



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

**FINAL DECISION**

OAL DKT. NO. EDS 01484-24

AGENCY DKT. NO. 2024-36835

**J.B. AND R.B. ON BEHALF OF E.B.,**

Petitioners,

v.

**ELIZABETH CITY BOARD OF EDUCATION,**

Respondent.

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**Michael I. Inzelbuch**, Esq., for petitioners (Law Office of Michael I. Inzelbuch,  
attorneys)

**Richard P. Flaum**, Esq. for respondent (DiFrancesco, Bateman, Kunzman, Davis,  
Lehrer & Flaum, P.C.)

Record Closed: October 7, 2024

Decided: November 18, 2024

BEFORE **R. TALI EPSTEIN**, ALJ:

**STATEMENT OF THE CASE**

Petitioners unilaterally placed E.B., who is eligible for special education and related services, in an out-of-district, private school before allowing E.B. to attend the district school under an individualized education program (IEP) that was inappropriate and did not provide her with a free, appropriate public education (FAPE). Are petitioners entitled

to reimbursement from the District for E.B.'s unilateral placement at an appropriate out-of-district placement for the 2023–2024 school year and, thereafter, until such time as the District offers E.B. an IEP that provides her with a FAPE? Yes. Under N.J.A.C. § 6A:14-2.10(b), the tribunal may require the District to reimburse parents for the costs of private placement.

### **PROCEDURAL HISTORY**

Petitioners J.B. and R.B. on behalf of their minor daughter, E.B. (collectively, Petitioners), filed a request for due process petition with the Office of Special Education Programs, New Jersey Department of Education on December 11, 2023.

The Department of Education transmitted the contested case under N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13 to the Office of Administrative Law, where it was filed on February 5, 2024.

Respondent, Elizabeth City Board of Education (or, the District) filed an answer to the petition on February 7, 2024, and at a prehearing conference on February 21, 2024, advised of its intention to move for summary decision dismissing the due process petition with prejudice. Pursuant to the briefing schedule set with the parties, the parties timely submitted their respective papers, and the motion was fully briefed on April 8, 2024. By order dated May 16, 2024, the undersigned denied the District's motion, and the matter was set for hearing on dates requested by counsel.

The in-person hearing took place over the course of three days on June 27, 2024, July 30, 2024, and July 31, 2024. The parties requested to file post-hearing submissions following receipt of the transcripts. Respondent submitted its post-hearing brief on October 1, 2024. The record closed on October 7, 2024, upon receipt of Petitioners' closing brief.<sup>1</sup>

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<sup>1</sup> Petitioners initially filed an oversized closing brief on October 1, 2024, which was rejected by the tribunal. Petitioners promptly supplied the tribunal with a revised closing brief which was accepted on October 7, 2024, as a timely submission.

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

Based on the testimony presented at the hearing, my assessment of its credibility and weight, the documents admitted in evidence, and my assessment of their sufficiency, I **FIND** the following **FACTS**:

In or around July 2023, E.B.'s parents registered her for the 2023–2024 school year in the District.<sup>2</sup> (T3, 178:22-179:1.) During the prior school year (2022–2023), E.B. had attended the Jewish Educational Center (JEC), a private parochial school in Elizabeth. (T3, 157:2-5.)

In March 2022, E.B. was evaluated by the Union County Educational Services Commission (Union County Commission) and deemed eligible for special education and related services under the Specific Learning Disabilities (SLD) classification because of her significant underachievement in reading. (R-27.) Accordingly, while she was in second grade at the JEC, E.B. received special education and related services under an individualized education service plan (IESP).<sup>3</sup> The IESP services were intended to supplement the private school's main educational program but were insufficient.<sup>4</sup> E.B. struggled academically and emotionally. (T3, 157:9-19; 158:1-4.)

In the spring semester of 2023, E.B.'s mother, R.B., began investigating other placement options for her daughter. (T3, 158: 5-6; T3, 178:25-179:1.)<sup>5</sup> Cognizant that private schools had application deadlines, Petitioners applied (on their daughter's behalf) to the Joseph Kushner Hebrew Academy, the Craig School and the Winston School (Winston) for the upcoming 2023–2024 school year. (T3, 158:12-19.) R.B. testified that Petitioners' intent in doing so was to keep E.B.'s options open for the third grade. (T3, 158:8-11; 158:20-25.) R.B. also tried to register E.B. with the District in June 2023 but

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<sup>2</sup> References herein to T1, T2, and T3 are to the transcripts from the first, second, and third day of the hearing, respectively.

<sup>3</sup> As opposed to an IEP, which is offered to eligible students who enroll in public schools, an IESP outlines services and support for eligible students who attend private schools.

<sup>4</sup> Under the IESP, E.B. received speech therapy, occupational therapy, and specialized instruction described as group "study skills" and group "IDEA B study skills." (R-2.)

was told that it was too late in the school year and to wait until July 4, 2023, which she did. (T3, 159:7-160:7.)

On July 5, 2023, the District advised E.B.'s parents that E.B. was placed at Sonia Sotomayor School #25.<sup>6</sup> (R-7.) On the same day, E.B.'s mother, R.B., requested an IEP for her daughter, who would be entering the third grade. (R-5.) The written request, marked "received" by the District on July 6, 2023, noted that E.B. was diagnosed with dyslexia and that "her current academic environment (the JEC) could not accommodate her needs." (Ibid.)

An initial identification and evaluation meeting to discuss E.B. was scheduled by the District and attended by R.B. and various District representatives. (R-10.) As a result of that meeting, held on July 24, 2024, "[i]t was determined that [E.B.] is suspected of having a disability which adversely affects the student's educational performance and is in need of special education and related services, or speech-language services only." (R-11.) The District proposed that certain evaluations of E.B. be performed to determine if she had a disability, and parental consent was provided for all four proposed evaluations: educational/learning, psychological, social history/occupational therapy and speech. (Ibid.; T2, 160:18-23.)

The District conducted the evaluations on an expedited basis during the first two weeks in August 2023. R.B. cooperated with the District throughout the evaluative process. She attended meetings as scheduled by the District, consented to the District evaluations and brought E.B. to the school for each of the assessments. (See, e.g., T1, 118:5-9; T1, 238:18-24.) R.B. previously had provided the District with E.B.'s progress reports from the JEC, the IESP (outlining the services that E.B. had been receiving and under which E.B. was "struggling," according to R.B.), an August 2022 literacy evaluation prepared by Francine M. Matthews, Ph.D. (Dr. Matthews), which among other things, diagnosed E.B. with dyslexia, and the results of various standardized testing that had been administered to E.B. (R-9.) At the hearing, the District witnesses conceded that because it was summer, they made no attempt to reach out to E.B.'s prior placement and

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<sup>6</sup> The tribunal notes that the IEP lists Nicholas Murray Butler #23 as E.B.'s placement, and it is not clear whether the discrepancy (in R-11) is a typographical error. (R-21.)

speak to her teachers or gain an understanding of the services she was receiving in or outside the classroom under the IESP. (T1, 59:11-15; 119:10-16; 200:17-201:8; 218:20-221-221:18; 239:24-240:3; T2, 46:23-25.) Indeed, no one on the District's child study team (CST) could articulate the nature of the special programming that E.B. received at her prior placement. (T1, 58:23-59:10; 116:11-14; 221:24-222:6; 239:17-23.) Nor did anyone from the District make any inquiries of the JEC or the Union County Commission to find out. (T1, 59:11-15; 116:15-24; 239:24-240:3.)

By contrast, R.B. was forthcoming with the District during the evaluative process. R.B. shared information with the CST about E.B.'s dyslexia symptoms and academic weaknesses. She also advised the District that E.B. was distractible and had received counseling for behavioral issues. (T1, 147:18-24; T3, 161:10-14, R-11.) As discussed below, E.B. was formally diagnosed with ADHD on August 30, 2023. (T3, 161:17-18.)

By notice dated August 15, 2023, E.B.'s parents received an invitation from the District to attend a meeting on August 23, 2023, to review the results of the District's evaluation and plan for E.B.'s educational needs (the "IEP Meeting"). (R-17.) The notice further advised that if E.B. was "determined to be eligible, an IEP would be developed at the meeting, if feasible." (*Ibid.*)

E.B.'s mother<sup>7</sup> attended the IEP Meeting virtually, accompanied by Petitioners' educational consultant, Susan Caplan (Caplan). Caplan, a licensed learning disabilities teacher consultant (LDT-C) with thirty-two years of experience working as an LDT-C in the public school system, attended as a "second set of ears." (T3, 108:12-15.) Caplan took notes at the meeting, which she memorialized in a typed write-up. (R-21.) Caplan was the only meeting attendee who recorded (and maintained) contemporaneous notes of what transpired at the IEP Meeting.

