



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

**FINAL DECISION**

OAL DKT. NOS. EDS 00311-20  
AND EDS 06990-20  
AGENCY DKT. NOS. 2020-30999  
AND 2021-31832

**E.K. ON BEHALF OF W.W.,**

Petitioner,

v.

**MANTUA TOWNSHIP BOARD OF  
EDUCATION**

Respondent.

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**Jamie Epstein, Esq.** for petitioner

**William C. Morlok, Esq.** for respondent (Parker McCay P.A., attorneys)

Record Closed: August 16, 2022

Decided: September 29, 2022

BEFORE **CARL V. BUCK, III, ALJ**

**STATEMENT OF THE CASE**

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, E.K. (mom or petitioner) has requested a due process hearing on behalf of her son W.W. (W.W. or student), who is classified as eligible for special education and related services. Petitioner contends the Mantua District Board of Education (Mantua or Board or District) failed to offer her son an Individualized Education

Program (IEP) that delivered a Free and Appropriate Public Education (FAPE). Petitioner seeks compensatory education for the years 2015-16, 2016-17, 2018-19, and 2019-20 school years, and payment for Independent Educational Evaluations procured by petitioner.<sup>1</sup>

### **PROCEDURAL HISTORY**

P.W. and E.K. o/b/o W.W. filed a petition for due process against the Mantua Township Board of Education on December 9, 2019<sup>2</sup>. On January 8, 2020, the matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13 under Docket Number EDS 00311-20. On July 6, 2020, petitioner filed a second petition for due process amending the relief sought (given that W.W. had graduated from the District), under OAL Docket Number EDS 06990-20. The two matters were consolidated under OAL Docket Number EDS 00311-2020 on May 19, 2021. A prehearing order was issued on August 10, 2020. This matter was heard on November 16, 2020, November 17, 2020, May 20, 2021, May 21, 2021, June 1, 2021, July 1, 2021, July 14, 2021, September 8, 2021, September 9, 2021, September 29, 2021, October 15, 2021, and July 11, 2022. Additional information was provided by the parties on August 16, 2022, and the record then closed.

A number of motions and/or actions were filed during the pendency of the litigation. Among these were:

- 1. Motion to Consolidate.** On May 19, 2020, an order to consolidate was granted based on joint agreement of the parties.

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<sup>1</sup> Petitioner's initial due process filing sought a manifestation determination meeting, independent evaluations, functional behavior assessment and an IEP with a Behavior Intervention Plan (BIP), counseling services and compensatory education. Petitioners subsequently withdrew all requests other than for compensatory education.

<sup>2</sup> The caption of the matter was subsequently recaptioned to "E.K. o/b/o W.W. v. Mantua Township Board of Education" due to the passing of the student's father, P.W.

2. **Order to Compel Discovery.** On October 13, 2020, respondent filed a motion to preclude petitioners' evidence and witnesses and dismiss petitioners' claims. Petitioners subsequently submitted a witness list and exhibits. Oral argument was held on October 19, 2020, and the tribunal ruled that:

. . . any materials contained in the October 13 submission made by Mr. Epstein, which were not previously provided to Mr. Morlock nor are contained in any of the purported joint exhibits as submitted by Mr. Morlock's office on September 9, will not be introduced or used for evidentiary purposes during this hearing.

Notwithstanding, the respondent continued to request, and tribunal continued to direct, that petitioners provide discovery in a compliant format. Petitioner did not comply with those requests.

3. **Motion to Compel Payment.** On June 2, 2021, petitioner filed a motion with supporting documentation to compel respondent to pay for three (3) Independent Educational Evaluations (IEE) requested of the Board on December 10, 2019. These were for speech, behavior and reading assessments which were ultimately paid for by petitioner in the amounts of \$2,500.00 for the speech; \$2,973.75 for behavior; and \$3,200.00 for reading assessment evaluations. During the course of the hearing, it was revealed that these payments were paid by petitioner's attorney, Jamie Epstein, Esq. with petitioner executing a promissory note to Epstein for the payments. Through separate order, the tribunal addresses this motion.
4. **Motion to Compel Tribunal to "disclose his qualifications to hear this IDEA case as required by 20 USCS Sec. 1415(f)(3)(A)(ii)".** On September 10, 2021 petitioner filed a motion made a request for the tribunal to recuse. This request stated, inter alia, that:

4. Throughout these proceedings, besides appearing bias in favor of the BOE and against W.W., ALJ Buck has repeatedly demonstrated he does not possess knowledge of Federal and State regulations pertaining to 20 USCS §§ 1400 et seq., and

legal interpretations of 20 USCS §§ 1400 et seq. by Federal and State courts.

The motion stated that petitioner had, on July 2, 2020, filed an Open Public Records Act (OPRA) request for the tribunal's qualifications. By order, dated September 28, 2021, the motion for recusal was denied.

5. On September 17, 2021, petitioner submitted a consent order modifying the caption of the matter.
6. In or about September 2021 petitioner filed a subpoena for the appearance of The Honorable Tama Hughes, ALJ in this matter. The subpoena was quashed.

Post-hearing summations were due to be filed by the parties by March 25, 2022. William C. Morlok, Esq., for respondent filed on March 24, 2022, and Jamie Epstein, Esq. for petitioner filed his brief on April 2, 2022. A hearing date to clarify receipt of all needed information was scheduled for July 11, 2022, at which time petitioner did not appear. Additional information was requested of the parties which was received on August 16, 2022. At that time the record closed.

### **BACKGROUND**

At commencement of the initial petition, W.W. (student) attended a middle school under the jurisdiction of the Mantua Township Board of Education. By the time case management on the matter began, W.W. had graduated from this school. His high school was not under the control or supervision of Mantua.

The petition filed on December 8, 2019, requested the following relief:

- A. Board is barred from removing W.W. from his current placement and program until the final adjudication of this due process petition.

- B. Order the Board to offer W.W. an IEP that is reasonably calculated to provide W.W. with a free and appropriate public education in the least restrictive environment.
- C. Order the Board to conduct manifestation determination meetings in the event of future displays by W.W. of behaviors which may lead to his discipline.
- D. Order the Board to modify W.W.'s IEP to exempt him from discipline from behaviors which have been identified as manifestations of W.W.'s disability.
- E. Order the Board to pay for W.W. to receive independent educational evaluation in all areas of suspected disability by evaluators selected by W.W.'s parents, including, but not limited to, an independent functional behavior assessment and positive behavior intervention plan if indicated.
- F. Ordered the Board to pay for W.W.'s counseling services to be provided privately by a mental health professional of W.W.'s parents' choice.
- G. Order the Board to provide compensatory educational services to W.W. for the period of time they knew of or should have known W.W. was not receiving a free and appropriate public education in the least restrictive environment and reimburse W.W.'s parents for any evaluations or services they have provided privately.
- H. Order the Board to protect W.W. from HIB and its hostile school environment.
- I. All other appropriate relief.

The petition filed on July 6, 2020, was based on W.W.'s IEE assessments obtained by petitioners. The assessments were in the following areas: psychiatry, behavior, occupational therapy, speech therapy, reading, assistive technology and school psychology. That petition sought the relief requested in the first petition ¶¶E and ¶¶G but

added the period from the date of the first petition to the end of the 20-21 school year. This included the time period from March 18 to June 11, 2020.

## **FACTUAL DISCUSSION AND FINDINGS OF FACT**

### **Testimony**

**Jacqueline Reilly** (Reilly), a learning disabilities teacher consultant and a case manager on the District's Child Study Team (CST), was qualified and testified on behalf of the Board. Reilly is qualified as an expert in case management and performing case and learning evaluations. (T1: 47.)

Reilly testified that her overarching goal as a case manager is to ensure students receive FAPE. (T2:119.) During Reilly's time with the Board, Reilly has completed approximately 150 assessments and drafted 200 Individualized Education Programs. (T1: 40, 44.)

