

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
(CONSOLIDATED)

OAL DKT. NOS. EDS 07675-14

EDS 09143-14 and

EDS 15019-16¹

AGENCY DKT. NOS. 2014-21095

2014-21420 and 2017-25247

F.S. AND A.S. ON BEHALF OF Z.S.,

Petitioners,

v.

EDISON TOWNSHIP BOARD

OF EDUCATION,

Respondent.

Michael I. Inzelbuch, Esq., for petitioners

Douglas M. Silvestro, Esq., for respondent (Busch Law Group, attorneys)

Record Closed: October 6, 2016

Decided: November 21, 2016

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

¹ Petitioners request for emergent relief (OAL Dkt. No. EDS 15019-16), filed on October 4, 2016, was not addressed and not consolidated with EDS 07675-14 at that time. This decision, however, resolves all issues in the emergent application and I need not provide a separate Order.

STATEMENT OF THE CASE

This is an appeal filed on behalf of F.S. and A.S. and on behalf of their son, Z.S., for relief under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400 to 1419, as reauthorized effective July 1, 2005, P.L. 108-446 (2004), and the implementing federal and state regulations. Petitioner, Z.S., at the time of filing this case, is classified eligible for special education and related services as a student with a disability. Z.S. was diagnosed and recognized by the respondent as having ADHD and was classified as Other Health Impaired. The parties differ on whether the unilateral placement of the student at the SINAI School is appropriate and whether the respondent failed to provide FAPE to the student. Respondent, the Township of Edison Board of Education (Board or District), opines that the petitioners are not entitled to reimbursement because the SINAI School is not the appropriate placement for Z.S., and even if it were, the petitioners' demand for reimbursement should be denied because FAPE was provided to Z.S. by the Board. Z.S.'s parents' request that the Board pay for continued placement at the SINAI School and pay for all costs/expenses related to Z.S.'s attendance therein, including attorney fees, costs, and expenses.

PROCEDURAL HISTORY

Petitioners filed for due process on October 16, 2013, and the matter was transferred and filed at the OAL on November 26, 2013. Thereafter, the petitioner withdrew the petition by letter dated February 20, 2014. Afterward, a second petition for due process was filed on April 28, 2014, seeking an appropriate educational program for Z.S., reimbursement and/or continued placement at the SINAI School, educational records and other related relief. An IEP was offered for Z.S.'s seventh-grade year during a June 11, 2014, IEP meeting. Petitioners rejected that IEP on June 25, 2014, and then filed a second due process petition requesting similar relief to the relief contained in the first due process petition. Subsequently, the OSEP transferred the matter to the Office of Administrative Law (OAL) where it was filed on March 7, 2014, for a hearing. The two matters were consolidated in December 2014 with the consent of both the respondent and the petitioners.

Hearings were scheduled and held on the following dates: October 9, 2015, October 13, 2015, November 18, 2015, November 23, 2015, March 4, 2016, May 23, 2016, July 20, 2016, and August 16, 2016. After the Board's case (on March 4, 2016) and based on the submissions of both parties the petitioner sought summary decision on whether the Board made a prima facie case that Z.S. was provided with FAPE from the fifth through the eighth grade. This motion was decided in favor of the respondent, without prejudice.

FACTUAL DISCUSSION

TESTIMONY

Mansi Patel

Mansi Patel (Patel) is the Case Manager from the Edison School District and testified on behalf of respondent. Patel was the drafter of the IEP and Addendums at issue in these cases. Patel stated that she is a school psychologist and also served as a Case Manager, who drafts IEPs. Patel was Z.S.'s Case Manager for Z.S. for the grades two through five and for the June 2014 IEP. Patel identified R-1 as the document written during Z.S.'s third-grade year and concluded that no additional evaluations were necessary. No additional evaluations were necessary because the diagnosis of ADHD significantly impacted his learning in the classroom setting and the District had the documentation they needed to provide his eligibility. It was determined by Patel that Z.S. was Eligible for Speciation Education and Related services as Other Health Impaired (OHI). Z.S. was diagnosed as having ADHD.

Patel described Z.S.'s fourth-grade program as "pull-out" for Language Arts and Math and "in-class support" for Science and Social Studies as he was struggling academically. Patel further stated that Z.S. had shown a lot of improvement, and as a result, he was provided with a trial of "in-class support" for math, around February 2012. Patel also described Z.S.'s fifth-grade program as having no resource room as he was showing much more improvement in terms of academic skills as well as behavioral difficulties (such as impulsivity, calling out, difficulty with social peers). Patel testified

that Z.S. received counseling as a related service for school grades three through five with a change in the method of delivery from group services to individual services.

Furthermore, Patel developed the IEP for the sixth grade with the program which was not different for Z.S.'s fifth-grade program. Patel stated, however, that there was no counseling services provided based upon her speaking to the guidance counselor and Z.S.'s teacher. Patel did acknowledge that Z.S.'s mother had a concern about Z.S. getting counseling on an as needed basis. Patel also stated that "study skills" was discussed as being an option for Z.S. Patel identified R-6, as the IEP, dated April 16, 2013, which showed "study skills" as listed under parental concerns. Patel also testified that she was not aware of any "outside medical evaluations for Z.S." when she described the IEP for his sixth grade. In addition, Patel also testified that he never specifically observed Z.S.

In further testimony, Patel was unable to recall Z.S.'s attendance record for the sixth and fifth grades. When presented with Z.S.'s attendance record, Patel did not dispute the record as set forth. Patel also testified that she does not observe or review the report cards for her students.

Patel stated that in August 2013, Z.S.'s mother contacted her with reference to evaluations for Z.S. However, Patel did not recall any conversation with Z.S.'s mother, she did acknowledge receiving an email from the mother stating that she was not happy with Z.S.'s progress in the past year. Patel further acknowledge that Z.S.'s mother did mention that she wanted her son to go to a private Jewish school, however, the mother did not ask for reimbursement. Patel was shown a telephone log which showed that on October 17, 2012, the mother stated that Z.S. was stressed about school, the amount of homework and class work. The mother further stated to Patel that she was looking at the Kushner (SINAI) School.

Patel also stated that she drafted an IEP for the seventh grade (after Z.S. was unilaterally placed at the SINAI School since September 2013). This IEP proposed in-class support for academics. On June 1, 2014, Patel stated that Z.S. would receive speech and language services (in a group format) for thirty minutes per week and

individual counseling for thirty minutes per month. Patel acknowledged that the speech and language services were not offered for Z.S. prior to his seventh grade due to a private evaluation completed by the parents. Patel also acknowledged that the mother did express concern as to Z.S.'s NJ ASK scores, but Patel was unable to recall her response to the mother's concern.

Patel stated that after Z.S. was unilaterally placed in the SINAI School and the mother requested from the District that they do evaluations and that independent evaluations be conducted outside of the District. Patel acknowledged that the parents completed private evaluations including Functional Behavior Assessment (FBA), Auditory and Psychiatric. The parents also requested an Occupational Therapy Evaluation and an Assistive Technology Evaluation.