Three District representatives, members of E.B.'s CST, also attended virtually, via Teams: Jessica Riccardi (Riccardi) - school psychologist, Yao-Hsuan Huang (Huang) - LDT-C, and Sabrina Marques (Marques) - speech language specialist (SLS).

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<sup>7</sup> E.B.'s parents are divorced, and R.B., a New Jersey special education teacher, has residential custody of E.B. (T3, 157:20-25; 176:6-9.)

(T3, 17:11-15; T1, 81:9-19; R-19.)<sup>8</sup> At the start of the IEP Meeting, E.B. was informed that there would be no general education or special education teacher at the meeting. The parties dispute whether E.B. “waived” the requirement of the teachers’ presence, and I **FIND** that the evidence provided on this issue preponderates in favor of E.B.’s position that she was “told” that the teachers were “not available” to attend because it was the summer. (T3, 178:3-18; T1, 82:3-12; T3, 17-11:17; T3, 18:5-10.) I also **FIND** that E.B. did not object, and she consented to moving forward with the IEP Meeting. (Ibid.)

The CST then proceeded to review their reports and evaluation results, except for the occupational therapist who was not in attendance. Occupational therapy (OT) was proposed as part of the District program, and there is no dispute that E.B. was eligible to receive those related services. Indeed, E.B. had been receiving both OT and speech therapy at the JEC. (T3, 18:13-19.)

For her part, the LDT-C (Huang) noted that her evaluation of E.B. revealed severe weaknesses in reading comprehension and fluency. Huang administered the Woodcock-Johnson IV Tests of Achievement (WJIV-ACH) and Oral Language (WJIV-OL) to E.B. The Woodcock-Johnson test is intended to determine levels of “academic achievements in the areas of reading, writing, math, and oral language.” (T-1, 223:1-2.) Huang’s initial evaluation report (R-16A) recorded that E.B. scored in the “Low Average” range in basic reading skills and struggled with reading comprehension and fluency. (T1, 228:18-229:4.) In math calculations, E.B. scored in the “Average” range, but the math problems were read to her. When the questions were presented as “word problems,” or were “multi-stepped” or had “extra information,” E.B. had a “hard – a more difficult time,” and she scored in the “Low Average” range in “problem solving.” (T1, 229:5-13.)

E.B.’s scores in reading comprehension were abysmal. She scored in the “Very Low” range, which Huang agreed equates to the “1st percentile” and is “the lowest you

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<sup>8</sup> Dr. Thomas MacNamara (Dr. MacNamara), the CST social worker, also prepared a report. But he did not participate in the IEP Meeting and has never reviewed the IEP that the District prepared for E.B. (T1, 201:17-19.) While Dr. MacNamara opined as a social worker expert that E.B. could function in a general education or other setting within the District, he was unable to provide any factual support for his opinion. Dr. McNamara also admitted that he did not know E.B.’s reading levels, math levels, diagnosis or classification. (T1, 188:15-23; 195:11-196:24.) Accordingly, his opinion is accorded no weight in the tribunal’s final decision.

can go.”<sup>9</sup> (T1, 252:13-20.) Her passage comprehension score was also extremely weak; E.B. scored in the “3rd percentile.” (T1, 252:13-25.)

E.B. fared no better in “reading recall,” “reading fluency,” “oral reading,” and “sentence reading fluency.” She scored in the “Very Low” range in each of these areas, scoring less than .1% in reading recall and .5% in reading fluency. (T1, 253:1-11.)

Indeed, Huang testified that following her evaluation (and before the IEP Meeting), the CST met as a team and determined that given E.B.’s current Full Scale IQ score (discussed below), there was a “severe discrepancy between [E.B.’s] academic levels and reading comprehension and reading fluency.” (T1, 231:8-11.)

In her evaluation report, Huang concluded, among other things, that E.B. “would benefit from a program of supplemental reading interventions.” (R-16A.) Huang recommended that E.B. receive “phonics instruction,” “multi-modality instruction,” and “dictation applications.” (Ibid.)

Marques, the SLS, then summarized her findings. As memorialized in her evaluation report (R-13), Marques reported “no concerns regarding E.B.’s articulation.” She administered two standardized tests (the CELF-5 and the TOLD-P:5)<sup>10</sup> on which E.B. scored in the average range. Marques concluded that E.B.’s “receptive and expressive language skills were commensurate with her age.” (T2, 55:5-17.) Marques found E.B. to be “100% intelligible” and therefore “didn’t require articulation therapy.” (T2, 45:25-46:7.) Marques also concluded that E.B. did not qualify for any service relating to voice or fluency because “[s]he was intelligible.” (T2, 45:16-22.) Marques’ evaluation of E.B. did not test phonology. (T2, 60:14-16.)<sup>11</sup>

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<sup>9</sup> On the Woodcock-Johnson test, score ranges are “Very Low,” “Low,” “Low Average,” “Average,” “High Average,” and “Superior.” (T1, 252:7-12.)

<sup>10</sup> CELF-5 is an acronym for Clinical Evaluation of Language Fundamentals - Fifth Edition. TOLD-P:5 is an acronym for Test of Language Development-Primary: Fifth Edition.

<sup>11</sup> Marques’ report neglected to include that E.B. was receiving twice-weekly speech services at her prior school, but that information was “considered” by the CST in the resulting IEP. (T2; 78:1-79:4; R-23.)

As the case manager and psychological evaluator, Riccardi had a dual role at the IEP Meeting. First, she summarized the results of her cognitive assessment of E.B. as the school psychologist. As memorialized in her psychological report (R-14), Riccardi performed a one-hour assessment of E.B. on August 15, 2023, during which she administered the WISC-V to E.B. The WISC-V is an IQ test for children and is intended to measure cognitive ability. As recorded by Riccardi, E.B. received a Full Scale Intelligent Quotient (FSIQ) score of 84, which was in the “Low Average” range and denoted a 14-point drop from E.B.’s prior FSIQ, as recorded by Dr. Matthews just one year earlier. Riccardi was aware of the 14-point deviation but did not include it in her report because she “didn’t consider it outstanding.” (T1, 132:7-10.) The 14-point decline was remarkable to LDT-C Caplan because it was an indicator that E.B.’s struggle in a general education classroom was affecting her ability to acquire background knowledge as manifested by her decreasing performance on an IQ test. ( T3, 35:19-23.) While Riccardi’s report did not mention the decline in E.B.’s IQ test, it did acknowledge that children with E.B.’s level of functioning “may experience academic difficulty when compared to same-age peers” and noted that R.B. was seeking additional services through the District to support E.B.’s academic needs because the IESP services provided at the JEC were not sufficient to address E.B.’s weaknesses. (R-14.)

Following the District’s presentation of its evaluation results, Riccardi, as the case manager, provided the District’s opinion that E.B. was eligible for special education and related services under the SLD classification, the same classification under which the Union County Commission had found E.B. to qualify for services. (T1, 83:8-16.) R.B. agreed. (T1, 83:17-23.)

Next, the CST proposed its plan for E.B.’s program and placement. R.B. was not provided with the written IEP at the IEP Meeting, nor did the District provide Petitioners with a draft in advance of the IEP Meeting. But R.B. was told at the IEP Meeting that E.B. would be placed in the District’s third-grade general education classroom and receive the “in-class support program.” (T1, 84:12-19.)

Under that program, as Riccardi testified, “[t]he teacher for the majority of the day is a general education teacher. A special education teacher supports the general

education teacher for two periods per day, once during math and once during language arts that's typically 40 minutes each [of the 80-minute periods] as well as a specialized reading program in the curriculum and, if needed, which [E.B.] did qualify for, was occupational therapy services." (T1, 84:22-85:5.) Riccardi further clarified that the specialized reading program was "**embedded** in the class support program." (T1, 86:8-10; T1, 86:20-25.) (emphasis added.)

The District's "in-class support program" did not provide any special education support during science or social studies. During those content classes, E.B. would not receive any special education to support the general education third-grade curriculum. R.B. was also told that other "modifications" – which, as subsequently memorialized in the IEP, comprised a non-individualized, laundry list of generalized modifications – would be available, as needed, to assist E.B. with the general education curriculum. The District's educational plan for E.B. did not provide E.B. with any speech and language services.