Reilly first performed W.W.'s evaluation in October of 2017, and at this time she completed an observation of W.W. (T1: 48; J-43, 575.) Reilly described W.W. as a "great kid" who is easy to work with one on one. Reilly became W.W.'s case manager, and described their relationship as follows:

[W]e had a friendly relationship, he referred to me by name, he knew who I was. I was often, you know, in the classroom or on the playground or in the cafeteria just to see all of my students and connect with them and support---and support the teachers in the classroom as well, so he's a great kid.

[T1:48.]

W.W. enrolled in the District for the 2014-2015 school year, when he began first grade. (T1: 54.) Reilly reviewed the special education placements offered and stated which placement W.W. was assigned to for each of his years with the District. (T1: 49-55.) Reilly explained that W.W. was placed in a self-contained classroom until fourth

grade, which is the most restrictive setting the school offers, and is reserved for the students with the highest level of needs. (T1:53-54.)

When W.W. entered fourth grade, he no longer required a self-contained setting, and was placed in a pull-out resource classroom for language arts and math and an in-class resource classroom for science and social studies. (T1:54.) Reilly stated the pull-out resource classroom has approximately six special education students and special education teacher, whereas an In-Class Resource (ICR) classroom is taught by both a general and a special education teacher and contains a mixture of the two student populations. (T1:50-51.) During fifth and sixth grade, W.W. was placed into an ICR classroom for math, which is an even less restrictive placement.

Reilly stated that W.W.'s progression from a self-contained class, and moved into an ICR classes, with the pull-out class for Language Arts, signified he was "improving" and "making progress and doing well." (T1:55.)

In October 2017, the District conducted a learning evaluation (J-43) and a psychological evaluation (J-42) of W.W. Reilly compared these assessments to the independent assessments completed by W.W.'s parents in February of 2020. (J-45; J-49). Reilly testified that W.W.'s scores had "greatly improved." (T1, 113.) This included both that W.W.'s "Total Achievement" score increased by fourteen points, and also his score for almost every individual topic had improved as well (Listening Comprehension, Oral Expression, and Reading Comprehension.) (T1:67-68.) In addition, W.W. improved from eighty-eight to ninety-six. (T1:71-72) The full-scale Intelligence Quotient (IQ) demonstrated an eighteen point increase from W.W.'s initial assessment with the District which was completed in 2014. W.W.'s grades also showed success.

Reilly also discussed W.W.'s progress reports, which monitored his progress towards the goals set in his IEP for each school year. There were several specific goals set in place for W.W. during his last three years with the District. Reilly noted that W.W. "progressed satisfactorily" towards his 2019-2020 reading goal "When presented with narrative and/or informational text from [W.W.]'s content area subjects on his instructional

level, [W.W.] will provide at least one example of explicit text-based evidence to support inferences and an analysis of the text.” (J-2, 307; T1, 112.)

On April 10, 2019, W.W.’s IEP team convened to discuss his program for the upcoming sixth grade year. Reilly discussed the process by which W.W.’s 2019-2020 IEP was developed as well as the nature of the modifications. These modifications included providing W.W. with a highly structured environment with a consistent daily routine, allowing for repetition and clarification. W.W. also had several modifications, based upon his teacher’s observations, to ensure he stayed on track and was paying attention. Reilly testified that as of the April 2019 meeting, she was unaware of any substantial behavioral concerns for W.W. She stated there were minor issues in the classroom handled by W.W. teachers including off task behavior but could not recall other reports of conflict with other students or insubordination.

On cross-examination, Reilly was questioned about two behavioral entries during the 2018-19 school year. She responded that these two incidents were isolated and occurred outside of the structured classroom setting. No member of W.W.’s IEP team raised any major behavioral concerns at the April 2019 meeting, including W.W.’s parents. The only concern raised by W.W.’s parents was related to W.W.’s reading comprehension, for which they requested a summer reading program. See J-19. The District acceded to this request and W.W. attended the summer reading program. W.W. attended five of the nine sessions in the summer and did well in the sessions he attended (J-20.)

During his sixth-grade year, W.W. similarly had no major behavioral issues within the classroom. However, the District became aware during the 2019-2020 school year of several incidents occurring outside of the school setting. Reilly testified that when the District became aware of these issues, it offered a series of responses. For example, the District offered to perform a Functional Behavioral Assessment (FBA), but W.W.’s parents refused to consent to the FBA. W.W.’s parents also revoked consent for the counselling services W.W. had been receiving.



On June 2, 2020, W.W.'s IEP team convened to develop his program for his transition into middle school, and at that point the District again offered several options to address W.W.'s recent behavioral incidents. During this meeting, W.W.'s parents were present but did not provide any input. These offerings included a one-to-one aid and increased counseling services, both group and individual. The parents did not allow the District to implement either service.

Reilly has extensive experience in the area of special education and assessments and placements of students placed in special education programs. (T1, 39-44). **I FIND** Reilly's testimony to be credible.

**Stephanie Logan** (Logan), the district director of special services, was qualified as an expert in the fields of identification, evaluation and classification of special education students as well as the development and implementation of IEPs, and oversight of special education programs. Logan testified on behalf of the Board. Logan has nearly eighteen years of experience in special education. Logan's primary responsibilities as director include overseeing the child study team and the special education programs and teachers. Throughout her career, Logan has participated in between 300-500 eligibility and IEP meetings.

Logan first became acquainted with W.W. when she started working for the District in 2016. Logan also explained she observed W.W. a number of times in the classroom settings and participated in his instruction on occasion. When asked to describe W.W., she stated that when she began, W.W. was in a self-contained setting, and since then he has shown a lot of growth. Logan testified he actively participates in class, interacts well with his teachers, is very well-liked by his teachers, and would engage with his counselors.

Logan reviewed W.W.'s disciplinary record prior to the events precipitating the filing of the petitioner. There were relatively isolated incidents in 2015 and 2017, neither of which W.W. received formal discipline for. The first incident occurred in March of 2015 when W.W. allegedly stated the word "butt" to his classmates on more than one occasion. Thereafter, an incident occurred in September of 2017, when W.W. stated to another

student that he was going to kill him. When asked about the incident, W.W. stated he did not mean it, and he said it after he got upset thinking that other students were going to tease him.

In early 2019, there were two occasions in which W.W. made threatening statements to another student, but both incidents occurred outside of the structured classroom setting. Logan explained that a structured environment is one in which the students are aware that there are expectations and rules. On the other hand, unstructured environments include areas such as the bathroom or hallway, where there are no formal procedures, and the students move about freely. The first disciplinary event occurred in January of 2019, when W.W. allegedly told another student “If we weren’t in school, you would be dead.” As a result of this incident, W.W. received afterschool detention, which can range between forty-five minutes and one hour. The second incident occurred in March 2019 when W.W. made the statement to another student, “He is turning me into a killing machine.” The assistant principal held a conference with W.W. and his counsellor regarding the incident and called W.W.’s parent. This incident resulted in a one-day out of school suspension.

The final disciplinary issue prompting occurred in November of 2019, when W.W. made a verbal threat to a student on the playground. The incident initially resulted in a five-day suspension, but this term was later shortened to three days. One of the conditions of W.W.’s suspension was that he obtain psychological clearance prior to his return to school. The District set up an appointment for W.W., and he did not attend. Rather, W.W.’s mother showed up alone. The District subsequently received psychiatric clearance for W.W. from a psychiatrist he was already seeing. This was the first time the District was notified that W.W. received any type of psychiatric services outside of school.

Following the incident in November of 2019, Logan testified that she spoke with W.W.’s mother regarding what services the District could offer to address the situation.

Using what we know about W.W. from his counselors, from his teachers, from past having him in our district, I offered what you see in this e-mail. We offered to increase his counseling that was already in his IEP. We offered to increase

his counseling and offered to increase his group counseling to work on social skills with him. He had a very nice relationship with Mrs. O'Brien, who was one of his counselors at the time. She saw him individually, and Mrs. Campbell saw him in group. She had an excellent relationship with him. We knew W.W. really liked her, and we wanted to give him more time to connect with Mrs. O'Brien to work on those skills.

