three years[.]" T5 24:6–8.

Schlosser advised Fog of additional goals that were not in the March 30, 2021, IEP but were added: improve discrete repetition of spoken directions, accurately follow one- to two-step directions, and convey comprehension of two to three sentences of spoken information. Fog considered the first to be akin to accommodation that will not help S.K. meet processing goals. Following one- or two-step directions was less ambitious than prior IEPs' goals, which indicated regression. The last goal should have been included in the IEP if the District truly intended to work on comprehension.

Fog conducted a behavioral evaluation of S.K., which allowed for observation of his functional use of language. She described him as a delightful young man and noted that he has perseverative language and difficulty with social communication, self-expression, and understanding some basic language. He also had some behaviors, such as shaking his legs, looking around the room, standing, writhing his hands, and giggling, that "could help to inform educational programming." T5 36:8; P-3 at 44.

Fog administered standardized and observational testing, which indicated that S.K. had "significant language impairments in receptive/expressive language, reading, and written expression." P-3 at 23. With regard to receptive language, he had "decreased vocabulary knowledge, ability to follow verbal directions and comprehension of short narratives." P-3 at 20. His receptive language improved when presented with picture supports and information was broken down into simple commands. "His reduced vocabulary, syntactic, and grammatical knowledge . . . impacted his ability to understand spoken language and, therefore, make it challenging for him to respond appropriately to complex question forms or lengthy verbal information." Ibid. "[His] expressive language primarily consists of simple sentences, questions, and perseverative language. He does have the ability to expand when prompted; however, his independent skill set is significantly reduced[.]" P-3 at 21. This adversely impacted his comprehension.

Fog found that S.K.'s reading fluency and comprehension skills are also impaired. He "decoded at an extremely fast rate, which caused him to omit parts of words, whole words, or make substitutions." Ibid. He transposed words, incorrectly decoded as the words increased in complexity, and mispronounced words. These deficits adversely impact his comprehension, and he required a focus on functional reading comprehension.

Ibid. S.K.'s written expression was also impaired. Ibid. He “demonstrated weaknesses in his vocabulary skills, struggled to use a variety of punctuation marks, compound sentences, introductory phrases and clauses, and only wrote one paragraph of information.” Ibid.

Socially, S.K. was able to “identify some common nonverbal body language and vocal tones,” as well as “demonstrate the ability to identify when someone was uncomfortable when it was too loud,” but he had difficulty identifying other emotions and social intent. Id. at 22. Because visual supports were involved, he would likely have more difficulty without supports. Fog wrote that S.K.'s reduced ability to “comprehend emotions and nonverbal language when presented with visual representation . . . will impact his ability to accurately interpret information within the classroom and vocational settings.” Ibid.

During Fog's classroom observation, S.K. exhibited “atypical classroom and social behaviors (e.g., giggling in class and calling out or interrupting) when there was not an adult seated next to him.” Ibid. She opined that he requires specific intervention with language and social communication to improve his skills and that his parents must employ these interventions at home “to support generalization of skills.” Ibid.

Fog observed S.K.'s English language arts class, during which the speech-pathologist pushed in, and a portion of his science class. Although the speech session was intended to be a group session, the pathologist spent a majority of the time working only with S.K. It was a “general broad-language lesson” that did not target a specific IEP goal or skill set. Nor did it involve scaffolding, visual supports, repetition of information, or data collection. T5 39:4–5; P-3 at 22. Due to the breadth of the lesson, it would not “assist in improving [S.K.'s] significant deficits.” P-3 at 22. Specific targets were required.

In the science class, Fog observed that S.K. had significant difficulty with focus and attention to task. Id. at 23. A teacher did not sit next to him to “keep him on task.” Ibid. Without this support, he was observed to turn around in his chair, look around the room, fidget/move his body around, and interrupt the teacher. Fog also noted that he had a significant decrease in his ability to respond appropriately to questions. Ibid.

Fog diagnosed S.K. with autism spectrum disorder, mixed receptive/expressive language disorder, and reading disorder. Ibid. She wrote that he “presents with significant language impairments in receptive/expressive language, reading, and written expression. Additionally, he struggles with social communication, most negatively impacted by his weak language skills.” Ibid.

Fog recommended an out-of-district placement because “he continued to struggle to respond appropriately to classroom material, and his specific goals were not being targeted using specific evidence-based intervention strategies.” P-3 at 23. His IEP did not specify the amount of support that he actually required in his English class, based on Fog’s observation of the amount of attention he received from the speech-pathologist. “If [S.K.] requires this level of support, it should be stated on the IEP. . . . It further indicates that [S.K.] requires more support than what is described on his current IEP.” Ibid. Also, “based on the inconsistencies within the IEP . . . and the repeated goals since 2018, which indicated a lack of progress, it is not believed that changes to goals, or slight amendments to his IEP can meet the level of support that [S.K.] requires.” Id. at 24. She recommended “a small teacher-to-student ratio with consistent access to individualized instruction. The program should be rooted in language and should work to generalize learned skills to other environments outside of the classroom setting. . . . All teachers and staff must have specific training in language disorders, development, and autism.” Ibid.

Further, because “individuals with autism spectrum disorders tend to be visual and concrete learners[,] . . . implementing visual supports when teaching abstract concepts should support comprehension across the board.” Ibid. “Teaching instruction should be hands on, structured and repetitive”; there should be “frequent review and integration of previously learned information”; and “verbal instructions must also be modified to support comprehension, including explicit, simplified instructions” for both academic and job-based tasks. Id. at 24–25. S.K.’s environment must be structured, predictable, and consistent, and consistent data must be collected to assess progress. Id. at 25.

With respect to therapy, Fog recommended individual speech-language therapy twice per week, in a pull-out location with an emphasis on functional-based

communication skills, and one time per week in a group. The group peers should be similarly situated to S.K. Ibid.

Fog concluded that S.K. was capable of more progress if he had the appropriate supports. The District, however, did not appear to have knowledge of his skill set and did not appear to “actively improve[] his speech and language skills . . . within a broader context of his entire school day.” T5 42:8–11.