Upon hearing what the District was offering to provide, R.B. inquired whether E.B. would receive Orton-Gillingham (OG) reading instruction.<sup>12</sup> Riccardi was only able to state that the OG program was "just rolling out" in E.B.'s in-district placement and that E.B. would receive "specialized reading instruction based on her needs." (T3, 164:11-165:1; T1, 101:18-8.) But no one from the CST was able to provide R.B. with any specifics regarding the "specialized reading program" other than Riccardi's non-committal statements. As a result, no determination was made at the IEP meeting, nor was any assurance provided to R.B. that her dyslexic daughter would receive OG instruction under the District's program for E.B. (T1, 102:12-21.)

When the discussion of the District's proposed program for E.B. concluded, R.B. asked if she could observe the program. Riccardi agreed to inquire about scheduling an observation in September. R.B. also advised the CST that she would be sending E.B. to Winston until she was able to observe the proposed placement and "saw an appropriate

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<sup>12</sup> OG is a program of instruction that uses a structured literacy approach to address language-based learning disabilities, including dyslexia, reading comprehension and fluency weaknesses, dysgraphia and written expression disorders. (T2, 119:4-20.)

program in Elizabeth being offered.” (T3, 166:3-11.) No one from the District responded to R.B.’s statement, and there was no further discussion at the IEP Meeting regarding R.B.’s concerns that the program being offered by the District was inappropriate for E.B. (T1, 166:12-17.)

After the IEP Meeting concluded, Riccardi finalized the draft IEP and sent Petitioners a copy of E.B.’s IEP for the 2023–2024 school year (the “2023–2024 IEP”). (R-23.) As set forth in the 2023–2024 IEP, E.B. is eligible for special education and related services under the SLD category in the areas of “Reading Fluency” and “Reading Comprehension” due to the “significant discrepancy between her ability (FSIQ=84) and achievement in these areas” which “disability adversely affects her classroom performance.” (Ibid.)

Consistent with the District’s proposal at the IEP meeting, the 2023–2024 IEP provided the following, limited, **“Special Education Programs And Related Services”** to E.B.:

In-class Resource (support): Reading/Language Arts - 9/8/23–6/30/24 - 1 x Daily 40 min.

In-class Resource (support): Math - 9/8/23–6/30/24 - 1 x Daily 40 min.

Occupational Therapy: Group - 9/18/23–6/4/24 -1 x Weekly 30 min.

Under the section where the District was required to **“Describe any options considered and the reasons those options were rejected,”** Riccardi noted that speech therapy was “considered” because E.B. “had been receiving speech therapy at her prior school” but was discontinued in light of the “results of the current/speech language evaluation” that “are within the Low Average to Average range.” (Ibid.) Missing from that section was any indication of the District’s consideration of Dr. Matthew’s evaluation and rejection of her evaluation results and/or her diagnosis of E.B.’s dyslexia. There was also no consideration (or rejection) of Winston as an appropriate out-of-district placement.

Under the heading **“Concerns of the Parent,”** Riccardi inserted a verbatim copy of an August 23, 2023, email she received from R.B. after the IEP Meeting. The e-mail

stated that R.B. agreed with E.B.'s classification and noted what R.B. believed to be shortcomings in the District's proposed service plan. The e-mail further "reiterated" (as R.B. conveyed at the IEP Meeting) that Petitioners "will be placing [E.B.] at the Winston School in Short Hills and seeking reimbursement," until such time as the District is able to arrange for observation of the District's proposed placement.<sup>13</sup> (Ibid.)

Also noted under the heading "Concerns of the Parent" was R.B.'s assumption that the District had accepted Dr. Matthews' evaluation that R.B. was dyslexic. At the hearing, the District witnesses confirmed that Dr. Matthews' 2022 evaluation **was not** used for eligibility purposes," but no one from the District advised Petitioners that R.B.'s assumption was incorrect. As Riccardi explained at the hearing, she included R.B.'s assumption as a "concern of the parent" because "that's what mom wrote (in the August 23, 2023 email)," but the District did not accept Dr. Matthews' evaluation. (T1, 94:14-20.) During cross-examination, the District's LDT-C did, however, agree that in addition to her "academic challenges" and "reading and comprehension issues," E.B. "has dyslexia." (T1, 267:1-10.) Other than "what mom wrote," the 2023–2024 IEP did not acknowledge that E.B. was dyslexic. (R-23.)

Regarding R.B.'s concerns about E.B.'s "distractibility" and "focus" issues, the 2023–2024 IEP acknowledged that E.B.'s progress notes from the JEC stated that she benefitted from "small class sizes where she had the "attention needed to stay focused and on task" and "1:1 teacher support," but it did not consider a self-contained or small classroom setting for E.B. (Ibid.)

As mentioned above, the generalized modifications listed in the 2023–2024 IEP were not tailored to E.B.'s individualized needs. (Ibid.) Some examples of the "modifications" that appeared in the 2023–2024 IEP included "[a]dditional time to complete tasks/long-term projects with adjusted due dates," "use of calculator," "if possible, avoid more than one test on the same day," "teach the writing process," and

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<sup>13</sup> R.B.'s August 23, 2023, email notifying the District of Petitioners' intent to place E.B. at Winston was provided to the District more than 10 days before the District's scheduled first day of school (September 8, 2023). Notably, the District took no steps during that time to cure the shortcomings in E.B.'s educational program.

“use a consistent daily routine.” (*Ibid.*) None modified the third-grade level expectations of the general curriculum for a dyslexic student. (*Ibid.*, T3, 27:23-25.) Even worse, notwithstanding the District’s explicitly stated conclusion that “[E.B.]’s disability affected her from accessing the general education curriculum without specialized instruction,” the 2023–2024 IEP offered no specialized instruction to allow E.B. to access significant subject-matter areas of the third-grade curriculum that indisputably involved reading and reading comprehension. Specifically, the 2023–2024 IEP failed to provide E.B. with specialized instruction in science and social studies. (R-23.)

The District concedes that the third-grade science and social studies curricula include reading. (T1,124:4-8; 244:23-25.) Both E.B.’s case manager and the District’s LDT-C acknowledged the undeniable fact that given E.B.’s reading-centered disability, she would need help in science and social studies to access the general education curriculum. (T1, 125:3-18; 126:23-127:3; 245:1-18.) While the District witnesses argued that “modifications” could be used to address the lack of specialized instruction, they were unable to explain how that would work in science and social studies. Nor could the District explain why a special education teacher was deemed necessary for E.B. to access the general education curriculum that included reading and reading comprehension in language arts and math but was not necessary to access the general education curriculum in science or social studies, which also required reading and reading comprehension. Thus, I **FIND** that the modifications listed in the 2023–2024 IEP were insufficient and inappropriate to enable E.B. to be involved and progress in the general education curriculum for science or social studies.

On cross-examination, the reason why the District did not offer specialized instruction to E.B. during social studies and science was revealed. The decision to offer E.B. limited specialized instruction in language arts and math (for only 40 minutes of the 80-minute classes) and no specialized instruction in social studies or science *was not* because the District made the determination that E.B. could access the remainder of the general education curriculum, and make meaningful progress, by applying “modifications” or making “accommodations.” Rather, the simple – albeit insupportable – reason why the 2023–2024 IEP did not provide E.B. with an in-class resource for science and social studies, or for half of the language arts and math classes,

was because the third-grade special education teacher, in the District school where E.B. was placed, was “[only] in the classroom (for 40 minutes) during language arts and math.” (T1, 126:10-21.)

The following exchange between the District’s LDT-C and Petitioners’ counsel leaves no doubt that the IEP proposed by the District was not tailored to E.B.’s individualized needs but merely reflected the special education that was available in the District at the third-grade level:

Q: The same E.B. who has significant reading issues would not get any special education during science and social studies according to your IEP, correct?

A: Yes.

Q: Is that because it doesn't exist, or she didn't need it?

A: It doesn't exist.

Q: So essentially the child's needs are not what are considered, it's what we have. We have in class support in reading and math, correct?

A: Yes.

Q: We don't have it for science and social studies?

A: Yes.

Q: She needs the same help during science and social studies, correct?

A: Yes.

Q: But we don't have it?

A: But the general education teachers could implement the modifications that are in the IEP as well.