On cross-examination, Patel confirmed that she never conducted any additional evaluations of Z.S. and did not conduct any formal or informal observations of Z.S. Patel also stated that Z.S. attended Edison schools through the fifth grade (June 2013) and the last evaluations conducted by the respondent were: Educational-May 15, 2008; Social Assessment-June 19, 2007; Neurological Evaluation by Dr. Mintz-June 15, 2007; and a Psychological Evaluation-August 6, 2007. Patel admitted that these evaluations were completed while Z.S. was in preschool. Z.S.'s Full Scale IQ was shown to be 110 on August 6, 2007. Patel further admitted that she never compared Z.S.'s educational scores to his Psychological Evaluation, even though she had done so for other students.

Patel also stated that Z.S.'s "standard score" in understanding deviations was 64, listening comprehension a 93, and passage comprehension a 91. Patel said that the District uses a 22-point discrepancy in order to determine if a student has a "significant learning discrepancy." The 22-point discrepancy is not posted on the District's website and Patel did not inform the parents of Z.S. of this fact. Patel was also unaware of a more recent Psychological Evaluation completed by the parents when Z.S. was in first grade, which reported a Full Scale IQ of 130.

Patel also testified that she only reviewed Evaluations completed by the Edison School District, which she believed were relevant. Patel only reviewed and looked in her personal file which she received from the previous Case Manager as opposed to the file of the Child Study Team which was kept in the Board office. When Patel monitored Z.S.'s progress and needs, she did not review numerous private/independent evaluations which were in Z.S.'s Child Study Team file and were provided by Z.S.'s mother when the student was in the Edison Schools. Patel did not list certain medical conditions in the IEP, including Z.S.'s ticks. Patel also admitted that she failed to speak with the previous Case Manager before taking on her case-management duties while Z.S. was in the third grade, even though she should have. Patel also acknowledged that she failed to list the seven private/independent evaluations that the parents completed prior to the June 2014 IEP. In addition, Patel admitted that she failed to contact any of the private evaluators and to record Z.S.'s NJ ASK scores within the IEP. Patel also did not list all of the parental concerns with the IEP.

Patel acknowledged that she did not contact the Children's Specialized Hospital, despite Z.S.'s mother advising that Z.S. was being treated there for a sleep disorder, which lead to a poor attendance record during the fourth and fifth grades. Patel admitted that she should have contacted this Hospital. Patel also failed to accept or reject four of the seven private evaluations as she should have done.

With reference to the "progress reporting" for the fifth grade, which did not indicate the progress Z.S. made during the third and fourth marking periods as to counseling, Patel admitted that it was her job to insure as to such progress reporting, but did not do so. Regarding the "autism diagnostic interview" Patel did not review this evaluation because although it was in the District's file, it was not in her personal file. Patel acknowledged that Z.S. had trouble focusing in school and trouble socializing, and thus met the criteria for Autism.

Patel acknowledged that it was her job to monitor Z.S.'s progress and that one way to do that was to review report cards, which she failed to do. Patel stated that at the end of fifth grade, Z.S. "needed improvement." But Patel could not recall in what areas and did not take any notes, nor had any emails as to same. Patel did state that

she reviewed the progress reporting for the third grade but was unable to recall if she reviewed same for the fourth or fifth grades.

Patel also testified that “counseling” was not reported for the third and fourth marking periods in the fifth grade, and that they should have been and that only two out of eight of the goals were mastered for counseling; two out of eight of the goals were mastered for language arts; zero out of eight goals were mastered for science; and zero out of three goals were mastered for social studies. Patel also stated that she did not receive the unilateral placement letter from Z.S.’s mother and that she did not contact the SINAI School.

Patel also testified that Z.S.’s belongings were being stolen during fifth grade, which caused him to be upset. Patel was not aware of several emails sent by Z.S.’s mother to her son’s teachers regarding the mother’s concerns as to Z.S.’s progress and social/emotional concerns. Patel was aware that Z.S. often did not complete assignments, but recalled that this was only in the beginning of the year, even though emails were sent stating same and that these events continued through March. Patel was further unable to recall the mother of Z.S. expressing concerns as to her son’s reading. Patel also recalled that the Director of the SINAI School did reach out to talk to Z.S.’s teachers during the fifth grade in April 2015.

Patel stated that Z.S.’s mother requested independent evaluations for psychiatric, medical, psychological, speech and language, occupational therapy, social, neurological and behavior. Patel confirmed that despite the fact that the form document was called a “Waiver” there was no waiver by the parents, and thus she was unable to relate why she used that form as there was a written and signed request for independent evaluations.

Patel confirmed R-43 as the IEP offered to the petitioners for the seventh grade, but Patel was unsure if that was the final IEP with respondent’s counsel. This was so even though it was stipulated to by the parties that R-43 was the only and final IEP for the seventh grade. Patel further acknowledged that if Z.S. would have been provided the general education class of study skills in the sixth grade, Z.S. would have been

unable to receive any foreign language instruction through and including the eighth grade.

Catherine Rokosz

Catherine Rokosz (Rokosz) is a special education teacher in the Edison School District and testified on behalf of respondent. Rokosz stated that there were nineteen children in her fifth-grade class, of which six were classified. She stated that the "Journey's Reading Program" was used for all fifth-grade students, as was the STARS Assessment (general and special education). Rokosz testified that she did not write the IEP of April 2012 (R-5). Rokosz testified that Z.S. had some issues with seeking attention and sometimes if Z.S. wanted clarification with something he would walk up and ask a teacher directly instead of staying in his seat. Teachers would have to redirect Z.S. when he was not attending to the lesson or he was doing independent work.

Rokosz also stated that Z.S.'s behavior did not require her to cease instruction and was not disruptive nor did it require a Behavior Plan. Rokosz was unable to remember the frequency of counseling services, however, after reviewing the IEP. Rokosz stated that Z.S. was pulled from his class once a week. With regard to Z.S.'s testing, Rokosz stated that Z.S. had small-group instruction and had extra time for tests and quizzes. In addition, for math, Z.S. was allowed to use a calculator. In addition, Rokosz stated that there was repeating and clarifying directions for Z.S. and reading items out loud.

Rokosz also testified regarding modifications for Z.S. including not having to do all the math problems on the worksheet and if there was a lot of writing Z.S. could use a computer to type or Rokosz would minimize the amount of writing. Z.S. would also get extra time to complete his work.

With regard to STAR Assessments, Rokosz referred to R-7, and stated that it was a diagnostic tool. Rokosz described STAR as a computerized test that does not have a handwriting component and that it was timed with no modifications. Rokosz also

testified that while Z.S. was in the beginning of the fifth grade his grade equivalent was the sixth grade. Rokosz then went on to testify that despite Z.S. being above average in math, she stated that he had a little bit of difficulty with his multiplication and division facts and fractions. Rokosz was unable to reconcile these contradictory positions. Rokosz then said that the District uses Journey's benchmarks and the NJ ASK to measure a student's progress.