On cross-examination, Fog testified that, to the extent she had questions about the District’s processes or practices, she did not ask anyone at the District. She also did not relay her recommendations to the District. She acknowledged that, although she testified that S.K. was with the District for three years, he arrived there in the spring of 2019, and that the District initially implemented the IEP from California. The next IEP continued through the 2019–2020 school year, and S.K. left the District in September 2021. Fog noted, however, that the District was responsible for amending and creating IEPs that were responsive to S.K.’s needs.

Fog also acknowledged that virtual learning, as well as a global pandemic, can adversely impact students’ performance. She opined, though, that supports could be put in place to assist distractible students like S.K. As she did not know S.K. while he attended school virtually, she could not opine on how he was impacted. She opined that, regardless, he was unable to make progress because his goals were inappropriate. However, she was unaware that the District’s speech-language pathologist had tried to meet with petitioners—in response to their concerns—to revise goals and objectives beginning in March 2021 and to discuss S.K.’s difficulties during remote instruction. Fog was not given emails that recorded this, and spoke with the pathologist for only two to three minutes. T5 61:1–21; J-10.

Fog was not given the May 7, 2021, email statement of S.K.’s present levels of performance when she evaluated him and wrote her report. J-10 at 127. She only saw the excerpts provided by the speech pathologist. However, she believed that present levels were included in his IEP she reviewed.

Fog did not opine whether the Center School was appropriate for S.K. She did not observe there and did not know his levels of functioning there.

Ms. K. is S.K.'s mother. Upon arriving to New Jersey from California, Ms. K. met with the District CST and provided S.K.'s California IEP and other documents from his school there. The California IEP was in place until the April 26, 2019, IEP was developed. J-1. It was developed collaboratively with petitioners, who approved it, and it covered the remainder of S.K.'s seventh-grade year and continued into eighth grade. The IEP provided for an LLD program that was "heavily weighted towards his areas of remediation" and the District would "provide or differentiate a learning experience for him within the LLD class." T4 22:3–7. Petitioners trusted the CST and considered their meetings to be very good. Petitioners signed the IEP in June 2019, because they wanted to take time to review it. They met again with the CST in June, when they signed the IEP, to make minor modifications to the IEP and to prepare for the following school year. The June 2019 IEP remained in effect until the annual review.

Petitioners met with Jordan Marcus shortly after the school year started. S.K.'s eighth-grade teachers were very caring and communicative. S.K. did not meet all goals and regressed in some areas. This was evidenced by the fact that some of the goals were repeated, and some seemed simpler than those he accomplished in sixth grade. However, overall, she believed that his teachers were listening and trying to adapt and find ways for him to be successful. They employed differentiated approaches. Ms. K. recognized that the pandemic changed the way instruction was provided and presented difficulties for all involved.

In April 2020 petitioners met with Marcus and the CST for the annual review and to prepare for S.K.'s transition to high school. Petitioners had "more serious concerns" at that time because they were unfamiliar with New Jersey's high school class offerings and did not know if there was an equivalent to LLD at the high school. During the meeting, the CST recommended the high school program that was equivalent to LLD; the other programs were not appropriate for S.K. The proposed program was academic, with functional math and English and a vocational component that would involve classroom instruction and opportunities outside the classroom. Functional math involved more

practical application of math concepts. Petitioners asked for more information about the courses and were advised that they could get this information from the high school staff. They agreed to these classes. However, they did not want S.K. to participate in the vocational classes. They believed he was too young to work, and they preferred that he choose electives like other students, as he enjoyed electives. They also requested that a behaviorist be enlisted if S.K. needed behavioral intervention to help transition to high school. They requested an aide for when S.K. walked through the hallways and for other circumstances because he was used to having an aid for safety and they were concerned that the high school was large and busy. Marcus and the CST agreed to these requests.

Petitioners received a new IEP a few weeks later. It confirmed that petitioners rejected the vocational-studies proposal and that S.K. would instead enroll in electives. J-5 at 57. Approximately one week before the start of ninth grade, petitioners were able to access S.K.'s schedule online. They observed that both of his electives were listed as "vocational skills." They contacted Margie Murray and provided a list of electives that were appropriate for S.K. They were advised that none was available. On September 2, 2020, Ryan Hughes, S.K.'s high school counselor, sent an email to petitioners in which he listed the available electives. He noted that space was limited due to pandemic-related restrictions. For the eighth class period, the electives were Game Design and Development, Ceramics I, Introduction to Word Processing (typing skills), Theater I. For class period nine, the available electives were Financial Literacy, Introduction to Woodworking, and study hall. J-24 at 265. S.K. did not want to take Theater, Ceramics, or Woodworking, and Ms. K. did not believe he needed to take Financial Literacy at that time. They ruled out Game Design and Development because it "seemed" to require a prerequisite, and they did not know what study hall entailed. T4 36:10. They were left with Word Processing, which they considered a useful skill, and no electives for period nine. They, thus, agreed to vocational skills for period nine.

On September 23, 2020, Murray advised petitioners that S.K.'s teacher reported that he struggled with Word Processing. J-24 at 256. Ms. K. surmised this was because he did not find it engaging. Murray asked if the class could be converted to a pass-fail grading system, which would allow the teacher to make modifications for S.K. Petitioners agreed to this because they knew S.K. did not enjoy the class and, because it was an

elective, “it wasn’t important” to them. T4 38:4. Ms. K. recalled that the teacher contacted her to discuss methods to help S.K. focus, but she did not recall “any kind of major conversation about accommodations.” T4 38:11–12. Petitioners did not ask that S.K. be removed from the class.

While classes were conducted remotely, Ms. K. was in touch with S.K.’s teachers as much as possible, sometimes through email or while the class was in progress. In October 2020 the school converted to a hybrid schedule. S.K.’s academic classes were conducted in person and his other classes were conducted remotely.

Petitioners attended a back-to-school night, during which teachers discussed curriculum and parents asked questions. Petitioners were particularly interested in S.K.’s math class because it is an area of strength for him and “he needs to be exposed to higher level math.” T4 42:21–22. They were disappointed when the math teacher described the curriculum as including scheduling his day and banking rather than algebra and geometry. Petitioners believed he did not need to work on these subjects because he was very good at scheduling, and banking was unnecessary for a child his age. They believed these subjects were akin to living or vocational skills rather than math. They were told that this was part of the curriculum and that everyone needs to learn it. They were also told that there would be some differentiation because S.K. would be given worksheets to expose him to higher levels of math.