We offered to give him---I actually, you know, suggested a one to one aide for him in unstructured environments, but what we offered was a one to one aide to be with him all day. So he had that support. He likes adult interaction. We wanted to give him that support to support him as well as protect him in any incidences that might take place between him and peers.

We offered to do a functional behavioral assessment to see if we could determine the function of the behaviors, specifically in terms of those verbal threats that he had been making. I have a BCBA, a board certified behavior analysts that is qualified to conduct these FBAs and then could write a plan and write up these observations if need be.

[T3:59-60.]

We also suggested that we implement peer groups for socialization. In our building our counselors, our social workers and our school psychologists run what we call "lunch bunches" where they take students. Some students volunteer, some students are invited, and they mix students with identified needs and students who are typically developing, and they put together groups where students might be involved in playing games or Legos or it's a structured environment where the counselors are overseeing them and promoting social skills.

[T3:63.]

Logan noted that she wanted to develop a crisis plan for W.W. in the event of any disciplinary issue, which would ensure that W.W.'s counselor was with him throughout the disciplinary process. Logan explained that initially, W.W.'s mother agreed to all services and seemed pleased with the District's recommendations. However, during the week following the filing of the petition, she demurred, and this prevented the District from implementing any of the discussed supports. The District made a formal offer in writing

to implement the proposed supports following a resolution session, but W.W.'s parents rejected this offer.

In addition to refusing additional supports offered by the District, W.W.'s parents revoked consent for the counseling services W.W. was already receiving. Logan felt strongly about this and sent a letter to W.W.'s parents expressing concern regarding ceasing W.W.'s counseling. Logan explained in the letter, inter alia, that W.W.'s IEP specifically contained counseling in a group and individual sessions with identified goals including social goals, and W.W. had a close relationship with two of those counselors, and that counseling allowed him to talk about his feelings.

On cross-examination, Logan was asked whether the District conducted a manifestation determination following the November 2019 incident. On re-direct, Logan provided that a manifestation determination is required to be held when a student has reached ten suspension days or more, which can be out-of-school or in-school suspensions. Logan provided that here there was a one-day suspension in one school year and a three-day suspension in another school, so they were not required to conduct a manifestation determination.

Logan explained that the District exceeded its legal obligation to W.W. by providing homebound instruction on the first day of his suspension, despite only being required to do so after several days. Logan explained that they wanted to ensure that W.W. was making progress and that his specific teacher could communicate and share work with him.

Shortly after the petition was filed, the District became aware that W.W. was involved in a physical altercation that took place outside of school with another student during a Boy Scouts event, that resulted in both students being suspended from the program. Despite this behavioral incident, W.W.'s parents still refused to permit the District to implement any of the offered supports.

Following the filing of the petitioner, W.W.'s parents requested seven independent evaluations (IEEs). The District agreed to finance the IEEs but stipulated that their

financial contribution would be limited to the District's established caps. Logan described the process by which the District establishes what constitutes a reasonable and appropriate sum for an independent evaluation. The District then creates a list of oard approved independent evaluators and their costs and provides a range of potential costs. Logan testified that the maximum Board-approved evaluation cost is \$1,200 in the areas of speech, reading, and functional behavior, however petitioners submitted invoices for more than double that amount per evaluation. Logan opined that these are the highest invoices for these types of evaluations she has seen.

Regarding the reading assessment conducted by Max Ability Learning, Logan stated she received two separate invoices attached to two separate reports. The first drafted report and invoice submitted to the District were dated April 18, 2020, for a sum of \$3,500. On June 1, 2020, a modified report and second invoice for \$3,200 were submitted to the District.

Logan reviewed IEEs submitted by W.W.'s parents and each report's proposed recommendations. She noted the District was already providing W.W. with numerous accommodations and services recommended by the IEEs. For example, W.W. had access to all devices and programs recommended by the Assistive Technology (AT) assessment. Five of the IEEs submitted recommended counseling services, but the District was prohibited from providing any counseling services after W.W.'s parents revoked their consent. (J-45 at 610; J-46 at 624; J-47 at 631; J-49 at 643; J-52 at 757-760.)

Logan discussed why some recommendations not already offered by the District were inappropriate. Logan testified that it would be improper to comply with the psychiatric IEE's recommendation that in the event of similar disciplinary issues involving W.W., the District should halt its automatic protocols for emergency evaluation and allow W.W.'s parents to determine whether an emergency psychiatric evaluation is necessary. (J-48 at 635.) Logan explained that the District acts *in loco parentis* for its students and it would be in violation of its duty to allow the judgment of one student's parents to supplant its own when it may concern the safety and welfare of other students.

Logan further testified that the IEEs contained conflicting recommendations. The psychiatric IEE recommended that W.W. be placed in a classroom with a small teacher to student ratio with a one-to-one aide, which Logan explained would be a pull-out resource or a self-contained classroom. (J-48 at 635.) However, the Educational IEE recommended W.W. be placed in an inclusive setting in all classes. (J-45 at 610.) Logan noted that neither independent evaluator provided any basis or reasoning for why he or she recommended their proposed educational setting.

On cross-examination, Mr. Epstein questioned Logan regarding whether the District provided W.W. a FAPE during the Covid-19 pandemic in compliance with federal and state guidance. Logan responded that the District acted in accordance with all guidance issued by the United States and New Jersey Departments of Education. Logan further stated that the District's plan for providing education during the pandemic was approved by the New Jersey Department of Education. When asked why the District did not update W.W.'s IEP to reflect remote instruction at the beginning of the pandemic, Logan replied that she was directed in meetings with the state and county special education directors that this was not necessary. She explained that the District's switch to remote learning was only supposed to be for a two-week period, but after the state of emergency continued the projection for schools reopening was unclear. On redirect, Logan stated the District has approximately 250 special education students, and it would be impossible for the District to schedule 250 IEP meetings with all required team members within the first two months of the pandemic.

Logan's has extensive experience in the fields of identification, evaluation, and classification of special education students as well as the development and implementation of IEPs, and oversight of special education programs. **I FIND** her testimony to be credible.

**Jennifer O'Brien** (O'Brien) is a certified school social worker, who serves as a social worker and as a school counselor. O'Brien was qualified as an expert in social work and school counseling and testified on behalf of the Board. O'Brien is also responsible for conducting threat assessments for the District. A threat assessment is

necessary when a student finds themselves in crisis and may be a threat to themselves or another student.

O'Brien served as W.W.'s school counselor during the 2019-20 school year. O'Brien described W.W. as a happy, kind, and respectful kid with a high energy for life and his interests. During the 2019-20 school year, W.W. received two individual twenty-minute therapy sessions each month, and two thirty-minute group therapy sessions. At the time of the 2019 incident, O'Brien was asked to conduct a threat assessment for W.W., and O'Brien did not find W.W. to be a threat to himself or anyone else.

O'Brien testified that W.W. benefited from the District's counseling services. O'Brien stated that counseling helped W.W. to develop his social skills:

I believe there was an issue with sometimes understanding like social communication like what was being said to him or I think sometimes if kids were joking or teasing I don't know that W.W. understood if it was, you know, we're all laughing in this together or we're being teasing you and—and I think that sometimes it was hard for him to—you know, when those situations arose and then that could potentially cause him to become more reactive just, you know, again trying to figure out what was really being said, what was going in that particular situation.

[T4:173-74.]

O'Brien further explained that she addressed these issues with W.W. in both individual counseling prior to the termination of counseling. Counseling sessions focused on the students' relationships with others including appropriate communications and interactions. In individual sessions, W.W. addressed his concerns about whether or not he was doing the right thing. O'Brien testified that W.W. told her at the beginning of the 2019-20 school year that he wanted to stay away from the individuals that tended to get him into trouble.

O'Brien testified that he was a student who benefited from having individual and small group counseling, and that he enjoyed it. She further testified that he appeared to take something away from counseling and it was helpful for him to understand the

nuances that exist in communication, and to have an additional support person. Furthermore, W.W. may have had conversation with her or shared frustrations that he was not having with others.

