



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 11512-22

AGENCY DKT. NO. 2023-35162

B.C. AND S.C. ON BEHALF OF J.C.,

Petitioners,

v.

CHERRY HILL TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Hillary D. Freeman, Esq., for petitioners (Freeman Law Offices)

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, P.A., attorneys)

Record Closed: June 3, 2024

Decided: July 10, 2024

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, B.C. and S.C. (collectively “petitioners”) requested a due process hearing on behalf of their daughter, J.C., who is classified as eligible for special education and related services. Petitioners assert that the Cherry Hill Township Board of Education (“Board” or “District”) failed to provide an individualized education program (IEP) that delivered a free

appropriate public education (FAPE) to J.C. for the 2022–2023 school year. Petitioners seek compensatory education and an IEP that places their daughter in an out-of-district program that specializes in educating students with J.C.’s needs.

PROCEDURAL HISTORY

Petitioners filed a request for a due process hearing on November 16, 2022, which was transmitted to the Office of Administrative Law (OAL) and filed on December 23, 2022. Thereafter, the parties participated in a settlement conference; however, the parties were unable to resolve the matter, and it was assigned to the Honorable Tama B. Hughes, ALJ, on January 27, 2023. An initial call was held on January 31, 2023, at which time the Board’s attorney represented that new counsel would be taking over the case on behalf of the Board.¹ A status call was held on February 7, 2023, at which time petitioner’s counsel requested and obtained the consent of the Board’s counsel to amend the complaint. On February 23, 2023, petitioner filed an Amended Petition for Due Process. The Board’s answer was filed on February 27, 2023. On April 28, 2023, an Order was entered compelling respondent to permit observation of J.C. by Dr. Gallagher.

Multiple hearing dates were set in this matter; however, they were subsequently adjourned at the parties’ request to facilitate ongoing settlement discussions.² The matter was heard on February 23, 2024, February 26, 2024, March 4, 2024, and March 5, 2024. The record remained open to allow the parties the opportunity to obtain transcripts and provide written summations. Written summations were submitted in lieu of a final day of hearing and received on June 3, 2024, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The following facts were derived from the testimony and documentary evidence as being undisputed, and I thus **FIND** as **FACTS** the following:

¹ Eric Harrison, Esq., substituted in for the Board’s attorney, Robin Ballard, Esq.

² Hearing dates were set for April 21, 2023, May 4, 2023, May 31, 2023, June 20, 2023, July 26, 2023, October 11, 2023, November 1, 2023, and January 26, 2024.

J.C. was born on April 14, 2015, and is currently diagnosed with autism spectrum disorder and mixed expressive receptive language disorder. She was previously identified as eligible for special education and related services on April 9, 2018, at the Barclay Early Childhood Center due to a classification of preschool child with a disability. (R-20.) She participated in a half-day special education class for preschool disabilities, speech therapy, and occupational therapy until September 8, 2020, when she exited due to COVID and virtual learning. (ibid.)

Thereafter, petitioners enrolled J.C. in the Applied Behavior Analysis (ABA)-based program at Amazing Transformations. In April 2022 petitioners requested that J.C. be referred to the child study team to start the determination and planning process for the 2022–2023 school year. On April 26, 2022, an evaluation planning meeting was held, and an Initial Consent to Evaluate was received on April 28, 2022.

Evaluations that were conducted and reviewed as part of the IEP development included: a May 17, 2022, Augmentative Communication Evaluation Report (R-14); a June 1, 2022, Interactive Kids Consultation Summary (R-15); a June 5, 2022, Psychological Assessment (R-16); a June 29, 2022, Educational Evaluation (R-18); and a July 21, 2022, Speech and Language Evaluation (R-20).

Augmentative Communication Evaluation—May 17, 2022, evaluation date. (R-14.)

This evaluation was conducted by a third-party evaluator. J.C. was described as a multimodal communicator who can communicate her wants and needs via gestures, sign, vocalizations, words approximations, and augmentative and alternative communication (AAC). The evaluator consulted with J.C.'s team at Amazing Transformations, who reported that J.C. can independently utilize her communication device to make requests for preferred items such as food and places. Without the assistance of her augmentative communication system, J.C.'s methods of communication are not efficient or effective. Several recommendations were made as it related to AAC equipment that J.C. would benefit from, the language system (software), accessories, customization of some of the pages within the software (i.e., change drink to her favorite or under “eat” put in J.C.'s preferred foods), and access functions. The report also set

forth some functional communication goals—socialization goals, requesting goals, answer questions goals, conversation goals — most with mastery criteria that were less than 100 percent.

Interactive Kids Consultation Summary—June 1, 2022, evaluation date. (R-15.)

This evaluation was done by the District’s outside provider. The report noted that J.C.’s primary form of communication is through her AAC device and that she needs assistance using her device during social interactions but has demonstrated progress in independently utilizing it in relation to other situations. J.C. has a 1-1 registered behavior technician to help manage interrupting behaviors, facilitate the use of functional communication, and help shape social skills. Frequent prompting is needed to teach/shape social skills and to assist J.C. with expanding the vocabulary she has mastered on the AAC device. Program staff recommended that J.C. have 1-1 supervision at all times due to her history of aggression, self-injurious behavior, and eloping.

It was reported that J.C. shows signs of being anxious in certain situations. Loud noises were identified as “non-preferred,” and she uses noise-cancelling headphones to help manage these situations. J.C. responds well to hands-on learning as well as video modeling. Effective strategies have included video modeling, role play, and modeling skills in the moment. J.C. also has great receptive skills. Her program has primarily consisted of natural environment teaching. She also benefits from routine and structure. Visual schedules have been a successful tool for J.C. for tracking daily tasks and teaching her new self-help routines.

Staff also reported that J.C. was working on self-help. Her program at Amazing Transformations also targeted social skills as well as individual self-regulation tools. Staff noted that in an effort to self-regulate, J.C. will remove herself from the task or individual that she no longer wishes to engage with. Social interactions require modeling of social play. If given the choice, J.C. prefers to play with a toy on her own.

When interacting with peers, J.C. responds most often to female classmates. She will typically ignore new staff and students, and it takes time for her to adjust to new people.

Interrupting behavior has included self-injurious behavior—flopping backwards onto the floor, hitting herself in the head, and adult-directed aggression. Denied access has been noted to cause interrupting behaviors. Transition can lead to interfering behaviors. When J.C. doesn't want to engage in a non-preferred activity, she will independently ask for a break. Current supports at Amazing Transformations include an individual schedule that has forced-choice reinforcement built in, fidgets, and a visual timer for transitions; blocking and redirecting has also been an effective strategy for her.

The staff also reported that it is important for J.C. to spend an extended period of time with individual staff as well as in the environment for her to “pair.” Tools such as video modeling have been used to assist J.C. in engaging with new environments. She enjoys working with staff that are energetic and engaging, even goofy at times. She has preferred adults and displays a lack of trust for people she doesn't know. If J.C. decides to not engage with a staff member or student that she does not prefer, she will avoid eye contact and orient her body away from the unwanted contact.

J.C. benefits from frequent sensory breaks, which may include movement activities, the use of kinetic sand, water play, or slime. She does not prefer traditional seating, often using a bean bag chair or yoga ball. Her favorite reinforcers include baby dolls, barbies, and scented slime, among other things.

Recommendations made by the representative from Interactive Kids included:

- Substantial time should be spent pairing with J.C. before placing demands. Allow her to acclimate to her new classroom, new staff, and new classmates before placing demands.
- When pairing with J.C. provide fun, energetic attention.
- It would be beneficial to prepare her in advance for the change in placement.

- Gradually increase demands as J.C. becomes more accustomed to her new classroom placement.
- When transitioning to a location where a group of students will be present (gym, lunch etc.), transition J.C. to that location prior to the rest of the students arriving.
- Carry headphones to all locations in the event J.C. needs access to them.
- Continue to target increasing social skills.
- Focus on increasing independent functional communication skills.
- Prepare J.C. for transitions by utilizing a visual schedule, timer, and by giving transition warning.
- Build frequent, non-contingent movement breaks into J.C.'s schedule.

Psychological Assessment—June 5, 2022, evaluation date. (R-16.)

This assessment was performed by the District's psychologist. The report noted that J.C. has difficulties with expressive and receptive language, behavior, and functional skills. She has an augmentative device and can request food and activities. She is described as a sensory seeker who enjoys swimming and jumping on the trampoline. She also likes to paint with her hands and fingers. Petitioners were concerned about J.C.'s transition into a more structured classroom setting. J.C.'s gross motor skills appear to be adequate, but her fine motor skills are an area of concern. Safety is another area of concern because J.C. can throw herself on the floor, pick up food from the floor and eat it, or drink or eat other people's food, and engage in self-injurious behavior.

The Wechsler Nonverbal Scale of Ability (WNV) was administered. J.C. was upset throughout, so her scores should be interpreted with caution. According to the test results, J.C. is currently functioning within the very low range of intelligence overall with a full scale IQ standard score of 39 based upon her performance on two core subtests. Due to J.C.'s difficulties with fine motor skills, the Coding subtest was unable to be administered. On the Matrices subtest, J.C. placed within the very low range with a "T" score of a 19. On the Recognition subtest, J.C. placed within the very low range with a T

score of a 15. On the Object Assembly subtest, J.C. earned a very low T score of a 27. This was her highest score and can be seen as a personal strength for J.C. comparatively.

J.C. was also evaluated using the Vineland-3 Comprehensive Parent/Caregiver Form, which was completed by the petitioners. On the Adaptive Behavior Composite (ABC), she scored 50, well below the normative mean of 100. The ABC score is based on scores from three specific adaptive behavior domains involving communication, daily living skills, and socialization. J.C.'s communications standard score was 32, which is well below the average range (percentile rank >1). J.C.'s standard score for Daily Living Skills was 59, well below the average range, and corresponds to a percentile rank of >1. This domain was a relative strength for J.C. comparatively. Her score on the Socialization domain was 42, which corresponds to a percentile rank of >1. The two other domains—Motor Skills and Maladaptive Behaviors—were also included on this measure. J.C.'s motor skills were scored at 71, which is viewed as an area of strength. Her gross motor skills were rated significantly higher than her fine motor skills. On the Maladaptive Behavior domain, J.C. received v-scale scores of 15 for internalizing behaviors and 18 for externalizing behaviors.

Educational Evaluation—June 29, 2022, evaluation date. (R-18.)

This evaluation was conducted by the District's learning disabilities teacher consultant. Petitioner reported to the evaluator that J.C. demonstrates challenges with expressive and receptive language, behavior, and functional skills. She utilizes an augmentative communication device and can request foods and activities. She is a sensory seeker. She loves to swing and jump on the trampoline and can balance. Gross motor skills are strong. Fine motor skills are an area of need. Additionally, safety is of particular concern at this time. J.C. may hit the back of her head, throw herself to the floor, or pick up food from the floor and eat it. Petitioners are concerned about J.C.'s self-harming behaviors as it relates to her transition into a more structured program/back to the classroom. Tantrums may result in her hitting her head on the floor.

On January 26, 2017, J.C. was diagnosed with autism spectrum disorder (primary encounter diagnosis), mixed receptive-expressive language disorder, and prematurity.

An observation was conducted at Amazing Transformations, wherein it was noted that J.C. is in a classroom with eleven adults and six children. Near the end of the observation, an additional two students joined the group. J.C. had a 1-1 aide who sat next to her and appeared to support her engagement in the play and in use of her augmentative communication device. She took data on J.C.'s goals/behaviors as prescribed by her plan. Data was taken every minute towards her goals.

At the time of observation, the kids were engaged in the game of letter bingo and then later object bingo. J.C. used her communication device, prompts, and visual aids. She sat on a peanut-shaped therapy ball as alternative seating and was able to bounce to provide sensory input. During the game, J.C. matched some letters. She sat quietly and attended to the activity. Redirection to the activity was not required. She took turns with prompting and adult support. At times, self-stimulatory behaviors (arm flapping, vocalizations when it was her turn), occurred. With the use of her device, she made a request for "I want cereal." The request was immediately honored. As she played, she ate her cereal and potato chips. She responded positively to prompts for sharing with her peer. She also received praise for successful matching during the game. She interacted silently with the adults in the room and was highly involved in the activity. She was curious about the observer, frequently tilting her head and looking at her. Throughout the observation, J.C. had access to her visual schedule, water bottle, communication device and headphones, and adult support.

Tests administered: Child Development Inventory. This inventory requires parents to respond to items that measure a child's development of social, self-help, gross motor, expressive language, language comprehension, and letter and number skills.

Social—J.C. usually obeys when asked to do something, follows directions during supervised group activities. Accepts correction. Does not fit well into groups (listening, sharing, taking turns, and contributing). Does not show affection.

Self Help—eats with spoon and fork and drinks from a cup. Can wash and dry her hands. Remembers where things are kept in the house. Tries to put her shoes on. Undresses w/o help. Needs help brushing

her teeth and support for toileting. May need help for eating dressing and washing.

Gross motor—can walk, run, kick a ball, and hop. Can stand on one foot and plays on playground equipment. Plays catch with other children, has good balance and coordination for physical play.

Fine motor—places puzzle pieces into a puzzle board. Colors in a coloring book. Draws or copies horizontal and vertical lines, builds with blocks, does not draw or print.

Language—With the support of her augmentative device, J.C. has a vocabulary of 20 or more words. She names basic shapes, names days of the week, makes requests for food. She understands the concepts of “off and “on,” can follow simple directions and understands “no.” She does not have a large vocabulary.

Letters and Numbers—Recognizes at least 5 letters of the alphabet. Does not print her name. Does not recognize numbers.

Noted areas of concern:

- Does not talk well for her age
- Speech is difficult to understand
- Does not seem to understand well
- Acts younger than her age
- Does not pay attention
- Cannot sit still
- Seldom plays with other children

The Child Development Inventory ranged from 2.7 years (letters) to as low as 13 months (language comprehension).

In summarizing the evaluation, the evaluator stated that J.C. attends Amazing Transformations, where she is in the ABA intervention program with individual assistance. The Child Study Team has recommended placement in the self-contained class as well as related services including occupational therapy (OT), speech and language therapy, and assistive technology. Supports include access to an educational assistant, as well as modifications and accommodations.

J.C. demonstrates challenges with expressive and receptive language, behavior, and functional skills. She uses an augmentative communication device and can request foods and activities. She is a sensory seeker—loves to swing and jump on a trampoline and can balance. Motor skills are strong. Fine motor skills are an area of need. Safety is of concern as she may hit the back of her head, throw herself on the floor, eat food from the floor, or eat or drink other people's food/drink. She also has self-harming behaviors as related to a transition into a more structured program/back to the classroom. Tantrums may result in her hitting her head on the floor.

Parents completed the child development inventory—based on parents' reporting—J.C. presents with global delays for social, self-help, gross motor, fine motor, language, and early academic skills.

On August 18, 2022, an initial eligibility determination was made, and the initial IEP meeting was held. On August 30, 2022, initial consent to implement the IEP was obtained, and, thereafter, on September 6, 2022, the initial IEP was implemented.

Summary of Testimony

Allyse Karakashian (Karakashian) was qualified and testified on behalf of the Board as an expert in the field of behaviorism. She is a certified behavior analysis who is employed by Interactive Kids as a behavioral consultant. Interactive Kids contracts with the Board to provide services to the students in the District. In general, as part of her responsibilities, she is assigned students within the District whom she is tasked with observing and identifying maladaptive behavior, taking data, then taking that data and make recommendations—creating behavior plans and strategies to utilize proactively and reactively to manage the observed behaviors. Karakashian went through an example (i.e., calling out instead of raising a hand), and how the negative behavior would be managed, data collected, and a determination made on whether the behavioral plan was effective.

She became familiar with J.C. in August 2022 when J.C. was assigned to her caseload for the 2022–2023 school year at the Horace Mann Elementary School (School).

She attended the virtual IEP meeting in August 2022, at which time she met the petitioners. Under the mandates of the IEP, depending on the frequency and duration of the monthly observations, she was tasked with observing J.C. and taking data. At the time of the meeting, she learned that prior to enrollment at the School, J.C. had attended Amazing Transformations, a private school that is behaviorally based and not curriculum driven. (R-12.) The school manages behavior and teaches skills, as opposed to academics.

She was familiar with the June 1, 2022, consultation summary that was completed by her colleague, who had gone to Amazing Transformations to observe J.C. in her then-current environment. (R-15.) The information collected was used to help prepare J.C.'s program under the IEP.