With regard to reading, Rokosz stated that in Language Arts, Z.S. was able to read independently at his reading level and Z.S. was able to answer questions. Rokosz then stated that Z.S. would have a bit of difficulty making a connection between the character in a story and where the story takes place. Z.S. would need more help in language arts than he needed on math.

Z.S.'s scores in the STAR Assessment were reported as 463 then 467 and then 561. Rokosz said that while the scores went up, the percentile rate went down because the STAR test gives questions based on what the student is answering, either correctly or incorrectly.

With regard to Z.S.'s fifth-grade Report Card, Rokosz testified that she and the general education teacher provided those grades and it was not a surprise that Z.S. received "N's" because of his ADHD and that he was off task on average six or seven times throughout the day. She found that the distraction did impact his academics.

Rokosz stated that after reviewing his attendance sheet and being absent twenty-eight days and being tardy thirty-five times, she considered her class appropriate for Z.S. With reference to Exhibit R-6 (6th Grade IEP), Rokosz testified that she prepared summaries and it was not her job to recommend related services. Rokosz further stated that the parents of Z.S. did not express any concerns as to the sixth grade. Rokosz also stated that the grades in the gradebook are not the final grades within the report card because when she, as a teacher, is grading a student, she uses assessments, which would be their tests and their quizzes and she looks at homework assignments, class participation, and classwork assignments.

During cross-examination, Rokosz stated that she was unsure how many years she used the STAR prior to Z.S.'s fifth-grade experience. Rokosz further acknowledged that no one provided the STAR Assessment to Z.S.'s mother prior to the hearing and she was unsure if she discussed it with the mother. Rokosz testified that the STAR Assessment is not used to measure progress but that teachers can use what they want from it in their teaching to hone in on some of the things each student may need. Rokosz did admit that she had no training in the STAR Program. Rokosz further admitted that STAR was not a times assessment and did not allow for modification.

With regard to NJ ASK, Rokosz testified that she uses those scores to focus in on scores that are not proficient. Rokosz stated that Math was Z.S.'s strength and that Language Arts Z.S. was having some difficulties and that Z.S. was borderline. Rokosz did not know Z.S.'s IQ; she did admit that he had the potential to do better in language arts. Rokosz confirmed that Z.S.'s scores were going down and that this was not a good thing.

Rokosz testified that there was a discrepancy between Z.S.'s potential and his performance, yet she acknowledged that she had never reviewed the STAR Assessments and the NJ ASK before. Tellingly, Rokosz found that there was a significant discrepancy between Z.S.'s potential (IQ) and his performance in reading, writing and language arts. In addition, Rokosz stated that she did not and was unable to measure objective progress as the district last completed one standardized objective Educational Evaluation in preschool.

With regard to testing, Z.S. took all district and State assessments in a small-group setting with many of his tests and quizzes taken in small settings. Rokosz testified that Z.S. had organizational and attentional difficulties throughout the day, even though she was unable to give an exact number. Rokosz also admitted that these issues affected his academics.

Rokosz confirmed that Z.S.'s mother indicated that she was planning on sending her son to another school, but Rokosz did not ask why. Rokosz was unable to testify as to whether Z.S. mastered any of the objectives within the IEP for fifth grade. Rokosz

also acknowledged that the letter “P” for “Progress” was a very broad term and that all of the goals/objectives provide an area for “comment” in case the teacher wished to clarify, however she did not do such. Rokosz stated that the letter “P” was generic and without more in-depth information, a person would be unable to really know what progress a student made. Even though Z.S. received “P” as progress indicators for fifth grade, she was unable to state what, if any, progress Z.S. made.

Rokosz further stated that with regard to the Running Record (R-14), the letters “Q”, “R,” and “S” were not identified or explained as to what level each represented and she was not sure if she explained it to Z.S.’s parents. The IEP that followed the fifth grade (R-6) did not contain any specific reading levels, math levels, science levels, social studies levels, or writing levels.

Rokosz found Z.S. was often distracted and there was no written plan; however, there was a general behavior plan for the classroom with no specific data as to how Z.S. did. With reference to Z.S.’s report card, Rokosz stated that the Report Card was not individualized and could not be used in order to determine individual progress. There were numerous areas which reflected that Z.S. “needs improvement” and were not reflected in his progress reporting for the IEP for that period of time. With reference to Z.S.’s writing documents (R-9 and R-10), Rokosz stated that there were no grade levels and she was unable to advise as to the scores obtained by Z.S.

During Cross-examination, Rokosz stated that “Journey’s Program” was used for both special education and general education children. With reference to the proposed IEP for the sixth grade, Rokosz stated that the IEP failed to state what Z.S.’s instructional or individualized levels were and did not state what “Journey’s” level Z.S. achieved. In addition, the IEP did not list the “STAR” assessment data. Rokosz also testified that she was unsure as to whether the “Study Skills” class for Z.S. for the sixth grade was a special education or general education class.

Christopher Conklin, Assistant Superintendent

Christopher Conklin (Conklin) was the respondent's assistant superintendent. Conklin testified as an expert in the field of special education on behalf of respondent. Importantly, Conklin testified that he never met with Z.S. nor did he ever observe Z.S. Conklin did receive and review Z.S.'s records and spoke with his teachers. Conklin further testified that he could not recall what he talked about when they spoke.

Conklin stated that the sixth-grade IEP for Z.S. would have provided an appropriate education to Z.S. Conklin also stated that the respondent uses multiple measures to examine measured progress, like quizzes, grades, projects, STAR information, and day-to-day performance. Conklin did acknowledge that Z.S.'s scores in NJ ASK did go down from third to fourth grade. Conklin further stated that NJ ASK scores are not used to determine if a student makes progress. In explaining a 30-point drop in the NJ ASK score for Z.S. in language arts between fourth and fifth grades, it was Conklin's position that it had nothing to do with progress because there is a major difference in rigor from these grades. Conklin also recalled that at the Resolution Session, there was a discussion as to Z.S.'s return to the District for the seventh grade and "possible evaluations." Conklin also testified that the Evaluations in Exhibit R-42 were not complete because Z.S. did not return to the District.

On cross-examination, Conklin stated that the fact that evaluations were contingent on Z.S. returning to the District, this wording was not on the document. (R-42.) No such wording was in the 7th grade IEP. (R-43.) Even though Conklin reviews all IEPs in Edison, Conklin confirmed that he was not a member of the IEP Team. Conklin also acknowledged that the District received the private/independent Evaluations but was unsure as to whether the CST received them.

