



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00998-2024

AGENCY DKT. NO. 2024-36903

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

Petitioners,
v.

**CHERRY HILL TOWNSHIP BOARD OF
EDUCATION,**

Respondent.

Jamie Epstein, Esq., for petitioners

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

Record Closed: June 25, 2024

Decided: July 9, 2024

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415, et. seq., petitioners, J.S. and S.S. requested a due process hearing on behalf of their daughter, J.S. (J), who has an autism diagnosis but is not eligible for special education and related services. J has an Individual Education Plan (IEP) and is eligible for speech and language services. After a series of incidents with a classmate occurring in October and November 2023, at Carusi Middle School within the Cherry Hill Public

School District (District), petitioners filed a request for a Harassment, Intimidation, and Bullying (HIB) investigation, filed a criminal complaint against the student, and stopped sending J to school. In a letter, dated November 30, 2023, the parents requested Independent Educational Evaluations (IEEs) for assessment of J as a special education student. (R-23.) The Board initially denied their request and filed for due process to support their denial. The Board withdrew its petition and agreed to fund IEEs.

Thereafter, petitioners requested this due process hearing, demanding that:

- A. The BOE provide J.S. with an IEE at public expense;
- B. The BOE provide J.S. with an IEP with a placement and program consisting of special education and related services that are reasonably calculated to provide JS with a free and appropriate public education in the least restrictive environment;
- C. The BOE provide J.S. with compensatory education from the time they knew or should have known that J.S.' IEP failed to provide her with a placement and program reasonably calculated to provide her with a free and appropriate education in the least restrictive environment.

[Counter claim to 2024-36866, transmitted to the OAL on January 24, 2024, by petitioners seeking a due process hearing]

Respondent, Cherry Hill Township Board of Education (Board), maintained that their determination that J did not meet the criteria to be classified as eligible for special education and related services but did meet the criteria to be eligible for speech and language services was appropriately based on the evaluations from 2021. Respondent further maintained that as of the December 15, 2023, reevaluation meeting, requested by the parents, there was no reason to suspect that J might need special education. Addressing J's failure to attend school since November 30, 2023, respondent contends that J's parents never sought an excused absence from school by providing a note from a medical or mental health provider. Finally, the District never prevented J's return to school.

PROCEDURAL HISTORY

The matter in controversy stems from the December 19, 2023, Petition for Due Process brought by the Board to deny petitioners' request of November 30, 2023, for IEEs. On January 4, 2024, petitioners filed an Answer and a Counterclaim, seeking the relief noted above. After transmittal to the Office of Administrative Law (OAL), the matter was assigned to me. At the initial telephone conference on January 12, 2024, I was advised that the Board intended to withdraw its petition and fund an IEE. I accepted the Board's letter withdrawing its petition (R-3) and did not retain jurisdiction over the counterclaim.

On January 24, 2024, petitioners filed their counterclaim as a Due Process Petition which was transmitted to the Office of Administrative Law (OAL), where it was filed on January 25, 2024, to be heard as a contested matter. N.J.S.A. 52:14B-1 to 14B-15; N.J.S.A. 52:14F-1 to 14F-13. The matter was transmitted without a resolution session or settlement conference. The matter was also assigned to me. After a telephone conference, the hearing dates were scheduled for March 12, 2024, and March 13, 2024.

On February 9, 2024, petitioners filed a motion to compel discovery and to demand a response to their Prior Written Notice. On February 14, 2024, respondent filed its opposition, and on February 26, 2024, petitioners filed their reply. I denied petitioners' motion by Order, dated February 29, 2024.

On March 6, 2024, respondent filed a motion to quash subpoenas served on two of the District's employees, who had knowledge of the HIB investigation instituted by J's parents and Melanie Pierce, J's therapist with Interactive Kids. Petitioners' attorney, Jamie Epstein, Esq., sent an email advising that he had limited internet access and requested that the March 12, 2024, hearing be postponed. Mr. Harrison, respondent's attorney, opposed the adjournment of the hearing date. I denied the request for an adjournment and issued an Order, dated March 11, 2024, granting the motion to quash the subpoenas.

On March 12, 2024, at the start of the due process hearing, petitioners made an oral motion for reconsideration of my Order to Quash, based upon Mr. Epstein's representation that Melanie Pierce, LWS, is J's private therapist, whose services are not provided through an agency or contractual agreement with respondent. I granted this oral motion for reconsideration and issued an Amended Order, dated March 13, 2024, denying the motion to quash as to Ms. Pierce.

At the hearing on March 12, 2024, respondent called Marc Wisley, the supervisor of Special Education for Cherry Hill Public Schools, who testified as an expert in the field of special education. The respondent rested after Mr. Wisley's testimony.

On March 13, 2024, each of the petitioners testified. Due to the Amended Order, a new date had to be set for the testimony of Melanie Pierce. Under subpoena, Ms. Pierce appeared on April 4, 2024, but refused to answer questions based on her code of ethics and privilege as J's therapist, despite petitioners' waiver of their privilege. Petitioners filed an action in the Superior Court to enforce their subpoena. On June 3, 2024, the Superior Court entered an Order enforcing the subpoena, declaring the privilege waived, and requiring Pierce to testify. (P-28.)