The report reflected that J.C. had attended Amazing Transformations for the past year and a half. Prior to that, she attended the Barclay Early Childhood Center. J.C. was on a list to receive at-home ABA services through Amazing Transformations. J.C.'s primary form of communication was through the use of an AAC device. The AAC assists children in learning how to speak and acts as a form of communication. In J.C.'s case, she needed assistance in using her device, which meant that she would need more assistance in using the device in an academic setting.

She was familiar with the school's autism program where J.C. was placed, and there was nothing in the program that would impede J.C.'s ability to use her AAC. Many other students had gone through the same program and used the device.

The report also noted that J.C. had a history of aggression, eloping, and self-injurious behavior. J.C. had a 1-1 registered service technician to help manage interrupting behaviors, help facilitate the use of functional communication, and help facilitate appropriate social skills, and frequent prompting was needed.

According to Karakashian, it is not unusual or out of the ordinary for a student to have a 1-1 aide in the classroom. Nor was it unusual to have a student attend the program that had a history of eloping, aggression, and/or self-injurious behavior, which is why a

1-1 aide would be required. After reviewing the report and attending the IEP meeting, she believed that the autism classroom was the appropriate placement for J.C.

One of the things that she recalled petitioners stating at the IEP meeting was that J.C. took a long time, sometimes up to six months, to “pair” or build a rapport with staff members and start working with them. While not unheard of, she believed that six months was a long time to build a rapport. She also recalled that B.C. was upset at one point, believing that S.C.’s concerns were being ignored or not considered. One such concern was the request by the petitioners for an in-class resource in addition to a 1-1 aide.³ Another concern was their disapproval of use of restraints on their daughter. Based upon the information available at that time, she (Karakashian) did not believe that an in-class resource setting was appropriate for J.C.⁴ In her opinion, J.C. would not receive the “supports” that she needed. The curriculum was different, the setting was too fast-paced, and the academics would be too challenging for J.C. at that time. In all, she felt that such an environment would be too overwhelming for J.C. As it related to the parents’ concern over the use of restraints, it was explained to the petitioners that restraints may be necessary if J.C. attempted to elope or if she demonstrated aggression towards herself or someone else. According to Karakashian, J.C.’s aide received restraint training as did most staff members.

In going through the August 17, 2022, IEP, she recalled going through the summary of evaluations, including J.C.’s psychological evaluation and cognitive profile, and believed that the recommendation that she be placed in the autism classroom was appropriate. (R-21.) She did not find J.C.’s behavioral evaluation, which noted behavior that included eloping, self-injurious behavior, and adult-directed aggression, to be unduly

³ Karakashian testified that an in-class resource could be an inclusion classroom with two teachers—a special education teacher and general education teacher who would offer more support. In addition, there would be a 1-1 aide to help J.C. both academically and behaviorally.

⁴ According to Karakashian as noted in the August 17, 2022, IEP, the parents’ request for an in-class resource was considered and rejected based upon J.C.’s present levels of academic and functional performance and individual needs as noted in the IEP, “supports such as but not limited to individual assistance, behavioral consultation, speech and language therapy, occupational therapy, and assistive communication are needed to help her make progress within the educational environment. Based upon the LRE discussion, the team does not anticipate these supports to be effective in supporting [J.C.’s] progress within a general education classroom such that she would make meaningful progress towards her goals and objectives” (R-21.)

concerning—noting that such behavior could and would be addressed through a Behavioral Intervention Plan (BIP) in conjunction with a 1-1 aide to implement it.

In going through the behavioral interventions that were proposed in the IEP, while she herself did not make the recommendations in the IEP, she believed that they were appropriate for J.C. She was cognizant of the fact that J.C. had not been in a public school setting for over a year and a half and that the transition from a private setting to a public school setting was going to be difficult. To assist in this transition, there were a lot of proactive strategies and supports in place prior to her starting school.

She conducted her first in-class observation of J.C. on September 13, 2022, at which time she took data and thereafter made data-driven recommendations based upon the observations. (R-21.) Including J.C., there were six children in the classroom. During her observation, J.C. attempted to elope from the building to go to the playground, which, according to Karakashian, is not an uncommon behavior in an autistic classroom. For this behavior, she recommended that a visual schedule be put in place to create predictability so that J.C. would know what was coming next. Data was charted during this observation that would ultimately be used to show any progress or regression. It also gave the School an idea of how J.C. was able to work in the classroom environment. In J.C.'s case, some of the problem behaviors that were noted were vocal disruptions, tantrums, and self-injurious behavior. Among her recommendations was to collect data on partial intervals of thirty minutes on the behaviors of concern. If the behavior occurred during the interval, the occurrence was noted. There was also compliance—which is whole interval reporting—this report notes whether J.C. complies with each directive that is given during the thirty-minute interval to determine compliance for that interval.

She was aware that Dr. Gallagher, petitioners' expert, criticism of the data collection in thirty-minute intervals. She disagreed with Dr. Gallaghers assessment regarding the thirty-minute intervals because if anything, partial intervals overestimate the behavior.⁵ Thirty-minute intervals in a school setting provides the District with a picture

⁵ Later on in her testimony, Karakashian discussed why thirty-minute intervals were appropriate in the school setting as opposed to a clinical setting, explaining that they are two different environments. Unlike a clinical setting, a school setting has an academic curriculum that the school is required to adhere to and

of not how many times a behavior is occurring—rather, that the behavior is occurring. In this regard, as part of the recommendations under the IEP, the data collected during the week of September 13, 2022, was to be reviewed with the 1-1 aide (Kim). According to Karakashian, she personally worked with and trained both the aide and classroom teacher in collecting the data. She also trained them in how to use J.C.’s AAC device, and how to prompt J.C. in how to make a request/demand.

Also recommended was functional communication training. This included “manding,” which is a command/demand—if J.C. wanted something, say for instance a preferred item, J.C. would be taught how to request it. It was a way to teach J.C. how to properly request something instead of using interfering behaviors. It was a method of replacing interfering behavior by using the functional equivalent. “Manding” was targeted first to help J.C. to tell us what she needed in the moment instead of relying upon negative behavior. Maria Alpizar (Alpizar) was J.C.’s teacher in the 2022–2023 school year, and she (Karakashian) worked effectively and collaboratively with her during the year as she did with J.C.’s aide, Kim. Another recommendation was to provide J.C. with edible reinforcement (food), when transitioning from preferred to nonpreferred items or activities. She found that this reinforcement worked for J.C. and helped reduce her negative behavior when transitioning from preferred to nonpreferred activities.

The IEP also recommended that for tantrum behavior, the staff should continue to maintain the original demand that triggered the behavior. The goal here was to have the child understand that interfering behaviors, such as a tantrum, will not get them out of the original demand/task in the school setting. It is to reinforce that if they do their work, then they will have access to what they want. Tokens were also recommended, which are used to reinforce positive behavior. She believed that the use of tokens was appropriate for J.C.

Her next observation of J.C. took place on September 16, 2022. (R-23.) According to Karakashian, in September 2022 she was frequently in the classroom to observe J.C.

is bound by rules and regulations. Even if data was collected in fifteen-minute increments, J.C.’s instruction would not have changed, nor did she believe that her progress would have changed.

and help support the staff.⁶ During this observation, as with most of her observations, she worked one on one with J.C. She did this to both support J.C. and also model what she did for the staff so that they could learn how to interact with J.C. and how to implement strategies. For the most part, everything that she recommended worked with J.C. During this observation she “manded” with J.C. while on the playground. She went through how she prompted J.C. to request more pushes on the swing by “signing.” After several trials, J.C. began to independently request to be pushed by signing “more.” When it was time to leave the playground, while there was low-level vocal disruption by J.C. before going inside, once inside, she transitioned without engaging in a full-on tantrum. A copy of her consult summary was provided to J.C.’s teacher, Alpizar, later that day. (R-24.)

Karakashian went on to state that she analyzed the data that had been collected from September 2022 to December 2022 by both herself, and the staff, and graphed it. (R-41.) In highlighting some of the data results, she noted that vocal disruptions (crying/whining) occurred 41 percent of reported intervals and decreased in frequency over time. Self-injurious behavior, such as hitting herself in the head with a closed or open fist or on a hard surface such as the floor, had a slight decline in behavior.⁷ The fact that there was only a slight decline did not concern her tremendously, noting again that even J.C.’s mother commented that it took a long time for J.C. to pair with her environment and staff. As it relates to elopement, the behavior did not occur. The one instance where she did engage in elopement as observed during the initial consultation in September 2022 was prior to the data collection period, therefore not included. Because the behavior was not observed during the data collection period, it was subsequently removed from the data collection. (R-46.) In going through the tantrum data, she noted that there was a decline in the behavior, which was a positive. While there was still a 12 percent of recorded intervals of tantrum behavior, it was on a downward swing.⁸ As it relates to the compliance intervals that required J.C. to follow

⁶ According to Karakashian, she was in the classroom at least two days a week to observe J.C., and if she was not in the classroom to observe J.C., she was there for other children.

⁷ According to Karakashian the staff was always concerned when J.C. attempted to hit her head on the floor. If they saw a precursor in behavior, they would put soft objects on the floor such as pillows to block her from hitting her head directly on the floor.

⁸ Karakashian defined a tantrum as an instance of vocal disruption paired with elopement, and/or self-injurious behavior, that lasts longer than thirty seconds. Timers were in the room which assisted the staff with the interval timing.

concise demands with no more than two prompts per demand, J.C. demonstrated compliance in about 78 percent of the recorded intervals. (R-41.)

On December 20, 2022, direct observations were made of J.C. during intensive teaching trials (ITT), which is teaching in trials instead of a whole lesson. One of the things that was noted during the ITT sessions was that J.C.'s compliance and accuracy increased once she understood what was expected of her. She went through the behaviors that were observed during the sessions (body tensing and vocal disruption), triggering events (antecedent demand), and the consequence of her behavior, which was "no reaction." According to Karakashian, the consequence of no reaction by the staff was to withhold attention so that the behavior does not become attention-maintained.

She was aware of Dr. Gallagher's criticism that J.C. was observed crying a great deal and nothing was done. She believed that criticism was unwarranted in J.C.'s case because the more attention J.C. received for her vocal disruption, the more the behavior increased. One of the recommendations she made as a result of the December 20, 2022, ITT was to continue to temporarily increase the rate of reinforcement that J.C. received when she is in an escalated state prior to the beginning of the ITT. The reason she suggested this was to facilitate J.C. achieving success and help with her escalated state. This was important prior to the beginning of the ITT to help her with a successful session. She also suggested mixing mastered targets in between new targets to help momentum. This was to mix something that J.C. liked and was good at before presenting her with a more difficult task to build behavioral momentum. (R-42.)

She is familiar with J.C.'s Progress Report dated December 2022. The purpose of the report was to show her gains and see how she had progressed in each domain—speech, occupational therapy, behavioral, daily living skills, and academics. (R-43.) In addition to monitoring J.C.'s behavior, she had an opportunity to observe and actually assisted in training staff on how to implement the goals put forth for J.C. in the other domains. She believed at the time, that the levels of progress noted in J.C.'s progress report accurately represented J.C.'s progress and indeed showed improvement.

In January 2023, J.C.'s data interval sheet was updated to remove interval data for elopement, and because J.C. started knocking her knees together in a forceful manner, she added the behavior to the data collection so that the behavior could be tracked, and accurate and effective strategies could be developed. She hypothesized that the knee-knocking was an "extinction burst," because it started occurring when the vocal disruptions started decreasing. To address the behavior, they brought in a "peanut ball" that she could sit on, which both precluded her from knocking her knees and addressed her sensory needs. The peanut ball was introduced after collaborating with the occupational therapist. (R-46.)

Another data summary was done on January 19, 2023, which reflected a decrease in vocal disruption, self-injurious behavior, and tantrums, and an increase in compliance. In sum, J.C.'s negative behavior decreased, and her positive behavior increased. (R-50; R-66.)

In going back to October 2022, she was present at the thirty-day IEP review meeting. It was clear at that time that petitioners did not want J.C. in the District's program as evidenced by the fact that they had an independent evaluator (Dr. Gallagher) come in to observe J.C., and by their responses to questions posed during the meeting. She was also present when the parents' expert, Dr. Gallagher, observed J.C. in the classroom a couple of days prior. At the time of observation, J.C.'s behavior was the same or similar to what she had been exhibiting over the two prior weeks of school. Karakashian went on to note that at the time of observation, J.C. had only been in school for approximately sixteen days. The parents at the time of the meeting were concerned with ITT as a means of teaching—believing that J.C. did not respond well to discrete trial teaching, which is a form of ITT. She informed the parents that J.C. was making progress and doing well and provided the parents with the additional behavioral information. Also addressed were the parents' concerns regarding usage of visual schedules and timers, noting that they helped J.C. make choices and transition.

Also discussed at the meeting was J.C.'s use of the AAC and her educational performance. At no time prior to January 2023, which is when they received

Dr. Gallagher's report, was there any criticism of the program by Dr. Gallagher or any other professional.

In February 2023, another data summary report was completed because the operational definition for self-injurious behavior was amended to include knee-knocking. In review of the report, the data revealed an increase in self-injurious behavior. This was not surprising because the knee-knocking had been added to the operational definition. (R-59.) As the year went on, however, this behavior decreased. (R-77.) The fact that J.C.'s self-injurious behavior did not decrease dramatically as of March 2023 did not mean that the interventions were failing; again, the operational definition of self-injurious behavior had been amended to include knee-knocking. Had that not been included, the 3 percent decrease in behavior would have been more dramatic.

Karakashian went on to state that during an observation on March 9, 2023, J.C. was having difficulty during large group activities wherein she would engage in negative behavior—crying, self-injurious behavior, and a body tensing tantrum—when access to for instance, her iPad, was terminated or delayed. Again, this did not concern her on a larger scale because J.C.'s behaviors were still decreasing and demands still elicited negative behavior but not as intensely or as frequently. In the large group activities, J.C. was still having difficulties understanding what was expected of her. To address J.C.'s behavior, she recommended increasing the rate of reinforcement during large group activities such as one minute sitting with a calm body during large group and thirty seconds of access to her iPad or preferred item. (R-61.) These recommendations were implemented going forward.

She reviewed J.C.'s March 2023 Progress Report and believed it accurately described how J.C. was performing in the classroom. (R-62.) In April 12, 2023, she noted that J.C. was now writing her name with only verbal reminders of which letter will come next. (R-64; R-65.) She felt that this was a significant achievement for J.C. from when she started school in September 2022 when such tasks were difficult and challenging for her. At the time of her observation, no interfering behavior was observed, which was very positive.

In going through skill-acquisition data, which is used for teaching fields such as academics, it is different in that it requires a “yes” or “no” of whether J.C. was able to demonstrate the skills or behavior. It is collected daily as opposed to all day. Karakashian stated that she reviewed this data as part of her work as a behaviorist. (R-65; R-79.) Based upon this data, it is clear that J.C. made skill-acquisition progress in addition to behavioral progress.

Karakashian went on to state that all the behavioral data that was collected by herself and J.C.’s teachers was placed into an excel spreadsheet that had automatic calculations that would come up with the percentages when the behavior occurred. (R-66.) Additionally, as part of her oversight, she also reviewed Alpizar’s communication log with the parents, which reports what J.C. worked on during the school day. (R-67.) The log reported both good and bad incidents that occurred during the day. In review of the log, it was her belief that over the course of the year, J.C. had made meaningful progress.

In January 2023 she learned that Dr. Gallagher had issued a report that was critical of the District. (R-26.) At no time prior to Dr. Gallagher’s observation or after did she speak to or hear from Dr. Gallagher. Nor did Dr. Gallagher come back in to observe J.C. in the classroom setting prior to the issuance of the report. She disagreed with several of the observations and criticisms that Dr. Gallagher noted in her report. One such observation surrounded how the staff handled J.C. when she exhibited crying behavior when demands were placed on her, or when items were removed, and a demand was made. Dr. Gallagher criticized how the staff handled J.C.’s crying episodes—commenting that the staff lacked compassion and ignored J.C., and that they had not yet met a level of pairing with J.C. upon which J.C. would comply without vocal protesting or more intense behavior.