Petitioners had concerns about other instruction, including speech therapy. They, thus, asked to convene an IEP meeting with Murray. Murray offered to join them when they met with Marcus in October to review assessments that were conducted over the summer. Petitioners preferred a dedicated IEP meeting to discuss their concerns about the curriculum. An IEP meeting was not scheduled until March 2021.

Petitioners observed Unified Sports when S.K. first enrolled in the District. Although many of his classmates and friends participated, they determined that it was not appropriate for him. While the participants were of all levels of skill, many had severe verbal and physical challenges and, thus, were not matched to S.K. socially and the program would not teach him to be a better athlete. S.K. had played sports for years with

his much older brothers; was physically able to play; and knew which sports he liked to play. However, he would not “survive on a high school basketball team with neurotypical kids because he struggled with abstract big picture concepts like teams and needing to win.” For these reasons, petitioners “didn’t pay particular attention.” T4 48:17–18. Instead, they hired kids “who are basketball stars” from other districts to play with him. T4 48:20.

Ms. K. critiqued the social-skills group because it did not involve activities that she believed would foster social skills among high school students, such as video games and sports. Rather, the group, which met remotely because of the pandemic, engaged in other activities such as cooking a recipe at the same time, while the teachers tried to facilitate conversation about the activity. Despite the criticism, petitioners did not remove S.K. from the group or from anything else.

During the March 2021 IEP meeting, petitioners discussed their concerns with Murray, the speech pathologist, and others. The entire CST was not present. Petitioners were concerned because it appeared that S.K. was not making progress or that he was regressing. It appeared that his goals were repeated, and the curriculum and the materials were inappropriate, particularly with respect to math and language. They also believed the speech-language therapy was implemented inappropriately or ineffectively.

Ms. K. offered an example of the problem with speech-language therapy. While teaching the concept of figurative versus literal, the speech pathologist used a book about a space cadet. Ms. K. acknowledged that “‘space cadet’ can be used figuratively to mean “dreamy” or “spacy.” However, she opined that it was an outdated phrase that “nobody uses . . . today.” Rather, people say “spaced out.” T4 52:14–16. She also believed the book, which was about a child who is obsessed with going into space, was inappropriate. She believed it would be more appropriate to reference something different, such as “brave as a lion,” because this is something a “child really understands.” T4 52:23–25. The speech pathologist explained that the book was part of the planned reading list. Ms. K. commented that she should not have had to point this deficiency out to the pathologist, when the curriculum is “obviously” inappropriate. T4 53:7. She opined that

“the people teaching it are not making those thoughtful decisions on how to make a child really learn and understand things.” T 53:8–10.

The IEP meeting became argumentative, and petitioners realized that “unlike [their] entire experience with public school this was not a collaborative environment.” T4 53:16–18. “[I]t became really obvious to us at that point that this school district and the staff there . . . do not want to be collaborative with us. They were defensive, they kept saying we were wrong even when we gave examples and [said], ‘All right, let’s just step back, we need more people in this[.]’” T4 53:19–24. The meeting was ultimately adjourned because it required the presence of the full CST. They all agreed to meet again. Petitioners retained counsel and sought an independent evaluation to confirm their “view [that] the program was grossly inappropriate” and to identify the appropriate program for S.K. T4 56:22–23. They retained Dr. Barenbaum and Carly Fog.

The speech-language pathologist, Wendy Schlosser, had offered to meet separately with petitioners. She said she would present revised goals based upon what the petitioners told her. On March 31, 2021, Schlosser asked Ms. K. if she could meet by Zoom that day. She wanted to “hear [her] thoughts about [S.K.’s] current goals and share more detail about his progress” and asked Ms. K. to offer alternative meeting times if she was unavailable. J-10 at 113. They did not meet because Ms. K. was abroad, tending to her ailing father.

On May 25, 2021, Murray sent petitioners the teachers’ written statements of S.K.’s present levels of performance. J-10 at 127. This was to be discussed during the IEP meeting on May 26, 2021. During the May 26, 2021, meeting, petitioners repeated their concerns and listened to the teachers’ presentation of S.K.’s present levels of performance. However, Ms. K. said that she and Mr. K. “had already decided by then that we really needed to get some expert advice on what would be an appropriate program, so we expressed our own opinion that we felt it was inappropriate.” T4 57:16–19. District personnel asked petitioners what they believed was appropriate for S.K. They replied, “Well, now that we’ve retained expert services it doesn’t even matter because we are not the experts in education and what kind of programming exists[.] I don’t have the

knowledge to know that.” T4 57:22—58:1. They thus advised that they would defer to the advice of their experts and “whatever they suggested.” T4 58:4.

After conferring with the two retained experts, petitioners determined that their concerns about the District’s program were well founded. The experts recommended they evaluate out-of-district schools that met the criteria they delineated. Petitioners had not sought an opinion that S.K. required an out-of-district school. They desired an opinion concerning the appropriate program and what the instruction should “look like.” T4 59:15. Although the CST should have done this, “it was obvious that . . . [it] was not willing or able to.” T4 59:17–19.

The experts advised that S.K. should avoid the distractions presented by a busy school. Smaller classrooms and class sizes were also important. He required a “very rigorous remediation program in language,” which was his biggest challenge, and a “differentiated curriculum in areas that he was capable of performing.” T4 60:25—61:5. For example, in math and science, he should be “exposed to material that most typical kids were with suitable adaptations so that it’s accessible at his level, and different ways of teaching.” T4 61:5–10. The experts also recommended social-skills training “that was not an artificial construct but was more woven into the day to day and more appropriate for a child of his level.” T4 61:12–14. Petitioners quickly examined out-of-district school options because they wanted S.K. to be able to start at the new school at the beginning of the next school year.

Petitioners selected the Center School based upon the experts’ recommendations. It has been in business fifty years and is “an exclusive special education school.” T4 66:4–5. Its programming is “night and day” compared to the District’s. First, for the subjects he is good at, science, math and construction, S.K. is learning substantive things and is making progress. S.K. indicated that he was engaged and retaining information because he shared information about what he is learning. He relayed information about the work he was doing early in the school year, when Ms. K. “expected nothing from him.” T4 64:13–14. He “never volunteered” this type of information while at the District. T4 64:20. Ms. K. believed that this was indicative of the success of the program.