O'Brien has experience as a social worker and school counselor. **I FIND** her testimony to be credible.

**Mary Jane Contino** (Contino) was W.W.'s special education teacher for reading and writing (English Language Arts or "ELA") during the 2019-20 school year. Contino worked for eighteen (18) years as a special education teacher with the District prior to retiring on July 1, 2020.

Contino worked with students with various disabilities, creating their lessons and a learning environment. Contino estimated she has taught over 200 special education students during her tenure with the District. Contino participated as a member of these students' IEP teams and was responsible for implementing their IEPs in the classroom.

There were seven students in Contino's ELA class, and she was assisted by a paraprofessional. Contino spoke highly of the students in her class, stating it was "one of those classes [where] they supported each other, and they enjoyed each other's company[.]" (T5:18.) Contino stated he was a very nice boy to have as a student and that he was never disrespectful to the other students in the class. He did not have behavioral issues within her classroom or other conflicts in the classroom with students. She noted that W.W. had some minor issues with interrupting the class, but that W.W. never did so in a disrespectful way. Contino further explained these issues were successfully addressed by refocusing and redirecting tactics within his IEP and signaling techniques.

Contino reviewed W.W.'s IEP for the 2019-20 year, prior, in order to see his present levels and what he accomplished during fifth grade, as well as to see the accommodations and modifications, and to determine if there were special alerts or behavioral programs. Contino reviewed the modifications in his IEP, and why the modifications were included, and confirmed each was provided in her classroom



including: (1) extra time if needed; (2) a daily routine; (3) modeling; (4) repetition; (5) clarifying directions; and (6) refocusing and redirection. (J-19 at 286). Contino also stated how each modification was implemented.

Contino testified that W.W. excelled in reading class, particularly when he transitioned to independent reading during the latter half of the school year. During the second semester, he began with ten minutes of independent reading, which increased to fifteen minutes over time. Students had poster boards to write something about their book, and students were allowed to select their independent reading books.

W.W. completed three books prior to school's closure due to the Covid-19 pandemic. During the following period of virtual learning, W.W. chose to read at a more advanced level and his parents indicated that he did well with this material. W.W.'s test scores increased. In the first semester of the 2019-20 school year, W.W.'s reading scores jumped two grade levels. The pandemic prevented the District from re-testing W.W. at the conclusion of the school year.

During the 2019-20 school year, W.W. also saw great improvement in Contino's writing class. Contino explained that her writing class generally began with a lesson followed by independent writing time where she and the paraprofessional would assist each student individually. In comparing W.W.'s writing sample from the beginning of the year to his mid-year sample, Contino stated she was happy with W.W.'s progress and that it was clear that he was applying her lessons from the first part of the year.

Contino reviewed the report from petitioner's independent reading evaluation conducted by Ms. Topiel (Topiel). Topiel observed W.W.'s reading class in January 2020 and told Contino that she would return to observe W.W.'s writing class after lunch but failed to do so. Topiel's report contained numerous errors, such as stating that there were ten students in W.W.'s class when there were in fact only seven. The report also stated that homework was a nightmare for W.W., which Contino states she did not have knowledge of. Rather, Contino noted homework was a strength of W.W.

Contino expressed concern that statements made in Topiel's report were disparaging towards W.W., specifically a statement that watching W.W. was "like watching someone who kept filling the oil well in a car engine that had a never-ending oil leak."

Contino demonstrated experience and knowledge in the field of special education. **I FIND** her testimony to be credible.

**Geraldine Healy Marini** (Dr. Marini) was offered as an expert in occupational therapy related to special education students. Respondent did not object to Dr. Marini being admitted as an expert in occupational therapy, however objected to her admission as an occupational therapy expert in the realm of special education. On voir dire, Dr. Marini admitted that her company only contracted with three school districts currently and that she does not provide any of the district's direct services. Dr. Marini stated she has attended approximately three or four IEP meetings within the last year. Following the issuance of her report, Dr. Marini was retained to testify as a private expert at a rate of \$150 per hour.

The information Dr. Marini used to formulate her report was from her interview with W.W., his mother, E.K., reports from District faculty, and W.W.'s student record. Dr. Marini conducted an in-class observation and observed W.W. for two hours. Dr. Marini stated she did not review the entirety of W.W.'s student record. Marini stated that W.W.'s outcomes from Occupational Therapy (OT) should focus on anxiety and communication skills. However, she agreed that she did not have the ability to diagnose a student with anxiety or communication skill deficits. Dr. Marini acknowledged that W.W.'s mother reported no OT issues at home and agreed with the District therapist's recommendation in Spring 2016 that OT services be discontinued due to his noted improvement.

In regard to the observation, Dr. Marini interviewed W.W.'s mother, E.K., E.K. reported no issues with W.W.'s eating or sleep routines at home. She also reported that there were no issues with his routine regulation and that he participates in his own self-care. Moreover, she stated that W.W. had lots of social participation and community engagement.

Dr. Marini testified that based on her observations, the District appeared to support W.W. and he had successful relationships with his teachers. She stated that W.W. “frequently” exhibited off task behavior, which can include yawning, rubbing his face, or bringing his hands to his mouth. W.W. completed the worksheets assigned during the math class Dr. Marini observed and exhibited a good cursive style formation when writing his first and last name. Dr. Marini asked W.W.’s teachers to fill out a functional educational checklist, and in those checklist responses, W.W.’s teachers did not indicate concerns with W.W.’s visual motor skills, self-care, eating, or gross motor skills.

On direct examination, Dr. Marini reviewed the four recommendations contained within her report. Dr. Marini’s first recommendation was that W.W. receive a functional behavioral Assessment. Dr. Marini later attempted to offer a behavioral assessment of W.W. Dr. Marini’s other recommendations include services she believed the District should provide, however she stated she did not inquire what the District was already providing. When questioned regarding counseling services, Dr. Marini indicated she did not consult with Jennifer O’Brien, W.W.’s counselor. Dr. Marini agreed that W.W. required counseling and was unaware that W.W.’s parents had revoked their consent. Dr. Marini was also unaware the District provided all students with services such as mindfulness, meditation and yoga, and a social emotional learning program.

Given Dr. Marini has expertise in the realm of occupational therapy but not as much in the realm of special education in schools, **I DO NOT FIND** her testimony credible as it relates to special education occupational therapy or persuasive in this case.

**Michael McLeod** (McLeod) was offered as an expert in providing speech language pathology to students. McLeod was not certified by the New Jersey Department of Education to provide speech therapy services in New Jersey Schools. In drafting his report, McLeod relied upon information obtained through in-class observations, an interview with W.W., information provided by W.W.’s parents in his intake form and through an interview, and a review of W.W.’s past IEPs. McLeod testified that he began providing speech services to W.W. in June or July of 2019, prior to the issuance of this report.

McLeod stated he had not provided standardized testing on W.W. One test conducted was the Clinical Evaluation of Language Fundamental—Fifth Edition (CELF-5) which scored W.W. in nine categories. Of the nine categories, W.W. scored “average” in seven and “slightly below average” for the remaining two. (J-52.) For one of the areas in which W.W. scored below average, “Pragmatics Profile”, McLeod stated that this score was based entirely on information provided by W.W.’s mother. The data from the CELF-5 was used to create W.W.’s Core Language Score (CLS) and four other index scores. W.W.’s score in the five areas were “average” compared to the entire student population.

McLeod also conducted an in-school observation of W.W. He first observed W.W. in an art class where it was very self-directed and play-based, and W.W. “followed directions and sat quietly at the table and interacted with students at the table” and “everything seemed to go as planned with him and the rest of the class.” (T6:138.) McLeod described W.W. as laughing and smiling and noted that he followed clean up instructions. McLeod also stated the teacher checked in on W.W. and praised him for his work. McLeod observed W.W. in math class and during a speech and pathology session and stated that W.W. “dominated the conversation throughout the session and made everyone focus on [McLeod].” (T6:139.)