Karakashian believed that such criticism was unwarranted. While every behaviorist has a different approach, J.C. had been in the classroom a little over two weeks, and by her parents’ own admission it takes J.C. a very long time to pair with someone. She herself is not a huge fan of noncontingent reinforcement because it inadvertently reinforces negative behavior and there is no real research to back up use of noncontingent reinforcement, which is what Dr. Gallagher recommended. Additionally,

she had already started working on pairing with J.C. and working on her play skills, which is something that J.C. did not have at the time. Notably, having J.C. play with her—which is what Dr. Gallagher had recommended—would have been perceived by J.C. as a demand at the time. Karakashian went on to add that she continued to work on pairing with J.C. and was successful in doing so as time went on. She also saw that J.C. paired well with her aide (Kim) and teacher over time, which was consistent with what the parents had said.

Another observation and concern raised by Dr. Gallagher dealt with the implementation of token economy with J.C. and her (Dr. Gallagher's) belief that delayed reinforcement was not effective. Karakashian took issue with Dr. Gallagher's findings, stating that J.C.'s teachers and aide had been properly trained on the strategies that had been put in place. Additionally, J.C. was in a new environment with a new staff and had in fact positively responded to the program as evidenced by the increased positive behavior—compliance, attendance, and the absence of the negative interfering behaviors.

Dr. Gallagher also expressed concern over the lack and delay of reinforcement. Again, Dr. Gallagher's commentary comes after J.C.'s sixteenth day in school and is misguided and inaccurate. The school staff absolutely had an understanding of the basic principles of reinforcement and properly administered the same. While Dr. Gallagher may not have seen an immediate response then and there during her observation, J.C.'s compliance continued to increase over time and her negative behaviors decreased.

Also commented upon by Dr. Gallagher was the belief that the ABA strategies being utilized by the school—i.e., token economies, timers, schedules, etc.—were antiquated and that J.C. required staff who were trained in "Practical Functional Assessments." Karakashian again reiterated that that is the opinion of one behavior analyst, and as demonstrated in J.C.'s case, the strategies that were implemented were quite effective for J.C. If J.C. had not made "meaningful progress," then they would have implemented different strategies.

According to Karakashian, “Practical Functional Assessment” is a very involved process to identify triggers and functions. There are a lot of negatives to this process, which has limited research with the assessment itself mostly done by the author (Dr. Hanley) himself. Karakashian went on to add that it takes a great deal of time, effort and cost and is not ideal for a school setting. It is not the only methodology out there for students such as J.C., and in J.C.’s case, it was redundant because they had already identified the triggers and the function and already had functionally equivalent replacement behaviors and interventions in place for it.⁹ Additionally, Dr. Gallagher’s commentary that the staff lacked empathy and that ignoring J.C.’s crying behavior was unethical was misplaced. First, the staff did not lack empathy—they were in fact warm and caring individuals. Second, allowing a child to cry is a very common practice, especially when the behavior is attention-maintained. At no time was J.C. ignored. Using vocal disruption as an example—the behavior is what was ignored. Attention was withdrawn from the behavior because it was used as an escape by J.C. As evidenced by the data, this behavior improved over the course of the year using this approach.

Dr. Gallagher was also critical of the October 7, 2022, IEP because Speech/Language identified only three goals—none of which were provided by an AAC evaluator. While Karakashian felt it was appropriate for Dr. Gallagher to comment on speech/language goals given how behaviorists routinely work closely with all of the domains, she dismissed Dr. Gallagher’s commentary that none of the goals were created by an AAC evaluator. First, the goals and objectives that were put in place were appropriate—this is particularly so because J.C. was not at all fluent in navigating her AAC device at the beginning of the school year. Second, an AAC evaluator would not see J.C. as frequently as a speech/language therapist.

Dr. Gallagher also criticized measurement of goal mastery of 80 percent. Karakashian disagreed with Dr. Gallagher’s findings and recommendations in this regard—believing that 80 percent for goal mastery was reasonable and provides for meaningful progress. At all times they strive for more, but 80 percent is reasonable. Even

⁹ According to Karakashian, J.C.’s functions were access and escape, and vocal disruption was maintained by attention. They were already aware that the triggers were demands and denied/terminated access.

if the goal-mastery measurement had been changed to 100 percent, J.C.'s program would have remained the same, as would her level of progress.

She also disagreed with Dr. Gallagher's commentary as it related to the BIP. Contrary to what Dr. Gallagher had determined, the BIP was in fact self-explanatory and appropriate. It has the target behaviors, documentation of prior interventions, and outlines positive supports/interventions. The plan was clear and concise and allowed for a reader to implement the procedures and maintain treatment integrity. Additionally, the people implementing the IEP were well-versed in the program and able to implement it.

With regard to Dr. Gallagher's last finding that J.C. had significant sensory needs that were not being met, Karakashian again voiced her disagreement with the finding. J.C. had access to many sensory items, and breaks were frequently offered where she (J.C.) had free access to a multitude of sensory items.

Dr. Gallagher also commented upon when children from the general education classroom came into the autistic classroom to play with the kids—reverse inclusion. While J.C. interacted with the other kids, it was not without prompting and negative behavior on her part. Karakashian noted that J.C.'s responses and behavior were not surprising given how early in the school year it was, and many of J.C.'s behaviors were demand-based, and she did not understand what was expected of her. In reverse inclusion instances that occurred later in the year, J.C. had more of an understanding of what was expected and was more compliant.¹⁰

On cross-examination, Karakashian went through her credentials and explained the difference between a board-certified assistant behavior analyst (BCaBA), which is her title, and a board-certified behavior analyst (BCBA), and how she is supervised by her BCBA colleagues.

¹⁰ Reverse inclusion is when general education students come into the autism room and play with the kids. There may be group games, or centers with the other students to provide a typical peer model and increase social skills. The point of reverse inclusion is to increase social skills through exposure, have a typical peer model, and reinforce appropriate social skills.

She acknowledged that she did not contribute to the development of the August 2022 IEP, having been assigned to the case last minute. While she attended the IEP meeting on August 22, 2022, she did not have an opportunity to review all of J.C.'s records, including prior evaluations (Speech and Language, Psychological, Educational) that had been done. She did so sometime after the meeting.

One of the recommendations that was in the IEP was for a behavioral intervention consultation for an hour each month during the school year. According to Karakashian, the amount of time varies depending on the student. In J.C.'s case, she frequently exceeded sixty minutes each month. The consultation included observation, record reviews, and reporting. The IEP was not changed to reflect the amount of actual time she spent because she knew that the beginning was a "front load" with a lot of time spent to support J.C. and her teachers, and that as time went on it would balance itself out.

Karakashian did not recall hearing commentary during the IEP meeting that the evaluations underestimated J.C.'s potential. She was unfamiliar with how the psychological evaluation was administered and concurred that if a child has a low IQ, it affects their abilities. She also concurred that just because a child is non-verbal, it doesn't mean that they have a low IQ. In J.C.'s case, she believes that J.C. can learn and has in fact made meaningful progress.

In turning back to the IEP, Karakashian was asked about the appropriateness of the August 22, 2022, IEP. In response, she stated that she believed that the IEP presented an accurate depiction of J.C.'s present levels and that the behavior plan, interventions, and modifications were appropriate. She did not change the BIP in the IEP during the school year; however, she did implement changes in J.C. programming which were not reflected in the IEP. She did not agree with the statement that the BIP needed more steps, noting that it was in fact easy to implement, self-explanatory, and was being implemented with consistency and fidelity because she was there to ensure such. If she wasn't there, then one of her colleagues would take her place.

Karakashian was clear that she did not write the BIP in the IEP and that at no time did she call the case manager to have the BIP amended in the IEP. This was because

she knew that her recommendations were being implemented. She went to add that her recommendations were based off of her observations, which happened to be very similar to what was in the BIP, with the exception of video modeling, role play, and task analysis, which were not in her consult summaries. She did not believe they were necessary at the time. Some of her recommendations were not identified in the BIP but had been implemented, included functional communication training, play-based activities, and the way ITT was implemented. She assumed that the parents had given consent for the programming modifications that she had implemented.

She was questioned about the fact that the IEP did not specifically provide for sensory items and her recommendation in the October 4, 2022, consultation report that J.C. be provided sensory and movement breaks. (R-21; R-28.) More specifically, why she made the recommendation if the IEP was so self-explanatory. In response, Karakashian stated that she must have seen something during her observation that made her believe that it was appropriate to add sensory items. She went on to state that J.C.'s program does allow for sensory items—her recommendation was to have sensory items during ITT so J.C. would have access to the items and compliant during the sessions. While she was not a big proponent of non-contingent reinforcement, she thought it was appropriate in J.C.'s case to help her de-escalate and regulate. J.C. for instance would engage in negative behavior when demands were made of her; by allowing her access to sensory items, she would calm down and become more open to learning.

When asked if the access to sensory items reduced J.C.'s negative behavior, Karakashian stated that it was difficult to track self-regulated behavior. A calm demeanor does not always equate to being calm internally; however, inappropriate behavior is something that can be tracked. In J.C.'s case, the use of sensory items was an additional strategy to keep her regulated.

Also questioned was the recommendation that J.C. be provided alternate seating. In response, Karakashian stated that she thought that alternate seating, such as a wobble wedge, would help to regulate her. She did not believe that it was the first time that it had been implemented in J.C.'s program—she just had not seen it. After being shown her colleague's observation report of June 1, 2022, she agreed that use of alternate seating

had been used at J.C.'s prior school—Amazing Transformations. (R-15.) She also agreed that she did not recommend usage of alternate seating until a month into the school year and that it was not in the IEP, but she reiterated again, that did not mean that J.C. had not already been exposed to it.

Karakashian could not recall whether J.C. used alternate seating in the month of September—despite the fact that she was in the classroom at least twice a week. She did recall, however, other children in the classroom having it. She still believed that the OT sensory input in the BIP in the IEP, which called for sensory and movement breaks, was clear and self-explanatory.

Discussed next was “pairing”—what it is, how a rapport is built, and if she had seen that with J.C. Karakashian explained that she had seen J.C. pair with her 1:1 aide and her teacher, and she herself had paired with J.C. several times. She described some of the times that she had “paired” with J.C. through play and reinforcement with food for instance because J.C. was food motivated. No demands were placed on J.C.—the whole experience for J.C. was geared to be fun and positive. After pairing with J.C., she saw an increase in compliance. When asked, she could not recall doing a reinforcer assessment.

In questioning Karakashian further about her October 4, 2022, direct observation, she confirmed that J.C. was non-compliant during the ITT session—interfering behaviors were present, causing her to be unable to comply, which was reflected in her report. (R-28) She had never done a Functional Behavior Assessment regarding J.C.'s behaviors because she already knew the functions that had been identified in the “antecedent, behavior, consequence” (ABC) data that had been collected the first week of school, and observations.¹¹ She went on to add that the function tells them why the behavior is occurring and why they are engaging in it—automatic reinforcement, seeking access to something, for attention, or to escape something—the four functions of behavior.

¹¹ Karakashian testified that the “antecedent” tells them exactly what happened before the behavior occurred, the “behavior” tells them what it looks like, what the child did and what the child engaged in, and the “consequence” is whatever followed the behavior—i.e., was the child released from the demand? The consequences could be positive adult attention. Individual corrective responses or redirection is a consequence—it's whatever follows the behavior that is being tracked.

Karakashian also described what the ABC data sheet captured and what it looked like. (R-84.)

She agreed that an FBA is done to identify the “function,” and that a method of identifying the function could be to collect ABC data. No FBA was done in J.C.’s case, which is extensive and typically done when the triggers or precursor behavior is unknown, because the precursors or triggers were already identified using the ABC data. Therefore, no FBA was necessary.

When asked what the difference was between frequency data and ABC data, Karakashian stated that frequency data tells you how much a behavior occurs, and the ABC data gives the antecedent, the behavior, and the consequence. Frequency data is collected when there is a clear onset and offset of behavior. ABC data is collected when there is a behavior of concern and you’re trying to find the precursors or triggers and function.

Karakashian was also questioned about her colleagues’ report of June 1, 2022, surrounding the observation of J.C. at Amazing Transformations—specifically J.C.’s teacher comments regarding how J.C. paired and how J.C. engaged in maladaptive behavior if she was working with a less preferred staff member. (R-15.) One such question was whether the behavior that was captured on the ABC data sheet was reflective of J.C. working with someone she didn’t know and if that was a potential function of her behavior. In response, Karakashian stated that it could have been; however, that was taken into account at the time. From the start, they were cognizant of the fact that it took J.C. a long time to pair with her environment and new people. They were also aware that J.C.’s program at Amazing Transformations was a “natural environment”—teaching based upon what was going on in the environment at the time with limited demands on the children and allowing the child to do what they wanted.

According to Karakashian, J.C., to some extent, was provided that same programming in the District during the 2022–2023 school year in group play or at other times but not during intensive teaching. Karakashian acknowledged that J.C. exhibited interfering behaviors during intensive teaching and that her parents had informed them

that J.C. did not prefer that teaching methodology. She went on to state that they continuously monitored J.C. to assess whether the delivery of the instruction was appropriate. This was done by taking data on the differences in compliance and the occurrence of the behaviors during each instruction methodology that was being delivered.

Also questioned was the recommendation that J.C. be provided edibles during intensive teaching as a reinforcer, and the fact that according to the Augmentative Communication Evaluation Report done in May 2022, J.C. was proficient in using her AAC device to ask for food that she wants. In response, Karakashian stated that when J.C. came into the District, she was not independently using her AAC device to request things. It was her assumption that J.C. was not fluent in using the device, and she admittedly did not do an assessment as to the reason why. One of the reasons she didn't do an assessment was because she felt that it was more important for J.C. to pair with her environment and not rush it.

Karakashian was next questioned on the ITT sessions and her earlier testimony that J.C. became dysregulated during some of these sessions, which were done in the classroom. J.C.'s IEP called for noise-cancelling headphones because J.C. had sensory issues. She believed that for the most part, when the ITT sessions were taking place, the room was quieter because other students were also getting ITT. She did not have data to reflect the circumstances/environment when J.C. was receiving intensive training, nor did she believe it was important to collect such information. She also believed that her behavior plan that she had developed and implemented throughout the year was working and put in play, and believed, but could not say with certainty because she wasn't physically present, it was implemented when she was not in the classroom.

In turning to the behavior data that was collected, Karakashian stated that the data was typically collected by either J.C.'s teacher or her 1-1 aide and that she (Karakashian) used the data to graph the behavior. (R-84.) Karakashian described partial interval data collection as marking a behavior occurrence any time that it occurs within a thirty-minute interval. Regardless of whether the behavior occurs once or twenty-five times within the thirty minutes, it is marked as a "yes" for having occurred. The data does not reflect how

many times within the thirty minutes the specific behavior occurred, just that it occurred. She went on to state that compliance is whole interval data wherein J.C. would be considered compliant if she followed every directive for thirty minutes—therefore the data sheet is marked as “no” for that behavior. (R-84 at 39.) According to Karakashian, the measuring of J.C.’s progress was based upon this data.

In going through the definitions, specifically vocal disruption, Karakashian agreed that unless J.C. was visibly unwell, they would not be able to tell if J.C. was crying and/or whining because she was unwell. She disagreed with the notion, however, that the definition for vocal disruption could be misinterpreted. She also disagreed with the statement that they did not know the reasons for the behaviors, stating that the reasons or the function behind J.C.’s behaviors typically fell under the umbrella of denied or terminated access and escape from demands.

When challenged on this last statement, Karakashian stated that they collected ABC data in the first couple of weeks of the school year and if a new behavior was observed, such as knee-knocking, additional ABC data was collected to determine the reasons or function behind the behavior. In J.C.’s case, she had all of the data that was needed to determine the function through interval data, observation data, and ABC data.

When asked how J.C.’s attempts to handle escape from demands were handled, Karakashian stated that she would recommend providing J.C. a means of communication to request a break, which is done through functional communication training. Such recommended training was not in J.C.’s IEP, rather it was in her (Karakashian’s) consult summaries. She would typically collect J.C.’s data at least once a week and review, analyze, and graph it. If there was something of concern, she would speak to J.C.’s teacher when she saw her next. She acknowledged that some of the behaviors that data was being taken on were behaviors that interfered with J.C.’s education, which is why interventions were put in place. Once the data was put into a graph and placed on an excel spreadsheet, she could determine whether there was progress or regression. This in turn would show whether the strategies that had been put in place were working. Between each data collection and analysis, she was also in the classroom and could see

whether the strategies were working, and if not, she could make immediate recommendations.

She believed that collectively, they had done everything possible to help J.C. make meaningful progress, and with the exception of the sensory component, all of the recommended strategies were consistent with the principles of applied behavioral analysis. When asked whether she has seen research to support her recommendations to, for instance, do partial interval data collection, she acquiesced that she had not; however, that is what is practiced in the school setting. She did not agree with Dr. Gallagher's criticisms about the programming, stating that different behavior analysts choose interventions that they believe are appropriate for their client; it doesn't mean they are right or wrong.