Second, in language and comprehension of expressive and receptive language, the areas in which S.K. has major deficits, he sees a speech pathologist three times per week and there are “very, very focused reading programs that are designed for remediation.” T4 65:8–9. A reading specialist works with S.K. on reading and comprehension. Petitioners were recently advised that the one reading specialist in S.K.’s class was too busy to give the students the attention they need. Thus, the school was going to hire another specialist. This indicated to Ms. K. that, because the school recognized that “some of the kids need more help . . . it’s centered on the child.” T4 66:2–3. Ms. K. also noted that other students at the Center School are at S.K.’s level or are higher functioning. He, therefore, has role models he can imitate and learn from.

Third, the school builds social skills into S.K.’s day. He is not taught the things he already knows, such as organizing and scheduling. Rather, he is learning how to have fun, engage with peers, and talk with adults and is integrated throughout each day. Also, the eighth period of each day is dedicated to social interaction, and each child chooses their activity. S.K. is involved in the Nintendo Club, where he plays with like-minded peers while teachers facilitate social interaction. S.K. also joined multiple clubs, including one that has social trips on Saturdays twice per month, and a biking and hiking club. He also participated in a play, which surprised Ms. K. because she did not think it would interest him. She surmised he did so to join his friends.

Ms. K. noted that the school also offers school field trips. She acknowledged that the District school did this, too. She distinguished the two, however, by stating that S.K. “is part of . . . a community of like mind, the whole school is doing this, he’s getting a choice.” T4 68:13–15. Finally, S.K. participates in electives and has not been denied an option due to unavailability.

On cross-examination, Ms. K. acknowledged that special- and general-education students participated together in Unified Sports and that she did not address her concerns about the program to the District. Also, petitioners asked that S.K. participate in the program at the Center School.

Ms. K. acknowledged that she did not “hound” Murray about scheduling an IEP meeting while she was out of the country. The time difference between India, where she was, and the United States, was an impediment and Mr. K. “doesn’t always follow up as much as” Ms. K. does. T4 80:12. Also, she was respectful of the District’s need to address the scheduling problems associated with the pandemic. Petitioners diligently pursued the District in every other respect.

Ms. K. acknowledged that, after she spoke with the math teacher, he differentiated instruction for S.K. so as to introduce algebraic concepts. However, he merely provided worksheets, which was insufficient. It was not a “well-thought-out continual curriculum” and did not involve S.K. “working on the curriculum.” T4 81:13–15. The class continued to focus on scheduling and banking, which was unnecessary.

Ms. K. noted that Murray advised that there was an opening in music and art electives, with general-education students, in the fourth marking period. S.K. participated for one or two months. His report card indicated that it was a special-education art class. J-18.

Petitioners started to investigate out-of-district schools after they received oral advice from their retained experts. They did not wait for the written reports. S.K. attended the extended-school-year program at the District while petitioners explored out-of-district options. Petitioners did not communicate with the District about their intention to move S.K. out of the District school, as they had retained an attorney. On July 22, 2021, their attorney wrote to the District to request that it consider an out-of-district placement, given Dr. Barenbaum’s report, which was included with the letter. J-11. The District did not respond or agree to the request. Petitioners, therefore, proceeded to explore out-of-district schools.

In response to Vitale-Stanzione’s testimony, Ms. K. testified that S.K. was not given independent practice work to do at home, in conjunction with the 95 Percent program. At the Center School, a reading specialist works with him twice per week and the speech pathologist works with him three times per week. Language concepts are reinforced in all of his classes. While she was not able to testify about the Center School’s curriculum,

she explained that it was successful. During his year at the District high school, he regressed in language comprehension and behaviorally. She attributed this to an inappropriate level of education. After a year at the Center School, it is “night and day” with respect to language comprehension and he has not had difficulty processing information. Also, he used more sophisticated sentence structures and is interested in reading, which is a new development. This indicates that the Center School program is working. She summarized, “[W]e gave Ridge High one year[.] . . . It’s not like we didn’t try their programs. We did. . . . [W]e went in with good faith and great confidence that they will be really good for [S.K.]. Otherwise, I wouldn’t put him there. Now I wish I’d pulled him out earlier[.]” T6 54:25—55:5.

Document Review

A review of the records produced by the parties reveals the following:

The April 26, 2020, IEP identified areas in which S.K. improved (e.g., “improved his turn taking skills in a classroom or in conversation,” “speech clarity has also improved,” “uses the structure words as part of the Visualizing and Verbalizing program to enhance both his reading and brainstorming for descriptive writing,” “mastering most multiplication and some division facts[;] [w]ith increased mastery of his basic facts, higher level mathematical concepts will become more accessible).” J-5 at 63–66. The IEP also identified areas of need (e.g., “increase use of descriptive words and phrases in writing and oral speech,” and “needs to increase listening skills and turn taking in conversations”). Id. at 67.

The March 30, 2021, IEP documented petitioners’ expression of concern about S.K.’s “regression from virtual learning” and their belief that he was not being sufficiently challenged. J-8 at 298. The IEP included teachers’ reports of S.K.’s difficulties with virtual learning. See, e.g., id. at 299–300.

The May 25, 2021, teachers’ statement of S.K.’s present levels of performance reported areas of success as well as areas in which further work was in progress. For example, he was learning algebraic topics and successfully followed the order of

operation when using a manipulative and had “great ability with plugging in numbers for the given variable.” J-10 at 128. Although he often tried to solve the puzzles in the wrong order, once reminded about the proper order he would complete them successfully. Ibid. This corresponded to objectives in his March 30, 2021, IEP. J-8 at 306. He scored 89 percent on his banking-skills assessment; the IEP objective called for 75 percent success. J-10 at 128; J-8 at 307. However, he required additional work on evaluating deposits versus withdrawals. J-10 at 128.

In the functional English class, in the context of the 95Percent reading-comprehension program, S.K. answered who, what, where, and when questions when the text was highlighted and he was redirected. The IEP objective called for answering these questions with “fading prompting.” J-8 at 304. Additional work was to be done to help him answer with less prompting and to answer more complex questions. His writing benefitted from graphic organizers and visual aids . J-10 at 133–34.