Conklin also stated that there was no longer a CST procedure manual used within the District. With reference to the STAR Assessments, Conklin stated that he was not an expert in these Assessments and was unable to state whether these Assessments were used to measure progress. With reference to the 7th Grade IEP (R-43), Conklin did state that it was contingent upon Z.S. return to the District. In addition,

Conklin confirmed that the respondent's CST and Patel did not contact the SINAI School prior to proposing the 7th grade IEP after Z.S. was unilaterally placed at SINAI but was unable to say why this was not done. Conklin also stated that he had no knowledge of the SINAI School and never visited nor spoke with any staff from SINAI. As such Conklin could not offer an opinion regarding the quality of suitability of the SINAI School with reference to Z.S.

Susan Caplan, M.Ed., LDTC

Susan Caplan (Caplan), who testified on behalf of petitioners, was accepted as an expert in "special education, special education programming, and as an LDTC (learning disabilities teacher consultant)." Caplan had worked in the public school system for thirty-two years in New Jersey but did not work at the SINAI (or related) schools. Caplan holds New Jersey certifications as a Teacher of the Handicapped. Caplan, as a witness, was quite credible in terms of the depth and detail of her testimony. It was also clear that Caplan was unbiased and objective as a witness.

Caplan testified that she was involved in matters where Evaluations were adverse to what the parents wanted. Caplan does not work for the SINAI School and at times have disagreed with parents who wanted to place their children in the SINAI School.

Caplan completed 2 Evaluations on Z.S. (P-84.) The first Evaluation was dated February 5, 2014. In an effort to obtain more information, Caplan attempted to speak with Patel without success. Caplan wished to speak with Patel in order to observe the program and the proposed program.

Caplan always reviews progress reports, report cards, speaks with teachers, reviews NJ ASK scores, reviews formalized evaluations and reports of physicians who assess children and give a diagnoses. Caplan testified that she reviews the PLEP/PLAAFP sections of IEPs. Caplan further testified that the Grade 3 Re-Evaluation Planning Meeting (R-1) failed to provide a rationale as to why no testing was mandated and it was her opinion that it must be included. Caplan also reviewed the

2007 Evaluations completed by the District and that there was a recommendation that a Speech & Language Evaluation be completed.

As to R-2, "Notice of Eligibility-3rd Grade," Caplan stated that although it concluded that Z.S. was eligible for special education as Other Health Impaired, the document failed to include the date of the Speech & Language Evaluation and at the time, the district had Evaluations/documents that clearly indicated that Z.S. had other impairments, including the Children's Hospital Evaluations, a Private Psychological Evaluation and other medical evaluations.

Caplan explained that in order to determine a student's needs, or if the student is being successful, an individual should look at the student's overall ability. Caplan found that the only Evaluations listed were the 2007 Evaluations (when Z.S. was exiting preschool). Caplan confirmed that the 2007 Speech and Language Evaluation were not listed. Caplan found it to be highly unusual for a student in fifth grade to only have evaluations from when he was in pre-school. This would call into question the reliability of those Evaluations.

The IEP reported that Z.S. has a High Average IQ and the NJ ASK scores were not being listed despite the fact that there was an area in the IEP to provide same. With regard to reading, the IEP stated that "He works in a small group with six (6) other children for a two hour period." The IEP further stated that Z.S. performed better in small groups. The IEP stated that Z.S. is at a level "0" in reading, without any indication as to what that means. In addition, as to math, science, social studies, writing, and reading, there was no specification and it was her opinion that the IEP should provide specificity as to grade levels because the PLAAF is supposed to be the springboard for the Goals and Objectives. The IEP went on to say that Z.S. had difficulty focusing on starting work, chatting, disturbances, but did not show if these problems were during large-group or small-group instruction. The IEP also contained contradictory statements, for example, that Z.S. had a Behavior Plan to address his behaviors that impede his learning, but it also stated that his behaviors did not impede his learning.

Caplan also found that the evaluation procedure listed in the IEP was not appropriate for Z.S. It was Caplan's position that the Goals and Objectives in the IEP should be based on functioning.

With reference to the 4th Grade IEP (R-5), Caplan found that there were no current evaluations listed therein. Caplan was also surprised that there were no current educational evaluations and thus there was no accurate description as to what he can and cannot do in reading and writing. In addition, the IEP stated that he was doing well in math, there was no detail, including a skill level provided therein. It also listed Level "P" for reading but did not show an instruction or comprehension level. Accordingly, because goals and objectives are based on whether he could do something independently or with a teacher's assistance, this level indication is short of what is needed. The IEP recommended counseling for Z.S., but failed to state why that was necessary. It was problematic that the Goals and Objectives were not specific and not based on current Evaluations.

The IEP, dated April 16, 2013, (R-6) for Z.S.'s fifth grade, again lists only pre-school exit evaluations. This is not acceptable as Z.S.'s admission to Middle School has a whole different list of demands than elementary school.

Caplan also confirmed that the NJ ASK scores for Z.S. went down significantly. The IEP lists Z.S. as having difficulty organizing and often off topic, often requires re-direction, and was often more focused and on task when working in a small group. Caplan found that the PLAAFP did not match this. Caplan also found that the NJ ASK tests (R-15 and R-16) reflected that Z.S. significantly regressed from third to fourth grade. For Z.S.'s fifth grade, he both regressed and advanced which Caplan attributed to Z.S.'s distractibility. Caplan did testify that NJ ASK is more accurate than the STAR test when addressing a student's progress. Caplan found that STAR is intended as a guide for instruction and NJ ASK is more effective as an assessment tool.

Caplan also testified as to Z.S.'s report cards (R-17; R-18; R-19) which she found to indicate a lack of progress and regression and contradicts with the IEP as to present levels. With regard to Progress Reporting, Caplan found that it did not evidence any

mastery for the fifth grade and were not complete. Caplan also found that the Goals and Objectives did not show any degree of improvement in areas of attention, concentration, focus, task completion, and organization. With reference to Z.S.'s fifth-grade report card, Caplan found that there was in fact regression.

Caplan also testified that Z.S. should have been classified as "Multiple Disability." Caplan found that Z.S.'s difficulty with reading, comprehension, written expression and verbal expression, are inconsistent with his abilities.

With reference to Z.S.'s performance at the SINAI School, Caplan testified that his behaviors had improved, his academics improved and the services Z.S. received there including a Behavior Plan, counseling coordination with the private therapist. Based on her testing, Caplan found progress in writing and language, passage comprehension, and editing. Caplan observed Z.S. three times for each evaluation and found that Z.S. made progress at the SINAI School in writing skills. Caplan also observed Z.S. when she was at the SINAI School for other students. Caplan saw Z.S. while he was in small classes.

With reference to the June 2014 IEP (R-43) for seventh grade, despite the fact that the District had numerous evaluations in its position, supplied by Z.S.'s mother, none of them were listed in the June IEP. It was her opinion that those Evaluations should have been listed in the IEP. For example, Dr. Melini's evaluation provided evidence of a Specific Learning Disability, but was not noted in the IEP. It was Caplan's opinion that these multiple diagnoses should have been considered when determining eligibility and classifications. Yet the District relied on a previous evaluation, which was conducted while Z.S. was in preschool.