Prior to the Superior Court's Order, on April 30, 2024, petitioners filed a motion requesting that a hearing date be scheduled to allow their expert witnesses, the independent evaluators funded by the District, to testify. After receipt of the independent evaluation reports, addendum reports, opposition, and reply, I issued an Order on June 7, 2024, denying petitioner's motion. On June 12, 2024, petitioners filed a motion for reconsideration. By Order, dated July 13, 2024, I denied petitioners' motion for reconsideration. I further ordered that the matter proceed to hearing on June 18, 2024, for the testimony of Melanie Pierce.

On May 31, 2024, petitioners filed a Request for Emergent Relief seeking stay put and an extended school year, which I denied by Order, dated June 11, 2024.

On June 17, 2024, petitioners filed a motion seeking my recusal, reassignment to another Administrative Law Judge (ALJ) and vacating my order for reconsideration. I advised the parties that the hearing would proceed on June 18, 2024. I issued an Order denying petitioners' request for my recusal on June 20, 2024.

On June 21, 2024, petitioners filed a motion for reconsideration of my Order denying stay put. There is no basis for such a motion, and it is hereby **DENIED**.

On June 24, 2024, petitioners filed a motion seeking, inter alia, a protective order for J's therapy records, P-29 and P-30, which were provided during the hearing through the testimony of petitioners' witness, Ms. Pierce, by subpoena. Upon review and consideration of petitioners' motion, I **CONCLUDE** that the confidentiality protections under N.J.A.C. 1:6A-18.2 are sufficient to preserve petitioners' interest in privacy, which also ensures that "[r]ecords of special education hearings shall be maintained in confidence, 34 C.F.R. 300.610, at the Office of Special Education Programs." Thus, petitioners' motion is **DENIED**.

At the close of the hearing on June 18, 2024, the parties elected to deliver oral closing summations. Closing summations were presented on June 25, 2024, and the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents in evidence, I **FIND** the following as **FACT**:

J was born on October 13, 2011. On July 3, 2014, when J was two years old, she was evaluated by Amir Pshytycky, M.D., at the Division of Pediatric Neurology and Development at Children's Regional Hospital, because of her parents' concerns with her development. Upon assessment, Dr. Pshytycky reported that J presented with symptoms consistent with autism spectrum disorder. (P-1.) On August 4, 2024, J had a developmental assessment by Elizabeth R. Saslow, PhD, a psychologist, upon referral for testing from Dr. Pshytycky. (P-2.) On November 26, 2014, J had a genetics

consultation with Jaya Ganesh, MD, wherein it was determined that she had an Anomaly of Chromosome 10. (P-3.) When J was three years and eleven months, she had a developmental and behavioral evaluation. (P-4.) The testing “revealed high average receptive language skills and visual motor integration skills.” Ibid.

According to her father, J attended kindergarten and first grade at a public school in Winslow Township before the family moved to the Philippines for four years. J attended first grade at the Headway School for Gifted Learning. Second through fourth grades were at the Holy Family Catholic School for Girls. While in the Philippines attending school, J did not have an equivalent of an IEP. She did not receive occupational, behavioral, or speech therapy.

The S family returned to the United States and settled in Cherry Hill Township and enrolled J in District for the 2021-2022 school year for fourth grade. Prior to the start of school, by letter, dated August 28, 2021, Mr. and Mrs. S requested that J be evaluated in all areas of suspected disability. (P-5.) The parents’ stated concerns were that J struggled with pragmatics, coping with new tasks, interpersonal communication, interaction with peers, and lacked safety awareness. Ibid. They requested that J be assessed for speech therapy, occupational therapy, behavioral therapy, and whether she needed a one-to-one paraprofessional aide. Ibid.

The District agreed to perform the following evaluations: Speech/Language, Social History, Educational, and Psychological. On September 15, 2021, Mr. and Mrs. S consented to the proposed evaluations. (R-14.) By letter, dated September 16, 2021, Mr. and Mrs. S notified the District about their concerns with one of the school psychologists who had implied that J was not in need of special education and asked whether a different school psychologist could perform the evaluation. (R-15.) At the time of the testing, J was ten years old and attending fourth grade in James Johnson Elementary School.

Psychological Evaluation (R-16) – The examiner was Desiree Marasa, Ed.S¹, who evaluated J on October 14, 2021, and prepared a report. Ms. Maras administered ten subtests from the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V). J's Full-Scale IQ (FSIQ) of 123, placed her in a very high range of cognitive ability. J's verbal comprehension index, which reflected her ability to verbalize meaningful concepts, think about verbal information, and express herself using words was above average but for J an area of relative weakness in comparison to her overall ability. Another weakness was visual spatial, where J scored in the average range. J scored above average on fluid reasoning. Her working memory skills were high, and her performance was a relative strength compared to her performance on language-based and visual spatial tasks. Her pattern of strengths and weaknesses suggested that J does better when information is presented in an auditory versus visual format. J's overall processing speed was extremely strong.

Social Work Evaluation (R-17) – Brianna Walker, MSW, evaluated J on October 7, 2021. For this evaluation, Mrs. S stated her concerns were not with academics but with J's safety and overall awareness of danger.