Q: Let's go back to the difference between modifications and special ed. She needs special ed for reading throughout the day, correct?

A: Yes.

Q: That was not provided to her according to the IEP, correct?

A: Yes.

(T1, 245:1-246:3.)

On August 30, 2023, E.B. was “formally diagnosed” with ADHD. (T3, 162:12-16.) As noted above, the 2023–2024 IEP reflected the CST’s knowledge of E.B.’s previously reported “distractibility” and “focus” issues, but it did not note that the CST considered, much less proposed placing E.B. in a self-contained setting that would allow for “1:1 teacher support.” Here, too, the District neglected to engage in a meaningful assessment of E.B.’s individualized needs. E.B.’s placement in the general education classroom was a foregone conclusion because, when E.B. was assessed, there were no “pull out” resource rooms available in the District at the third-grade level. (T3, 188:8-15.) Again, the District’s development of an educational plan for E.B. was driven by what services existed in the District at the time, not E.B.’s individualized needs.

The IEP noted that E.B.’s “academic weaknesses may impact her ability to achieve at a level commensurate with age and grade peers,” but as Caplan pointed out, the District “didn’t put [E.B.] in a program to remediate those deficits.” Instead, they placed her in a classroom with a general education curriculum that is “based on grade level achievement as opposed to a resource center where you can modify the curriculum.” (T3, 56:23-57:5.)

At the time of her placement, E.B. was reading at “a first-grade level.” Her placement in the general education program was approximately two years above her reading level. (T3, 27:1-4.) With regard to fluency and reading comprehension, the District’s LDT-C assessed E.B. to be at the “kindergarten” level. (T1, 244:1-16.) Yet for half of the language arts and math classes, and for the entire science and social studies classes, all of which would be taught at the third-grade level, E.B. was offered no support by the District.

The 2023–2024 IEP also fell short in delineating measurable academic goals. As a threshold deficiency, Goal 3 – which should have been addressed to E.B.’s undisputed weakness in reading comprehension – was left blank. (R-23.) There were also no goals to address E.B.’s weaknesses in phonological awareness, decoding and fluency. (T3, 58:7-11.)

On September 28, 2023, R.B. visited the District school to observe the third-grade classroom and the proposed in-class support that the District was offering to E.B. (T3,

168:13:-169:3.) R.B.'s classroom observation confirmed her concerns regarding the inappropriateness of the District's proposed placement for her daughter. (T3, 169:4-19.) There was no OG instruction provided in the classroom that R.B. observed. When R.B. asked the special education teacher if OG was part of the curriculum, the teacher answered that she was "not sure." (Ibid.) R.B. then "went to Ms. Riccardi" and asked her, again, if OG instruction would be provided to E.B. Again, Riccardi was unable to provide a response. (T3, 169:14-22.) But several hours after R.B.'s exchange with Riccardi at the school, Riccardi emailed R.B., stating that the special education teacher whom R.B. observed was trained in implementing OG and that E.B. would receive a specialized OG reading program. Riccardi also asked when E.B. would begin attending the District school. (P-45.)

R.B. followed up with Riccardi again, asking for specific information regarding the frequency of the OG instruction and whether it would require that E.B. miss any classroom instruction. (T3, 170:17-172:2.) On October 4, 2023, Riccardi responded: "OG is 4x weekly. [E.B.] would miss 2 health periods, 1 science period, and 1 writing period." (P-45.)

Riccardi's response on October 4, 2023, did not comport with the "in-class support program" or the CST's discussion at the IEP Meeting of a specialized reading program that was "embedded" in the third-grade curriculum. Quite the opposite, it revealed – for the first time – that E.B. would be "pulled out" of the general education classroom.

Riccardi's unequivocal declaration, on October 4, 2023, that E.B. would receive OG instruction "4x weekly" also did not square with testimony provided by District representatives, including Dr. Michael Ojeda (Dr. Ojeda), the District's Director of Special Services. Dr. Ojeda explained that in order "to determine the amount and duration" of OG intervention, the District needed to "pre-test" the eligible student. (T3, 187:11-13.) Dr. Ojeda further confirmed that without pre-testing, the District "would know the maximum [intervention], which would be five days a week, but we wouldn't know exactly how many days" a student would receive. (T3, 187:18-189:22.)

Regardless, the District's purported agreement to offer OG instruction to E.B. "4x weekly," without pre-testing her, was made without any attempt by the District to modify the written IEP from an "in class support program," with specialized reading instruction "embedded" in the program, to a hybrid or partial "pull out" program where R.B. would be removed from the general education classroom for four periods each week, including science and writing.

On cross-examination, Riccardi admitted that the OG instruction offered to E.B. in her October 4, 2023, email was "supplemental instruction" that should have been listed in the IEP. (T1, 111:12-18.) Yet there was no amendment made to the 2023-2024 IEP that the District presented to Petitioners in August.

Although she was the case manager assigned to E.B., Riccardi conceded that she had no understanding, "logistically," of how the scheduling or the OG program being offered to E.B. as reflected in her October 4, 2023, email would work. Riccardi simply wrote what was told to her by a special education teacher. But Riccardi also admitted that when she sent the email to E.B.'s parents to rely upon, it was clear that E.B. would be receiving OG somewhere other than the classroom. (T1, 109:4-24.)

In mid-October 2023, following her observation of the program proposed by (and in) the District and receipt of Riccardi's October 4, 2023, email advising that E.B. would be missing classes to receive OG instruction, R.B. emailed the District, noting "[s]ome, but not all of the reasons" why she believed that the District program was not "appropriate" for E.B. (R-25.) The "reasons" provided in the email were as follows: (1) absence of special education teacher during academic instruction; (2) no differentiated instruction observed; (3) class size was too large for E.B.; and (4) general educational curriculum was too difficult for E.B. (Ibid.) The email did not address any concern regarding the absence of speech therapy from the District's program. The email did, however, advise that because the District's "program was not appropriate for [E.B.]," Petitioners would be "continuing her placement at the Winston and seeking reimbursement for all costs and transportation until such a time that an appropriate public program is provided." (Ibid.) Approximately eight weeks later, Petitioners filed their due process petition and request for hearing.

E.B. attended Winston for the 2023–2024 school year. She currently is a student there. Winston is a specialized school for students with language-based learning disabilities, such as dyslexia. R.B. reports that her daughter is thriving at Winston. At Winston, E.B. receives OG instruction from “OG-certified and trained” teachers in a small class setting. OG is “incorporated throughout the day in every subject,” including “science” and “history.” E.B. also receives speech therapy and OT at Winston. R.B. provided un rebutted testimony that E.B.’s reading has improved while at Winston, and she has advanced to reading chapter books. R.B. also has seen improvement in E.B.’s writing and has observed E.B.’s use of OG methods that she learned at Winston to help her read and write better. (T3, 173:18-174:24.)

Caplan had the opportunity to observe E.B.’s instructional program at Winston in April 2024. Caplan noted that, at Winston, E.B. receives specialized instruction to address her reading and writing weaknesses. In addition to 40 minutes of daily instruction devoted to phonemic awareness and decoding skills, she also has a daily, 40-minute period called “reading” that is a “comprehension focused program.” R.B. also receives 40 minutes of daily instruction in writing during which spelling and grammar rules are reinforced. Language instruction is delivered using “visual representation” in a small classroom setting. At Winston, E.B. is in a class of three students for reading, written language and decoding. The small class size is important to address E.B.’s issues with distractibility, and it also allows for more individualized instruction. (T3, 39:5-40:19.)

Dr. Karen Kimberlin (Dr. Kimberlin), an expert in the identification and remediation of dyslexia and an expert in speech, reading and writing disabilities, also had the opportunity to observe E.B. at Winston. Trained in OG, Dr. Kimberlin was impressed with the multi-sensory OG instruction that E.B. is receiving at Winston. Dr. Kimberlin confirmed that the specialized instruction at Winston, “with daily phonics instruction,” is targeted to address E.B.’s dyslexia needs and is led by skilled, OG-certified teachers. (T2, 1591:21-24; 160:3-162:10; 178:12-14.) Based on her evaluation of E.B., Dr. Kimberlin diagnosed E.B. as dyslexic “with comorbid weaknesses” in reading fluency and comprehension (as also acknowledged by the District) in addition to a learning disability in writing and a developmental language disorder. (T2, 148:21-149.4.)