Judith Leah Karp

Judith Leah Karp (Karp) was accepted as an expert in the field of Special Education and Educational Programming and testified on behalf of petitioners. Z.S.'s mother contacted Karp during Z.S.'s fifth grade while he attended the Edison Schools. Thereafter Karp then spoke with the teachers from the Edison school district. Z.S.

attended the SINAI School from the sixth grade through the eighth grade. Karp stated that Z.S. made progress in both language arts and math while in the SINAI School.

Karp stated that SINAI uses “Key Math,” which is an objective test with rational norms and a standard Reading Inventory with similar criteria of national norms and one to one administration by an administrator. Z.S. was tested in a normal test in August, just prior to the start of his sixth grade. Mrs. Krantz, the assistant director and administrator, conducted the test for all three years. This resulted in a standard range of results for Z.S. It was Karp’s conclusion that Z.S. made general progress overall at SINAI over the three years he attended that school.

Karp found that Z.S. had many challenges, including impulsivity, lack of social awareness, pragmatic language skills, Tourette’s syndrome, and fine motor weaknesses. Z.S. was administered medication “several times a day” while at the SINAI School through a nurse for his attention and mood disorders, associated with his Tourette’s syndrome. Karp did speak with Dr. Laveman, from the Children’s Specialized Hospital that treated Z.S. since the second grade. Over the period of three years, Z.S. grew in vocabulary, word recognition and passage comprehension. Karp further testified that SINAI is an accredited school by the Middle States Association. The school was accredited by this Association since the early 2000s.

Karp also testified that Z.S. had issues with reference to riding in on the mainstream school bus. As a result of Z.S.’s activities, he was suspended several times and by the end of the sixth grade, he was no longer allowed on the bus. By the middle of the seventh grade, Karp stated that Z.S. made progress with riding on the bus and thus for the seventh and eighth grades, was able to ride the bus with Kushner and SINAI students. These events were certainly recognition of progress being made both socially and behaviorally. SINAI staff met with Z.S. and his mother in order to make sure that the goals they were working on at home were consistent with the goals they were working on at school. Karp found that when Z.S. came to SINAI, he had no social expectations and no awareness as to the consequences of his actions.

Karp also testified that Z.S. was mainstreamed for social activities, gym, trips, monthly school activities, lunch, recess, and breaks. This all occurred with the support of SINAI staff, advanced planning and with Z.S. making progress. Karp stated that when Z.S. came to SINAI, he was unable to mainstream and after being at SINAI, he was able to mainstream. Z.S. learned to use pragmatic language in order to handle many social situations.

Z.S. also received counseling services at SINAI with School Psychiatrist Dr. Karen Wasserman. SINAI also used "behavioral contracts" in order to address behavior and academics. Based on these methods, Z.S. became more independent in his functioning in gym, lunch, and special activities.

With reference to SINAI's Comprehensive Service Plan (CSP), which is similar as the respondent's IEP, the CSP provides information about the services provided to the student, the teachers who are teaching each student and academic goals for each class as well as social skills goals and social behavioral goals. Karp stated that counseling started in October and O.T. started in May. Z.S. also received Speech and Language services one time per week for thirty minutes each. Karp testified that Z.S. made progress with regard to social/behavioral goals.

Karp provided an expert opinion that Z.S. made progress in academics while at SINAI. Z.S. behaved more appropriately while he was in class. With regard to SINAI's CSP for the eighth grade (P-182), Karp stated that the eighth grade is more challenging educationally for children. Karp said that the eighth grade was exceptionally difficult for Z.S. The SINAI staff found that Z.S. was still progressing through the eighth grade. Z.S. articulated his feeling better through the eighth grade. With reference to Z.S.'s Report Card, Karp found that his progress with reference to social/emotional issues was inconsistent. However, Z.S. made progress in Social Studies and Writing. In addition, with regard to friendships, there still existed challenges. SINAI staff continued to work with Z.S.'s home therapists.

Importantly, Karp stated that no one from the Edison School District, requested records or took an opportunity to observe or speak with any of the SINAI School's staff as was done with other children.

On cross-examination, Karp stated that she was subpoenaed to testify by the Petitioners. Karp further stated that she had no documents with her at the time of the hearing. She said that there were CSP meetings at least twice a year to review the student's progress. Karp put the level of non-sectarian education at 75% of the day. Karp said that prayer and breakfast were "mainstream" activities. Karp said that lunch and gym were also mainstream activities. There were changes to Z.S.'s schedule/classes based on his needs. The class size for Z.S. was no more than five to six students.

Karp stated that the Behavioral Contracts for Z.S. were ever evolving. They were based on a positive reward system that allowed Z.S. to earn "free time, extra privileges, extra DS or iPad time" for acting appropriately. It was Karp's belief that a self-contained class was appropriate for Z.S. for use of monitoring and redirecting. With regard to social skills, Karp stated that the SINAI School uses in part, Social Thinking by Marsha Garcia Winner, with the curriculum being used in counseling, staff development, and in the classrooms.

Gloria Bland Katz, LDT-C, PRSE

Gloria Bland Katz (Katz), MA, LDT-C, PRSE, was accepted as an expert in learning consulting, LDTC, Speech and Language Therapy, and Special Education Programming. Katz had served as a Child Study Team Member and Case Manager. Katz was retained directly by the parents in this case.

It was Katz's opinion that the respondent in this case did not provide a Free Appropriate Public Education to Z.S. The time frame for this failure was from post-preschool until the present time. When shown a copy of the District's Educational Evaluation (P-184), Katz stated that she would not use the Woodcock-Johnson test for Z.S. Katz found that in that Educational Evaluation the results should be used with caution because of Z.S.'s high level of distractibility. It was Katz's position that giving an Educational Evaluation at the age of five years and six months would not yield the most reliable and valid data for measuring growth from year to year as was done by the

District. Katz believed that at the first tri-annual with Z.S. in the third grade in a Resource Room Program, it would present an opportunity to do a current Educational as a part of re-determining the eligibility for service. At this point in time, the data would be more reliable and valid. Katz noted that the CST failed to provide any rationale for this action, even though the student requested it.

Katz also testified that she reviewed the District's Social Evaluation finding that the reason for the referral was due to adjustment and behavioral concerns at home and at school. Katz found this to be very unusual. Katz also reviewed the District Neurological Evaluation (Dr. Jesse Mintz- P-22) that noted ADHD, use of medication, and Z.S. being unable to interact with peers or behave tolerably in school.

Katz commented on the District's Psychological Evaluation (P-23), which took place on August 6, 2007, in which it was noted that Z.S.'s IQ was 110 (High Average). The Evaluation found significant social issues, external aggression, and poor temper control. Katz also stated that the District's Speech & Language Evaluation of July 1, 2007, (P-25) was not a complete and thorough evaluation. Katz described it as a "screening tool" and found it to contain significant weaknesses in relation to Z.S.'s IQ.