McLeod stated that W.W. had issues with articulation. However, he admitted that no time during his observation of W.W. did he witness that this impacted his ability to interact with his teachers or peers. McLeod also stated that W.W. struggled with social relationships. McLeod suggested that W.W. should be involved in an unstructured lunch group with his peers three-to-four-times per month to improve its social skills. McLeod did not personally observe counseling or social and emotional learning programs offered by the District.

McLeod stated that he did not recall contacting the District to suggest changes in W.W.’s speech and language services. McLeod was also asked whether at any point he told W.W.’s parents that they should make certain recommendations to the District regarding W.W.’s speech and language services. McLeod responded that at one point

he mentioned to W.W.'s mother that she should request individual speech therapy services, instead of the group services currently provided.

McLeod is not licensed in New Jersey, and though **I FIND** the testimony to be credible, reliance on his testimony is limited to general aspects of speech pathology rather than as it pertains to school in New Jersey.

**Kathleen McCabe-Odri** (Dr. Odri), was offered petitioners as an expert in the areas of autism, applied behavioral analysis, and special education. Dr. Odri testified she is the director of a non-profit program, Partners in Learning, which she founded in 1999. While the program focuses on the educational needs of children with autism, the program focuses on children with autism, and the centers primarily include children ages two and a half through six during the school day. Prior to founding Partners in Learning, Dr. Odri worked a teacher of special education for the Medford Lakes School District from 1991-1994.

Dr. Odri was retained by petitioners to perform a Functional Assessment (FBA) in December of 2019. Dr. Odri reviewed the findings of her report. During the first parent interview, W.W.'s mother reported she had a mainly positive school experience with the District, and her main concerns were from the inappropriate verbal interactions that resulted in suspension for W.W. W.W.'s mother also expressed concern that W.W.'s language delays were not properly being addressed and this may have resulted in misunderstanding the acronyms used in one of the disciplinary instances. The acronym referenced is "IKY", which was believed to stand for "I'll kill you." In a later interview, W.W.'s mother stated W.W. had made statements at home such as "I'm going to kill you" but that this behavior has since reduced.

The school observation portion of the FBA consisted of two sessions. Dr. Odri testified she intended to observe for a third session, however this was unavailable due to the pandemic. Of the two observation sessions, Dr. Odri was present for one of them, and Dr. Odri's colleague was present for both. This observation lasted for one hundred minutes. Dr. Odri testified that during this observation, she and her colleague, Ms. Forrain, compared W.W.'s instances of "off-task" behavior with another student in his

classroom for a ten-minute interval. W.W. was found to be on task forty-three percent of the time interval, whereas his peer was on task at a rate of forty-eight percent. “Off-task” for purposes of this assessment included times where W.W. made an extraneous body movement, was visually inattentive, or made a vocalization that was unrelated to the task.

The second observation was conducted by Ms. Forrain and lasted sixty-five minutes. During this observation, Ms. Forrain recorded several instances of “lower-level challenging barriers.” The behavior which occurred the most was “hand flapping” which Ms. Forrain noted had occurred fourteen times during the observation. On cross-examination, Dr. Odri stated the definition of “hand flapping” is broad and may include when W.W. wiggles, flaps his fingers or arm, or stiffens his arms at his sides.

Dr. Odri summarized her interviews with W.W.’s teachers, Ms. Contino and Ms. Schmidt. Both teachers stated they had never witnessed W.W. engage in the high-level behaviors that resulted in his suspension and they felt these behaviors were unlikely to occur in structured environments, including their classrooms. W.W.’s teachers also stated that his off-task behavior and inappropriate movements did not act as a barrier to establishing meaningful relationships with his peers.

As part of the FBA, Dr. Odri interviewed W.W.’s principal, Mr. Miles, who recounted the events surrounding W.W.’s November 2019 disciplinary actions. Mr. Miles stated he did not witness the events; however, he received a peer report that W.W. used the acronym “IKY” directed at another student. Dr. Odri testified that Mr. Miles opined that after speaking with W.W., he believed W.W. understood what he was saying was wrong and knew adults would not find this conduct appropriate.

Dr. Odri stated that in her report, W.W.’s higher level, less frequent challenging behaviors occurred during unstructured times with peers with less adult supervision. She suggested the District provide remediation in those settings during non-academic times. Dr. Odri recommended that W.W. be provided with a one-to-one aide and counseling services. She testified that she was aware the District had offered W.W. a one-to-one aide following the November 2019 incident, however his parents had declined. Dr. Odri also testified that she was aware W.W.’s IEP for the 2019-2020 school year included

counseling services, and that W.W.'s parents revoked consent following the November 2019 incident. When asked about the revocation of consent, W.W.'s mother informed her that his counseling services were "discontinued due to W.W.'s difficulty in explaining complex issues and not having his parents there to help clarify the meaning." On re-cross, Dr. Odri stated it is unusual for parents to be present during counseling sessions.

On cross-examination, Dr. Odri acknowledged that she was not informed by W.W.'s mother that he had been involved in a physical altercation with another boy at Boy Scouts. Dr. Odri also was not made aware that the District offered to conduct an FBA following the November 2019 incidents and his parents declined.

Given Dr. Odri has experience in the realm of autism and special education, and appears to rely on this knowledge in her testimony, **I FIND** her testimony to be credible, with the caveat that Dr. Odri has worked with the age group of two and a half to three years, and thus may be limited in her experience of children in the same age as W.W. Moreover Dr. Odri was not provided comprehensive information regarding all behavioral issues and all of the District's offerings to W.W. These limitations in testimony are material as they point to a lack of comprehensiveness in understanding of W.W.'s actual status on the part of Dr. Odri.

**Christopher Lam** (Dr. Lam) was offered as an expert in child and adolescent psychiatry. W.W. has been a patient of Dr. Lam since 2015. W.W.'s treatment consisted of psychopharmacology, medication for his symptoms.

Dr. Lam reviewed the contents of his psychiatric report. Under the section title "History presenting illness," Dr. Lam stated that W.W.'s primary problems were with receptive and expressive communication, which occurred in the context of mental retardation. Mental retardation<sup>3</sup> is defined as a full-scale IQ of less than eighty. Dr. lam's most recent psychological examination of W.W. indicated his IQ was at ninety-six.

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<sup>3</sup> In E.K.'s testimony (petitioner), E.K. stated that with regard to Dr. Lam's testimony – stating that W.W. suffered from "mental retardation," E.K. stated that no other medical professional or evaluator has told her that W.W. suffers from "mental retardation."

Dr. Lam's report included recommendations. The first recommendation was for W.W. to be taught in a small setting with a special education teacher as well as a one-to-one aide. Dr. Lam's second recommendation was that W.W. be provided with modifications such as comprehension checks, pre-teaching, and things of that nature. Dr. Lam stated none of these modifications were included in W.W.'s IEP that he reviewed. Dr. Lam's final recommendation was that "automatic protocols for emergency evaluation [of W.W.] by strangers should be halted and parents should be allowed to determine whether or not an emergency psychiatric evaluation is necessary." He explained he did not find it appropriate for the school system to automatically send W.W. to a crisis center and be evaluated in the even that he made a comment that may be misinterpreted. Dr. Lam also stated he was not fully aware of the District's procedures in this regard.

Prior to this report, Dr. Lam had not spoken to anyone at W.W.'s school or attended an IEP meeting for W.W. or made recommendations to the District.

Dr. Lam testified that W.W.'s communication skills greatly improved since he began seeing him in 2015. Dr. Lam stated he did not find W.W. to have suicidal or homicidal ideations but understood how W.W.'s statements could be interpreted in that way.

Dr. Lam testified with a background in child and adolescent psychiatry. **I FIND** his testimony largely credible as it pertains to the application of his expertise. However, it appears that Dr. Lam did not understand the supports offered by the District, nor was he fully aware of the District's procedures. Likewise, these gaps in knowledge are material as they point to a lack of comprehensiveness in understanding of W.W.'s actual status on the part of Dr. Lam.