The 2023–2024 IEP did not identify that E.B. had a writing disability. (R-23.) Dr. Kimberlin confirmed that the 2023–2024 IEP did not provide the type of instruction, *i.e.*, daily OG instruction with a trained OG aide across all written schoolwork, that E.B. needed to remediate her dyslexia. (T2, 153:18-154:1.) Much less, she observed no OG learning when she visited the third-grade classroom that the District offered to E.B. (T2, 155:18-21; 156:17-157:4.)

Based on the foregoing, I **FIND** that the 2023–2024 IEP failed to provide E.B. with the opportunity for significant learning or meaningful benefit in light of her potential.

Had the District been able to provide a third-grade program that accommodated E.B.’s educational needs, R.B. would have preferred that E.B. attended an Elizabeth public school. As “someone who works in the public school,” R.B. appreciates “the good that public school has to offer and was hoping that Elizabeth would have a program that would accommodate [E.B.’s] needs.” (T3, 175:4-10.)

Unfortunately, the District was not able to do that. The special education instruction available for third graders at E.B.’s District school placement was insufficient to address E.B.’s individualized needs. Nor did the “in class support program” offered in the 2023–2024 IEP adequately address E.B.’s demonstrated weaknesses in reading and reading comprehension.

By its terms, the “duration” of the 2023–2024 IEP ended on June 30, 2024. (R-23.) The tribunal was not provided with an IEP for E.B. covering the current school year, and it is assumed that no individualized plan exists for the 2024–2025 academic calendar.

### **LEGAL ANALYSIS AND CONCLUSIONS**

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities. Receipt of those funds is contingent upon a

state's compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989).

### **The Applicable Law**

As a recipient of federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities receive a FAPE. 20 U.S.C. §1412. FAPE includes special education and related services. 20 U.S.C. §1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public school district. N.J.A.C. 6A:14-1.1(d). To fulfill its obligation to deliver a FAPE, the District must offer an educational program “reasonably calculated to enable [E.B.] to make progress appropriate in light of [her] circumstances.” Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386, 399 (2017).

The IEP is the vehicle by which the local public school district provides each eligible student with an IDEA-mandated FAPE. Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (citing 20 U.S.C. § 1414(d)). The IEP spells out how a school will meet an individual disabled student's educational needs. Y.B. v. Howell Twp. Bd. of Educ., 4 F.4th 196, 198 (3d Cir. 2021). Among other requirements, an IEP must include a statement of the “child's present levels of academic achievement and functional performance,” consider the impact of that child's disability on his/her ability to be involved and “progress in the general education curriculum,” offer “measurable annual goals” to “enable the child to . . . make progress in the general educational curriculum,” and describe “supplementary aids and services . . . provided to the child” to meet those goals. 20 U.S.C. § 1414(d)(1)(A)(i)(I), (II)(aa), (IV)). The educational benefit conferred to the student through an IEP must be “meaningful.” Polk v. Cent Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988).

The IDEA further requires that disabled children be provided a FAPE in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5). While an IEP cannot be judged by whether it provides an eligible student with the “optimal level of services,” (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995)), it must provide “more than a

trivial benefit” and be reasonably calculated to confer “significant learning” in light of the particular student’s individual abilities. Ridgewood Bd. of Educ. v. N.E., 172 F.3d at 247.

Stated differently, to satisfy its obligation to provide an eligible student with a FAPE, the District must offer “educational instruction specifically designed to meet the unique needs of the [disabled] child, supported by such services as are necessary to permit that child ‘to benefit’ from the instruction.” Polk, 835 F.2d at 180.

The District bears the burden of proving that it offered a FAPE. N.J.S.A. 18A:46-1.1. It must be able to offer “a cogent and responsive explanation for [its] decisions that demonstrates that the IEP meets the requisite standard. Andrew F., 580 U.S. at 404. Further, the District must collaborate with parents (and vice versa) to design an appropriate IEP. 20 U.S.C. § 1414 (d)(1)(B); see also N.J.A.C. 6A:14-2.3; N.J.A.C. 6A:14-3.7(b). This mandated, collaborative process reflects a recognition that the development of a sufficiently individualized program of education necessarily involves a “fact-intensive” inquiry that is “informed not only by the expertise of school officials, but also by the input of the child’s parents.” Andrew F., 580 U.S. at 399–400.

A parent who believes that a school district has not provided their child with a FAPE as required under IDEA may request a due process hearing. See Lascari, 116 N.J. 30 at 36 (citing applicable New Jersey state regulations). The parent need only place the appropriateness of the IEP at issue, shifting the burden to the school district to prove that the IEP was indeed appropriate. The focus of the inquiry is on “the IEP actually offered and not one that the school board could have provided if it had been so inclined.” Id. at 46.

In a situation where a child has been unilaterally placed by his or her parents in an educational setting other than as provided in the IEP, reimbursement may be available to the parents for tuition and related expenses (e.g., transportation) if the school district “fails to meet its burden of establishing the appropriateness of its program.” Under that scenario, where the school district cannot demonstrate by a preponderance of the evidence that it offered the student a FAPE, the burden shifts back to the parents to establish that they unilaterally placed their child in an “appropriate” program. T.R. ex rel.

N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 582 (3rd Cir. 2000) (explaining the test for reimbursement for unilateral private placement as a two-pronged inquiry).

Private placements are not held to the same standard as public schools when determining whether they are “appropriate.” W. Windsor-Plainsboro Reg'l Sch. Dist., Bd. of Educ. v. M.F. & M.F., 2011 U.S. Dist. LEXIS 21827, \*25 (D.N.J., Mar. 4, 2011) (“[T]he standard a [private] placement must meet in order to be ‘proper’ is less strict than the standard used to evaluate whether a school district’s IEP and placement are appropriate.”). Private placement is appropriate if the education provided by the private school is determined to be “reasonably calculated to enable the child to receive educational benefits.” Madison Bd. of Educ. v. S.V. ex rel. C.V., 2020 U.S. Dist. LEXIS 155644, \*9–10 (D.N.J. 2020).

Even where a district violated its obligations under the IDEA and the unilateral placement was appropriate, courts retain discretion to reduce or deny reimbursement if the equities so warrant. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246–47, 129 S. Ct. 2484, 2496 (2009). Specifically, under the IDEA and the corresponding New Jersey regulation, the cost of reimbursement may be reduced or denied “upon a judicial finding of unreasonableness with respect to actions taken by the parents.” 20 U.S.C. § 1412(a)(10)(C)(iii)(III); N.J.A.C. 6A:14-2.10(c)(4); cf., Madison Bd. of Educ. v. S.V. ex rel. C.V., 2020 U.S. Dist. LEXIS 155644, \*13–14 (D.N.J. Aug. 26, 2020) (parents acted reasonably and were entitled to full reimbursement for private placement.)

### **The 2023–2024 IEP Failed to Provide E.B. With a FAPE**

The gravamen of Petitioners’ due process petition is that the District failed to provide E.B. with a FAPE. In their post-hearing summation (Amended Closing Br. at 2–9), Petitioners also contend that the District “breached” the “child-find” obligation by “rushing through” the evaluative process and failing to consider E.B.’s prior evaluation or the services she received at her prior school. Given that the District did indeed find that E.B. was disabled, and Petitioners agreed with the District’s classification of E.B. under the “Specific Learning Disability” category, the tribunal will consider Petitioners’ argument, *infra*, in the context of substantive deficiencies in the IEP resulting from a flawed

evaluative process. See S.W. & J.W. ex rel. W.W. v. Florham Park Bd. of Educ., 2015 N.J. AGEN LEXIS 384, \*1 (Recognizing that “child find refers to the District’s responsibility to identify students with disabilities who do not yet receive special education services. “Child find’ does not address the proper classification of students, only the narrow determination of whether a student is eligible for special education services, at all.”) For clarity, I **CONCLUDE** that the District did not violate the child-find obligation, as contemplated by the IDEA.

Turning to the crux of the parties’ dispute, it is noteworthy that witnesses from both sides do not significantly disagree that E.B. presented with severe weaknesses in reading and reading comprehension. Nor is there any disagreement that her functional levels in both of those areas (and fluency) upon entering third grade would be well below grade level. Indeed, with respect to reading comprehension and fluency, the District’s LDT-C agreed that E.B. was at the “kindergarten” level. (T1, 244:1-16.) The District’s educational experts determined that specialized instruction in reading was required to enable E.B. to access the general education curriculum for language arts and math.