Katz was incredulous do to the fact that the District failed to complete any evaluations since preschool with regard to Z.S. Katz stated that the District should have done some standardized testing in order to determine eligibility to continue with special education. With reference to the STAR test, Katz said that this test was geared to support a teacher with instruction and does not measure academic levels. The STAR test is not a standardized assessment and has practically no value as to a student's progress.

With reference to Caplan's Evaluations (P-12 and P-162), Katz stated that she compared it with the only Educational Evaluation completed by the District and she could only compare 4 out of 15 subtests because they were the only ones that were administered across all three. When comparing the two Educational Evaluations done by Caplan, Z.S. did better or maintained progress in about 75% of the subtests. This lead Katz to the conclusion that what happened at SINAI School reflected in the

achievement scores of maintaining or gaining but making meaningful growth based upon maintaining the functional level scores. Such a comparison was impossible with the District's Educational Evaluation, because there was only one evaluation and it provided unreliable results due to the student's tender age.

Katz also testified regarding the IEPs which were created for Z.S. The CST provided no written documentation in the IEPs that the teacher had amassed any data supporting the target objective had been achieved. In addition, Katz never found any grade levels in any of the PLEPs. Katz found this to be strange. It was Katz's expert opinion that grade levels are required to be in an IEP.

Regarding the April 2012 IEP, written by the District, the area of reading listed a letter "P," which Katz found to be the same as being in the second grade, with Z.S. was in the fourth grade. Katz stated that what drives the IEP are the instructional needs of the student and there was no data which supported the services provided to Z.S. under the District's plan for education. The IEP, she found, was based on outdated tests, when Z.S. was seven years of age and he was then over ten years of age.

With regard to Z.S.'s report cards, Katz stated that she reviewed those report cards and found that there were no modifications provided for Z.S.'s attendance and tardy issues. These issues were clearly visible to the District and were raised by Z.S.'s mother. Katz would have also expected that the fact that the Edison School Nurse administered medication to Z.S. several times a day would be reflected in the IEP. Katz stated that she could not understand that the seventh-grade IEP (R-43) did not contain current data and no current information/data was sought or included from the SINAI School, where Z.S. attended for one year. In fact, Edison did not contact the SINAI School or observe the program.

On cross-examination, Katz stated that she did not prepare a Report, nor did she observe Z.S. in school or the District. Katz did say that she did interview Z.S. and his mother. Katz further stated that she did not complete any testing, but reviewed records and spoke with Judy Park. Katz stated that formal evaluations are not required every three years. However, Katz did state that when there is a recommendation for a

program change, classroom teachers could use assessments without parental consent. Katz further confirmed that the SINAI School had a behavior plan in order to address Z.S.'s absences and tardies. It was Katz's belief that even though a significant number of Z.S.'s tardies were excused, the IEP should have discussed this. On redirect, Katz stated that when a student is unilaterally placed, the public school where he is currently registered remains responsible to evaluate and offer FAPE.

Dr. Karen Wasserman

Dr. Karen Wasserman (Wasserman) is a certified school psychologist. Wasserman was accepted as an expert in school psychology and supervision and testified as such on behalf of petitioners. Wasserman works full-time at the SINAI Schools and is there every day and provides counseling to approximately forty students, including individual and "push-in's." Wasserman provided both individualized and "push-in" counseling for Z.S. during the sixth through eighth grades, with the group size and duration changing depending on Z.S.'s individualized needs. Wasserman created and wrote Objectives and provided services as Z.S.'s counselor for the school years: 2013-14, 2014-15, and 2015-16. Wasserman testified that Z.S. made progress incrementally gaining skills through his experience. Z.S. made progress because his skills became increasingly more independent.

Wasserman stated that Z.S. was rarely tardy when he attended SINAI School and that when he was absent; it was because his mother or sister was in the hospital or Z.S. was sick. Wasserman also stated that SINAI created a system where Z.S. had a chance to get his books and go back and forth to his desk in one of the SINAI classes. SINAI also provided extra time to Z.S. and SINAI staff was present to assist Z.S. Wasserman also confirmed that SINAI also helped mainstream Z.S. through structured clubs in Kushner, intermural sports, and communication with Kushner teachers. Wasserman also testified that the SINAI building was next door to Kushner classes. Both Kushner students and SINAI students had breakfast together, lunch together, and at dismissal time, all the students would stand around together and congregate.

Wasserman also stated that “behavior contracts” and “plans” were created for Z.S. by Karp, Assistant Principal Weinstein and herself. Wasserman testified that Z.S. made progress while at SINAI and Z.S.’s level of compliance increased.

A.S.

A.S. is the mother of Z.S. and the petitioner in this matter. A.S. stated that while she was on vacation, she requested her attorney (Inzelbuch) to prepare a unilateral notice letter for the 2013-2014 school year. (P-61.) A.S. also sent written correspondence to Patel on June 25, 2014, and received a response from Conklin (P-116), but did not receive a response to the 2015-2016 unilateral placement letter which was sent. In addition, A.S. wrote to Z.S.’s teachers at the Edison School District as to issues with medications, behaviors and confrontations with other students.

A.S. stated that she was constantly in contact with the teachers at Edison about his time management, organizational skills, and problems he was having packing up at the end of the day. A.S. also stated that she sent an email to Patel, telling her that she was concerned about her son starting middle school and made inquiries as to what was going to be done for Z.S. The response she received was “It’s all going to be okay and it will work itself out.” A.S. found this response to be unacceptable.

A.S. also made a request for independent evaluations. A.S. also stated that Z.S. never received such evaluations. With regard to behavioral incidents, A.S. recalled that Z.S. had such issues in the fourth grade. Z.S. was isolated from other students. Z.S. also had a hard time with authority figures and he was often disrespectful. Z.S. would be aggressive with others. Both teachers and other parents would contact A.S. and advise her of such problems. These problems were not adequately addressed by the District. While Z.S. was at Edison, A.S. would drive Z.S. to school.

A.S. stated that she gave permission for Z.S.’s fifth-grade teachers to speak with Karp from the SINAI School but the teachers never advised her that they did contact SINAI. A.S. also testified as to Z.S.’s issues with homework, behavior, tantrums while he attended Edison Schools. A.S. also testified that her son had issues regarding the

fifth grade in Edison including too many students in the school and his inability to hear the teachers. A.S. stated that she advised the District that Z.S. might attend SINAI; she also stated that she did not make the final decision until after the last IEP meeting in April 2013. A.S. also stated that Z.S. had anxiety when he took the NJ ASK test. A.S. inquired with Patel about Z.S.'s NJ ASK scores dropping. Their response was "It is what it is." A.S. also stated that the April 2013 IEP (P-6) did not reflect all of her concerns. A.S. also stated that she never was given information/documentation as to the STAR assessments and was not aware of same prior to this hearing.