**Ellen Topiel** (Topiel) was presented by petitioner. Topiel is an adjunct professor who evaluates graduate students in their education and in special education placements. Topiel has performed evaluations and worked as a tutor and has worked with high school and preschool students. Topiel has not been a special education teacher or participated in drafting an IEP.



Topiel conducted one classroom observation in January of 2020 for ninety minutes. During her classroom observation, Topiel did not witness any program implemented to redirect W.W.'s attention. Topiel later stated she observed W.W.'s teacher redirected his attention twenty-five times.

As part of her assessment, Topiel had W.W. complete a writing sample. W.W. wrote two paragraphs each with five or more sentences. Topiel compared this with a writing sample of an "average sixth grade writer" which she obtained from the internet. Topiel stated she had no context for this writing sample, such as how long the student took to complete this assignment and whether they were provided additional time to revise/edit the piece.

On cross-examination, Topiel stated that the comparative charts she included in her report were data she felt was relevant and she omitted other areas in which W.W. was assessed. In a comparison of the 2017 psychological evaluation and the 2020 independent psychological evaluation completed by Rowan, Topiel indicated that most of the scores went up, including IQ, oral language, total reading, basic reading, reading comprehension and fluency, written expression, and the five composition scores on the WIAT that deal with reading and writing.

Given Topiel's background and expertise, **I FIND** her testimony to be credible as a reading expert. However, it appears Topiel did not include relevant areas in her analysis, and further was not able to adequately explain the methodology behind the writing comparison technique utilized. Her report also made statements which were in direct contravention to the testimony of teachers. i.e., regarding "homework". Thus, these inaccuracies and limitations are taken into consideration in determining the weight of her testimony.

**E.K.**, petitioner, presented testimony. E.K. described W.W.'s disciplinary history within the District. The first incident occurred on March 31, 2015, when W.W. allegedly stated "butt" to his classmate and one student reported that he stated the word "ass." The following summer, E.K. requested that the District conduct an FBA to explore W.W.'s

perceived issues with inattention and immaturity. In response, an FBA was conducted in August of 2015. The FBA recommended the District continue to provide specific direction and implement techniques of redirection, modeling, and positive reinforcement and tolerance for delayed reinforcement. When asked whether the recommendations in the 2015 FBA were implemented in W.W.'s subsequent IEP, E.K. stated "[n]ot in the systematic way that was recommended, no." (T11:25.) E.K. explained in her email correspondence with Ms. Topiel that the District indicated they believed the FBA's recommendations could be implemented by W.W.'s teachers without a formal behavioral intervention plan.

E.K. testified as to an IEE that was to provide W.W. with a Neuro-psychological assessment at the public expense, but the BOE did not, and she provided it herself a year later. Moreover, she paid for private speech therapy and a social skills group. E.K. testified that the IEP Team did not follow the neuropsychological test. Moreover, regarding the time period from March to June 2020, that "in person" was not instituted until a few weeks before the end of the school year, and W.W.'s special education consisted of sending him assignments, and the parents had to provide W.W. special education services.

Following the March 2015 incident, there were no other disciplinary violations in the District for two years. In September of 2017, E.K. was contacted by Ms. Shorter after W.W. used the word "kill" toward another student. E.K. told Ms. Shorter that she did not believe W.W. meant to threaten the other student and that she would work on the issue with W.W. at home. W.W.'s parents did not have him evaluated at this point. W.W. had no further disciplinary issues until 2019.

In February 2019, the District contacted E.K. to inform her that W.W. said to another student in the bathroom, "If you weren't in school you would be dead." (T11:49-50.) W.W. received one after-school detention for this. W.W.'s next disciplinary incident occurred on March 5, 2019, when a student reported that W.W. made another allegedly homicidal comment to another student. Following this event, the District requested that W.W. receive psychological clearance before returning his school following his one-day suspension. The District recommended Inspira Crisis Center, and W.W.'s father took him

there. E.K. was not at the center, but speculated this was a traumatic experience for W.W., as he waited several hours and was repeatedly asked questions. W.W. received clearance and returned to school.

The next disciplinary issue occurred on November 20, 2019, when W.W. informed his friends that he would not be attending the next Boy Scouts event at a shooting range because his mother was afraid he would shoot someone. The District contacted E.K., who agreed that was what she had said, and all parties agreed that W.W. was informing his friends as to why he would not be there and that there were not veiled threats involved. W.W. was not disciplined as a result of this incident.

On November 26, 2019, several students reported to Mr. Miles that W.W. said "IKY" to another student on the playground. This acronym was interpreted to mean "I'll kill you." E.K testified that W.W. actually used the acronym "IKYA" meaning "I'll kick your ass," but then stated that W.W. meant to state "IKYA" however failed to get the last letter out. W.W. received a three-day suspension for this incident and was provided home instruction in his core subjects.

During a conference between the District personnel and W.W.'s parents following the incident, a school resource officer asked whether W.W.'s parents kept a gun in their home. W.W.'s parents answered affirmatively; however, it was locked away. W.W.'s father, P.W., stated that during a conference between District personnel and W.W.'s parents, the events may be related to a YouTube video uploaded by another student teasing W.W. A formal HIB investigation was conducted in February 2020, however, Mr. Miles looked into these allegations and confirmed in January that the video had been removed. The HIB investigation was conducted, and the Board determined the complaint was founded as HIB.

In order to return to school following his suspension after the November incident, the District requested that W.W. be cleared by a psychiatric professional and meet with the school psychiatrist. E.K. testified that she obtained psychiatric clearance for W.W. from Dr. Lam, but she refused to allow W.W. to be seen by the school psychiatrist. She

stated she sent W.W. to school without him first being seen by the school psychiatrist and that she continued to send W.W. to school, and he was not sent home.

E.K. revoked consent for the District to provide W.W. with counseling services in December 2019. E.K. stated this decision was based upon “lack of confidentiality and lost trust in the leadership at the school.” (T11:71.) E.K. also declined the District’s offer to provide W.W. with a one-to-one aide following the incident. E.K. stated that W.W. had no history of violence, of hurting himself or others.

Taken as a whole, **I FIND** the majority of petitioner’s testimony credible. It appears petitioner largely recounted the disciplinary events and engagement with the District with specificity. However, I recognize there is a discrepancy in petitioner’s testimony with regards to the incident, which was reported on November 26, 2019, as to whether petitioner stated “IKY” or “IKYA.”

**Discovery Issues:**

On more than once occasion, Mr. Epstein was asked to provide opposing counsel, and this tribunal, all correspondence related to the independent evaluations offered by petitioners. To the point where I issued orders for Mr. Epstein to provide information to the court and to opposing counsel.

Mr. Epstein failed to provide this information.

**LEGAL ANALYSIS AND CONCLUSIONS OF LAW**

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482 (the Act). One purpose of the Act, among others, 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.A. § 1400(d)(1)(A). This “free appropriate public education” is known as FAPE.

The purpose of compensatory education is to “replace educational services a child should have received in the first place,” and the remedy “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of the IDEA.” Ferren C. v. Sch. Dist. Of Philadelphia, 612 F.3d 712, 717-18 (3d Cir. 2010) (internal citations omitted). See also Ridgewood Bd. of Educ., 172 F.3d 238, 249 (3d Cir. 1999). Compensatory education is due from the time the school district knew, or should have known, the student was not receiving a FAPE, but excluding the reasonable time required for the district to remedy the problem. M.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

In short, the Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C.A. § 1401(9). A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the State involved; and d) are provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d).

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). An IEP should be developed with the participation of parents and members of a district board of education’s CST who have participated in the evaluation of the child’s eligibility for special education and related services. N.J.A.C. 6A:14-3.7(b). The IEP team should consider the strengths of the student and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluations of the student; the student’s language and communications needs; and the student’s need for assistive technology devices and services. The IEP establishes the rationale for the pupil’s

educational placement, serves as the basis for program implementation, and complies with the mandates set forth in N.J.A.C. 6A:14-1.1 to -10.2.