Speech and Language Evaluation Report (R-18) – Alana Annunziato, MS CCC-SLP issued her report on November 12, 2021. As part of the assessment, Mrs. S completed a case history form to provide information about J's language development and communication at home. Mrs. S. believed that J lacked age-appropriate conversation skills and had issues with pragmatic speech. J's fourth grade general education teacher completed a teacher input questionnaire. The teacher's reported areas of concern were as follows: avoids eye contact; difficulties in engaging in conversations with peers; difficulties putting her ideas into words; responds too quickly; easily distracted; her rate of speech is too fast; and difficulties with getting words out. Her teacher also noted that J can become emotional when sharing ideas. J's strengths consisted of her strong command of vocabulary, eagerness to learn, and desire to share ideas. Ms. Annunziato observed J in her classroom. Based on her observation, Ms. Annunziato reported that J's barriers to academic success included "hesitancy to participate, especially in group

¹ Ms. Marasa was not the school psychologist, opposed by the parents.

work, and difficulty attending to students who were speaking during small group discussion.” Ms. Annunziato also observed J at recess, where she was walking around the playground independently, not engaging with her classmates.

Ms. Annunziato administered tests from the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) to measure J’s language ability. On the four tests to determine her Core Language score, Word Classes, Formulated Sentences, Recalling Sentences, and Semantic Relationships, J scored in the average range of language functioning. J’s Receptive Language Index was measured based on her performance in three tests, Word Classes, Following Directions, and Semantic Relationships. J’s score placed her in the above average range of language functioning. For Expressive Language Index and Language Memory Index, J scored in the above average range.

An area of weakness was J’s score on the Pragmatics Profile. This is a checklist to assess J’s verbal and nonverbal pragmatic skills that may influence social and academic communication. J’s parents and teachers provided input. J received a scaled score of 2, which is a percentile rank of 0.4.

The examiner also administered the Social Language Development Test – Elementary: Normative Update (SLDT-E:NU) which is designed to assess language-based skills of social interpretation and interaction with friends, the skills found to be most predictive of social language development. The first sub-test was Making Inferences, where J was asked to infer what someone in a picture was thinking. There are two tasks. The first one is to examine whether J could appropriately use facial features, body language, and context from the pictures to respond. The second task was for J to identify the information from the photo used to make the inference. J’s score of nine was in the thirty-seventh percentile for her chronological age. Subtest B, Interpersonal Negotiations, required J to pretend she was in a conflict with a peer. J needed to identify the problem, propose an appropriate resolution and explain her resolution. J scored in the twenty-fifth percentile of her chronological age. The third subtest was Multiple Interpretations to show J’s capability of flexible thinking. The fourth subtest was Supporting Peers which tested the degree of support given to a friend, not the truthfulness of the response. J also scored in the twenty-fifth percentile of her chronological age.

In summary, testing revealed J's hesitancy to participate, especially in group work, and difficulty attending to students who were speaking during small group discussions as barriers to her academic success. When engaged in conversation, J did not maintain eye contact or turn in the direction of the speaker. J's overall receptive and expressive language skills derived from the CELF-5 fell within or above the average range. However, pragmatics was an area of weakness. On the SLDT-E:NU, J's overall social language development skills were below average.

At the initial eligibility determination meeting on November 29, 2021, the CST determined that J was eligible for speech/language services. As a result, J's IEP for fourth grade provided individual Speech-Language Therapy for three twenty-five-minute sessions monthly. (R-19.) Mr. and Mrs. S consented to the implementation of the IEP on November 30, 2021. (R-20.)

The annual review meeting was held on April 29, 2022. Mr. and Mrs. S attended. (R-21.) J's IEP for fifth grade modified her Speech-Language Therapy to group sessions, not to exceed five students. (R-22.)

J's annual review meeting for sixth grade was held on May 23, 2023. Her Speech-Language Therapy remained a small group, but the duration was changed to twenty-five yearly twenty-five-minute sessions. (P-8.) As noted in the IEP in the Present Levels of Academic Achievement and Functional Performance section, J's therapy group consisted of J and one other student. It was recommended that J continue to receive Speech/Language therapy services "to address carryover of pragmatic skills in larger group situations and assist transition to middle school." (Id. at 5.)

By letter, dated November 30, 2023, Mr. and Mrs. S requested full and individual evaluations for their daughter for assessment as a special education student. (R-23.) They expressed their concerns for J's safety and her inability to appropriately respond to social clues. The stated in the letter that "[J] was sexually assaulted multiple times without her understanding that unwanted touching and kissing is a form of sexual assault." Ibid.

Mr. and Mrs. S believed that J's "safety awareness in the general school environment is compromised." Ibid.

In response to the letter, a reevaluation and planning meeting was convened on December 15, 2023. As listed on the attendance sign-in sheet, petitioners attended this meeting. The meeting was also attended by J's general education teacher, her case manager, school social worker, the Learning Disabilities Teacher Consultant (LDTC), and the Speech-Language Pathologist. (R-24.) The District did not believe evaluations were warranted to determine if J had a disability which adversely affected her academic performance. (P-14.) As stated in the District's letter to the parents dated December 18, 2023, J was performing well above average in all subject areas and was participating in extracurricular activities (cross-country and drama). Ibid. It was further noted that J had a Speech Only IEP and her speech-language specialist "reported at the meeting that [J] has been making nice progress towards her goals."