With regard to Z.S.'s fifth-grade report card, she enforced the fact that her son received a large number of "N"s (needs improvement) and that she expressed concern to Z.S.'s teachers and received no real responses. A.S. confirmed that she told Patel about Z.S.'s mood swings, anxiety, and his hard time interacting with other children. A.S. also attended a June 11, 2014, meeting and requested independent evaluations and required an Occupational Therapy Assessment and Assistive Technology Evaluation and these were not provided. A.S. also stated that she provided numerous Evaluations to the District prior to the June 11, 2014, meeting. The District did not respond or change Z.S.'s classification as requested by her and based on these additional Independent Evaluations.

A.S. found that while at SINAI, Z.S. had very few events of being tardy, as opposed to while he attended the Edison Schools, where he had many more. A.S. provided the District with medical documents which explained Z.S.'s inability to sleep, tremors, etc., but no one from the District ever contacted Z.S.'s treating physicians. A.S. stated that while at Edison, Z.S. had medication administered by a nurse two to three times a day. A.S. spoke to this nurse many times, who reported to A.S. that Z.S. was having a rough week on occasion. A.S. also explained that Z.S. was asked to stay home from school in the fourth and fifth grades due to allegations of inappropriate behavior. This confirmed the fact that Z.S. was having behavioral issues in the District.

A.S. went on to explain that Z.S. then progressed at the SINAI School with reference to understanding the circumstances of the world around him. Z.S. also progressed with being able to follow instructions much better. Z.S. progressed in

socialization while at the SINAI School. Z.S. also participated with mainstream children in soccer and other events, including play dates.

On cross-examination, A.C. stated that she decided to send Z.S. to the SINAI School after waiting for the District to get back to her regarding her requests and when they did not, she decided to send him to SINAI. A.S. also stated that at the IEP meeting (R-6), Z.S.'s teachers expressed concerns as to his placement in the middle school. It was A.S.'s position that Z.S. needed re-direction. A.S. stated that she was considering SINAI when Z.S. was in the fifth grade. Although Z.S. still needed redirection while at SINAI, it was easier at SINAI because there was less stimuli in his classroom and he was far more focused and exhibited better behavior.

A.S. stated that SINAI was able to better educate Z.S. because of the different environment and structure. In the SINAI School, Z.S. was receiving much more one on one teaching. Z.S. got much more redirection geared directly at him while at SINAI. The way A.S. found SINAI, was that one of Z.S.'s treating doctors, Dr. Laveman, introduced her to another parent whose child attended SINAI. This parent's child had similar issues to the issues Z.S. had.

Karen T. Kimberlin, M.S., CCC-SLP

Karen Kimberlin (Kimberlin) was accepted as an expert in speech and language, reading and writing and testified as same for petitioners. Kimberlin testified that her evaluation (P-86) was provided to the District in November 2014. Kimberlin reviewed records, conducted testing and observed Z.S. at SINAI and that she considered the SINAI School as an appropriate placement for Z.S. It was Kimberlin's opinion that Z.S. had a language based learning disability. There were listening and speaking difficulties which impacted Z.S.'s reading and writing.

Kimberlin also expressed her opinion regarding the District's Speech and Language Evaluation (2007). Kimberlin stated that it was a test, conducted in preschool. It was her position that additional testing for Z.S. was required. A.S.

presented issues regarding expressing himself and social issues which called for social testing to be done.

Kimberlin testified as to her March 19, 2014, Report (P-86). She stated that Z.S. was evaluated by several medical professionals and was diagnosed with asthma, ADHD, ODD, dysregulation mood disorder, sensory integration disorder, obsessive-compulsive disorder, and dysgraphia. Z.S. also has a history of suffering from Tourette's Syndrome. Z.S. had an educational classification as OHI. Z.S. received occupational and physical therapy services privately and in preschool. Kimberlin also conducted a SINAI School observation. She found Z.S. to have a language-based learning disability secondary to higher-level language processing difficulties, social communication impairment, a reading disability and dysgraphia/disorder or written expression. Kimberlin believed that it was very likely that Z.S.'s behavioral/emotional issues were tied into his learning disability. It was Kimberlin's position that if Z.S. was re-assessed after 2007, he could have benefited from speech and language therapy services.

FINDINGS OF FACT

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS**:

Z.S. was classified eligible for special education and related services as a child with a disability, i.e., ADHD. Z.S. lives with his mother and siblings in Edison, New Jersey. Z.S. was enrolled within the District toward the end of June 2013. In July 2013, A.S. met with the guidance counselor in Edison in order to supply Z.S.'s records and evaluations. A.S. specifically told the District that Z.S. was a special needs student and thus required special education and other related services.

Z.S. was assigned "N's" (needs improvement) from grades three to five in the following areas: reading, math, social studies and personal growth and development. Z.S.'s grades declined in math, science/health and social studies. Z.S. was often tardy

and had poor attendance while in Edison for the grades three to five, but was not reflected in the District's IEP.

Z.S.'s attendance issues and tardiness issues, although still in existence while in the SINAI School, declined and were no longer a major issue. With regard to Z.S.'s NJ ASK scores, language arts regressed in the following grades: three, four, and five; math regressed from grade three to four and elevated from grade four to five, but was still below the grade-three level.

As to the IEPs, I **FIND** provided by the District failed to provide a current evaluation and failed to properly diagnose Z.S. regarding his disabilities. Further, the District did not provide any expert who drafted a proposed IEP for M.S. for the 2013-2014 school year.

LEGAL ANALYSIS

The IDEA was enacted to assist states in educating disabled children. It requires states receiving federal funding under the Act, such as New Jersey, to have a policy in place that ensures that local school districts provide disabled students with FAPE designed to meet their unique needs. See 20 U.S.C.A. § 1412; N.J. Const. Art. VIII, IV, 1; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1 et seq., Hendrick Hudson Cent. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the State involved; and d) are provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C.A. § 1401(9). Both parties in their submissions agree that this is the legal standard.

It is further agreed that a FAPE is one that is sufficient to confer some educational benefit that is more than trivial or “*de minimis*,” it does not need to maximize “the potential of the child”. Rowley, supra, 458 U.S. at 192, 200, 102 S. Ct. at 3043, 3047, 73 L. Ed. 2d at 703, 708. Parents who wish for their child to receive extra service beyond what is available to nondisabled students in the public schools cannot expect the public to pay for the privilege. C.T. and T.T. o/b/o R.T. v. Robbinsville Bd. of Educ., EDS 04682-10, Final Decision (Jan. 14, 2011), <http://njlaw.rutgers.edu/collections/oal/>.

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985).