Yet the 2023–2024 IEP failed to offer E.B. specialized instruction in reading for science and social studies even though the District’s educational experts knew that E.B. would have the same problems accessing the general curriculum in those subject areas. (T1, 125:3-18; 126:23-127:3; 245:1-18.) Nor is the tribunal persuaded by the District’s conclusory position that the general modifications listed in the 2023–2024 IEP could have substituted for the specialized instruction that E.B. needed to progress in the general education curriculum for either of those content classes. The District’s educational experts were unable to explain how any of the listed modifications would be applied in the general education classroom during science and social studies to address R.B.’s disabilities. Thus, I **CONCLUDE** that the 2023–2024 IEP was not reasonably calculated to enable E.B. to access the general education curriculum in science and social studies, much less make progress in those classes in light of her severe reading and reading comprehension deficiencies.

The 2023–2024 IEP fares no better with regard to the educational program the District offered E.B. for language arts and math. The District acknowledged that E.B.’s

severe weaknesses in reading and reading comprehension qualified her for specialized instruction. The District also knew that E.B. was entering the third grade at a first-grade reading level, well below her general education classmates, yet it only offered her in-class support in language arts and math for one-half of each 80-minute class period. In other words, for 40 minutes of each class, while the general education teacher was instructing students in subjects that indisputably involved reading and reading comprehension, E.B. would receive no in-class support. While the District's LDT-C believed that E.B. would have been able to access and "receive meaningful benefit from" the general education curriculum with the limited support offered because E.B.'s cognitive level was "Low and Low Average," the tribunal is not so persuaded. (T1, 98:4-99:9.) In that regard, the tribunal finds the testimony of LDT-C Caplan much more compelling. As a special education expert, Caplan explained that 40 minutes of in-class support in language arts and math was not appropriate for E.B. because the proposed general education program was "approximately two years above her level." For one-half of each class, E.B. would have no specialized reading support. Indeed, E.B. had received 40 minutes of OG programming at the JEC in the second grade, and it was not enough to provide a meaningful benefit to her. (T3, 33:8-13.) As Caplan expounded, the academic demands were only going to increase, and they would "change dramatically in third grade." Whereas in "first and second grade [students] learn to read," beginning in third grade students "read to learn." In Caplan's expert opinion, E.B., as an independent reader on a first-grade level, was "not able to handle the material that would be in the classroom." (T3, 26:15-28:10.) Thus, I **CONCLUDE** that the 2023–2024 IEP was not reasonably calculated to enable E.B. to make progress appropriate in light of her circumstances in the general education curriculum for language arts or math.

At the hearing, it was revealed that the special educational program the District proposed for E.B. was the program that was available in the District for the third grade. When the 2023–2024 IEP was developed, the only special education programming the District had for third grade was to "push-in [disabled students] for in-class support." There was no resource room. (T1, 253:12-254:4.) There also was no special education teacher available for third-grade science or social studies. The only in-class support available in the third grade was for language arts and math, and only for one-half of each period. But the fact that a full panoply of special education programming was not available at the

third-grade level in the District does not excuse the District from developing an educational program that addressed E.B.'s individualized needs, even if that required an out-of-district placement. See, e.g., T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 165 (7th Cir. 2014) (school districts “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services,” including private schools).

As for the subsequent OG “pull out” program made by the District in an email, it was decidedly not specified in the 2023–2024 IEP. Accordingly, that offer cannot now be presented by the District to bolster its claim that it met its obligation to offer an appropriate IEP to E.B. See Lascari, 116 N.J. 30 at 46 (in determining whether an IEP is appropriate, focus must be on the IEP offered); W. Windsor-Plainsboro, 2005 WL 2897495 (D.N.J. Oct. 31, 2005). Indeed, the District witnesses testified that the specialized reading program that E.B. was to receive under the 2023–2024 IEP was “embedded in the class support program.” (T1, 86:8-10; T1, 86:20-25.) Nor did the District make any attempt to amend the 2023–2024 IEP. Even if considered, the District’s belated offer to provide OG instruction to E.B. four times a week for 40-minute intervals outside the classroom was made without the required pre-testing and, thus, could hardly be said to be individualized to E.B.’s needs. (T3, 187:11-13.)

The 2023–2024 was also deficient in that it failed to consider the impact of E.B.’s dyslexia on her educational needs. The District witnesses testified that they had no reason to dispute Dr. Matthews’ diagnostic conclusion that E.B. was dyslexic, and the District’s LDT-C agreed that E.B. “has dyslexia” (T1, 267:10-11), yet the CST did not consider Dr. Matthews’ findings in their eligibility determination, and the 2023–2024 IEP does not identify E.B. as dyslexic. Consequently, the resulting 2023–2024 IEP failed to consider the impact of E.B.’s dyslexia on her ability to be involved and progress in the general education curriculum. As Dr. Kimberlin testified, to remediate E.B.’s dyslexia and comorbid weaknesses, she required an education plan that provided an OG-trained instructor who could reinforce OG learning concepts across all written schoolwork. (T2, 152:20-23; T2, 178:12-14.)

While the District claims that the CST could not rely on Dr. Matthews' diagnosis that E.B. was dyslexic for eligibility purposes because the evaluation was "a year old" (T1, 61:9-16), the CST made no independent attempt to have E.B. re-tested for dyslexia. Nor did the District specify in the 2023–2024 IEP that Dr. Matthews' evaluation was not accepted. (T1, 136:19-13:10.) To the contrary, R.B. assumed that the CST had accepted Dr. Matthews' evaluation, and the CST never advised her otherwise. (T1, 132:13-134:1.)

Each of the foregoing deficiencies in the District's educational plan for E.B. for third grade provides a sufficient basis to conclude that the 2023–2024 IEP was inappropriate for E.B. When considered together, there is no question that the 2023–2024 IEP did not meet E.B.'s educational needs for the 2023–2024 school year. Thus, I **CONCLUDE** that the 2023–2024 IEP was not reasonably calculated to enable E.B. to receive meaningful educational benefits, and the District has not met its burden of proving that it provided E.B. with a FAPE.

The District claims that Petitioners cannot claim a denial of FAPE because they "refused to consent" to the 2023–2024 IEP and unilaterally placed E.B. at Winston before trying out the proposed in-District program. In support of its argument, the District cites to N.J.A.C. 6A:14-2.3(c) which states, in relevant part, that "if a parent refuses special education and related services on behalf of a student, the [District] shall not be determined to have denied the student a [FAPE] because the student failed to receive necessary special education and related services."<sup>14</sup> (Resp't's Post-Hearing Br. at 13–14.)

However, there is nothing in the record that supports the District's invocation of N.J.A.C. 6A:14-2.3(c). E.B.'s parents did not "refuse" special education services for their daughter. To the contrary, they initiated the process. It was Petitioners who requested that the District provide E.B. with an IEP that met her educational needs. (R-8.) Even when the District presented an inappropriate IEP, E.B.'s mother continued to communicate with the District's case manager to share her concerns and try to obtain

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<sup>14</sup> The District also cites, in error, to N.J.A.C. 6A:14-2.3(e)(4), which addresses a situation where a parent "revokes [written] consent" for special education and related services. However, the District does not claim that Petitioners revoked a written consent, and they did not. The District's reliance on N.J.A.C. 6A:14-2.3(e)(4) fails.

further information regarding OG programming for her daughter. (T3, 168:13-169:22.) Petitioners did not “refuse” special education services from the District. R.B. tried, to no avail, to obtain appropriate special education programming from the District tailored to E.B.’s needs. Put simply, N.J.A.C. 6A:14-2.3(c) does not apply under the circumstances here.<sup>15</sup>

Also unavailing is the District’s claim that because the 2023–2024 IEP provided “comparable services to E.B. from the prior placement,” Petitioners cannot argue that the District failed to offer E.B. a FAPE. (Resp’t’s Post-Hearing Br. at 14.) The sole case cited by the District to support its flawed assertion is Y.B. v. Howell Twp. Bd. of Educ., 4 F.4th 196 (3d Cir. July 19, 2021). The District’s reliance on Howell is plainly inapposite. The decision in that case concerned the “comparable services” standard under the IDEA’s intrastate-transfer provision and has no application here.<sup>16</sup> In any event, the record does not establish that the 2023–2024 IEP provided comparable services to E.B.’s prior placement. There is no dispute that the 2023–2024 IEP discontinued E.B.’s speech services. (R-23.) As for the other special and related services that E.B. received at the JEC under the IESP, none of the District witnesses were able to articulate the special education programming that E.B. was receiving at her prior placement. (See, e.g., T1, 58:23-59:10; 116:11-14; 221:24-222:6; 239:17-23.) Nor did anyone from the District make any inquiries of the JEC or the Union County Commission to find out. (T1, 59:11-15; 116:15-24; 239:24-240:3.)