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, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982), the United States Supreme Court held that a state provides a 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 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, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701. The Act did not, however, 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 addition, the Court noted 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. Therefore, 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 Board will have satisfied the requirements of law by providing the child with personalized instruction and sufficient support services “as are necessary to permit [him] ‘to benefit’ from the instruction.” G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671 (D.N.J. Feb. 27, 2009) (citing Rowley, 458 U.S. at 189). The IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). But an IEP must provide meaningful access to education and confer some educational benefit upon the child. Rowley, 458 U.S. at 192. To meet its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386 (2017).

There are instances where a school district should implement a behavioral intervention plan (BIP) in order to provide a FAPE. The first occurs when a school changes the placement of a child with a disability due to a disciplinary incident. 20 U.S.C. 1415(k)(1). A change occurs when a student is suspended for over ten consecutive school days, or the student receives a series of short-term, related suspensions that amount for more than ten school days in a school year. N.J.A.C. 6A:14-2.8(c). If a change in placement occurs, the IEP team must determine if the behavior was as a result of the manifestation of the student's disability, in which case the IEP team shall conduct a Functional Behavioral Assessment and implement a Behavioral Intervention Plan. 20 U.S.C. 1415(k)(1)(F)(i). The second situation where the IEP team must consider "positive behavioral interventions and supports, and other strategies . . . This is when a student's behavior impedes his or her learning or that of their peers. 20 U.S.C. 1414(d)(3)(B)(i).

In sum, "[t]he educational opportunities provided by our public-school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." Rowley, 458 U.S. at 198. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry, and that "[i]t is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variation in between." Rowley, 458 U.S. at 202.

Regarding the Covid-19 pandemic, in March 2020, the U.S. Department of Education issued an advisory document advising how LEAs should comply with IDEA regulations during the COVID-19 public health crisis. The document was not intended to impose additional requirements on LEAs, nor act as legally binding rules, but rather to provide informal guidance of the Department of Education's interpretation of the IDEA and its implementing regulations in the specific context of the COVID-19 health crisis.<sup>4</sup>

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<sup>4</sup> US Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, (Mar. 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.

The Department of Education provided that if an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.” Ibid., at 2. The Department of Education stated that during this time schools were only required to ensure that “to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP.” Ibid. 1

In 2019, New Jersey issued guidance rescinding prior guidance that allowed for certain therapy and speech-language services to be provided through tele-practice, instead requiring that school districts provide them only in-person. In April 2020, the State Board of Education adopted a temporary rule allowing school districts and agencies to deliver special education and related services to students through tele-health, tele-medicine, electronic communications, remote, virtual, or other online platforms.<sup>5</sup> (modifying N.J.A.C. 6A:14-1.1(d); 14-3.9(a); and 14-5.2.)

Based upon the testimony and documentary evidence presented in this matter, the District provided W.W. with a FAPE during his education at the District. Based on the documentation provided, the District included W.W.’s parents in the IEP process and in his educational placement and services. When a concern arose, the District responded accordingly. There was communication with District personnel, such as W.W.’s case manager in 2018, Kara Taylor, regarding W.W.’s educational placement and progress

From E.K.’s testimony specifically, it appears that the main issues for petitioner which surround this litigation arose in 2019 when W.W. had disciplinary violations. Following the November 2019 incident, Logan indicated in her testimony that the District had recommended a 1:1 aide, counseling, Functional Behavioral Group, social group, etc. However, petitioner did not accept these supports and, indeed, specifically rejected attempts to provide such assistance. The District scheduled W.W. a meeting with the

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<sup>5</sup> NJ Dept. of Educ., Providing Special Education and Related Services to Students with Disabilities During Extended School Closures as a Result of COVID-19, (April 3, 2020), Providing Special Education and Related Services to Students with Disabilities During Extended School Closures as a Result of COVID-19 ([nj.gov](http://nj.gov)).



school psychiatrist, Dr. Hewitt, however W.W. did not attend. Petitioner revoked the District's offering of counseling.

It is clear throughout the testimony and data provided that W.W. demonstrated academic growth during his time at the District, and that the District was attentive to W.W.'s needs and educational plan. W.W.'s ELA Teacher, Contino testified as to her efforts in ensuring W.W.'s progress in reading and writing. Contino stated that W.W. struggled with drawing inferences from reading material, and she focused on those skills. In the Independent Reading Program, W.W. was able to select his own reading material he had an interest in. W.W.'s writing skills improved during his final year with the District. W.W.'s IQ showed an increase from his time with the District, as did his academic scores more broadly. The testing scores (including the WIAT testing categories) also demonstrated improvement in scores from 2017 to 2020. Even setting aside the issues with petitioner's experts provided in this case as described above, their reports largely demonstrated that (1) petitioner showed academic improvement, and (2) that many of the supports recommended by the experts were provided in the District or were offered by the District but not accepted by W.W.'s parents.

Moreover, W.W.'s parents, and particular petitioner, was involved in the IEP process. W.W. was provided an FBA in 2015, and thereafter IEPs and educational planning took place. Petitioner was involved in the IEP processes and had opportunities to express requests. The District offered an FBA and other supports such as counseling. The District also offered numerous modifications for W.W. including: (1) refocusing and redirection; (2) frequently checking for understanding; (3) monitoring on-task performance; (4) providing short breaks for refocusing if necessary; and (5) allowing for repetition or clarification of directions if needed.

Petitioner seems to argue a FAPE was not provided during the Covid-19 pandemic. Petitioner states the BOE "failed to modify the IEP for remote learning to address whether he was even capable of benefiting from remote learning." See Pet'r's Br. 9. However, petitioner does not bring forth any particular arguments that demonstrate that the District was not providing adequate supports during this time as required. Rather, the District has described that they were still involved in ensuring W.W. had adequate

education during this time. Mr. Epstein's line of questioning contained in the following section:

On cross-examination, Mr. Epstein questioned Logan regarding whether the District provided W.W. a FAPE during the Covid-19 pandemic in compliance with federal and state guidance. Logan responded that the District acted in accordance with all guidance issued by the United States and New Jersey Departments of Education. Logan further stated that the District's plan for providing education during the pandemic was approved by the New Jersey Department of Education. When asked why the District did not update W.W.'s IEP to reflect remote instruction at the beginning of the pandemic, Logan replied that she was directed in meetings with the state and county special education directors that this was not necessary. She explained that the District's switch to remote learning was only supposed to be for a two-week period, but after the state of emergency continued the projection for schools reopening was unclear. On redirect, Logan stated the District has approximately 250 special education students, and it would be impossible for the District to schedule 250 IEP meetings with all required team members within the first two months of the pandemic.

infers that W.W. (and, presumably, other students with an IEP) were ill-served as their IEPs were not updated within the first two months of the COVID-19 lockdown which led to remote learning in the vast majority of the state. Such inference would be specious at best and disingenuous at worst.

Petitioner also points out that there was no manifestation determination completed. However, the District details that they were not required to do so as W.W. did not have over ten days of suspension - there were only two one-day suspensions in the 2018-19 school year and one three-day suspension during the 2019-20 school year. Evidence was not presented which would demonstrate W.W., or any other student's, learning was impeded by the scenarios presented.

Based upon the testimonial and documentary evidence presented in this case, I **CONCLUDE** that the Board has proven by a preponderance of the competent and credible evidence that the IEPs offered by the Board provided W.W. with a FAPE with the

opportunity for meaningful educational benefit appropriate in light of W.W.'s circumstances, within the least restrictive environment and that the petition seeking compensatory education fails.

**ORDER**

Based upon the foregoing, it is hereby **ORDERED** that the petition for compensatory education be and is hereby **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019). 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 Programs.