As of November 30, 2023, the parents, out of concern for J's safety, elected not to send her to school.

Prior to the meeting on December 11, 2023, petitioners filed a verified petition and request for emergent relief with the commissioner of the Department of Education seeking safety protections to allow J to return to school. J.S. obo J.S., a minor child v. Board of Education of the Township of Cherry Hill, Camden County, OAL DK NO.: EDU 13843-23. After a hearing, the Honorable Kimberley M. Wilson, ALJ, concluded that the petitioners had failed to meet all the requirements under N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief. In her decision, Judge Wilson noted that J could return to school at any time to continue her education.

By email sent on January 12, 2024, the Board's attorney, Eric L Harrison, Esq., notified petitioners' attorney, Jamie Epstein, Esq., of the following:

As J.S. has not been to school since November, the District has reconsidered its position. Notwithstanding the lack of any evidence that J.S. requires special education services, the District is willing to fund an independent educational

evaluation – most importantly, based on your clients’ mental health concerns, a psychiatric assessment. We will therefore withdraw the petition.

[R-3.]

DISCUSSION AND ADDITIONAL FINDINGS OF FACT

Summary of Testimony:

Marc Wisley is the District’s Supervisor of Special Education. He testified as an expert in the field of special education. His position requires him to play a supervisory and advisement role in relation to the CST.

Mr. Wisley explained that eligibility for special education is determined through a three-pronged approach. The first prong is to identify whether the student meets an eligibility category as defined in N.J.A.C. 6A:14-3.5(c). The second prong is whether the disability has an adverse effect on the student’s education, an educational impact. The third prong is whether the student requires specialized instruction. To be eligible the student must meet all three prongs.

Mr. Wisley never personally met or evaluated J. His familiarity is based on his review of the 2021 evaluations, meetings with the CST, and reviewing the information.

According to Mr. Wiseley’s review of the Psychological Evaluation (R-16), J. performed in the average to extremely high range on all subject areas. He also reviewed the Social Work Evaluation, dated October 7, 2021. (R-17.) He noted that reasons for the evaluation were the parents’ concerns about J’s pragmatic language difficulties, interpersonal communication, issues with coping with new tasks, and safety awareness. A Social evaluation is to assess family, school, and community factors, which would contribute to eligibility for special education and related services and adjustment within an educational setting. Mr. Wiseley also reviewed the Speech and Language Evaluation, dated November 12, 2021, and noted J’s low score in the pragmatics profile. (R-18.)

An IEP was developed in conjunction with the Initial Eligibility Determination. (R-19.)

J's diagnosis of autism, in itself, did not make her eligible for special education and related services. Her autism diagnosis is a defined disability under N.J.A.C. 6A:14-3.5(c)(2). However, according to Wiseley, the data at the time, gleaned from the evaluations, showed that J's autism did not adversely affect her education and she did not need specialized instruction. In Mr. Wiseley's opinion the CST determined that although J met the criteria for the first prong, the final two prongs were not met. Accordingly, the CST offered an IEP based on J's deficit in pragmatics as identified in the Speech and Language Evaluation. Goals were developed to address that deficit. Mr. Wiseley felt the frequency and duration of the services recommended in the IEP was appropriate. In his experience, there is a great deal of corroboration that occurs when the CST recommends related services; the parents consented to this service. In his opinion, the IEP was appropriately based on the evaluation information and the recommendations of the CST.

J's fifth grade IEP was developed at the annual review on April 29, 2022. (R-22.) In this IEP, J was offered three monthly twenty-five-minute speech sessions in a group not to exceed five students. Mr. Wiseley explained that when students are working on pragmatics, the standard is to begin therapy in an individual setting, but as the student progresses with skills, they move into a group-based setting because peers are needed when practicing pragmatic skills. Mr. Wiseley noted the following provision in her IEP, "J. expressed interest in practicing pragmatic language strategies with peers, she noted concerns with determining what to say when someone does not want to talk, play, etc., and how to maintain a conversation with someone who does not share her interests." (*Id.*, at 5.) This statement revealed that J was showing an area of growth which would be cause for increasing opportunities for group interactions.

On November 30, 2023, parents sent Mr. Wisley a letter requesting independent evaluations for J. (R-23.) As with all requests for evaluations, Mr. Wisley forwarded the information to the CST to schedule a meeting and review the request. An initial identification and evaluation and planning meeting was held on December 15, 2023. (R-

24.) Because J was a student eligible for speech and language services only, the parents' letter prompted an Evaluation Planning meeting that involved the student, parents, general education teacher, and the full CST, including the school psychologist, social worker, the LTDC, and a speech therapist.

After the meeting, Mr. Wisley spoke with Jennifer Campbell, J's sixth grade case manager at Caruso. While J has an autism diagnosis, the CST still did not see an educational impact or the need for specialized instruction at that time, so the request for evaluations was denied as unwarranted. At the time of the meeting due to the incidents, J was not attending school. However, J attended regularly from September through November and performed well academically in all classes.

Because of the decision denying the parents request for evaluations, Cherry Hill was required to file a petition for due process. On December 19, 2024, Cherry Hill filed its required petition.