Having concluded that there is no bar to Petitioners’ due process petition and that the 2023–2024 IEP failed to provide E.B. with a FAPE, I will consider Petitioners’ claim for reimbursement related to the unilateral placement.

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<sup>15</sup> Neither does the District’s citation to G.W. v. Ringwood Bd. of Educ., 2022 U.S. Dist. LEXIS 164362 (D.N.J. Sept. 9, 2022) and S.W. & J.W. ex rel. W.W. v. Florham Park Bd. of Educ., 2015 N.J. AGEN LEXIS 384 (2015) advance their argument. Both cases involved circumstances—not present here—where petitioners admittedly withheld consent from the school district and refused to allow the district to conduct re-evaluations of their respective children.

<sup>16</sup> Howell addressed the question of whether a child with an IEP, who transferred to a different school district within the state, was entitled to receive the “same services” the child was previously receiving. Answering the question in the negative, the Court then focused on whether the transferee district provided “comparable services” sufficient to discharge its obligation to provide a FAPE. Howell 4 F.4th at 200.

### **Petitioners' Entitlement To Reimbursement**

Where the District failed to provide an eligible student with a FAPE, reimbursement for unilateral placement is a recognized remedy if the placement is determined to be "appropriate." 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); N.J.A.C. 6A:14-2.10(b). The parent bears the burden of demonstrating that the private placement is appropriate. See, Madison Bd. of Educ. v. S.V. ex rel. C.V., 2020 U.S. Dist. LEXIS 155644, \*6.

In determining whether a unilateral placement is appropriate, a parent need not show that a private placement maximizes their child's potential. Rather, to meet the standard of appropriateness, a private placement must only meet the threshold requirement that the placement be "reasonably calculated to enable the child to receive educational benefits" and cannot have provided "no educational benefit." See, E. Brunswick Twp. Bd. of Educ. v. D.S., 2023 U.S. Dist. LEXIS 130736, \*32.

The District argues that Winston is an inappropriate placement for E.B. because (1) specialized instruction was not provided to her in the LRE; and (2) an evaluation performed by Caplan several months after R.B. was placed at Winston indicated that below-average scores in reading comprehension, written expression and spelling. (Resp't's Post-Hearing Br. at 23.)

Regarding the first point, the District continues to claim erroneously that E.B. "would have no issues being successful in a general education classroom for the majority of the day" with a special education teacher to support her in reading. (T1, 85:25-86:7) But in contradictory fashion, the District's witnesses also admit that E.B. would be behind her general education peers by at least two grade levels in every class that included reading and reading comprehension and E.B. would have absolutely no special education to support her during science and social studies and only for partial periods during language arts and math. (T1,124-13-17; 242:17-21; 245:5-18.)

While no one from the District observed E.B. at Winston, there is ample expert testimony in the record from Caplan and Dr. Kimberlin about their observations of E.B. in

the private placement. At Winston, E.B. receives multi-sensory OG instruction throughout the day by teachers who are trained to address her dyslexia. (T2, 159:21-162:10; T3, 39:10-40:6) Caplan also confirmed that the small class size at Winston helps address E.B.'s distractibility, and she can focus on the skills at hand which are "drilled down" to the class of three and mastered before moving on to the next skill. (T3, 40:14-19.) R.B.'s observations of E.B. at home are of a happier, more confident child who not only has progressed to reading chapter books and improved her writing but is enthusiastic about reading. (T3, 174:3-19.) R.B. also reports that she has observed E.B. using OG strategies she learned at Winston to help her read and write better. (T3, 174:11-15.)

In short, the facts and expert testimony indisputably support the conclusion that E.B. is making progress at Winston and benefiting from the instructional programming available to her in that placement.

Finally, the District's claim that Winston is an inappropriate placement because E.B. received "below-average" scores on certain tests that Caplan administered to E.B. months after she started at Winston, is easily dismissed. As Caplan explained, no baseline scores existed for the tests she administered to E.B. Therefore, they cannot be compared to results achieved on different tests to denote progress (or lack thereof). (T3, 130:24-131:15.)

Accordingly, I **CONCLUDE**, that Petitioners have met their burden of establishing that E.B.'s placement at Winston is "reasonably calculated to enable [E.B.] to receive educational benefits" and is the LRE under the circumstances. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 11 (1989). As such, I further **CONCLUDE** that E.B.'s private placement meets the basic requirements of IDEA and is, therefore, eligible for reimbursement.

### **The Equities Do Not Warrant Reduction Or Denial Of Reimbursement**

The District argues that the tribunal should exercise its discretion under N.J.A.C. 6A:14-2.10(c)(4) to reduce or deny the cost of reimbursement given the "unreasonableness" of Petitioners' actions. (Resp't's Post-Hearing Br. at 15.) It asks the

tribunal to infer that Petitioners “only cooperated” with the District to “enhance their ability to be reimbursed for placing E.B. Winston.” (*Ibid.* at 18.) According to the District, “R.B.’s limited testimony, no testimony from J.B., no testimony from anyone at the Winston School” and the fact that R.B. did not tell the District when she registered E.B. that she had also applied and made deposits to private schools “profoundly demonstrates” that “R.B. has no intention of ever sending E.B. to the District.” (*Ibid.* at 17–18.) The tribunal does not agree. R.B. offered a credible explanation for her actions that were reasonable under the circumstances. She submitted applications to several private schools before registering E.B. at the District to not miss the private school deadlines. She acted as a responsible parent to keep all options open for E.B. for the upcoming school year. R.B. even tried to register E.B. earlier in June but was told by the District to wait until July.

As a single mother living in Elizabeth and a special education teacher in the New Jersey public school system, R.B. would have preferred that her daughter attend a District school. It was only after the District failed to offer an educational program that provided E.B. with a FAPE that R.B. enrolled E.B. at Winston. Even then, R.B. continued to communicate with the District’s case manager, sharing her concerns about the District’s proposed program and trying to obtain the appropriate OG instruction for her daughter, to no avail. The tribunal draws no inferences from the fact that neither party called J.B. or a Winston representative to testify.

Further, the District’s accusation that Caplan was part of a “plan” to “place E.B. at Winston and criticize the District later” is misplaced. (Resp’t’s Post-Hearing Br. at 18.) Caplan testified that she had no knowledge that R.B. had applied to any private schools in advance of the IEP Meeting. She attended the meeting with R.B. as a “second set of ears” and served as a note-taker. The District cannot absolve itself of the obligation to develop an appropriate IEP by shifting that responsibility to Caplan. Moreover, neither R.B. nor Caplan was provided with a copy of the draft IEP in advance of the IEP meeting, or even during the IEP meeting. Thus, it is unreasonable for the District to argue that R.B. and Caplan exhibited an “absolute lack of engagement” at the IEP Meeting (Resp’t’s Post-Hearing Br. at 18.) It is also false. R.B. tried to engage the CST in a substantive discussion about a specialized reading program for E.B., an area she was knowledgeable about, but none of the District attendees were able to answer her questions.

The District cites to several unilateral placement cases where reimbursement was denied and argues that the same result should be obtained here. In each case, the parents were the “impediment to participation in the evaluation of [the student’s] disabilities and the development of an appropriate IEP.” C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 91 (3d Cir. 2010). But unlike the parents in those cases, Petitioners did not act to obstruct development of the 2023–2024 IEP by withholding consent to District evaluations or withholding information about the extent of their child’s disabilities, delaying the IEP meeting or canceling district evaluations, or enrolling their child in a unilateral placement prior to the IEP meeting. To the contrary, the District witnesses agreed that R.B. was cooperative throughout the evaluative process. R.B. promptly provided consent to all the District-requested evaluations. She was forthcoming with E.B.’s disabilities and her concerns that E.B. was not receiving sufficient services at her prior school. R.B. also agreed to proceed with the IEP Meeting even though the District was unable to produce any general teacher or special teacher to attend. R.B. also provided the District with sufficient notice of her intent to place E.B. at Winston while she continued to communicate with the District in an effort to obtain more information about a specialized reading program for E.B. Notably, the District took no steps during that time to cure the shortcomings in E.B.’s educational program by attempting to amend the deficient 2023–2024 IEP.