She was present on the day that Dr. Gallagher came into the classroom to observe J.C. and saw that Dr. Gallagher in her report criticized how J.C.'s crying behavior was handled by the staff. Karakashian disagreed that J.C. was being ignored, rather, J.C.'s behavior was being ignored. It was her recommendation that adult attention increased the behavior and providing more attention would escalate the behavior in intensity and time. J.C. was upset at the time because a demand was placed on her. She was present at the time of Dr. Gallagher's observation and saw J.C.'s behavior and what precipitated it.

Karakashian went on to state that she had, previous to Dr. Gallagher's observation, trialed trying to comfort J.C. when she engaged in self-injurious behavior, which only escalated her behavior. She vehemently disagreed with the statement that the staff continued to force J.C. to continue. What they did was maintain the demand, which meant that the work demand remained the same. She also disagreed with Dr. Gallagher's commentary about pairing non-contingent reinforcements and use of play. At the time of observation of J.C., Dr. Gallagher did not know J.C. and did not know that her recommendations would in fact foster the opposite reaction—the more attention that J.C. was provided, the more intense her behavior became. Additionally, in the circumstance that Dr. Gallagher observed, playing would have been a demand because J.C. did not have play skills at that time. Karakashian again reiterated that there are different ways of

doing things and just because one evaluator embraces one method doesn't mean that every evaluator believes the same thing. There are different strategies for different behaviors.

Karakashian was also questioned about her excel spreadsheet, interval data that was collected by the school staff, and the summary of the partial interval data that she analyzed. (R-41; R-66; R-84.) For instance, she was questioned about the definition of compliance for data collection purposes and how much of the data collection she observed first-hand. In response, she acknowledged that she wasn't present during the data collection so could not say what the circumstances were that led up to the noncompliance or how often it occurred during the interval.

She was also questioned on the frequency data. Karakashian stated that she collected the data herself and the length of time of the observation was typically based upon the activity at the time. When questioned about her observations/data collection on November 17, 2022, which reflects a 63 percent compliance, and her consultation summary of the same date that reported a 67 percent compliance, she could not say for sure why there was a discrepancy in reporting. (R-38; R-84.) Also questioned was the fact that the data sheet for November 30, 2022, was not completely filled in, but she still determined that there were ten compliance intervals in her excel spreadsheet. Karakashian could not recall how or why she arrived at that determination. (R-84, Bates stamped 50; R-66.) Nor did she follow up with the 1-1 aide regarding the December 5, 2022, data sheet wherein the aide noted periods of compliance and non-compliance. (R-84, Bates stamped 53.) In turning to the November 17, 2022, summary sheet, Karakashian was asked about the demand that had been placed on J.C. that caused her body to tense. (R-38.) Karakashian could not recall what the demand was that triggered the behavior, and no ABC data was collected. Even if ABC data had been collected, the specific demand may not have been written down. She went on to explain that when ABC data is being collected in a school setting, a behavior can occur fast and frequently, so the staff will just write what occurred and may not reflect the specific demand.

In discussing her Behavior Data Summary, specifically her testimony on direct that J.C.'s vocal disruptions were on a decreasing trend, Karakashian stated that the

decreasing trend occurred over the course of the school year. As of the date of her December 19, 2022, summary, which encompassed September through December 2022, there was only a very slight decrease. (R-41.) The same with J.C.'s self-injurious behavior.

In questioning Karakashian about her April 17, 2023, Behavior Data Summary, she stated that the graphs were generated from data collected on various dates that were placed in an excel spreadsheet. (R-66; R-77.) When asked why the data collected on certain dates was noted in her Behavior Data Summary but not in her excel spreadsheet, she explained that the data collection must have been the "in between day" and that is how the excel program formatted it. Ibid. When questioned further on this point, Karakashian acknowledged that using for instance the December 3, 2022, date on the Behavior Data Summary, she could not say when the data was actually collected. That does not mean that the graph is inaccurate; Karakashian explained that that was how excel puts it in the system if it's five days from when the graph was started. In other words, the data that was collected and graphed was accurate, but the dates on the graph are not accurate.

Karakashian was next questioned about her testimony as it related to Dr. Gallagher's report that criticized how the school handled J.C.'s crying episode and recommended the use of play to build a rapport and pair with J.C. She was cognizant of the fact that there were several reports dating back to 2020 that reflected that J.C. had play skills. (R-10; R-11; R-15.) Karakashian stood by her earlier testimony, however, that J.C. lacked play skills at that time—or at least did not elicit them in that environment, adding that that was not the only reason she disagreed with Dr. Gallagher's recommendations. Among other reasons, had the school just used play skills all day as a means of pairing with J.C., J.C. would not have gotten any academics or behavioral skills. She believed that playing was appropriate to pair with J.C., but that it should occur during downtime, not during academics or other activities.

Regarding Dr. Gallagher's recommendation that the school stop using a token economy system with J.C., Karakashian stated that she both agreed and disagreed with that recommendation. She agreed that immediate reinforcement was better, which was

why she put it in her consultation summaries the provision of edible reinforcement in between “earns.” The edible reinforcement was used in conjunction with the token economy system so that J.C. did not have delayed access to reinforcement. She could not recall if she took specific data on this approach, but she had her compliance data from her observations to determine if something was effective and the interval data.

She also disagreed with Dr. Gallaghers recommendation that J.C. requires staff who are trained in “Practical Functional Assessment.” Such assessments, while possible, are not easy to implement in schools, and there are other ways to do things. Additionally, in J.C.’s case, interventions and the function of behavior were already identified which is one of the main reasons why a practical function assessment would be used.

Maria Alpizar (Alpizar), duly certified in elementary and special education, was qualified to, and testified on behalf of the District, as an expert in elementary education and special education—in particular, in autism education.

She described how behaviorism and autism education intertwined or overlapped in the classroom and some of the best teaching practices used in the classroom, which include use of a token economy system, timers, and visuals—all of which she believes are very effective.

In August 2022 she attended J.C.’s virtual IEP meeting as the special education teacher and came up with academic goals and objectives based upon J.C.’s then current levels, which were discussed by the petitioners, OT, and Amazing Transformations, who were present at the meeting. The IEP was agreed upon by the petitioners. It was her belief that the goals and objectives were reasonably calculated for J.C. to make appropriate progress given her diagnosis. Among other things discussed at the meeting was the need for an aide on the bus for J.C., the parents’ desire for inclusion for J.C.—not agreeing with the placement; and the parents’ concern with the use of “hand over hand,” discrete trials, and use of restraints.

It was her perception that the undertone of the meeting was a bit hostile. S.C. had taken the lead for the family, but at one point, B.C. started yelling at the case manager to

stop interrupting his wife. This was surprising because it was not her impression that anyone was interrupting or talking over S.C., and if it had occurred, which could happen in virtual meetings, it wasn't on purpose.

At the end of the meeting, it was decided that J.C. would remain in the self-contained classroom based on the evaluations that had been done by the District. She believed that the placement was appropriate for J.C. and after having taught J.C. during that academic year, continues to believe that the placement was appropriate.

According to Alpizar, Karakashian came into the classroom frequently—having several children on her caseload in addition to J.C. For J.C., she was there at least once a month, and when she came in, she would either directly observe, take data, or sometimes interact directly with the staff, student, or teacher. At the end, Karakashian would provide a write-up that was discussed, modeled, or recommended in the in-person consultation. (R-23.) She also trained her (Alpizar) with respect to educating J.C., as well as the other children, appropriately.

In describing the classroom, Alpizar stated that there were six children and five adults. One of the adults, Marilyn Keeling (“Keeling” or “Miss Kim”), was paired directly with J.C. and was with her throughout the day. Having worked with J.C. throughout the year and after observing her behaviors, it was her (Alpizar) belief that a 1-1 throughout the day may not have been necessary. Some of J.C.'s behaviors that she had read about or that were described to her such as head banging and eloping, did not occur nor was she self-injurious or unsafe towards another person. Regardless, she did not believe that J.C. became overly dependent on Keeling, and that J.C. made meaningful progress over the course of the year.

In describing the classroom environment, Alpizar stated that her classroom was pretty diverse at the time and made up of first and second graders. Academically, J.C. was a bit lower than one student, and socially, she was on par with two of the students but behind the other three. She believed that J.C.'s needs were being adequately addressed in the public school setting.

She was aware that in or around September 9, 2022, the petitioners requested J.C.'s records, and also requested that Dr. Gallagher be allowed to come in and observe J.C. in the classroom. The observation took place on October 4, 2022—a couple of days prior to the thirty-day IEP review meeting. (R-30.) Other than pleasantries, she did not have any substantive conversation with Dr. Gallagher on that date or thereafter. Nor did Dr. Gallagher attend the IEP meeting on October 7, 2022, and her report was not provided until months later, sometime in January 2023. (R-51.)

Regarding the October 7, 2022, IEP, she developed many of the goals and objectives in the IEP. Using for example the social/emotional/behavioral goal and objective, she believed that the criteria of four out of five trials was appropriate. It constituted 80 percent for mastery and was best practices. She went to add that even when a skill is considered “achieved,” they continue to work with the student to maintain the skill—the hope being that the child will achieve the remaining 20 percent with continued practice and maintenance. (R-30.) J.C. achieved many of her goals during the year, but not all of them. She believed that the goals were appropriately challenging, and she made progress in all of them but was not able to achieve them all. (R-43; R-62.)

The first time she learned that there was an issue with “knee-knocking” was after petitioners sent an email about bruises on J.C.'s legs. When they looked into it, they realized that it was from the knee-knocking that J.C. had started exhibiting when academic demands were placed on her. The occupational therapist suggested alternative seating such as a yoga or peanut ball, which was implemented, and after which they saw a diminishment in the behavior.

In discussing the difference between behavioral data and skill-acquisition data, Alpizar opined that behavioral data is taken throughout the day, from 9:00 a.m. to 3:30 p.m. In this case, it was conducted by Keeling in half-hour increments. Some of the things they tracked were vocal disruptions, self-injurious behavior, and tantrums. Skill acquisition on the other hand was assessed once a day—usually when the student comes into the classroom, at which time they are assessed to see what they recalled. (R-79; R-80.) The objective of each of the assessments was IEP driven and goal driven, and the

raw data that was collected was used in preparing J.C.'s progress reports throughout the year. (R-43.)

According to Alpizar, she sent communication logs or a digital form to the petitioners daily, but aside from that, aside from occasional emails, she had little communication with the parents. (R-67.) She went through one email exchange with S.C. on January 4, 2023, wherein they discussed J.C.'s iPad settings and J.C. independently drawing an "A." Alpizar went on to state that in the beginning of the year, J.C. could not print, draw, or write, and one of the biggest progresses that she made over the course of the year was the ability to write her name independently using all capital letters without tracing. (R-45; R-79.) This was accomplished by using hierarchy support and hand-over-hand support—a methodology that is used for educating children with autism.

Regarding Dr. Gallagher's report, she disagreed with Dr. Gallagher's criticisms. While she was not a BCBA, she has enough experience to unequivocally state that J.C.'s placement was appropriate and that she made meaningful progress based on her capabilities over the school year.

On cross-examination Alpizar was asked what she thought "meaningful progress" meant and what her expectations for J.C. were in this regard. In response, she stated that meaningful progress was progressing from where you started and making steady and consistent progress towards achieving a goal. Among other goals for J.C. was to behaviorally transition better and become calmer overall.

She herself did not collect behavioral data on J.C., but she reviewed the data during the day and throughout the week. She was also with J.C. for a better part of the day, so she personally observed her as well. In going through a couple of the interval behavioral data sheets, Alpizar acknowledged that the number of times the behavior was exhibited is typically not noted, only the fact that the behavior occurred during the interval. (R-84, Bates stamped 018.) Frequency data is occasionally collected as noted on the March 31, 2023, data sheet for self-injurious behavior (knee-knocking). It was collected on that date to give the parents more data as to why the bruising was happening and to

back up the school's findings. Alpizar did not agree with the statement that frequency data is more accurate than interval data.

Alpizar was also questioned about her testimony on skill-acquisition data and whether baseline data had been collected. In response, she stated yes, pointing to J.C.'s handwriting data. (R-70, Bates stamped 515.) With some of the other goals, baseline data was taken via observation—going through cards, identifying letters and numbers, and asking J.C. questions without prompting to see if she was able to answer the questions accurately. She acknowledged that the goals were written before J.C. came into her classroom. She believed that the goals were reasonably calculated based upon reports via the Child Development Inventory conducted with the parents' input, and evaluations that had been done, and anecdotal notes from people who had worked with J.C. in the past. Alpizar acknowledged that she did not do any formal baseline assessments. Nor did she collect data when J.C. first came into her classroom in September 2022 to determine what percentage J.C. was performing at with respect to the goals. She went on to state, however, that J.C. was unable to answer any questions when she first came into the classroom with respect to several of the goals such as activities of daily living and letters and numbers.

When asked if she, Keeling, or Karakashian had paired with J.C. in September 2022, Alpizar acknowledged that they probably had not. She also acknowledged that if they had paired with J.C. at that time, it was possible that J.C. may have performed differently.

Also questioned was her testimony that 80 percent mastery was best practices. More specifically, if she had ever reviewed any research on the effectiveness of 80 percent mastery with respect to goals. In response, Alpizar stated that she had not.

She was also asked about her prior testimony that J.C. did not respond well to discrete trial teaching. Alpizar explained what discrete trial teaching entailed and how it

did not work well with J.C.¹² In J.C.'s case, they used flash cards with different things on them (letters, numbers, objects, shapes, etc.). They also tried sensory learning, which S.C. stated was one of J.C.'s preferred way to learn. They used a sensory box that contained high kinetic sand, beans, or rice. Foam letters or foam numbers were placed in the box, and J.C. was asked to find a letter or number. According to Alpizar, J.C. liked what she liked, and what she didn't like was letters or numbers in the sand, beans, or rice. She much preferred taking everything out of the box so that she could just play with the sand, beans, or rice. Thus, this method of teaching did not prove to be effective for J.C. at that time.

Alpizar was also asked if she was familiar with "Essentials of Living," which she was not. She was also asked if discrete trials fell under the ABA umbrella and if there were other teaching methods that also fell under that umbrella. In response, she affirmed that discrete trials fell under the ABA umbrella as well as Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) and Assessment of Basic Language and Learning Skills (ABLBS). She went on to state that both of them are assessments, but they are also a way to then teach. The District utilized the strategies behind VB-MAPP's. She acknowledged that she has never specifically reviewed the research on VB-MAPP's.

When questioned how long she would utilize the same approach to teaching certain goals, Alpizar stated that they always work on goals and frequently used different approaches. The primary method remained the same—discrete trials—but they were supplemented by various activities throughout the day.

In going through several of J.C.'s goals and objectives in J.C.'s IEP, Alpizar was asked about the goal for J.C. to answer five personal questions, one of which was "What is your name?" (R-21.) In response, Alpizar stated that J.C. mastered the objective in February 2023. She did not, however, master "How old are you?", "Where do you live?", "Where do you go to school?", or "When is your birthday?" Nor did she master the goal

¹² Alpizar testified that discrete trial is "intensive one-to-one teaching where students are receptively or expressively learning to go through repetition, usually kind of quickly. Cards are often used, especially when dealing with students that lack more verbal language." 3T, 131:1-5.

of, during instructional activities, receptively or expressively identifying new letters starting with letters in her first name from a field of three, three consecutive times independently across the environments by June. According to Alpizar, J.C. did make meaningful progress on this goal as she was able to identify more letters in her name than when she first started. She went on to state that the goals were written and calculated with true thought as to where J.C. was at the time and offered her a challenge.

J.C. also mastered the sequencing of numbers 1–10 by December 2022 through discrete trials and repetitive interaction with the numbers. (R-79.) They did not move on to numbers 11–20, instead working on the number sequencing by starting the line at a random number and having her continue from that number.

She believes that J.C. made meaningful progress over the course of the year, even though she did not master all of the goals and objectives under the IEP. J.C. made consistent progress in the classroom—behaviorally, socially, and emotionally—in many meaningful ways. She went on to state that it is not unusual for a child not to achieve all of the goals in the IEP within the first year, particularly given the program that J.C. was coming from, which was more play-based than academic.

When asked, Alpizar agreed that J.C. could navigate on her own well, particularly when she wanted a preferred item such as slime.