Due to J's continued absence from school, the District was concerned and agreed to move forward with independent evaluations. (R-3.) When a parent requests IEEs, the District provides a list of individuals previously approved to expediate the process. Mr. Wiseley understood that the parents had not accepted either of the two approved independent psychiatrists offered by the District. As the parents had picked evaluators who were not known to the District, the District needed to review their credentials and receive Board approval for their funding.

By letter, dated January 29, 2024, the parents identified Rachaele Cianci for a psychological and educational evaluation and Rizza Miro Lemonakis for a comprehensive speech and language evaluation. (R-5.) No other assessments were identified.

By email, dated February 8, 2024, Mr. Wisley requested a copy of the credentials for the evaluators. (R-6.) By email, dated February 12, 2024, Mr. Wisley clarified that certifications were needed, either the evaluator's license or NJDOE Certification. (R-7.)

By email, dated February 13, 2024, the parents sent the credentials of their experts. (R-8.) On February 20, 2024, parents requested BOE payment vouchers authorizing payment for each evaluator. (R-28.) On February 22, 2024, Mr. Wisley asked whether any of the fees would be covered by health insurance. Ibid. This practice has been utilized in the past to supplement and help defray costs. On February 22, 2024, Mrs. S responded that they were not required to use insurance to cover any portion of the costs. On February 23, 2024, Mr. Wiseley confirmed that the BOE would cover the costs. Ibid.

After IEEs are completed, the reports are given to the CST for review. The standard operating procedure is for the CST to schedule a meeting with the parents to review the reports and make a determination about eligibility for special education services.

While Mr. Wiseley was aware of the HIB investigation and the stationhouse correction resulting from the parents' criminal complaint, he had no direct knowledge of either proceeding. The incidents fell under the purview of the building principal, Dr. Neil Burti.

Because the parents were electing not to send J to school, the District did not provide home instruction, send homework, or allow J to participate remotely. If a parent elects not to send their child to school, medical documentation from a professional is required for home instruction during the period the student is unable to attend school. Home instruction is medically based or after a determination by the IEP team. The District did not agree with the parents' decision not to send J to school.

Mr. S testified in this matter. The key points from the 2014 evaluations when J was two years old (P-1 through P-3) were J's diagnosis of autism, her chromosome X anomaly, and prosody in speech. J was very young, but the report also noted meltdowns and difficulty expressing her needs.

In August 2021, Mr. and Mrs. S presented a letter to the District about their concerns with J starting school in District. Their main concerns were about J's safety

awareness in the general education school environment. J had received speech therapy, OT, and behavior therapy in Winslow school district, prior to the family moving to the Philippines.

Mr. S noted that J's IEP for fourth grade did not address safety awareness issues, which had concerned him. (R-19.)

The reason for the November 30, 2023, letter to Mr. Wiseley was because their concerns about J's lack of safety awareness had come true when J was sexually assaulted by a classmate. (R-23.) Mr. S attended the December 15, 2023, meeting with his wife and daughter. The District only focused on how well J was doing in school, as justification for its determination that IEEs were not warranted. No one at the meeting addressed how the inappropriate sexual behavior affected J. They did not interview her, address the assault, or make any changes to her IEP. At the time of the meeting J had not been in school for fifteen days, and the District refused their requests for remote instruction, homework, or access to J's classroom materials.

On November 29, 2023, Mr. and Mrs. S filed a complaint with the Cherry Hill Police Department for the assault. There was no trial, the matter was resolved by a stationhouse correction during the first week of January with the classmate admitting the assault². Mr. S believed that the sexual assault could have been avoided had the school listened to the parents' concerns about their autistic child's lack of safety awareness and ability to understand social cues.

J has been affected by the incidents. She is not sleeping and has bad dreams. She is also withdrawn.

Mrs. S testified that there were no safety concerns addressed in any of J's IEPs. Because the school refused to address the issues, Mrs. S did not believe J would be safe returning to her classroom at Carusi.

² The stationhouse correction referred to by petitioners was not presented as an exhibit or admitted into evidence.

J testified and told me that she just wants to go back to school in a safe place where she can learn without anything bad happening.

Melanie Pierce testified after an Order entered on June 30, 2024, by the Honorable Judith S. Charney, J.S.C., compelled her testimony and declared the patient-therapist privilege waived. The parents had waived the privilege on April 4, 2024, but Ms. Pierce refused to answer any questions, so the parents filed an action in the Superior Court of New Jersey, Law Division-Camden County, to enforce their subpoena for her testimony.

According to Ms. Pierce's Intake Notes, her first session with J was on December 14, 2023. (P-29, at Therapy 1.) The parents had reported that "[J] has been taken advantage of her classmate. J is unable to recognize if someone is manipulating her. J's safety awareness is limited." Ms. Pierce used the term sexual assault because the incident where J had been kissed by another student against her will fit the general criteria for sexual assault given J's tender age. As reflected in her Intake Note, Ms. Pierce performed a Biopsychosocial Assessment. J reported that she had been getting to know a fellow student, "A." A told J that she was romantically interested in her, had written letters to her, and had sexually explicit dreams about her. J also reported that A had said she would "kill herself or others for love." (Id. at Therapy 2.) On November 29, 2023, Mr. and Mrs. S received a call from school informing them that J had been sexually assaulted by A, who pulled J by the arm into the bathroom and kissed her. A told J she had to kiss her back. Ibid.