September 29, 2022

DATE

\_\_\_\_\_  
**CARL BUCK III, ALJ**

Date Received at Agency

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

CVB/tat

**APPENDIX**

**WITNESSES**

**Petitioner:**

Geraldine Healy Marini  
Michael McLeod  
Kathleen McCabe-Odri  
Cristopher Lam  
Ellen Topiel  
E.K.

**Respondent:**

Jacqueline Reilly  
Stephanie Logan  
Jennifer O'Brien  
Mary Jane Contino

**EXHIBITS**  
**JOINT EXHIBITS**

**Transmittal Pleadings And Prehearing Order:**

1. Transmittal complete case W.W. - first case [J0001-J0022]
2. Transmittal complete case W.W. - second case (consolidation issue pending as of September 7, 2020 [J0023-J0056])
3. Prehearing Order of August 10, 2019

**Individualized Education Plans And Related Documents:**

4. September 2014- IEP Initial Evaluation Eligibility Paperwork [J0063-J0098]

5. November 12, 2014- Determination of Eligibility Conference [J0099-J0109]
6. February 6, 2015- IEP Annual Review [J0110-J0127]
8. January 20, 2016- IEP [J0131-J0148]
9. May 11, 2016- IEP Annual Review [J0149-J0168]
12. June 7, 2017- IEP Annual Review [J0185-J0201]
13. June 20, 2017- IEP Progress Report [J0202-J0217]
15. October 10, 2017- Reevaluation Planning and Consent [J0220-J0223]
16. November 7, 2017- IEP with Reevaluation and Eligibility [J0224-J0243]<sup>6</sup>
17. 2017-18 IEP Progress Report for Goals and Objectives [J0244-J0254]
18. May 30, 2018- IEP Annual Review [J0255-J0274]
19. April 10, 2019- IEP Annual Review [J0275-J0293]<sup>7</sup>
20. July 2019- Summer Reading – Progress Report [J0294]
21. September 17, 2019- Progress Report for IEP Goals and Objectives [J0295-J0303]
22. June 30, 2020- Progress Reporting [J0304-J0315]
23. 2020-2021 Final IEP for Clearview [J0316-J0334]

**Notices And Signatures:**

24. Notices and Signatures [J0335-J0424]

**Test Results History:**

25. Test Results History [J0425-J0428]

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<sup>6</sup> This exhibit is incorrectly listed in T1 as “Re-Eval Eligibility Meeting-‘17/18”, but this exhibit also includes the relevant IEP.

<sup>7</sup> This exhibit is incorrectly listed in T2 as “Undefined” and cited to on a non-existent page. However, this exhibit is properly identified in the other transcripts. Additionally, in T8, J-19 is identified as simply “IEP”.

**Grades:**

- 26. Fourth Grades [J0429-J0446]
- 27. Fourth Quick Look Up [J0447]<sup>8</sup>
- 28. Fifth Grades [J0448-J0460]
- 29. Fifth Quick Look Up [J0461]<sup>9</sup>
- 30. Sixth Grades [J0462-J0479]
- 31. Sixth Quick Look Up [J0480]<sup>10</sup>

**Evaluations Conducted By School:**

- 32. October 2013- Psychoeducational Evaluation [J0481-J0486]<sup>11</sup>
- 33. May 15, 2014- Nemours Follow-up Visit [J0487-J0489]<sup>12</sup>
- 34. September 2014- Psychological Evaluation [J0490-J0503]
- 35. October 2014- Learning Evaluation [J0504-J0509]
- 36. October 2014- Neurodevelopmental Reassessment [J0510-J0514]
- 37. October 2014- Speech and Language [J0515-J0519]
- 38. October 14, 2014- Occupational Therapy Evaluation [J0520-J0524]
- 39. October 7, 2015- Audiologic Evaluation and Central Auditory Processing Two Drafts [J0525-J0537]
- 40. August 14, 2015- FBA and Behavioral Recs Green [J0538-J0545]
- 41. October 30, 2015- Neuropsychological Evaluation [J0546-J0564]
- 42. October 2017- Psychological Evaluation by Taylor [J0565-J0573]

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<sup>8</sup> Referenced in T1 as “Report Card—Fourth Grade”.

<sup>9</sup> Referenced in T1 as “Report Card—Fifth Grade”.

<sup>10</sup> Referenced in T1 as “Report Card—Sixth Grade”.

<sup>11</sup> This exhibit is mistakenly referred to in T1 as a “Psychological Evaluation”.

<sup>12</sup> This exhibit is incorrectly referred to in T2 as “Morris-Dupont Medical Recs—2014”.

43. October 13, 2017- Learning Evaluation by Reilly [J0574-J0583]

## **INDEPENDENT EVALUATIONS**

44. AT Evaluation IEE [J0584-J0598]

45. Educational Assessment IEE [J0599-J0610]

46. FBA IEE [J0611-J0624]

47. OT IEE [J0625-J0633]

48. Psychiatrist Evaluation Dr. Lam IEE [J0634-J0635]

49. Psychological IEE [J0636-J0643]<sup>13</sup>

50. Reading Evaluation version, dated January 14, 2020, odd removed IEE [J0644-J0684]

52. Speech Language IEE [J0730-J0763]

## **Various School Files:**

53. Behavioral File 1 and 2 [J0764-J0801]

54. Counseling Logs [J0802]

55. Discipline [J0803-J0807]

56. Health [J0808-J0840]<sup>14</sup>

57. HIB Letter [J0841]

58. HIB [J0842-J0846]

60. Speech Logs and Emails [J0848-J0865]

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<sup>13</sup> Identified in T8 as "Rowan Report".

<sup>14</sup> This exhibit is identified in T11 as "Vaccination Schedule".

## **RESPONDENT'S EXHIBITS**

### **Emails And Correspondence:**

1. General Emails and Correspondence [R0001-R0042]
2. Jennifer O'Brien Email [R0043-40044]
4. Maryjane Contino Emails [R0049-R0069]<sup>15</sup>

### **Independent Evaluation Issues:**

7. December 19, 2019- Email with caps 12.19.19 and ATTACHMENT [R0083-R0090]
8. December 30, 2019- Email may proceed with IEEs 12.30.19 [R0091-R0092]<sup>16</sup>
9. 2020 Letters from District re highest rate [R0093-R0098]<sup>17</sup>
10. August 5, 2020- New IEE Discovery Invoices Paid [R0099]<sup>18</sup>
11. Invoice GrowNOW—Speech Invoice 2500 [R0100]
12. Invoice Maxability Learning Reading invoice 3500 4.18.2020 [R0101-R0103]
13. Invoice Maxability Learning Reading invoice 3200 6.1.2020 [R0104]
14. Invoice OT Professional Therapy Services Invoice [R0105]
15. Invoice Partners in Learning FBA invoice Letter [R0106]
16. Various W.W. Independent Evaluation Emails August 5, 2020 [R0107-R0152]

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<sup>15</sup> Transcript T5 mistakenly lists that R-4 is Ms. Contino's Resume and R-26 is email correspondence from Ms. Contino. The email chain is R-4 and Ms. Contino's Resume is R-26.

<sup>16</sup> This exhibit is mistakenly referred to in T3 as "Board cap requirements".

<sup>17</sup> This exhibit is mistakenly referred to in T3 as "Individual evaluator's payments".

<sup>18</sup> This exhibit is mistakenly referred to in T3 as "Evaluators board cap list".



**Petitioners' Documents Produced (Partial):**

18. Emails [R0159-R0193]<sup>19</sup>

**Resumes:**

26. Contino Maryjane Resume [R0305]<sup>20</sup>

30. Logan Stephanie Resume [R0309-R0311]<sup>21</sup>

32. Obrien Jennifer Resume [R0314-R0315]

33. Reilly Jacqueline Resume [R0316]

**PETITIONER'S EXHIBITS**

1. Parent Request for Independent Evals

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<sup>19</sup> This exhibit is identified in T3 as "Parent, attorney, eval e-mails".

<sup>20</sup> See Footnote 10.

<sup>21</sup> This exhibit is incorrectly referred to as "R-3" in T3.