Bobbie Gallagher (Dr. Gallagher), a board-certified behavioral analyst at the doctoral level, testified as an expert in the field of special education, autism, and behavioral analysis. She was hired by the petitioners in September 2022 to do an evaluation of J.C. in her current program to determine whether the programming that she was receiving was benefiting her. Petitioners were concerned about J.C.'s educational programming and whether it was appropriate for their daughter. In making such a determination, she looks at the staff to determine whether they have the skills necessary to implement basic applied behavior analysis (ABA)—more specifically, she looks at staff interaction with J.C. and whether they hold to the science of ABA and whether J.C. was benefitting from the interactions—i.e., completing tasks, moving through the environment well, and enjoying herself.

As part of her evaluation process, she typically reviews the most recent set of evaluations, the last three years of IEPs, progress reports, and any outside evaluations that have been done, and generates a report. (P-29.) She also conducted an observation of J.C. in the classroom setting on October 4, 2022, and spoke to J.C.'s parents. A second classroom observation was also conducted in May 2023.

According to Dr. Gallagher, the petitioners described J.C. as a non-verbal child who struggled considerably with online virtual learning during the pandemic. She attended Amazing Transformations, where she did well. One of the things that the petitioners repeatedly stated was that learning for J.C. had to be "purposeful." This can be seen for example, when a child gravitates towards a certain activity and engages in fewer behaviors or no behaviors during the activities.

In review of several reports and evaluations as part of her own evaluation, one of the common themes that she noted was that J.C. had good problem-solving skills, was delayed, and presents with autism. Another theme that was present was that sometimes J.C. had a hard time attending to the assessments—probably because she didn't know how to respond, so she would engage in some of her problem behaviors. Dr. Gallagher went on to note that there was a considerable decrease in problem behavior when J.C. attended Amazing Transformations probably because J.C.'s programming was based in the "natural environment teaching" versus discrete trial teaching or intensive teaching trials, which J.C. had an aversion to.¹³ On this last point, Dr. Gallagher stated that one of the ways you could tell that J.C. had an aversion to discrete trials was the increase in problem behaviors—crying, bouncing, hitting herself, etc.

One of the reports that she reviewed as part of her evaluation was the Speech and Language evaluation that was done by the District wherein J.C. was observed at Amazing Transformations. (R-20.) In the behavioral and classroom observation section, J.C.'s teacher at Amazing Transformations described J.C. as a happy child who easily followed

¹³ In giving an example of "natural environment teaching," Dr. Gallagher stated that math could be incorporated into baking cookies.

classroom routines, who was sensitive to noise and requests, and used headphones for background noises. The teacher also stated that J.C.'s communication skills varied day to day and that she required prompts but demonstrated overall improvement. J.C. had also begun to engage in parallel play and currently attended to non-preferred items with 40–60 percent accuracy. Dr. Gallagher went on to opine that the teaching environment at Amazing Transformations was a form of “Natural Environment” and that the methodology used by that school fell under the auspices of ABA. She also acknowledged that the discrete trial teaching sessions that the District was providing (i.e., J.C. sitting with the teacher and touching things on a card) also fell under the ABA umbrella, but noted that J.C. did not like that methodology.

The Speech and Language Evaluation also noted that on the Preschool Language Scale-5 (PLS-5), under developmental task, functional play, relational play, and self-directed play were marked as a strength, as was the ability to look at objects or people that the caregiver points to and name them, and following routine familiar directions with gestural cues. (R-20.) She was cognizant of the fact the BCaBA (Karakashian) represented that she was having trouble playing with J.C. and/or getting J.C. to play. Other strengths identified in the PLS-5 under “Expressive Communication” were seeking attention from others; vocalizing two different vowel sounds; combining sounds; attempting to imitate facial expressions and movement; and vocalizing two different consonant sounds. Dr. Gallagher went on to state that while J.C. is developmentally delayed, she has learned some skills and continues to be able to learn skills.

She also reviewed the District's Educational Evaluation of J.C. (R-18.) What stood out to her as it relates to this report was that J.C. was observed playing—in this case, bingo—using her device, and that J.C. was able to make a request with a full sentence of “I want cereal.” There was no real mention of any maladaptive challenges or behaviors. In other words, she was enjoying the environment, or the setting, because there was an absence of behavioral challenges. According to Dr. Gallagher, the lack of maladaptive behavior did not mean that J.C. didn't exhibit such behaviors at Amazing Transformations, it just meant that they were not observed at the time. Dr. Gallagher also noted that in the report, petitioners had expressed a concern about J.C.'s self-injurious behavior as it relates to transition into a more structured program/back into the classroom.

Dr. Gallagher went on to opine about the significance of J.C.'s participation in playing bingo and asking for cereal with the use of her device. When J.C. was playing bingo, she did not need redirection, was engaged in the activity, and attending to what was in front of her. When she asked for cereal using her device, it was given to her immediately. The import of giving the cereal to J.C. was to reinforce the fact that she had made the request independently and didn't have to be asked, "What do you want?" It was important to teach J.C. that when she requests something, it will be given to her. This reinforcement also gets J.C. to use her device more frequently and accurately.

The Consultation Summary from Interactive Kids was also reviewed as part of her evaluation. (R-15.) Among other things, the summary noted that a 1-1 registered behavior technician (RBT) worked with J.C. at all times to help manage interrupting behaviors, facilitate the use of functional communication, and help shape appropriate social skills. The summary also noted that J.C. showed signs of being anxious in certain situations. Independent of the report, Dr. Gallagher noted that one of the tells that J.C. is anxious is when she does a full face "stim"; another tell is vocalization such as crying and moving away from the person/situation. The summary also mentioned that it was reported that J.C. responded well to hands-on learning and natural environment teaching.¹⁴

Also reviewed as part of her evaluation was J.C.'s August 17, 2022. (R-21.) She believed that J.C.'s reported strengths were accurately reported and went through the relevance of each of the findings. She also saw the parental concerns about hand-over-hand prompting, discrete trials, and restraints. As it relates to the hand-over-hand prompting, she observed this when she visited the classroom and acknowledged that J.C. was able to complete the task without interfering behaviors. Regarding restraints, Dr. Gallagher stated that they shouldn't be used in an autism classroom as they are harmful, intrusive, and traumatic. Restraints should only be used if the child is about to hurt themselves or another. If there is a behavior that requires a restraint, a BIP should

¹⁴ Dr. Gallagher described "task analysis" is the breaking down of a task into much smaller steps.

be developed to address the behavior. Only if the plan goes wrong and someone is going to get hurt should restraints be used.

The August 17, 2022, IEP also had a BIP that she believed to be inappropriate. One of the reasons was because it did not sufficiently explain how to implement the strategies listed, and second, an observer would be unable to know if treatment integrity was being met and held. She went on to opine that in the field of ABA, technical writing of any behavior plan is required—noting that that interpretation of what someone says and what is written can vary among people. Therefore, the plan should be very clear and concise.

She also reviewed the strategies listed under the plan which fell under the ABA umbrella. It was unclear from the IEP how to interpret the strategies and/or when to implement them. She did see some of them implemented such as the timer and warnings when a transition was going to occur. The strategies didn't always work with J.C., who would for instance hold onto the iPad longer or get upset by the removal. In other words, the strategies, while implemented, did not stop the behavior. Dr. Gallagher went on to state that implementing an incorrect strategy could impact J.C.'s educational program because it would cause a varied application which in turn would hinder her ability to move forward.

She also looked at the appropriateness of the goals in the IEP. In her opinion, the assessments that were done—speech and language, educational, and psychological evaluation—were not appropriate for J.C. because they were not designed for autistic children. An appropriate assessment tool that the District should have used but did not was the VB-MAPP assessment tool, which is a tool used to assess individuals on the autism spectrum. It does not have a curriculum associated with it, rather, it assesses where the child currently is and then it helps to develop the programs that are needed to move forward. She also recommended the use of Essentials for Living, which is also an assessment tool specifically designed for children who are moderately to profoundly affected by their autism, noting that it has a section in it specific to those who utilize an AAC device such as J.C. The difference between the VB-MAPP assessment tool and the Essentials for Living is that VB-MAPP taps out at about six years old and has a focus on

vocal verbal language. Essentials for Living has a lifelong component to it and focuses on those individuals who have limited communication skills and how to assess their skills beyond the need for language.

According to Dr. Gallagher, some of the skills that the Essentials for Living assess are verbal skills, but in the AAC component for instance, it helps to identify the most appropriate type of language that should be taught to the child at that time. In J.C.'s case, she would fall into spending more time requesting and "manding" versus labeling "A," and she would learn to utilize her device more frequently and proficiently. The Essentials for Living also have what is called the "Essential 8 Skills" in order to be in a more inclusive environment and help in determining what skills the child has now and what they need to work on. It also has a daily living component and areas of academics as well. The assessment is a little more complex than the VB-MAPP as it has more components to it and requires more time with the child, but it is not more difficult. It should be done when the child first starts and thereafter on a yearly basis. Goals can be developed based upon the evaluation results. In looking at the goals in the District's IEP, an Essentials for Living assessment was not done, nor does she know where or how the goals were developed, or how J.C. was performing with respect to the goals when the IEP was prepared in August 2022. She went on to state that this last point was important because the goals were not specific to where J.C. was at the time—therefore, they may have been too high or too low and not meeting the level of J.C.'s needs.

She also reviewed the report from Amazing Transformations. One of the things that she recalled reading was that J.C. did well with natural environment teaching. She did well with some of the behavior intervention strategies that were implemented to decrease her problem behavior, and while a clinic-based setting does not generally have a heavy academic component, J.C. was gaining access to academics via the games that they were playing. Amazing Transformations also completed a VB-MAPP—the last one done in May 2021—and described the purpose of the VB Barriers Assessment.

Dr. Gallagher went on to note that when she observed J.C. in the classroom, she saw some of J.C.'s barriers, such as continued prompt dependency and scrolling behaviors, but did not see the District implementing any behavioral strategies. Notably,

she did not see scrolling as one of the target behaviors in any of the documentation that she reviewed or if it was ever addressed by the District. She also saw J.C. engaging in crying behavior for nearly all activities that were presented to her. The crying was never addressed by anyone. One of the comments that she heard from the staff was that J.C. “works through it” or “was working through it.” She found these comments disturbing because while J.C. may be working “through it,” as unhappy as she was at the time, she wasn’t performing to peak due to her distressed state. Thus, the school was taking data on her performance based on a child who’s engaging in those behaviors, which would be inaccurate and possibly leading into her getting things wrong. Dr. Gallagher went on to state that she could not understand why the school did not attend to J.C. when she was crying and try to figure out what was wrong. She had only been there for sixteen days, and during this time the staff should have been trying to “pair” with J.C. to make it a space where she wanted to be.

In her opinion, by that point, the school should have done significantly more pairing with J.C. - learning about her, evaluating her, and seeing what she gravitated towards. They should have provided a play environment to get J.C. to engage and offered her more reinforcers. What she saw was a lack of compassion. She went on to opine that the fact that they were still having problem behavior with J.C. at that point meant that the staff were not manipulating the environment or materials to better pair with J.C. While concerned, she did not say anything to the staff at that time primarily because the observation guidelines precluded her from doing so. (R-29.)

According to Dr. Gallagher, there is an entire area of research as it relates to compassion in ABA. Strategies have been developed that are more compassionate and less harsh and align more with the individual—addressing the needs from the individual’s perspective and not the therapist/teachers perspective. She went on to add that there is also research on trauma-based ABA based upon earlier ABA techniques/strategies.

She believes that the District implemented antiquated strategies as evidenced by the staff’s placement of demands on J.C. while she was crying—demands that made no sense to J.C.—and her unhappiness at being made to do them. It was also evidenced by the mass discrete trial methodology that was used. Also of concern was J.C.’s use of

the AAC device. According to Dr. Gallagher, at that point, the AAC device should have been used to allow J.C. to express herself—to get her to understand that if she asks, she gets. If the device is presented for tasks and demands, J.C. will not want to use it to express herself for fear that a demand will be made of her.

Dr. Gallagher also believed that use of the token economy system was improperly implemented as well. She believed that in J.C.'s case, the delayed reinforcement was ineffective, and that J.C. performed better with immediate reinforcement. She also pointed out that J.C. may earn a token for her first response to a task but does not perform as well on the next four tasks, with the last response being her worst. Thus, when the reinforcement is actually received it is really reinforcing the last and worst response, which in turn can delay her progress towards a goal. Last, with the delay in reinforcement, J.C. may not know why she's getting it and may perceive it to be a break from work, not a reinforcement.

It was her belief that J.C. would benefit from a "Practical Functional Assessment" (PFA), which is a process used in special education to help identify the contexts that lead to problem behaviors and how to prevent them. She went into great detail on how the assessment is implemented. She went on to state that in J.C.'s case, it would identify why she engaged in the behaviors that she engaged in, and then drill down for the more minute reason. For instance, you can't just say that it's to escape from a task and that she doesn't like to work. What you want to know is what is it specifically about the work that she doesn't want to do. By not drilling the issue down to the real reason why J.C. engages in a certain behavior, she will probably exhibit a new or different behavior as time goes on—as evidenced by the knee-knocking.

In discussing the knee-knocking, she reviewed the partial interval data and noted that the way the District had self-injurious behavior defined and identified, there was no way to determine whether the knee-knocking and the head banging were for the same reason or different reasons. (R-84.) If it's for the same reason, then they can be combined on the data sheet. However, if the behaviors were for different reasons, then they should not be combined. The way the data sheet currently reads, you cannot tell what the self-injurious behavior was, and what the reason was behind the behavior.

Dr. Gallagher also criticized the use of interval data collection as a whole, commenting that interval data does not tell you if a behavior has occurred once or fifty times during the interval. Therefore, you cannot determine if the plan was working or if there is an increase in the behavior, which in turn could impact J.C.'s progress.

Also criticized were the consultation summaries that were prepared by Karakashian. It was Dr. Gallagher's position that the summaries were unclear and that everything should have been spelled out in greater detail so that anyone reading them would not only know what to do and how to do it, but there would be consistency in the delivery of services. (R-28; R-42; R-44.) While she agreed that many of the recommendations were appropriate, just not articulated sufficiently, there was one recommendation that she did not agree with—the December 20, 2022, summary—wherein an increase in the rate of reinforcement was recommended when J.C. was in an escalated state and ITT sessions with mastered targets and mixing those with new targets to build momentum. (R-42.) She disagreed with the recommendations because there was no indication as to “why” the recommendations were being made. The consultation summary failed to address how to implement the recommendations, when to implement them, and why they were being implemented. Nor was there any data associated with the recommendations to provide any insight on the “why,” which is something that would have been appropriate to do given the behavior observed (body tensing).

The consultation summary of January 19, 2023, which graphed J.C.'s behaviors across time, was also telling because it showed that the strategy that was being implemented was not working. (R-50.) There was no correlation of the intervention to the decrease in behavior. If the strategy was working, there would be a downward trend—a consistency of going from up to down—and the graphing would look more like steps going down with some occasional blips, not what is seen on the January 19, 2023, graph. Dr. Gallagher went on to discuss how she would have handled receiving graphs such as that from one of her supervisors and why the graphs were deficient.

She also reviewed the January 31, 2023, consultation summary as it relates to knee-knocking. (R-54.) While the summary recommended collection of ABC data, she did not see any, and when she did a second observation in May 2023 she observed J.C.

exhibiting knee-knocking, and that data was being collected when it was observed by the staff. At that time, the knee-knocking was either ignored or the aide grabbed a pillow to put between her knees. While data was being collected at the time, it was not ABC data. She disagreed with the statement in the summary that J.C.'s knee-knocking behavior was specific to denied access or access being terminated because J.C. also exhibited the behavior when people asked her to do things. Additionally, while there was a recommendation for functional communication protocol which was appropriate, how it was being implemented or executed was not.

In addition to her other findings, she also believed that J.C. would benefit from the supervision of a BCBA, not a BCaBA or other staff with ABA training. This was due to J.C.'s significant challenges and the need for someone with more knowledge of ABA who has gone through more course work and training. In summing up her concerns, Dr. Gallagher stated that the District was not collecting the right kind of data; that it was not properly analyzing the data that has been collected; that it has failed to train J.C. with functional communication; and that the behavioral strategies that are in place are not properly spelled out.

Dr. Gallagher went on to opine that if daily data is being collected on a student such as J.C. on skill acquisition in ITT, progress would be seen with mastery of the target skills. If, after eight to ten consecutive sessions, there is no movement, then the teaching methodology should be changed. Movement towards mastery can be seen for instance if J.C. gets something right 50, 70, or 80 percent of the time. Movement can also mean going backwards.