ADDITIONAL FACTUAL FINDINGS

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness’ testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Estate of Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

To assess credibility, the fact finder should consider the witness’ interest in the outcome, motive, or bias. I am aware that the District employees would want to support the program they developed for S.K. and believe that the District’s program provided him with FAPE. I am also aware that petitioners believe that what they seek is in S.K.’s best interest. In addition to considering each witness’ interest in the outcome of the matter, I

observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their willingness or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony

Wendy Schlosser explained her understanding of S.K.'s needs and the program and methods that were required to address them cogently, thoroughly, and professionally. She explained that a student's progress does not always involve a simple, straight-line progression from year to year. Based upon her firsthand experience with S.K., Schlosser testified that he required continued work on the fundamental skills that he lacked and that were key to progressing in all areas of his education. This is corroborated by the reports of S.K.'s present levels of performance. Her efforts to discuss S.K.'s needs and her proposed amendments to his program are documented in the record. I find her testimony to be credible and reliable.

Jordan Marcus testified clearly, directly, and professionally and demonstrated a robust understanding of the complex issues presented when a child is qualified for special education and related services. He demonstrated a thorough understanding of S.K.'s abilities and needs and a genuine desire for his success. His explanation of the rationale for the District's approach to S.K.'s education was thorough and consistent. I find his testimony to be credible and reliable.

Similarly, Lisa Vitale-Stanzione provided a detailed, logical, and thorough explanation of the District's program and how it was used to respond to S.K.'s needs and help to develop his executive-functioning and comprehension skills. Her explanation was based in research and directly addressed S.K.'s specific needs. I find her testimony to be credible.

Marjorie Murray and Dr. Allyson Read clearly, directly, and professionally addressed the process utilized by the District in evaluating S.K. and identifying the appropriate programs for him. Murray discussed her attempts to communicate with

petitioners and the desire she and other District personnel had to engage in an ongoing dialogue with them. I find their testimony to be credible.

Ms. K. is clearly devoted to her son and committed to ensuring that he receives the best possible education and maximizes his potential. There is no reason to doubt her assertions about his capacity, his willingness to work hard, his areas of interest, and his desire to succeed. I find her testimony to be credible. I note, however, that Ms. K. indicated, through her testimony, that she and her husband determined that the District's program was insufficient without having fully communicated with the staff and without a full understanding of the program. Fundamentally, Ms. K.'s assessment of the curriculum was informed, in many instances, by her opinion. While she offered the caveat that she is not an educational professional and, thus, sought the counsel of experts, she determined that speech-language lessons were inappropriately fashioned; cooking in a social-skills class was unwarranted; the offered game-design elective was inappropriate for her son; and Unified Sports offered him no benefit. She relied upon her personal assessments to support these and other similar conclusions about the impropriety of the curriculum and program. Also, while it is undisputed that petitioners were unable to initially meet with Schlosser, they did not follow up with her when they were available. They did not communicate with Murray after the start of the school year, after vocational classes and math were addressed, or after Murray sent them a written statement of S.K.'s present levels of performance. They did not communicate with Flynn after they discussed integration of algebra into S.K.'s curriculum. Further, Ms. K. could not discuss the Center School's curriculum. However, she opined that it was beneficial for S.K. based upon his demeanor at home. Finally, petitioners did not request that the District convene an IEP meeting to discuss their evaluators' recommendations or ask that the IEP be modified. Rather, they began their search for an out-of-district placement

Dr. Barenbaum credibly testified about her testing and evaluation process and thoroughly explained the rationale for her critiques of the District's program and her recommendations. However, I note that, while her testing produced a different total score than that indicated by the District's testing, she and the District agreed about the weaknesses that impacted S.K.'s learning. Also, while she opined that the District did not utilize the methodologies that are necessary to address S.K.'s deficits and help him

develop skills, it is apparent that she was not aware that the District did, in fact, use the very programs she recommended, and she testified that she did not know which program was used in his language class.⁶ She did acknowledge that she observed executive-functioning strategies and scaffolding during S.K.'s in-District class. She was unaware of the District's social-skills offerings and electives; did not know that the electives were with typical peers; did not observe S.K. at lunch; did not know if he participated in Unified Sports; and speculated about the Unified Sports program. Her observation of one class was limited, and she did not return to the school to observe a math class because the drive to the school was too long. Indeed, she testified that she relied upon petitioners' reports of the District's programs and did not speak with District teachers or read about its programs. Further, she did not know that the District's teachers were specially trained in special education and their substantive subject areas.

Moreover, Dr. Barenbaum acknowledged, but seemed to dismiss, the fact that the Center School did not offer a social-skills class. In contending that the test she administered was appropriate for S.K., notwithstanding that he was older than the recommended age range, she relied upon the assertions of an education professional who did not testify. The assertions are hearsay because there is no other admissible evidence of them.⁷

Carly Fog also testified credibly about her evaluation and conclusions. However, she was unfamiliar with the District's programs that corresponded to her recommendations. She was also unaware that, beginning in March 2021, the District's speech-language pathologist had tried to meet with petitioners to revise S.K.'s goals and objectives and to discuss S.K.'s difficulties during remote instruction. Fog was not given

⁶ For example, she recommended visual supports to aid comprehension and that the instructor stop and ask questions to make sure S.K. understood.

⁷ Hearsay evidence is admissible in the trial of contested cases, and shall be accorded whatever weight the judge deems appropriate taking into account the nature, character, and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). However, while hearsay evidence is admissible, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1971).

emails that recorded this and had only spoken with the pathologist for two to three minutes.

For all of these reasons, I am unable to rely on the opinions of petitioners' experts concerning the propriety of the District's program and placement for S.K.

Having considered the testimony and documentary evidence and having had an opportunity to observe the witnesses and to assess their credibility, I **FIND** the following as **FACT**:

S.K.'s needs, expressive and receptive language and comprehension, are not in dispute. The District, using accepted testing methods, and taking into consideration sub-test results and not only the composite score, identified the same weaknesses that were identified by petitioners' experts. Its program addressed these needs, using appropriate methodologies, supports and modifications. A focus on regulation, executive functioning and comprehension strategies was implemented in conjunction with established protocols, including 95 Percent, Visualizing and Verbalizing, Lindamood-Bell, multi-sensory approaches, and hands-on visual tools. S.K.'s class programs were differentiated to meet his individual needs and abilities and his visual skill strength was utilized to help him develop skills across other educational areas. The methodologies employed by District personnel were also recommended by Dr. Barenbaum.