While the District correctly notes that it is unreasonable for a parent to thwart the collaborative process and prevent the District from meeting its IDEA obligation to develop an appropriate IEP, equally clear is that there is no requirement that a disabled child must “try out” the public school before considering a private placement where, as here, the IEP offered by the District cannot offer the child with a FAPE in-district.

Weighing the facts and circumstances presented in the record, I **CONCLUDE** that Petitioners did not unreasonably prevent the District from offering E.B. an appropriate IEP, nor did they place E.B. at Winston without giving the District sufficient notice. See, e.g., Madison Bd. of Educ. v. S.V. ex rel. C.V., 2020 U.S. Dist. LEXI 155644 (D.N.J. Aug. 26, 2020) (finding parents actions reasonable and awarding reimbursement for unilateral

placement). Accordingly, I **CONCLUDE** that Petitioners are entitled to full reimbursement for the costs of E.B.'s private placement at Winston.

### **Compensatory Education**

In addition to reimbursement, Petitioners seek relief in the form of compensatory education. In the event a student has been denied a FAPE, an award of "compensatory education can account for the period the student was deprived of this right." Lauren P. ex rel. David & Annmarie P. v. Wissahickon Sch. Dist., 310 F. App'x 552, 554 (3d Cir. 2009). A compensatory education is a judicially created remedy that is designed "'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA,' by providing the educational services children should have received in the first instance." G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608 (3d Cir. 2015) (quoting Reid ex rel. Reid v. D.C., 401 F.3d 516, 518, 365 U.S. App. D.C. 234 (D.C. Cir. 2005)).

Because Petitioners unilaterally placed E.B. at Winston at the beginning of the 2023–2024 school year and did not enroll her in District placement, it is unclear for what period Petitioners are claiming that E.B. was deprived of an appropriate education. Nor have Petitioners established that E.B. suffered from any educational deprivation due to the District's failure to provide FAPE that was not rectified by her attendance at Winston during the 2023–2024 school year. Thus, I **CONCLUDE** that Petitioners have not presented sufficient evidence to support a specific award of compensatory education.

As set forth above, the District failed to provide E.B. with a FAPE for the 2023–2024 school year, and there is no IEP currently in place. Accordingly, I **CONCLUDE** that Petitioners' due process petition should be **GRANTED**, in part, and that E.B.'s 2023–2024 IEP be amended to provide for E.B.'s placement at Winston. I further **CONCLUDE** that Petitioners are entitled to reimbursement from the District for the tuition they paid to Winston for E.B.'s attendance for the 2023–2024 school year and related transportation costs and for tuition paid to Winston in connection with E.B.'s current enrollment and related transportation costs until such time as a new IEP for the current school year is developed.

**ORDER**

Based on the foregoing, I **ORDER** that Petitioners' due process petition is **GRANTED**, in part, and the following relief is **ORDERED**:

1. The District shall reimburse Petitioners for the costs of E.B.'s placement at the Winston School, including tuition and transportation to and from school, for the 2023–2024 school year, subject to proof of payment of all costs sought to be reimbursed;
2. Petitioners and the District are directed to meet within thirty (30) days of this decision, or as soon as practicable, to begin the process of re-evaluating E.B., including in, but not limited to, the areas of speech, OT, reading and writing, and developing a new IEP that is appropriate for E.B., and reflective of her present levels of academic ability and disabilities; and
3. Until such time as a new IEP is developed that is individualized to E.B.'s needs, and an appropriate placement is determined, the District will continue to be responsible for reimbursing the tuition and transportation costs associated with E.B.'s current attendance at the Winston School.

It is further **ORDERED** that any and all other requests for relief as set forth in Petitioners' due process petition, if not addressed above, are **DENIED**, including Petitioners' request for an award of compensatory education and reimbursement of any other costs and expenses.

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.

November 18, 2024

DATE



R. TALI EPSTEIN, ALJ

Date Received at Agency

November 18, 2024

Date Mailed to Parties:  
cc

November 18, 2024

## **APPENDIX**

### **List of Witnesses**

#### **For Petitioner:**

R.B., E.B.'s mother  
Susan Caplan  
Dr. Karen Kimberlin  
Dr. Michael Ojeda

#### **For Respondent:**

Jessica Riccardi  
Dr. Thomas MacNamara  
Yao-Hsuan Huang  
Sabrina Marques

### **Exhibits**<sup>17</sup>

#### **For Petitioner:**

- P-44 Riccardi Email to R.B. re: Classroom Observation, OG Reading Program and OT, dated 9/28/23
- P-45 Riccardi and R.B. Email Thread Re: OG and OT – Parent Question re Special Education Teacher, dated 10/4/23
- P-86 Initial Speech Evaluation Tiffany Zilberman, M.S., CCC-SLP – The Therapy Place, dated 7/18/22
- P-93 Curriculum Vitae of Susan K. Caplan, M.Ed., LDT-C

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<sup>17</sup> The nonsequential numbering of exhibits reflects the fact that numerous pre-marked exhibits were (1) neither identified nor offered into evidence; or (2) the same exhibit was already offered into evidence by the other party under an “R” or “P” designation.

- P-96 Independent Language and Literacy Evaluation Report of Dr. Karen T. Kimberlin, SLP.D., CCC-SLP, Speech Language Learning Connection, LLC, dated 12/20/23
- P-97 Dr. Karen T. Kimberlin, SLP.D., CCC-SLP to M. Inzelbuch, Esq. Re: Questions to District in Accordance with 6/11/24 Observation, dated 1/12/24
- P-98 Curriculum Vitae of Dr. Karen T. Kimberlin, SLP.D., CCC-SLP
- P-99 Literacy Evaluation of Dr. Francie M. Matthews, Ph.D., NJ Certified Learning Consultant, dated August 2022
- P-103 Observation of Proposed Program, Report of S. Caplan, MED, LDT-C, dated 6/17/24
- P-108 Educational Evaluation – S. Caplan, M.Ed., LDT-C, dated 2/5/24
- P-110 School Observations Report – Dr. Karen T. Kimberlin, SLP.D., CCC-SLP - Speech Language Learning Connection LLC, dated 6/17/2024
- P-111 R. Flaum, Esq. to M. Inzelbuch, Esq. with District Responses to Dr. Kimberlin's Inquiries, dated 6/17/2024

For Respondent:

- R-2 Union County Educational Services Commission Services Plan (IESP), dated 11/3/22
- R-3 Jewish Educational Center (JEC) Report Card, 2022–2023 School Year
- R-5 Packet of Registration Materials, dated 7/5/23
- R-6 Elizabeth Public Schools Email Re: E.B. Successfully Registered, dated 7/5/23
- R-7 Elizabeth Public Schools Assignment Letter, dated 7/5/23
- R-8 Parent Letter to District Requesting IEP, dated 7/5/23
- R-9 Exchange of Prior Evaluations, Report Card and IEP for District Identification Meeting, dated 7/10/23
- R-10 Identification Meeting Sign-in Sheet, dated 7/24/23
- R-11 Initial Identification Planning Proposed Action, dated 7/24/23
- R-12 MacNamara Social History Evaluation, dated 8/9/23
- R-13 Marques Initial Speech-Language Evaluation Report, dated 8/9/23

- R-14 Riccardi Psychological Report, dated 8/15/23
- R-16 Invitation for Initial Eligibility Determination, dated 8/15/23
- R-16A Huang Initial Education Evaluation, dated 8/15/23
- R-19 IEP Meeting, Digital Participation Documents, dated 8/23/23
- R-21 Caplan Report of IEP Meeting, dated 8/23/23
- R-23 2023–2024 IEP for E.B., dated 8/23/23
- R-24 Consent to Implement (Unsigned)
- R-25 Class Too Large Email, dated 10/16/23
- R-26 Parent Email to District attaching Dr. Kimberlin’s 12/20/2023 Report, dated 1/4/24
- R-27 Affidavit of Jessica Riccardi w/Exhibits A–F attached, dated 2/23/24
- R-28 Resume of Jessica A. Riccardi
- R-29 Resume of Yao-Hsuan Huang
- R-30 Resume of Sabrina M. Marques
- R-31 Resume of Dr. Thomas MacNamara
- R-32 Email from Parent to Riccardi, dated 6/17/24