All the information about the incident was reported to Ms. Pierce by J's parents. She took the information at face value and felt she had no reason to question it.

On January 3, 2024, Ms. Pierce wrote a letter at the parents' request to provide to their attorney. (P-30.) In the letter, Ms. Pierce wrote that J's boundaries had been disrespected by the offending student but also by the school for not enforcing boundaries or addressing the harassment. Ms. Pierce believed in her professional judgment that an IEE would be beneficial for J, especially in the area of social skills, for J to be successful in school.

It appeared that J had attempted to set boundaries with the offending student, but she had not received adequate support from school personnel. It further appeared that the school did not recognize J's autism needs and her lack of social skills.

As a therapist, Pierce's role was to treat her client, J. Her treatment plan included the following goals: "[J] will improve social skills through knowledge and understanding of social awareness, communication, and boundaries;" and "[J] will process school incident, of violation of body integrity, through use of positive coping skills." There were corresponding objectives to meet each goal. (P-29, Therapy 9-11.) The objectives were to help J improve her social skills, gain an understanding and recognition of healthy boundaries, and how to use assertive communication.

Therapy was only provided through mid-March. Ms. Pierce believed her services were appropriate and necessary.

Credibility

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility conclusions "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 fact finder is expected to base

decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

In determining credibility, I am mindful that Mr. Wiseley, as the Supervisor of Special Education, supports the appropriateness of the evaluations and the IEPs developed by the CST for J. I am also aware that J's parents are motivated by their desire to protect their daughter and to ensure that the District addresses all her needs.

The documentary evidence in the form of the 2021 evaluations and the IEPs developed for fourth through sixth grades supported Mr. Wiseley's testimony that J is a bright above average learner with recognized pragmatic speech deficits. However, these are not the facts in dispute. Petitioners believe that they put the District on notice of J's difficulty with safety awareness in a general education environment due to her autism when they sent their initial letter requesting evaluations on August 28, 2021. (R-13.) While the parents made their concerns known, they did not disagree with the District's evaluations at the initial eligibility determination meeting on November 29, 2021. (R-19.) They consented to the implementation of the IEPs developed for fourth through sixth grades. Despite the parents' concerns there were no noted difficulties with J's educational progress or her social awareness until October of sixth grade.

The incidents in October and November of 2023, investigated by the District as a HIB, caused the parents to request IEEs. In their letter of November 30, 2023, petitioners specifically stated that "J was sexually assaulted multiple times without her understanding that unwanted touching and kissing is a form of sexual assault." (R-23.) The District responded to the parental request for IEEs by convening a reevaluation meeting. The CST determined that IEEs were not warranted because "[J] is not suspected of having a disability which adversely affects her educational performance, and is not in need of special education services." (P-14.) While the merits of the HIB investigation are not relevant to this proceeding, Mr. Wiseley testified that the HIB investigation had been proceeding separately from the reevaluation process. As noted in the December 18, 2023, letter after the identification and evaluation planning meeting, the purpose was to discuss the parents' concerns about J's functioning and safety in school. The District's response was that J was performing well above average in all subject areas and involved

in extracurricular activities. Moreover, her speech/language specialist “reported at the meeting that J has been making nice progress towards her goals.” Ibid. She had also regularly attended school until her parents elected not to send her.

There was not a due process hearing on whether the District’s initial decision to deny IEEs after the December 15, 2023, meeting was appropriate because the District withdrew its petition and agreed to fund IEEs. (R-3.) Although the issue had become moot, petitioners refiled their counterclaim with their request for IEEs as their due process petition herein.

As the party with the burden of proof and production, the District through Mr. Wiseley’s testimony as the Supervisor of Special Education, defended its determination based on the information and data available at the December 15, 2023, meeting that the Speech/Language IEPs developed after the 2021 evaluations were appropriate and supported that J was not suspected of having a disability which adversely affected her educational performance.

Within a month, by January 12, 2024, the District withdrew its objection to funding IEEs. (R-3.) Petitioners elected not to accept the District’s offer of an independent psychiatric assessment. Instead, they choose evaluators from a list provided by their attorney to perform a Psycho-Educational Evaluation and a Speech and Language Evaluation. As stated in my Order, dated June 7, 2024, I did not allow these evaluators to testify as petitioners’ expert witness in this proceeding because their reports had not been reviewed and assessed by the CST and the information contained in the reports would not have been available to the District on December 15, 2023, as available data.

J’s therapist, Melanie Pierce testified as to J’s need for therapy to help her process what happened, advocate for herself, and improve her social skills. Her demeanor during her testimony was calm, deliberate, and thoughtful. She displayed the traits of a caring professional, who clearly took her ethical obligation to her patient with the utmost seriousness. There is nothing in the record to indicate that petitioners shared J’s therapy with the District or informed them that they were placing J in private therapy as of the December 15, 2023, meeting. On January 3, 2024, Ms. Pierce wrote a letter addressed

to “To whom this may concern,” wherein she advocated for an IEE because in her opinion the prior IEEs failed to address J’s autism and failed to include social skills. (P-30.) Ms. Peirce testified that she wrote this letter at the request of the parents, who informed her that their attorney requested it. Although Pierce knew the letter was intended for litigation purposes, I believed her when she testified that she did not write anything that was not based on her own professional opinion. There is nothing in the record to show if this letter was ever provided to the CST or any member of the District for consideration.