District personnel communicated with each other about S.K.'s program, his needs, and his progress, which they documented. S.K. made progress but required additional focus in many important areas, to achieve broad-based, generalized, success. For example, Schlosser noted that when S.K. returned to part-time in-person instruction in October 2020 his lack of attention and impulsivity impacted his functioning across the board. She enumerated multiple strategies that were beneficial to S.K. For example, statements of his present levels of performance documented the precise areas in which he found success, or partial success, and the areas in which he struggled. The statements documented the conditions that supported his successful performance and identified methods for improvement. Marcus and Flynn similarly documented and explained S.K.'s areas of progress, limitations and ongoing needs.

The District highlighted the importance of generalization of skills. “Mastery” does not equate to generalization, which is when a student consistently and independently demonstrates the act or function in a variety of settings. Schlosser’s May 7, 2021, statement of S.K.’s present levels of performance documented S.K.’s inconsistency, which was routine among students with autism. She changed the way the goals were addressed, pending a formal change via the IEP, “so they included [S.K.’s] other areas of deficit.” T2 53:3.

Using her firsthand observations and knowledge of S.K.’s performance and needs, Schlosser reacted by developing revisions to his program, which she attempted to discuss with petitioners. While Ms. K. was initially unavailable to meet, neither she nor Mr. K. approached Schlosser at any later date. Schlosser was disinclined to propose formal IEP changes without first meeting with petitioners.

The District also employed the methodologies recommended by Fog. Its witnesses credibly testified about S.K.’s small class size and the District’s teacher-student ratio; the overarching goal of generalization of skills; and the teachers’ thorough training. Further, the District used materials recommended by Fog and implemented discrete social-skills instruction, visual supports, structured and repetitive instruction, frequent review and integration of previously learned information, and modified verbal instructions, also in line with Fog’s recommendations.

The District provided opportunities for social-skills development, including in electives, lunch, recess, and social-skills class. Adaptive physical education also allowed for interaction in the general-education setting. Petitioners did not enroll S.K. in Unified Sports, which would have offered additional social-skills opportunities, and S.K. did not continue with the social-skills club. District instructors, however, reported improved interactions with his classmates as time passed and he became more comfortable in his new school and his class.

Petitioners determined that S.K.’s program was inappropriate after he attended high school for a relatively short period of time and notwithstanding that his high school

experience was disrupted by the COVID-19 pandemic. He did not attend in-person high school classes until October 2020, when only one-half of the school day was conducted in person. Full-time high school did not reconvene until February 2021. The record demonstrates that S.K. was adversely impacted, to some extent, by remote instruction. The credible evidence in the record also indicates that, when he returned to in-person instruction, his lack of attention and impulsivity impacted every aspect of his functioning. Staff addressed his needs in this regard and also prepared to amend his IEP accordingly. Staff reported that he began to make progress after he returned to school.

Petitioners did not communicate their concerns to District personnel in a fulsome manner. When they did express a concern or make a request, staff responded. For example, in response to their request that S.K. learn algebra, his teacher integrated more algebraic work, while also explaining that the goals and objectives that were already in place were fundamental to his ability to do algebra. Despite their limited communication with District personnel, petitioners concluded, well before S.K. started his second year of high school, that school staff were unwilling to work with them.

Petitioners did not assert that a placement within the District, other than the one he was in, was more appropriate. Rather, they asserted that the Center School is the appropriate placement, although no one from the Center School testified about its program for S.K. As all of the testing consistently showed that S.K. tested below average in language and cognition and, as reported by Schlosser, he was in the lower to mid-range of the students in his class, the District properly placed S.K. in a class with students who were at his level.

CONCLUSIONS OF LAW

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to ensure that all children with disabilities have available to them a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). This “free appropriate public education” is known as FAPE.

A state is eligible for assistance if the state has in effect policies and procedures to ensure that it will meet the requirements of the Act. 20 U.S.C. § 1412(a). In New Jersey, such policies and procedures are set forth in the State statute, special schools, classes, and facilities for handicapped children, N.J.S.A. 18A:46-1 to N.J.S.A. 18A:46-55, and the implementing regulations, N.J.A.C. 6A:14-1.1 to N.J.A.C. 6A:14-10.2. See Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 34 (1989).

The primary issue in this case is whether respondent failed to provide S.K. with FAPE and, if it did not, whether it is obligated to reimburse petitioners for the cost of his placement at the Center School and continue his placement there.

The Act defines FAPE as special education and related services provided in conformity with the IEP. 20 U.S.C. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, 458 U.S. at 189.

The Act did not impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, 458 U.S. at 192. In support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972). Rowley, 458 U.S. at 192. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that

neither of these two cases purported any substantive standard. Rowley, 458 U.S. at 192–93. The Court also wrote that available funds need only be expended “equitably” so that no child is entirely excluded. Rowley, 458 U.S. at 193, n.15. Indeed, the Court commented that “the furnishing of every special service necessary to maximize each handicapped child’s potential is . . . further than Congress intended to go.” Rowley, 458 U.S. at 199. Thus, the inquiry is whether the IEP is “reasonably calculated” to enable the child to receive educational benefits. Rowley, 458 U.S. at 206–07.

The Third Circuit later held that this educational benefit must be more than “trivial.” See Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988). Stated otherwise, it must be “meaningful.” Id. at 184. Relying on the phrase “full educational opportunity” contained in the Act, and the emphasis on “self-sufficiency” contained in its legislative history, the Third Circuit inferred that Congress must have envisioned that “significant learning” would occur. Id. at 181–82. The Third Circuit also relied on the use of the term “meaningful” contained in Rowley, as well as its own interpretation of the benefit the handicapped child was receiving in that case, to reason that the Court in Rowley expected the benefit to be more than “de minimis,” noting that the benefit the child was receiving from her educational program was “substantial” and meant a great deal more than a “negligible amount.” Id. at 182. Nevertheless, the Third Circuit recognized the difficulty of measuring this benefit and concluded that the question of whether the benefit is de minimis must be answered in relation to the child’s potential. Id. at 185. As such, the Third Circuit has written that the standard set forth in Polk requires “significant learning” and “meaningful benefit”; that the provision of “more than a trivial educational benefit” does not meet that standard; and that an analysis of “the type and amount of learning” of which a student is capable is required. Ridgewood, 172 F.3d at 247–48. In short, such an approach requires a student-by-student analysis that carefully considers the student’s individual abilities. Id. at 248. In other words, the IEP must confer a meaningful educational benefit in light of a student’s individual needs and potential. See T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).