In review of the October 7, 2022, IEP, Dr. Gallagher found that for instance, the first goal—J.C. will answer five personal questions about herself—was specific and somewhat measurable, but it did not say how many times J.C. had to do it to be considered measured. The same with the remaining goals—while they were specific, they failed to identify how progress was to be measured.

She also reviewed the December 2022 Progress Report and found it difficult to interpret what “progressing gradually” meant under the first goal and that it was difficult

to tell whether the intervention was working. She noted hypothetically, that if some of the goals had not been mastered months after the implementation of the IEP, the goals and objectives in the IEP should be reviewed as well as the methodology that was being used.

In her opinion, as of April 5, 2023, J.C., had not made meaningful progress in her education program and the District had not offered a FAPE to J.C.

On cross-examination, Dr. Gallagher stated that she had been retained by the petitioners on August 30, 2022, when the petitioners expressed concern about their daughter going into the District and into a self-contained program. She also acknowledged having received a September 2, 2022, email from the petitioners wherein petitioner stated that they and their attorney were working on their IEP case and that they were working on the exact timing and phrasing of submitting the observational request. It did not concern her that her services were being requested for an IEP case before the school year had even commenced. She also acknowledged that she had spoken at seminars with petitioners' counsel in the past and had never spoken at a seminar on behalf of a school board.

She was aware that the August 2022 IEP noted petitioners' concern about J.C. not being placed in an inclusion classroom and that J.C. did not like hand-over-hand therapy or discrete trial therapy. She was also cognizant of the fact that Amazing Transformations did not expose the children to a particular academic curriculum, whereas in the public school, there were learning standards that needed to be taught.

In describing her conception of how Amazing Transformations provided a natural learning environment, she used the game bingo as an example. J.C. would be playing in an environment where she is learning to match—that is natural-environment teaching.

When questioned whether she asked to see data to confirm petitioners' representation that J.C. did not like discrete trials, Dr. Gallagher stated that she had not. Nor did she ask to see data on petitioners' representation that J.C. disliked hand-over-hand methodology, going on to state that she was waiting to see proof of it in the observation.

She was cognizant of the fact that an IEP meeting was held four days after her observation and that she did not attend, most likely because she was writing up her report. Dr. Gallagher agreed, however, that when she walked out of the two-hour observation, it was her opinion that the program was inappropriate for J.C. and that she shared her opinion, via a telephone call, with the petitioners post-observation.

When asked if, when she walked out of her observation believing that the program was inappropriate for J.C., whether the program was salvageable, she stated that any program is salvageable; however, she did not make such a recommendation to either the petitioners or their counsel. She agreed that her report was finalized in or around November 19, 2022, but could not say for certain whether the report was provided before January 24, 2023, when the petitioners' attorney sent it to the District.

When asked why she did not contact the school after her observations given her significant concerns over J.C.'s program, Dr. Gallagher stated that she was hired by the petitioners, not the District. Therefore, it would have been inappropriate for her to contact the District with her concerns. She also did not ask the petitioners for permission to talk to the school to suggest any changes because her recommendation to the petitioners was to "get her out" and "if they want to fix the program, great, bring her back."

Discussion next centered on Dr. Gallagher's two experiences in working with the public school district. More specifically, she was asked if when she worked in the two districts (Manchester and Edison), there were programs that needed fixing and whether her recommendation to the districts was to remove the child until the program was fixed and then bring them back. (4T, 206:20–21.) In response, she stated no, because she was there to fix the program. Had she gone to the IEP meeting in October 2022 she would have provided input into how to fix the program. She went on to note that the District had her report since January 2023 and had not done anything to address her concerns or recommendations. When asked, Dr. Gallagher acknowledged that aside from her two one-hour observations of J.C.—one in October and the second one in May 2023—she has never spent any time with J.C., nor has she attempted to talk to her educators.

She agreed that on direct she had stated that at Amazing Transformations, J.C. was being taught in a natural environment and that when it came to immediate reinforcers, they were teaching J.C. that if she asks, she gets. She concurred that in public schools, academic demands will be made on J.C. that by necessity, may not be preferred activities.

When questioned about VB-MAPP, Dr. Gallagher stated that she was aware that Amazing Transformations had done that assessment twice. While not her preferred assessment, preferring Essentials for Living, she did not believe it was inappropriate. She was unaware that the District was also using the VB-MAPP, commenting that when she observed J.C. in May 2023 the staff was not working on VB-MAPP goals. She acquiesced upon further questioning that in October 2022, sixteen days into the school year, she would not expect to see VB-MAPP being used because they were still “learning” J.C., and that somewhere in the documentation that she reviewed, there were comments about training and modeling VB-MAPP.

In turning to her testimony that the consultation reports were insufficient and lacked specificity, Dr. Gallagher was asked, for sake of completeness in her report and to have a fully informed opinion, whether she should have reached out to the District seeking more information. In response, she stated no, the behavioral data that was provided already revealed that what the District was doing was ineffective. More information would have only shown her that they specifically chose strategies that were wrong.

When asked about her earlier testimony that she didn’t understand everything that she was looking at but if she had more, it would strengthen her opinion that the program was inadequate, Dr. Gallagher stated that more information would not have changed the outcome of the data. When asked why she went back for a second observation if she had already reviewed the data and determined that the program wasn’t working, she stated that the data wasn’t clear enough so she thought an actual observation would be beneficial.

Dr. Gallagher was next questioned about her testimony that the strategies being used by the District were antiquated—specifically, whether she was sure that the research

articles that she cited to and relied upon in her report actually stated that use of token economy, timers, and schedules economies were antiquated or less effective. In response, she acquiesced that they did not.

In going through some of the articles that she cited to in her report, specifically, the Winter 2021 article in the Journal of Applied Behavior Analysis, “Functional Communication Training: From Efficacy to Effectiveness,” Dr. Gallagher agreed that the article stated, among other things, that a lot more research was necessary to determine the efficacy of functional communication training. (P-30.)

Another article by the same authors, done three years earlier, “Shaping Complex Functional Communication Responses,” was also questioned, specifically whether, given the sample size of the study—four children—conclusions could be made about the efficacy of a particular program. (P-30.) In response, Dr. Gallagher stated that the study leads to more studies to make such a determination. The same with the other two articles that were cited. When questioned further about the articles she cited in her report and the conclusions she made, she acquiesced that none of the articles stated that the strategies or methodologies used by the District were less effective than the ones that she recommended. She went on to state, however, that her training dictated otherwise and that the articles that she cited supported her approach. She did not agree with the statement that behaviorists often disagree on methodology, opting instead to say that sometimes they disagree. She did agree with the statement that some behaviorists who are very accomplished, even doctorate level, may be bigger fans of VB-MAPP than Essentials for Living. The same with token economies, timers, and schedules, some would believe that those strategies were not antiquated, but effective.

Dr. Gallagher was also asked about the statement in her report wherein she stated that ignoring crying behavior is unethical without a proper identification of its function and if she believed the BCaBA violated her ethical code. In response, she stated “yes.” Also questioned was her criticism that “Use of 80 percent criteria for goal mastery is not supported by research and, therefore, may lead to a lack of progress or regression due to insufficient training.” Specifically, she was asked where in the research that she cited to it stated that mastery had to be 90 or 100 percent. Dr. Gallagher could not point to

anything that would support those percentages, instead saying that percentages dip over time so for someone like J.C., if she learns it at 80 percent, then over time it will dip even further. Even 90 percent mastery is inappropriate; however, she acknowledged that she did not have research to back any of that up. She went on to add that she does not like to waste time readdressing behaviors that should have been mastered at a level where they don't have to worry about a dip.

Also questioned in her report was the criticism that the BIP does not explain how to implement the strategies listed and the fact that J.C. disliked hand-over-hand prompting. On this last point, it was her opinion that if a student dislikes such prompting, it should not be used. When asked how she learned that J.C. did not like hand-over-hand prompting, she stated either from the BIP or someone had observed it. She did not see or request any data to confirm J.C.'s dislike, but she did see J.C. crying during her two-hour observation when hand-over-hand prompting was taking place.

Dr. Gallagher was also asked about the statement in her report that J.C.'s sensory needs were not being met and that the lack of access led to maladaptive behaviors as well as her recommendations of how the staff should include sensory access while teaching. More specifically, she was asked if she was aware that there was a sensory bin in the classroom. In response, Dr. Gallagher stated that during her observation, she did see a sensory bin of Play Doh and slime; however, she did not see it as part of the BIP.

Also challenged was her criticism that the District did not utilize "current evidence based strategies." According to Dr. Gallagher, J.C. needed current strategies such as Practical Functional Assessment (PFA), skill-based treatment, and the Essentials for Living assessment tool. She acknowledged that Essentials for Living is one methodology to evaluate a student with autism, as are the VB-MAPP and functional behavior assessment. She believed, however, that a functional behavior assessment was substandard compared to a PFA. When questioned, she acquiesced that while the District may use methods that she considered "antiquated," this alone does not demonstrate that the student is not being appropriately educated. She also

acknowledged that there was no research out there indicating that the strategies that the District was utilizing should never be used.

With regard to J.C.'s crying, Dr. Gallagher reiterated that it was her opinion that the demands should have been removed from J.C. and she should have been given something that she liked. Additionally, J.C. should have been evaluated and not worked with that way again until the evaluation was complete. Upon further questioning, Dr. Gallagher admitted that it was J.C.'s sixteenth day and that she was aware that it could take months for J.C. to pair with someone.

On redirect, Dr. Gallagher reiterated that she was hired by the petitioners to do an evaluation, and after the report was provided to the District, they did not reach out to her to address the concerns or discuss her recommendations. Nor did she see any goals in the IEP that reflected that the District was doing the VB-MAPP or any documentation and/or data to that effect.

It was her firm belief that the Ethical Code was violated by the BCaBA because they continued to force J.C. to work while she was crying. J.C. is a non-verbal child who is communicating through crying that she did not want anyone to touch her. There could have been a myriad of reasons why J.C. was crying, and the District did not attempt to figure it out.

Dr. Gallagher also testified that the methods that she recommended have been shown to be more effective and compassionate. By not implementing her recommended methods, the District exacerbates the gap between J.C. and her neurotypical peers.

DISCUSSION AND ADDITIONAL FINDINGS OF FACT

Credibility analysis

A fact finder must weigh the credibility of witnesses in disputed matters. 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). The fact finder should consider the witness’ interest in the outcome, their motive, and any bias when assessing the credibility of a witness. Credibility findings are “often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.” State v. Locurto, 157 N.J. 463, 474 (1999). “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).

The District witnesses, Karakashian and Alpizar, who both testified as experts in their respective fields in this matter, testified in a professional and direct manner. They responded to questions without hesitation and with authority. Their testimony was not evasive or exaggerated in any manner to appear more favorable to themselves or the District.

Karakashian, a board-certified assistant behavior analyst , was admitted as an expert in the field of behaviorism on behalf of the District. She did not become involved in J.C.’s programming until the IEP meeting in August 2022 when she was assigned J.C.’s file. She was familiar with J.C.’s educational history and prior attendance at Amazing Transformations. While she did not develop the BIP in the August 17, 2022, IEP, she believed that J.C.’s placement in the autism classroom and services provided were appropriate given the length of time J.C. had been out of the public-school environment, the anticipated difficulties of transitioning her from a private setting to a public setting, and J.C.’s documented behaviors and low function levels.

She was also aware of petitioners’ concern as it related to J.C.’s classroom placement, use of restraints, hand-over-hand assistance, length of time it takes J.C. to “pair” with others, and discrete trials, among other things.

Throughout the academic year, she conducted observations of J.C. and took data, as did staff members, and analyzed the same. Based upon the data and observations,

recommendations and/or programming changes were made accordingly. Among the recommended strategies/interventions were the use of a visual schedule, data collection on partial intervals of thirty minutes on behaviors of concern, Functional Communication Training, which included “manding,” edible reinforcement when transitioning from preferred to nonpreferred items or activities, and use of tokens to reinforce positive behaviors. She was frequently in the classroom to observe J.C. and work with her, and over time, she paired with her. On this last point, even J.C.’s parents noted that it could take up to six months for J.C. to pair with someone. She also worked with and trained the classroom aide and teacher. She believed that the BIP was appropriate and self-explanatory, contrary to Dr. Gallagher’s determination.

It was her belief, as evidenced by the data and progress reports, that J.C. made meaningful progress over the academic year. As of December 2022, there was a decrease in vocal disruptions, a slight decrease in self-injurious behavior, a decline in tantrums, and no elopement behavior after the one incident in September 2022. As it relates to compliance intervals, J.C. demonstrated compliance in about 78 percent of the recorded intervals. In sum, there was a decrease in negative behavior and an increase in positive behavior.

This carried through into the spring 2023. In the March 2023 Progress Report, it was noted that J.C. was writing her name with only verbal reminders of which letter comes next. This was a significant achievement from when J.C. started school in September. There was also a continued downward trend with interfering behavior.

She disagreed with Dr. Gallagher’s findings, which the District received in January 2023, and which were based in part on Dr. Gallagher’s classroom observation that took place only sixteen days into the school year. She addressed each of Dr. Gallagher’s criticisms, pointing out why her findings/recommendations were inappropriate, particularly in a public-school setting. Karakashian on several occasions pointed out that there are different ways of doing things, and just because one evaluator embraces one method, it doesn’t mean that every evaluator believes the same thing.

Alpizar, duly certified in elementary and special education, was qualified and testified as an expert in elementary education and special education—in particular, autism education—and also testified on behalf of the District. She was J.C.’s special education teacher for the 2022–2023 school year and was the teacher who developed J.C.’s academic goals and objectives in the August 17, 2022, IEP, which were based on the evaluations performed in August and July 2022. She believed that J.C.’s placement in the self-contained classroom was appropriate for J.C., and after having taught J.C. for the 2022–2023 academic year, continued to believe the appropriateness of the placement.

Alpizar described the classroom environment, which consisted of six children, including J.C. and five adults—one of which was J.C.’s aide. She felt that J.C. academically was a bit lower than one student and socially on par with two of the other students but behind the other three. She was present when Dr. Gallagher observed J.C. in the classroom on October 4, 2022, but other than pleasantries, she did not speak to her.

With regard to the October 7, 2022, IEP, she developed many of the goals and objectives in the IEP and citing to for instance, the social/emotional/behavioral goals and objectives, believed that four out of five trials was appropriate, which constituted 80 percent mastery, which was best practices. Alpizar also noted that even when a skill is considered achieved, they continue to work with the student to maintain the skill. One of J.C.’s achievements over the course of the year was her ability to write her name independently. In the beginning of the year, J.C. could not print, draw, or write her name. By using hierarchy support and hand-over-hand support, she was able to achieve this goal.

Alpizar candidly admitted that while J.C. achieved many of her goals during the year, she did not achieve all of them. Despite this, she felt that the goals were appropriately challenging for J.C. and that she made progress in all of them.

Dr. Gallagher, a board-certified behavioral analyst at the doctoral level, testified as an expert in the field of special education, autism, and behavioral analysis on behalf of the petitioners. She was hired in early September 2022 by the petitioners to do an

evaluation of J.C. in her current placement to determine whether the programming that she was receiving was benefiting her. As part of her evaluation process, she looked at prior IEPs and outside evaluations, and conducted classroom observations—one in October 2022 and one in May 2023.

Dr. Gallagher expressed multiple areas of concern with J.C.'s IEP and its implementation. Among her concerns, starting with the BIP, she felt that it lacked specificity in how and when the strategies were to be implemented. The consultation summaries prepared by Karakashian were unclear and should have been spelled out in greater detail, and the data being collected was not the right kind of data and was improperly analyzed. The assessments that were done and used as a basis for the goals and objectives in the IEP were inappropriate because they were not designed for autistic children. What should have been done was a VB-MAPP and/or an Essentials for Living assessment, which would have provided the District with a more accurate picture of what level J.C. was performing at. She also felt that the strategies that were being implemented—token economy, timers, and schedules—were antiquated and inappropriately implemented as evidenced by J.C. crying.

I found all of the witnesses to be credible and well-qualified professionals, but I found the District's witnesses to be more persuasive.

The District employees, all of whom were qualified as experts in their respective fields, testified credibly and were familiar with the facts and their respective direct contacts with J.C. throughout the school day. I found them knowledgeable in their field, candid in their testimony, and clearly familiar with J.C.'s strengths and weaknesses.