Based on the credible evidence, I **FIND** as **FACT** that the only data and information in the record as of the December 15, 2023, reevaluation meeting showed that J was excelling in school, participating in extracurricular activities, and progressing in her speech language therapy under her current IEP. Since placing J in District for the 2021-2022, school year, the parents expressed their concerns about J’s safety and pragmatic language deficits. However, there was no indication of any problems until October 2023 and the incidents which prompted the HIB investigation. Based on J’s progress up until the incidents, there was no reason for the District to suspect that J had a mental health disorder that was interfering with her ability to learn. Accordingly, I must **FIND** that when the District agreed to fund the IEEs, which was prior to petitioners’ instituting this due process petition, the petitioners’ claim that J needed special education and related services was premature and could not be determined until after the evaluations were completed and the reports provided to the CST for review and consideration.

Petitioners are also claiming compensatory education for the time that J was not in school. There is nothing in the record to indicate that the District took any action to bar J from attending school. Petitioners admittedly did not send J to school because they did not believe she was safe. Petitioners’ prior request for an Order returning J to school with safety precautions was denied by Judge Wilson on December 22, 2023. As stated in Judge Wilson’s decision, on or around December 8, 2023, the District had changed the other student’s schedule so that she no longer had classes with J. Petitioners never provided any medical or mental health justification for their unilateral decision not to send J to school. Accordingly, I cannot **FIND** any support in the record justifying petitioners’ decision not to allow J to attend school.

LEGAL ANALYSIS AND CONCLUSIONS

This case arises under the Individuals with Disabilities Education Act (Act), 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to ensure that all children with disabilities have available to them a “free appropriate public education [(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). In New Jersey, the District bears the burden of proof at a due process hearing to show, by a preponderance of credible evidence, that it has met its legal obligation to provide a FAPE. Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 46 (1989); N.J.S.A. 18A:46-1.1.

The Act defines FAPE as special education and related services provided in conformity with the IEP. 20 U.S.C. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 247 (3d Cir. 1999).

Under 20 U.S.C. sec. 1401, a child with a disability is defined as a child with a listed disability, including autism, who by reason of that disability needs special education and related services. Here, the CST determined after evaluations in the fall of 2021 that J did not require special education and related services.

Under N.J.A.C. 6A:14-3.5(c):

A student shall be determined eligible and classified “eligible for special education and related services” under this chapter when it is determined that the student has one or more of the disabilities defined in (c)1 through 14 below, the disability adversely affects the student’s educational performance, and the student is in need of special education and related services. Classification shall be based on all assessments conducted, including assessment by child study team members, and assessment by other specialists as specified below.

...

2. “Autism” means a pervasive development disability that significantly impacts verbal and nonverbal communication and social interaction that adversely affects a student’s educational performance. Onset is generally evident before age three. Other characteristics often associated with autism are engagement in repetitious activities and stereotyped movements, resistance to environmental change or change in daily routine, unusual responses to sensory experience, and lack of responsiveness to others. The term does not apply if the student’s adverse educational performance is due to an emotional regulation impairment as defined in (c)5 below. A child who manifests the characteristics of autism after age three may be classified as autistic if the criteria in this paragraph are met. An assessment by a certified speech-language specialist and an assessment by a physician trained in neurodevelopmental assessment are required.

While J had an autism diagnosis, the IEP developed after the 2021 evaluations determined that J’s disability did not adversely affect her educational performance and she was not in need of special education. However, the CST determined that J’s pragmatic language weakness, based on her low pragmatics score and her below average social language developmental skills impacted her ability to effectively communicate her thoughts and ideas with peers and adults. Thus, she was determined eligible for speech language services under N.J.A.C. 6A:14-3.6 and her IEPs reflected Speech-Language Therapy.

The individualized education plan or IEP has been deemed the “hallmark” or “centerpiece” of the IDEA, as it is the primary vehicle for the delivery of a FAPE. Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 749 (2017) (citing Honig v. Doe, 484 U.S. 305, 311 (1988)). While an IEP is subject to change based on the child’s evolving needs, see 34 C.F.R. § 300.324(b), courts reviewing the IEP for appropriateness must view it as a “snapshot” in time and evaluate it prospectively. Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1040-41 (3rd Cir. 1993); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 537 (3rd Cir. 1995). The Third Circuit has held that “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” Fuhrmann, 993 F.2d at 1040. Therefore, “[s]o long as the IEP responds to the

[student's] needs, its ultimate success or failure cannot retroactively render it inappropriate." Carlisle, 62 F.3d at 534.

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

The Third Circuit in Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 247 (3d Cir. 1999) stated that the appropriate standard is whether the IEP offers the opportunity for "significant learning and confers meaningful educational benefit." The benefit must be meaningful in light of the student's potential; the student's capabilities as to both "type and amount of learning" must be analyzed. Id. at 248. When analyzing whether an IEP confers a meaningful benefit, "adequate consideration [must be given] to . . . [the] intellectual potential" of the individual student to determine if that child is receiving a FAPE. Ibid. The IDEA requires an IEP based on the student's needs and "so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate." Scott P., 62 F. 3d at 534.