In Endrew F. v. Douglas County School District, 580 U.S. 386 (2017), the United States Supreme Court clarified that while it had declined to establish any one test in Rowley for determining the adequacy of the educational benefits conferred upon all

children covered by the Act, the statute and the decision point to a general approach: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 580 U.S. at 399. Toward this end, the IEP must be “appropriately ambitious” in light of those circumstances. 580 U.S. at 402.

The Court continued that a student offered an educational program providing merely more than de minimis progress from year to year could hardly be said to have been offered an education at all, and that it would be tantamount to sitting idly until they were old enough to drop out. 580 U.S. at 403. The Act demands more, the Court asserted. “It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Ibid.

Thus, in writing that the IEP must be “appropriately ambitious in light of the child’s circumstances,” the Court sanctioned what has already been the standard in New Jersey: The IEP must be reasonably calculated to provide significant learning and meaningful benefit in light of a student’s individual needs and potential.

An IEP must not only be reasonably calculated to provide significant learning and meaningful benefit in light of a student’s needs and potential, but also be provided in the least-restrictive environment. See 20 U.S.C. § 1412(a)(5)(A). To the maximum extent appropriate, children with disabilities are to be educated with children without disabilities. Ibid. Thus, removal of children with disabilities from the regular-education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Ibid. Indeed, this provision evidences a “strong congressional preference” for integrating children with disabilities in regular classrooms. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993).

To determine whether a school is compliant with the Act’s mainstreaming requirement, a court must first determine whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. Id. at 1215. If such education cannot be achieved satisfactorily, and placement outside of the regular

classroom is necessary, then the court must determine whether the school has made efforts to include the child in school programs with nondisabled children whenever possible. Ibid. This two-part test is faithful to the Act's directive that children with disabilities be educated with nondisabled children to the maximum extent appropriate and closely tracks the language of the federal regulations. Ibid.

Accordingly, a school must consider, among other things, the whole range of supplemental aids and services, including resource rooms and itinerant instruction, speech and language therapy, special-education training for the regular teacher, or any other aid or service appropriate to the child's needs. Id. at 1216. "If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." Ibid. Indeed, the Act does not permit states to make mere token gestures to accommodate handicapped children, and its requirement for modifying and supplementing regular education is broad. Ibid. The Third Circuit has emphasized that just because a child with disabilities might make greater academic progress in a segregated special-education classroom does not necessarily warrant excluding that child from a general-education classroom. Id. at 1217.

With respect to the similarity of successive IEPs, in Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3rd Cir. 1995), the Third Circuit rejected an argument that a second IEP (1992–93) was inappropriate because of its similarity to the first IEP (1991–92). It explained:

[T]he alleged similarity of the 1991–92 and the 1992–93 IEP's does not mandate the conclusion that a decision ordering compensatory education is somehow irreconcilable with the refusal to order residential placement. As we explained in Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031, 1040 (3d Cir. 1993), "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." See also Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1992). Consequently, Scott's failure to make progress in the 1991–92 IEP, a judgment made retrospectively, does not

render either the 1991–92 IEP or the 1992–93 IEP inappropriate.

[62 F.3d at 534.]

James D. v. Board of Education, 642 F.Supp. 2d 804 (N.D. Ill. 2009), presented an argument similar to that of the petitioners here. The parties disputed the amount of progress the student made and whether that amount of progress was satisfactory under the IDEA. The student’s parents contended that her failure to master her IEP goals, and the fact that a number of the goals consequently were repeated from year to year, indicated that she did not make sufficient academic progress. The District Court observed that “courts have held that a student’s failure to master IEP goals does not compel the conclusion that the IEP was not reasonably calculated to provide a FAPE, particularly where the student made progress towards achieving those goals.” 642 F.Supp. 2d at 827. The court cited O’Toole By and Through O’Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692, 707 (10th Cir. 1998), which held that, where the student was “making adequate progress on” IEP goals, “[t]he fact that she had not fully met most of those objectives [did] not indicate she was not getting educational benefit.” The court also noted, “Likewise, the mere fact that a student’s IEP goals are continued does not necessarily mean that the similar IEPs were not reasonably calculated to confer educational benefit.” (citing Schroll v. Bd. of Educ. of Champaign Comm. Unit Sch. Dist. # 4, 2007 U.S. Dist. LEXIS 62478 at *5 (C.D. Ill. Aug. 10, 2007) (“[a]n IEP is not inappropriate simply because it does not change significantly on an annual basis * * * [or] because the student does not meet any of the IEP goals”). However, “if a student makes ‘no progress under a particular IEP in a particular year, . . . the propriety of an identical IEP in the next year may be questionable.” Schroll, 2007 U.S. Dist. LEXIS 62478 at *5 (emphasis added); see also Carlisle, 62 F.3d at 534 (“where a student fails to make any progress under an IEP in one year, we would be hard pressed to understand how the subsequent year’s IEP, if simply a copy of that which failed to produce any gains in a prior year, could be appropriate”) (emphasis added). The James D. court observed, “Therefore, to the extent that Sarah’s IEP goals were not mastered and were repeated, the proper inquiry is whether she made any progress on those goals, such that the District could reasonably have concluded that those goals were ‘likely to produce progress’ the next year.” 642 F.Supp. 2d at 827. Relying upon the evidence presented in the statement

of the student's present levels of performance and her teacher's testimony, the court found that she made "some progress" in achieving IEP goals. Ibid.