I found Karakashian to be extremely credible, and her observations, data collection, data analysis, and recommendations were well grounded. What I found to be particularly credible about her testimony was her candor about the evolution of the programming for J.C. and how and why it was implemented. She identified most if not all areas of J.C.'s needs and the programming that was necessary for J.C. to make meaningful progress and worked directly with J.C. and her teachers to ensure that she progressed both academically and behaviorally.

I also found Alpizar to be equally as credible about J.C.'s progress over the year. She stood firm that J.C.'s placement in the self-contained classroom was appropriate for J.C., as were the goals and objectives that were in the IEP. The goals were appropriately challenging, and while not achieving all of the goals and objectives, J.C. made meaningful and appropriate progress in all—citing to for instance, J.C.'s ability to write her name independently without tracing. This was accomplished by using hierarchy support and hand-over-hand support, something that the petitioners commented that J.C. disliked and Dr. Gallagher opined was an antiquated approach. Alpizar had the opportunity to work with J.C. on a daily basis and saw firsthand J.C.'s development and progress.

While I found Dr. Gallagher to be knowledgeable in her field, I have difficulty giving great weight to her testimony and her reports as I believe that to some extent, they were misleading and subjective.

Dr. Gallagher was hired just days after the August 2022 IEP meeting and before school started. It is clear that the petitioners were working with their attorney on their "IEP case," as evidenced by the email she received in early September 2022, which raises an aura of an agenda. What undermines her findings, however, is what flowed from there. Dr. Gallagher observed J.C. sixteen days into the school year on October 4, 2022. She had never personally met with J.C. before that date, nor did she see J.C. again until May 2023 when she conducted a second two-hour classroom observation. When she left the observation in October 2022 she was convinced that the District's program was wrong.

Among other things, she was highly critical of the classroom staff for allowing J.C. to cry and not attending to her. She believed that they should have done significantly more pairing with J.C. to learn about her, evaluate her, and see what she gravitated towards. They should have provided a play environment and offered her more reinforcers. She opined that if the staff was still having problem behaviors with J.C. (crying) at that point, it meant that the staff was not manipulating the environment or materials to better pair with J.C. The problem with this finding is that Dr. Gallagher was well aware that it took J.C. a significant amount of time—as in months—for J.C. to pair with people. Thus, such a finding seems inappropriate and extremely premature sixteen

days into the school year. Additionally, at that juncture, J.C. did not have play skills, so having her play would have been a demand.

Dr. Gallagher also testified that the strategies being used by the District—token economies, timers, schedules, etc.—were antiquated, citing several research articles in support of her findings and/or recommendations. When questioned whether the research articles that she relied upon to support her position actually stated that token economies, timers, and schedules were antiquated, she acquiesced that they did not. Nor did the articles state that the strategies and/or methodologies used by the District were less effective than the ones that she recommended. Notably, some of the same strategies and/or reinforcements were used by Amazing Transformations

The same with her criticism about the use of 80 percent criteria for goal mastery and that the 90 or 100 percent should be used for goal mastery. When questioned on this point, Dr. Gallagher could not point to anything in the articles that she cited that supported the percentages that she recommended.

Also challenged was her criticism that the District did not utilize “current evidence based strategies” and that it should use strategies such as PFA, skill-based treatment, and the Essentials for Living assessment tool. When her testimony was questioned further in this regard, she acknowledged that Essentials for Living is one methodology to evaluate a student with autism as are VB-MAPP and functional behavior assessment. While she believed that the functional behavior assessment was substandard compared to PFA, there was no research that indicated that the strategies used by the District were inappropriate.

In sum, I find that while extremely knowledgeable in her field, many of her criticisms of the District’s program were not supported by the research that she relied upon and instead appeared to be a preference for certain programs and methodologies.

In consideration of the above, and after hearing the testimony and reviewing the evidence presented in this matter, in addition to the findings above, I make the following **FINDINGS of FACT:**

An IEP meeting was held on August 17, 2022, at which time J.C. was found to be eligible for special education and related services under the classification of autism due to a pervasive developmental disability that significantly impacts J.C.'s verbal and non-verbal communication and social interaction and affects her educational performance. J.C. was placed in the autism classroom, where there were six children, including J.C., and five adults, one of whom was J.C.'s 1-1 aide, and Alpizar.

The IEP called for behavioral interventions—the target behaviors noted being elopement, self-injurious behavior, and adult-directed aggressive behaviors. It also identified transitions as a challenge to J.C. All of the behaviors were repeatedly identified in the observations/evaluations that were done prior to the development of the IEP and considered in the development of the IEP.

The IEP also set forth prior interventions and a description of the positive supports/interventions that were going to be provided, which included noise-cancelling headphones, individual schedule, fidgets, visual timer, pairing, sensory breaks/movement breaks, transitional warning, increased adult supervision and support, and first/then strategy. To determine the effectiveness of the interventions, the plan called for anecdotal records and data collection by classroom staff and the behavioral consultant with supports and interventions to be changed based upon data collection and behaviorist recommendations. Supports and interventions were to be faded and/or terminated based upon data collection and under the direction of the behaviorist. This was the same for the October 7, 2022, IEP, which called for the same supports/interventions, with the addition of priming J.C. for transitions and social praise.

While Dr. Gallagher believed that the BIP did not sufficiently explain how to implement the strategies listed, based upon the testimony and documentary evidence presented, I believe that the BIPs in both IEPs were sufficiently straightforward and consistently enhanced and implemented with fidelity throughout the year.

Review of the multiple consultation reports (R-22, R-23, R-27, R-28, R-31, R-33, R-37, R-38, R-42, R-44, R-47, R-54, R-55, R-57, R-58, R-61, R-64) found a thoroughness

of reporting that was precise in the observations that were done, definitions, recommendations, and training that had been undertaken. Strategies and interventions were clear and straightforward regarding how and when they were to be implemented by the staff, who were themselves personally trained by Karakashian.

Both IEPs addressed J.C.'s sensory needs. The BIP called for sensory breaks/movement breaks, multiple sensory instruction, and fidgets. Within the first week of school, Functional Communication Training was implemented, which included "manding." Staff were also trained on how to use J.C.'s AAC device and how to prompt J.C. in how to make a request/demand.

Data collection was done by Karakashian and the classroom staff, which was routinely reviewed and analyzed. Using the December 19, 2022, partial interval behavior data summary that was collected by the school staff and graphed by Karakashian as an example, there was a decrease in vocal disruptions, self-injurious behaviors and tantrums. Compliant behaviors improved during this same time period. (R-41.) This followed through to the Data Summaries of January 19, 2023, and February 23, 2023, and April 17, 2023, which showed a decrease in negative behaviors and an increase in positive behaviors. (R-50; R-59; R-77.)

Goals and objectives for academics (Speech/Language, Social/Emotional/Behavioral, Motor Skills, Daily Living, Reading, Writing, Science, Social Studies, and Math) were further identified based upon J.C.'s current levels and what she needed to work on over the course of the year. Thirteen goals were identified in the August 2022 and October 2022 IEPs, all of which provided mastery criteria and evaluation processes. While Dr. Gallagher was highly critical of 80 percent as the mastery criteria, she could not point to any specific research that supported this position, which appears to be one of preference. Notably, Alpizar credibly testified that 80 percent was best practices and more importantly, even if a skill is considered "achieved," they continue to work with the student to maintain the skill, the hope being that the child will achieve the remaining 20 percent with continued practice and maintenance.

In turning to J.C.'s progress, it is clear that J.C. did not achieve all of the goals and objectives on the IEPs, but it is also clear that she made meaningful progress both academically and behaviorally.

Under Goal 1—Speech/Language, J.C. continued to progress satisfactorily in December 2022 and March 2023. The goal and objective was for J.C. to engage in vocal play (back and forth vocalizing) with another person. In December 2022 it was reported that J.C. engaged in vocal play with the clinician during therapy activities on the average of four occasions per session and that she frequently paired her vocalizations with requests or comments using her AAC device. By March 2023, J.C. engaged in vocal play with the clinician on the average of six occasions per session and frequently paired her vocalizations with her AAC device, eye contact, or gestures toward an activity.

Under Goal 2—Speech/Language, J.C. again continued to make satisfactory progress on the goal and two objectives (J.C. will access her device to make requests and J.C. will access her device to respond to questions relating to class topics/activities). On the December 2022 Progress Report, it was reported that J.C. was able to make requests and answer questions using her AAC device in approximately 70 percent of opportunities given fading support. This increased to 75 percent by March 2023 and that she could use her AAC device to produce carrier phrases (“I see,” “I want,” “she is”) during structured activities with fading support. It was also noted in the March 2023 Progress Report that in the event she accidentally activated the incorrect icon when conveying a message, she could delete the word and correct herself independently.

Under Goal 3—Speech/Language, J.C. progressed satisfactorily towards this goal and objective. By December 2022 she was able to identify common items and actions by matching pictures or activating icons on her AAC device to label with at least 70 percent accuracy given minimal support. This increased to 75 percent by March 2023. In December she was able to follow novel directions related to therapy routines and activities with at least 80 percent accuracy given prompts/models and repetition as needed. By March 2023 she continued to perform these routines and activities with 80 percent accuracy but was able to do so with minimal prompting.

Under Goal 4—Social/Behavioral, she achieved benchmark 4.1 (Provided positive behavior supports, J.C. will transition from a more preferred activity to a less preferred task while following the classroom routine) by December 2022. She, however, progressed satisfactorily towards the goal of transitioning from one activity to the next, including transitioning from more preferred to less preferred tasks or activities. This does not appear to be surprising given that historically for J.C., transitioning has been known to lead to interfering behaviors.

Under Goal 5—Motor Skills, J.C. was making progress as of December 2022, where it was noted that she responded well to modeling and prompting to help her better grade her movements and produce a lighter, more refined product. By March 2023, J.C. had mastered both the goal and objective. She was able to independently utilize a functional tripod grasp during both coloring and handwriting.

Under Goal 6—Motor Skills, J.C. continued to make progress. By December 2022 she was rapidly progressing through the three-dimensional letter formation phase to the pre-handwriting phase. By March 2023 she had mastered the three-dimensional letter formation phase and had progressed exclusively to the pre-handwriting phase of the program. Additionally, it was reported in the March 2023 Progress Report that J.C. was working with more challenging visual motor and visual perceptual activities with great success and was working on matching patterns of up to ten objects. This was an increase from the December 2022 Progress Report, where it was reported that she was matching patterns of up to five objects.

Under Goal 7—Daily Living Skills, J.C. progressed gradually during both the December 2022 and March 2023 reporting period. Notably, in December 2022, while showing progress, J.C. required prompting to answer personal questions independently. By March 2023 she could independently and consistently answer the question “What is your name?” To answer the other questions, she required full prompting. She progressed gradually for both progress periods for the objective of answering three personal questions about herself using her AAC device with fading prompts across environments.

Under Goal 8—Reading, by December 2022 J.C. was progressing inconsistently. The goal required J.C. to receptively or expressively identify eight new letters, starting with letters in her first name from a field of three. Comments stated that, “At this time, J.C. is working on receptively identifying the letters [xyz]. Currently J.C. is inconsistently able to complete this task independently. When asked to identify a letter in a field of one, J.C. is able to do this independently, but when the field size is increased to two or more, she requires prompting and support to complete the task accurately.”

By March 2023 J.C. showed improvement and was progressing gradually. She was showing progress with her letters and able to match uppercase to lowercase for all letters. She was also able to sequence letters Aa-Jj independently. When probed, however, to receptively identify letters in a field of three, she was inconsistently able to do so accurately.

Under Goal 9—Mathematics, J.C. continued to progress gradually on the goal and satisfactorily towards the objective in both the December 2022 and March 2023 Progress Reports. By March 2023 it was reported that J.C. was consistently able to receptively identify numbers 1 and 2 with minimal prompting, but continued to require more support to identify other numbers.

Under Goal 10—Mathematics, in December 2022 it was reported that J.C. was progressing satisfactorily in her ability to sequence numbers 1–10. She was able to sequence independently all ten numbers just given the numbers and her sequencing board and showed comprehension of this task when she self-corrected her mistakes. By March 2023, J.C. had mastered this goal of sequencing numbers 1–10 and was able to complete this task independently across environments. She was also able to sequence numbers when starting with various numbers other than 1 and filling in the blanks of the sequence.

Under Goal 11—Writing, in both the December 2022 and the March 2023 Progress Reports, it was reported that J.C. was progressing satisfactorily. By March 2023 it was reported that J.C. was able to trace her first name independently within a quarter inch across environments. She also made great progress tracing all letters of the alphabet

and copying various letters. By the end of March 2023, J.C. was able to independently write her name using all capital letters without tracing. This was done by using hierarchy support and hand-over-hand support.

Under Goal 12—Science, J.C. continued to show progress. In December 2022 it was reported that J.C. was progressing gradually. She was working on receptively identifying pictures related to the weather and required prompts and support to complete the task consistently and accurately in a field of two or more. By March 2023, she was progressing satisfactorily. She was able to identify sunny, cloudy, and snowy using her device. When working in a group, J.C. was able to participate and attend with prompting.

Under Goal 13—Social Studies, the December 2022 Progress Report noted that J.C. was progressing gradually. She was working on receptively identifying pictures of community workers (firefighter, doctor, mailman). She required prompting and support to complete this task consistently and accurately in a field of two or more. By March 2023, the Progress Report noted that J.C. was progressing satisfactorily. She was showing progress in identifying pictures related to social studies, including community helpers and holiday related items and was able to identify a doctor and fireman in a field of three with decreased prompting and support. When working in a group, J.C. was able to participate and attend with prompting.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., was enacted to improve education for disabled students. One of the purposes of IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] 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). 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). The responsibility to deliver appropriate services rests with the local public school district. N.J.A.C. 6A:14-1.1(d).

Pursuant to IDEA, “a child with a disability” is one who has a disabling condition and needs special education and related services. 20 U.S.C. § 1401(3)(A). In New Jersey, a student is eligible for special education and related services by satisfying a three-part test, by demonstrating: 1) the student meets the criteria for one or more of the disabilities defined at N.J.A.C. 6A:14-3.5(c)(1–14); 2) the disability adversely affects the student’s educational performance; and 3) the student is in need of special education and related services. N.J.A.C. 6A:14-3.5(c); H.M. v Haddon Heights Bd. of Educ., 822 F. Supp. 2d 439, 449–50 (D.N.J. 2011).

IDEA 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 Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982), the United States Supreme Court held that a State provides a disabled child with FAPE if it provides “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Id. at 203. The Court reasoned that IDEA was intended to bring previously excluded disabled 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. IDEA was amended by Congress in 1997, subsequent to Rowley. The amendments focused on ensuring that students with disabilities receive a “quality public education” and not just some benefit. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 (2009).

When a due process hearing is conducted to determine if a FAPE has been provided pursuant to the IDEA, “the school district shall have the burden of proof and the burden of production.” N.J.S.A. 18A:46-1.1. If a change in the student’s IEP is sought, whether by the parents or the school district, the burden to prove whether the IEP is appropriate is upon the school district. Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 44 (1989). The burden of proof is by a preponderance of the credible evidence. N.J.A.C. 1:6A-14.1(d). There is no presumption of correctness on the part of the Board of Education for its proposed action. Ibid.

The primary method of ensuring the delivery of a FAPE is through the IEP. 20 U.S.C. § 1414(d)(1)(A). An IEP outlines the child’s present levels of academic

achievement and functioning, outlines measurable goals and the services to be provided, and establishes objective criteria for evaluating the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 65 (3d Cir. 2010). The IEP is meant to be developed, reviewed, and revised for the individual needs of the child. 20 U.S.C. § 1414(d)(1)(A).

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." Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017).

Here, petitioners assert that the August 17, 2022, IEP developed by the respondent was insufficient and did not meet the standards required by the IDEA. The recommendations and interventions in the IEP were not based on comprehensive, evidence-based evaluations necessary to address J.C.'s needs, and as a result, J.C. did not make meaningful progress during the 2022–2023 school year.

In support of this position, petitioners cite to multiple inadequacies in J.C.'s program, which include:

- J.C.'s behavioral data reflects intermittent progress with ongoing issues of vocal disruptions and self-injurious behaviors. Ignoring J.C.'s distress behaviors is not only unethical, but also ineffective and fails to address the root cause of her behaviors.
- Thirty-minute partial interval data dilutes the accuracy and effectiveness of the data collected as it fails to adequately capture the frequency and context of J.C.'s behavior.
- Reliance on token economies and delayed reinforcement was inappropriate for J.C.'s current skill level. She required immediate reinforcement for accurate responding. Failure to provide timely and appropriate reinforcement likely hindered J.C.'s ability to learn and generalize new skills.