Thus, I **CONCLUDE** that when the current IEP was drafted on May 23, 2023, the recommendation was for J to "continue to receive Speech/Language services to address carryover of pragmatic skills in larger group situations and assist transition to middle school." (P-8.) When the IEP was proposed and implemented, there was no indication that J was being harassed, bullied, or adversely affected educationally due to her autism.

After the incidents in October and November, the parents requested IEEs on November 30, 2023. Under 34 C.F.R. § 300.502(c), if the parent obtains an IEE at public expense, the results of the evaluation must be considered by the public agency, in any decision made with respect to the provision of a FAPE to the child. Until the District has had the opportunity to review and consider the IEEs, the right to a FAPE-denial remedy of change in programming or placement is premature.

Accordingly, I **CONCLUDE** that petitioners filed their petition prematurely before giving the District the opportunity to review and consider the IEEs and make a determination regarding the need for special education and related services.

The purpose of compensatory education is to remedy past deprivations of a FAPE. Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990). It “serves to ‘replace [] educational services the child should have received in the first place’ and . . . such awards ‘should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.’” Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 717–18 (3d Cir. 2010) (quoting Reid ex rel. Reid v. D.C., 401 F.3d 516, 518 (D.C. Cir. 2005)). The authority of a court to remedy a deprivation of FAPE is “a profound responsibility, with the power to change the trajectory of a child’s life.” Thus, the “courts, in the exercise of their broad discretion, may award [compensatory education] to whatever extent necessary to make up for the child’s lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.” Upper Darby Sch. Dist. v. K.W., 2023 U.S. Dist. LEXIS 129803, *35–36 (E.D. Pa. 2023) (quoting G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015)).

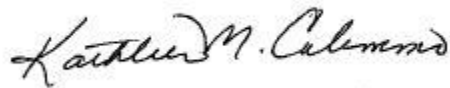
Petitioners believe they are entitled to compensatory education for the time they elected not to send J to school due to their safety concerns. The District does not dispute that J received no educational or therapy services during her extended absence. Petitioners never presented the District with any medical, behavioral, or mental health justification for J’s prolonged absence. Despite Judge Wilson’s prior decision and the change in the offending student’s schedule, petitioners continued to keep J home from school. In this instance, based on the evidence in the record, there is no support for the

petitioners' unilateral decision to keep J home from school. There is nothing to suggest that the District violated the IDEA, after it agreed to fund IEEs within one month of petitioners' request. There is nothing to suggest that the District was unable to keep J safe while she attended school had they been given the chance. Accordingly, I **CONCLUDE** there is no basis for an award of compensatory education for J's elected absence from school.

ORDER

For the foregoing reasons, it is **ORDERED** that petitioners' request for relief pursuant to the IDEA is **DENIED**.

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 9, 2024

DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency

Date E-Mailed to Parties:

KMC/tat

APPENDIX
WITNESS LISTS

For Petitioner:

Mr. S (father)
Mrs. S (mother)
J
Melanie Pierce, LSW, MSW

For Respondent:

Marc Wiseley

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 July 3, 2014, Neuro Evaluation
P-2 August 14, 2014, Psych Evaluation
P-3 November 28, 2014, Genetic Evaluation
P-4 November 16, 2015, Neuro Evaluation
P-8 May 23, 2023, IEP
P-14 December 18, 2023, Evaluation Letter from District to parents
P-28 Order enforcing subpoena
P- 29 Therapy Records
P-30 January 3, 2024, letter addressed "To whom it may concern"

For Respondent:

R-3 Harrison's letter, dated January 12, 2024, agreeing to fund an IEE
R-4 Harrison's letter, dated January 29, 2024, requesting information about
parents' IEE request

- R-5 Parents letter, dated January 29, 2024, to Wiseley identifying requested evaluators
- R-6 Email dated, February 8, 2024, from Wiseley to parents requesting certifications
- R-7 Email, dated February 12, 2024, from Wiseley to parents requesting license of NJDOE certifications
- R-8 February 13, 2024, e-mail from parents with proposal and credentials and Wiseley's response, dated February 20, 2024
- R-14 Letter, dated August 28, 2021, requesting evaluations
- R-15 September 16, 2021, letter from parents requesting that maria Castro not evaluate J
- R-16 October 14, 2021, Psychological Evaluation
- R-17 October 13, 2021, Social Work Evaluation
- R-18 November 12, 2021, Speech and Language Evaluation
- R-19 November 29, 2021, IEP for speech-language therapy
- R-20 November 30, 2021, Consent to implementation of speech IEP
- R-21 April 29, 2022, Meeting attendance sheet, consent to implement speech IEP, dated April 29, 2022
- R-22 April 29, 2022, Speech IEP
- R-23 November 30, 2023, parental request for evaluations for an IEP
- R-24 December 15, 2023, Initial Identification and Evaluation Planning Meeting sign-in sheet
- R-27 Curriculum Vitae for Marc Wiseley
- R-28 February 20, 2024, to February 23, 2024, email exchange between parents and Wiseley regarding IEE payment