Petitioners cite to Damarcus S. v. District of Columbia, 190 F.Supp. 3d 35 (D.C. Cir. 2016), to argue that the repetition of goals and objectives across multiple IEPs indicates an ongoing failure to respond to the student's difficulties. In that case, the Circuit Court found that "an alarming number of goals and objectives were simply cut-and-pasted (typos and all) from one IEP to the next." Id. at 53. The school district's witnesses acknowledged in their testimony that this demonstrated a lack of progress that likely frustrated the student. The court further observed that, rather than revise the IEP to address this, the school district "drastically cut services" and "attributed [the student's] lack of progress to a single data point (his FSIQ) and then all but wrote him off as having 'plateaued.'" Ibid. The court highlighted that the IDEA prohibits using "a single measure or assessment as the sole criterion for determining . . . an appropriate educational program." Id. at 54 (quoting 20 U.S.C. §1414(b)(2)(B)). While the court found that the school district erred in this regard, it offered a caveat concerning repetition of IEP goals: "This is not to say that repetition of goals from one IEP to the next is *per se* inappropriate. . . . Rather, this wholesale, cut-and-paste repetition is symptomatic of a larger, more concerning failure by the District to adapt its approach in the face of [the student's] continued frustration and lack of progress." Id. at 53, n.7.

Further, courts have addressed arguments concerning the degree of detail in IEPs. In O'Toole, the Tenth Circuit held that "there is no legal authority requiring a particular level of specificity in the statement of annual goals." 144 F.3d at 705. There, some of the goals were general, such as "to facilitate language," while others enumerated "articulable goals," such as "to improve reading skills." Ibid. Noting that IEPs "are not required to provide the level of detail found in monthly instructional plans," the court concluded that the goals and objectives were sufficient. Ibid.; see also Damarcus S., 190 F.Supp. 3d at 52 (referencing absence of cases holding that a lack of measurable baselines constituted a denial of FAPE).

Damarcus S. also addressed a dispute concerning the appropriate educational program or method. In that case, the plaintiffs asserted that FAPE was denied because

the school district utilized inappropriate educational programs. For example, they argued that the selected reading program taught the student to recognize pictures rather than to read. They contended that a program like Lindamood-Bell was the appropriate program for a student with his cognitive deficits. The court observed, “This is precisely the type of thorny educational policy question that courts are ill-suited to answer, and thus deference to both the Hearing Officer and [the student’s] IEP team is appropriate.” 190 F.Supp. 3d at 56. The court cited to Rowley, which held that the “IDEA does not ‘invite the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” Ibid. (quoting Rowley, 458 U.S. at 206); see also E.E. v. Ridgefield Park Bd. of Educ., 856 Fed. Appx. 367, *7 (3d Cir. 2021).⁸

Here, respondent has demonstrated, by a preponderance of the credible evidence, that it used appropriate testing to evaluate S.K. and identify his strengths and weaknesses. It developed an educational program that was tailored to these strengths and weaknesses. His teachers, case managers, and speech-language therapist documented his progress and the areas where further development and advancement were still required. They revised his programming in response to petitioners’ limited requests, independently proposed additional changes, and were prepared to discuss the content of his upcoming IEP and changes to the document with his parents. On more than one occasion, District personnel attempted to initiate further discussions with petitioners about S.K.’s needs, based on their ongoing observations and assessments, but were ultimately unable to communicate with petitioners, who eventually decided to remove S.K. from the school without first speaking directly with District staff.

Although several goals and objectives were repeated in S.K.’s IEP, the record demonstrates, by a preponderance of the credible evidence, that he was learning and progressing. However, there remained room for further progress, and he still needed to generalize his skills in many areas.

For the foregoing reasons, I **CONCLUDE** that respondent crafted a program and provided a placement for S.K. that was reasonably calculated at that time to provide him

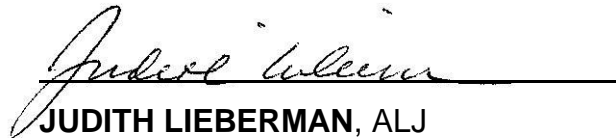
⁸ This case is not precedential. It is cited here because it provides relevant guidance.

with significant learning and meaningful educational benefit in light of his individual needs and potential, and the District's IEP offered this in the least restrictive environment. I, thus, also **CONCLUDE** that the District provided petitioners a FAPE under the IDEA. Petitioners are, therefore, not entitled to the relief they seek—placement at the Center School, reimbursement for the cost of enrollment at the school, and compensatory relief.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2022). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

December 21, 2022

DATE



JUDITH LIEBERMAN, ALJ

Date Received at Agency:

Date Mailed to Parties:

JL/jm

APPENDIX

WITNESSES

For petitioners

S.K.
Dr. Edna Barenbaum
Carly Fog

For respondent

Marjorie Murray
Wendy Schlosser
Jordan Marcus
Joseph Flynn
Lisa Vitale-Stanzione
Dr. Allyson Read

EXHIBITS

Joint

- J-1 District IEP, April 26, 2019
- J-2 Meeting attendance sign-in sheet, October 10, 2019
- J-3 District IEP, November 15, 2019
- J-4 Speech and language evaluation, March 16, 2020
- J-5 District IEP, April 26, 2020
- J-6 Psychological evaluation, July 30, 2020
- J-7 Educational evaluation, August 8, 2020
- J-8 District IEP, March 30, 2021
- J-9 Letter, Boyarin, Esq., to Adams, Esq., March 31, 2021
- J-10 Emails
- J-11 Letter, Greenwald, Esq., to O'Connell, July 22, 2021
- J-12 Letter, Greenwald, Esq., to O'Connell, August 9, 2021
- J-13 Letter, Greenwald, Esq., to O'Connell, August 23, 2021

- J-14 Letter, O'Connell to petitioners, September 8, 2021
- J-15 Blank
- J-16 Progress report, November 18, 2019
- J-17 Progress report, April 26, 2020
- J-18 Report cards
- J-19 Psychological evaluation, October 30, 2019
- J-20 Request to Amend IEP without meeting, November 13, 2019
- J-21 Reevaluation planning record, March 9, 2020
- J-22 Due Process Petition
- J-23 Answer to Petition
- J-24 Emails
- J-25 Regulations

For petitioners

- P-1 Dr. Barenbaum report, May 19, 2021
- P-2 Dr. Barenbaum Curriculum Vitae
- P-3 Fog report, May 27, 2021
- P-4 Fog Curriculum Vitae
- P-5 Center School records
- P-6 Dr. Barenbaum report, February 15, 2022
- P-7 Center School IEP, March 1, 2022

For respondent

- R-1 Record re phone conference to discuss transition, March 25, 2019
- R-2 Murray observation report, October 2, 2021
- R-3 Consent to implement initial IEP, June 16, 2019