- J.C. continues to exhibit behaviors (self-injurious behaviors and vocal disruptions) without significant improvement, which shows that the IEP did not address her behavioral needs adequately.
- The District failed to address J.C.'s sensory needs, which led to maladaptive behavior.
- As a result of the District's failure to address J.C.'s behaviors appropriately and collect appropriate skill acquisition or behavioral data, the Board could not prove that J.C. made meaningful progress or that the IEPs were appropriately ambitious or tailored to ensure FAPE was provided.
- DTT as the primary method of instruction was ineffective.
- No formal baseline assessments were done to determine J.C.'s initial performance levels beyond handwriting. As such, the IEP goals were not based on J.C.'s starting point.
- J.C. failed to achieve most of her IEP goals by the end of the school year.

Respondent contends that they did in fact provide J.C. FAPE in the least restrictive environment (LRE) during the 2022–2023 school year given J.C.'s profile. J.C. is non-verbal with her most recent cognitive testing placing her below the first percentile compared to her peers in all cognitive domains. Her educational performance at 7 years old placed her between 13 months and 2.7 years in all areas of functional age. The documentary and testimonial evidence presented in this matter reflect that the IEPs drafted in August 2022 and amended in October 2022 were appropriately ambitious for J.C. She was appropriately placed in a six-student autism classroom with a special education teacher and a 1-1 aide—both trained and overseen by a BCaBA, who also worked directly with J.C. The programming was based on evaluations and data gathered during the preceding spring and summer from which appropriate goals and objectives were tailored to meet J.C.'s needs. Meaningful behavioral and academic progress was reflected in both the narrative summaries and raw data reported/collected throughout the year.

Respondent further contends that Dr. Gallagher was, in essence, a hired gun, which was evidenced by her report and testimony. Like many experienced professionals, she

has preferred programs and methodologies. Contrary to the tone and substance of her report, respondent questioned whether she demonstrated that the respondent was operating in the “Dark Ages of Behaviorism.”

Upon hearing the testimony in this matter and upon review of the documentary evidence submitted in this matter, I concur with the respondent that J.C. was provided FAPE in the LRE during the 2022–2023 school year given J.C.’s profile.

As noted above, I found respondent’s witnesses to be well qualified and credible. While well qualified, I did not give Dr. Gallagher’s testimony as much weight as the respondent’s witnesses. The testimonial and documentary evidence presented by the respondent unequivocally reflected that the August 2022 IEP and the October 2022 amended IEP were appropriately ambitious and described why the autism classroom was the appropriate placement for J.C. based upon her then levels of academic and functional performance and individual needs. The IEP called for a special education teacher and a 1-1 aide—both of whom were trained and overseen by a BCaBA who worked directly with them and J.C. The programming was created based upon the evaluations that were conducted and data gathered during the preceding spring and summer. All of which were carefully reviewed and considered as part of the IEP process. Based upon that documentation, appropriate goals and objectives that were tailored to meet J.C.’s very specific needs and services were put in place. Contrary to petitioners’ arguments, the IEPs were appropriately ambitious based upon J.C.’s capabilities.

While the petitioners contend that J.C. failed to make meaningful progress, I believe otherwise given J.C.’s unique profile. The Educational Evaluation placed J.C. at a functional age of between 13 months and 2.7 years. Behavioral concerns that were raised by the petitioners and noted by the evaluators at the time the August 2022 IEP was developed included interrupting behaviors that included eloping, self-injurious behavior and adult-directed aggression. Denied access was noted to cause interrupting behavior. Transitioning was repeatedly identified as an issue, which was reflected in the evaluations that were done as well as by the petitioners as was pairing. Petitioners repeatedly voiced their concern that it takes months for J.C. to pair, which was properly taken into consideration by the District, and how the programming was structured.

Having said that, as evidenced by the data collected and analyzed and progress reporting, J.C. did in fact make meaningful progress. No, she did not master many of the goals and objectives on the IEPs; however, mastery alone is not the sole gauge of meaningful progress as each case is fact-specific and must be gauged in relation to the child's potential. J.C. had such meaningful progress as outlined in greater detail above. This point was touched upon by Alpizar during her testimony, wherein she stated that J.C. made consistent progress in the classroom—behaviorally, socially and emotionally—in many meaningful ways. She also noted that it was not unusual for a child not to achieve all of the goals in the IEP within the first year, particularly given the program that J.C. was coming from, which was more play-based than academic.

Respondent's brief also addressed this point by stating:

The Act does not require school districts to maximize a student's potential, or provide educational opportunities substantially equal to the opportunities afforded children without disabilities, but does require a "basic floor" of opportunity which consists of "access to specialized instruction and related services" individually designed for each child. Rowley, 458 U.S. at 197–201 (rejecting the lower court's holding that the Act requires States to maximize a student's potential); Endrew F. 137 S. Ct. at 1001 (rejecting parents' position that a FAPE is an "education that aims to provide a child with a disability, opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.")

The Third Circuit has interpreted this "basic floor" to be an education which offers the student an opportunity for meaningful learning, taking into account the child's potential. Ridgewood Bd. of Educ. v. N.E. ex rel. ME., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 185 (3d Cir. 1988) (providing that a satisfactory IEP requires "conferring of a "meaningful benefit," and must be gauged in relation to the child's potential); L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). In other words, "the educational program 'must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities.'" K.D. by & through Dunn v.

Downingtown Area Sch. Dist., 904 F.3d 248, 254 (3d Cir. 2018). It must likely produce progress, rather than regression or trivial educational benefit. Id.

The Third Circuit's interpretation of the Supreme Court's decision in Rowley was recently validated by the U.S. Supreme Court in the matter of Joseph F. o/b/o minor Andrew F. v. Douglas County School District, which acknowledged 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 variations in between." Rowley, 458 U.S. at 202. For that reason, the Supreme Court in Douglas refrained from elaborating what 'appropriate progress' will look like from case to case, except to say that it must be more than de minimis. Andrew F. 137 S. Ct. at 1001. Instead, it recognized the expertise and exercise of judgment held by school authorities in determining what "appropriate" progress resembles. Ibid.

With the above in mind, I **CONCLUDE** that the respondent provided J.C. FAPE in the LRE during the 2022–2023 school year.

Violation of 504 of the Rehabilitation Act

N.J.A.C. 6A:14-2.7(w) states that requests for a due process hearing with respect to issues concerning 504 of the Rehabilitation Act of 1973 shall proceed in accordance with this section. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination and exclusion of persons with disabilities from programs that receive federal funds. 29 U.S.C. § 791, et seq., 34 C.F.R. § 104 (2024), Subparts A, C and D. The stated goal of Section 504 is: "to the maximum extent possible, [persons with disabilities] shall be fully integrated into American life." Senate Report 1978. Section 504 is broader than the IDEA in terms of the scope with respect to who is protected and the programs in which they are protected. It applies to all persons with a disability including students, employees, patrons of public facilities, etc., and applies not only to school programs, but it also applies to extracurricular programs and after-school programs.

Here, petitioners assert that the respondent did not accommodate J.C.'s social, communication, behavioral, or educational needs. The respondent did not offer a curriculum, classroom environment, plan, or program that accounted for J.C.'s needs, nor

did it sufficiently address her impairments to improve her ability to participate in and access or benefit from her education. By failing to do this, the respondent denied J.C. the right to 504 accommodations and was in violation of the Act. S.S. & H.S. ex rel. P.S. v. Colts Neck Twp. Bd. of Educ., OAL Dkt. No. EDS 13645-12, 2014 N.J. AGEN LEXIS 81, Final Decision, at *88 (Feb. 14, 2014).

Notably, in review of the Amended Petition for Due Process, it appears that this count pertains to the transportation issue, which was resolved by the parties prior to the hearing and is not in issue. Assuming, arguendo, that it is not limited to that issue, as set forth above, just as I have found that the respondent provided J.C. with FAPE in the LRE, I **CONCLUDE** that the respondent did not violate Section 504.

Respondent developed and implemented an IEP and offered an amended IEP on behalf of J.C., which consisted of comprehensive statements of her educational needs and the specially designed instruction and related services to be employed to meet those needs. The IEPs were developed with the participation of J.C.'s parents and members of the child study team who participated in the evaluation of the child's eligibility for special education and related services. The IEP team considered J.C.'s strengths and the concerns of her parents for enhancing her education; the results of J.C.'s evaluations; her language and communications needs; and J.C.'s need for assistive technology devices and services. Modifications and supplementary aids and services as well as assistive technologies were provided to J.C. in the special education classroom to assist her in accessing her curriculum. Both IEPs developed for J.C. listed the various modifications, supplementary aids and services, and assistive technologies that were being provided.

Therefore, I **CONCLUDE** that the respondent has provided appropriate and meaningful services and accommodations to J.C. during the 2022–2023 school year so that she could access her education in accordance with Section 504 of the Rehabilitation Act.

Compensatory Education

Compensatory education is a judicially created remedy that may be awarded to account for the period in which a disabled student was deprived of their right to FAPE. School Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) (finding that tuition reimbursement was an appropriate remedy under the Education of the Handicapped Act, predecessor to the IDEA); Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 566 (3d. Cir. 2013).

Compensatory education may be awarded if it is determined that a school district failed to provide FAPE to a disabled student and the district knew or should have known that FAPE was not provided. M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996). A finding for compensatory education does not require bad faith or egregious circumstances, it only requires a finding that a disabled child was receiving less than a “de minimis” education. Id. at 397.

A finding for compensatory education does not require that there be an IEP first; a disabled child’s right to compensatory education “accrues when the school knows or should know that the student is receiving an inappropriate education.” Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 248, 250. The appropriate calculation for compensatory education relief should be the period of deprivation, minus the time reasonably required for the district to correct the problem. Mary Courtney T. v. Sch. Dist., 575 F.3d 235, 249 (3d Cir. 2009). Compensatory education relief is appropriate if it furthers the purposes of the IDEA. Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 719 (3d Cir. 2010) (citing Burlington, 471 U.S. at 369). However, the Supreme Court has declined to limit a court’s discretion in granting equitable relief under the IDEA. See Burlington, 471 U.S. at 369; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009).

Based upon my findings above, concluding that the respondent provided FAPE, I **CONCLUDE** that the petitioners’ claim for compensatory education is moot.

For the foregoing reasons, I **CONCLUDE** that respondent provided J.C. FAPE in the LRE and that petitioners' Due Process Petition should be denied. I **FURTHER CONCLUDE** that all other relief sought by the petitioners should be denied.

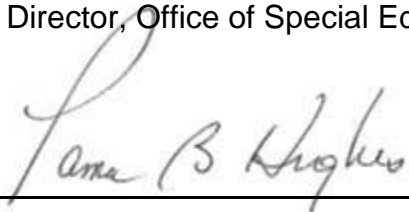
ORDER

It is **ORDERED** that all relief sought by petitioners is **DENIED** and petitioners' Due Process Petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2024) 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 (2024). 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.

July 10, 2024 _____

DATE



TAMA B. HUGHES, ALJ

Date Received at Agency _____

Date E-Mailed to Parties: _____

TBH/sg/dc

APPENDIX

WITNESSES

For petitioners:

Bobbie Gallagher

For respondent:

Allyse Karakashian

Maria Alpizar

EXHIBITS

For petitioners:

P-1 to P-28 Not in evidence

P-29 January 24, 2023, letter from H. Freeman, Esq., to R. Ballard, Esq., including Evaluation Report by Dr. Gallagher

P-30 Research articles

P-31 January 31, 2023, Interactive Kids Consultation Summary (also in evidence as R-54)

P-32 February 1, 2023, Interactive Kids Consultation Summary (also in evidence as R-55)

P-33 Not in Evidence

P-34 April 5, 2023, Addendum to ACES Evaluation by Dr. Gallagher

P-35 Curriculum Vitae, Dr. Bobbie Gallagher

P-36 Not in Evidence

P-37 Not in Evidence

P-38 VB-MAPP*

P-39 Not in Evidence

P-40 Not in Evidence

*Admitted into Evidence over respondent counsel's objection

For respondent:

- R-1 Not in Evidence
- R-2 Not in Evidence
- R-3 Not in Evidence
- R-4 Not in Evidence
- R-5 April 9, 2018, IEP
- R-6 March 20, 2019, IEP
- R-7 May 10, 2019, IEP
- R-8 October 28, 2019, IEP
- R-9 January 10, 2020, Learning Re-evaluation
- R-10 January 14, 2020, Speech and Language Evaluation
- R-11 January 14, 2020, Psychological Report
- R-12 March 2021 ABA Treatment Plan Update
- R-13 May 17, 2022, Letter from petitioner requesting referral to Child Study Team
- R-14 May 17, 2022, Augmentative Communication Evaluation Report
- R-15 June 1, 2022, Interactive Kids consultation summary
- R-16 June 5, 2022, Psychological Assessment
- R-17 June 29, 2022, Social Work Evaluation
- R-18 June 29, 2022, Educational Evaluation
- R-19 July 18, 2022, Occupational Therapy Evaluation
- R-20 July 21, 2022, Speech and Language Evaluation
- R-21 August 17, 2022, IEP
- R-22 September 13, 2022, Interactive Kids Consultation Summary
- R-23 September 16, 2022, Interactive Kids Consultation Summary
- R-24 September 16, 2022, email from BCBA regarding implementation of recommendations and modifications
- R-25 September 21, 2022, letter from case manager to petitioners
- R-26 October 4, 2022, Private ACES evaluation
- R-27 October 3, 2022, Interactive Kids Consultation Summary
- R-28 October 4, 2022, Interactive Kids Consultation Summary
- R-29 October 4, 2022, Dr. Gallagher Observation Form
- R-30 October 7, 2022, IEP
- R-31 October 12, 2022, Interactive Kids Consultation Summary

- R-32 Not in Evidence
- R-33 October 11–13, 2022, Interactive Kids Consultation Summary
- R-34 Not in Evidence
- R-35 Not in Evidence
- R-36 Not in Evidence
- R-37 November 7, 2022, Interactive Kids Consultation Summary
- R-38 November 17, 2022, Interactive Kids Consultation Summary
- R-39 Not in Evidence
- R-40 Not in Evidence
- R-41 December 19, 2022, Interactive Kids Behavior Data Summary
- R-42 December 20, 2022, Interactive Kids Consultation Summary
- R-43 December 2022 Progress Report
- R-44 January 4, 2023, Interactive Kids Consultation Summary
- R-45 January 5, 2023, email chain regarding writing letters independently
- R-46 January 12, 2023, updated data sheet
- R-47 January 13, 2023, Interactive Kids Consultation Summary
- R-48 Not in Evidence
- R-49 Not in Evidence
- R-50 January 19, 2023, Interactive Kids Behavior Data Summary
- R-51 January 24, 2023, correspondence from petitioners' counsel enclosing
ACES Evaluation
- R-52 Not in Evidence
- R-53 Not in Evidence
- R-54 January 31, 2023, Interactive Kids Consultation Summary
- R-55 February 1, 2023, Interactive Kids Consultation Summary
- R-56 Not in Evidence
- R-57 February 10, 2023, Interactive Kids Consultation Summary
- R-58 February 13, 2023, Interactive Kids Consultation Summary
- R-59 February 23, 2023, Interactive Kids Behavior Data Summary
- R-60 March 7, 2023, Interactive Kids Consultation Summary
- R-61 March 9, 2023, Interactive Kids Consultation Summary
- R-62 March 2023, Progress Report
- R-63 Not in Evidence

- R-64 April 12, 2023, Interactive Kids Consultation Summary
- R-65 2022–2023, data and work samples
- R-66 2022–2023, data and graphs
- R-67 2022–2023, daily teacher reports
- R-68 Curriculum Vitae, Maria Alpizar
- R-69 Not in Evidence
- R-70 Not in Evidence
- R-71 Not in Evidence
- R-72 Allyse Karakashian, Curriculum Vitae
- R-73 Not in Evidence
- R-74 Not in Evidence
- R-75 Not in Evidence
- R-76 Not in Evidence
- R-77 April 17, 2023, Interactive Kids, Behavior Data Summary
- R-78 Not in Evidence
- R-79 April 10, 2023, Data
- R-80 May 8, 2023, Data
- R-81 May 9, 2023, Email from Ms. Alpizar attaching May 8, 2023 Data
- R-82 May 8, 2023, Data
- R-83 May 10, 2023, Consultation Summary
- R-84 Interval Data Sheets
- R-85 Interval Data Sheets