In addition, when scrutinizing a FAPE claim there is a two-part inquiry. A court must first ask whether the state or school district has complied with the procedures of the Act when developing the IEP, and second, whether the IEP developed through the Act’s procedures is “reasonably calculated to enable the child to receive educational benefits.” Rowley, supra, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. While the IDEA does not require a school district to provide an IEP that maximizes “the potential of a disabled student, it must provide ‘meaningful’ access to education and confer ‘some educational benefit’ upon the child for whom it is designed.” Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999) (citations omitted). In “[e]xamining the quantum of benefit necessary for an IEP to satisfy IDEA,” the Third Circuit held “that IDEA ‘calls for more than a trivial educational benefit’ and requires a satisfactory IEP to provide ‘significant learning,’ and confer ‘meaningful benefit.’” Ibid. (citations omitted).

“When parents challenge [the adequacy of] a school’s provision of a FAPE to a child, a reviewing court must (1) consider whether the school district complied with the IDEA’s procedural requirements and (2) determine whether the educational program was ‘reasonably calculated to enable the child to receive educational benefits.’ “ Mary

T. v. Sch. Dist. of Philadelphia, 575 F. 235, 249 (3rd Cir. 2009) (quoting Rowley, supra, 458 U.S. at 206-07, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

Following amendments to the State regulations, in 1989 the New Jersey Supreme Court enunciated the standard to be applied in determining the adequacy or the appropriateness of an IEP. The Court in Lascari v. Ramapo Indian Hills Regional School District, 116 N.J. 30, 47-48 (1989), held that the education offered to a disabled child must be sufficient to confer some educational benefit upon the pupil. The Court went on to state that the current standard in New Jersey parallels the federal standard enunciated in Rowley. Lascari, supra, 116 N.J. at 48. This standard provides the foundation upon which the pupil's IEP is built. Moreover, the IEP establishes "the rationale for the pupil's educational placement." N.J.A.C. 6A:14-1.3.

Other Third Circuit decisions have further refined that standard to clarify that such educational benefit must be "meaningful," "achieve significant learning," and confer "more than merely trivial benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-84 (3d Cir. 1988), cert. den. sub. nom., Central Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The Third Circuit has re-emphasized the importance of the inquiry into whether the placement proposed by the district will provide the student with "meaningful educational benefit." I.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003).

Consequently, a FAPE is defined in broad terms—a limited definition would not encompass the many needs of such a dynamic population—that are consistent with the IDEA's corresponding mandate that the states provide each disabled child with specifically designed instruction that is tailored to the child's unique needs and is a "basic floor of opportunity." Rowley, supra, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690. Notwithstanding the demand that a FAPE is one that is sufficient to confer some educational benefit that is more than trivial or "de minimis," it does not need to maximize the potential of the child. Polk, supra, 853 F.2d 171. For this reason, the parents of a disabled child cannot compel a school district to provide an educational benefit that is

better than the one under the IEP, providing the IEP is sufficient to confer a meaningful educational benefit that is more than trivial or “*de minimis*.” Generally speaking, children with special needs must be provided an education tailored to their individual needs and that confers meaningful benefit. Ibid.

The issue of whether an IEP is appropriate is a question of fact. S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 271 (3rd Cir. 2003). Whether an IEP is appropriate is a student by student analysis that must analyze the individual student’s abilities. It is not a bright-line test. Ridgewood Bd. of educ. v. N.E. ex rel M.E., 172 F.3d 238, 248 (3d Cir. 1999).

When a school district fails to ensure that a FAPE is being provided, as was previously determined in this case, parents have the right to unilaterally place their child in a private school and receive reimbursement from the school district for tuition. Burlington, supra, 471 U.S. at 370-71, 105 S. Ct. at 2002-03, 85 L. Ed. 2d at 395-96; N.J.A.C. 6A:14-2.10(b). Reimbursement, however, is never required if a school district offered the disabled student a FAPE. N.J.A.C. 6A:14-2.10(a).

Once a forum holds that the public placement violated IDEA, it is authorized to “grant such relief as the court determines is appropriate.” 20 U.S.C.A. § 1415(e)(2). Under this provision, “equitable considerations are relevant in fashioning relief.” Sch. Comm. of Burlington, supra, 471 U.S. 359, 374, 105 S. Ct. 1996, 2005, 85 L. Ed. 2d 385, 398, and the court enjoys “broad discretion” in so doing. Id. at 369. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Ibid.

The United States Supreme Court held in a unanimous 1993 decision that, when a public school provides an inappropriate education to a classified child, courts may order reimbursement to those parents who unilaterally place their child in a private school, even if the private school does not meet certain criteria. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). In other

words, parents are not held to the same standard as local education agencies in making out-of-district placements. Ibid.

It is clear that A.S. is a caring, thoughtful mother who has Z.S.'s best interests at heart. Neither the text of the IDEA nor its legislative history imposes a "requirement that the private school be approved by the state in parent placement reimbursement cases." Florence, supra, 510 U.S. at 11, 114 S. Ct. 364, 126 L. Ed. 2d 291. To the contrary, the Court of Appeals concluded that the IDEA's state-approval requirement applies only when a child is placed in a private school by public school officials. N.J.A.C. 6A:14-2.10(b)

In addition, the IDEA includes a mainstreaming requirement requiring education in the "least restrictive environment." See 20 U.S.C.A. § 1412(a)(5)(A). Courts in this Circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. "The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom., Scott P. v. Carlisle Area Sch. Dist., 517 U.S. 1135, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996). Federal courts have adopted a two-part test for determining whether a school district complies with the statutory preference for the least restrictive environment. The first step is to determine whether the local school can educate the child in a regular classroom with the use of supplementary aids and services. Only if it is determined that the child cannot be educated in the regular classroom with supplementary aids and services do it then become necessary to consider out-of-district placements. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1215 (3d Cir. 1993).

The Third Circuit provided further instruction on the definition of meaningful benefit when it found that the benefit must be meaningful in light of the student's potential; to fulfill this mandate, the student's capabilities as to both "type and amount of learning" must be analyzed. Ridgewood, supra, 172 F.3d at 248. "When students display considerable intellectual potential, IDEA requires a great deal more than a

negligible [benefit].” Id. at 247 (quoting Polk, supra, 853 F.2d at 182). 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 an FAPE. Ridgewood, supra, 172 F.3d at 248. Moreover, there is no bright-line rule to determine the amount of benefit required of an appropriate IEP, and a “student-by-student analysis that carefully considers the student’s individual abilities” is required. Ibid. There must be a degree, intensity, and quality of special education and related services adequate to provide an educational benefit to the individual child. Egg Harbor Twp. Bd. of Educ. v. S.O., 19 I.D.E.L.R. 15, 17 (D.N.J. 1992).

Finally, the New Jersey Administrative Code requires certain prerequisites be fulfilled before Administrative Law Judge can require the school district to reimburse parents for the unilateral placement of their child in a school. N.J.A.C. 6A:14-2.10(b) requires that:

if the parents of a student with a disability, who previously received special education and related services from the district of residence, enroll the student in a nonpublic school, . . . or approved private school for the disabled without the consent of or referral by the district board of education, an ALJ may require the district to reimburse the parents for the cost of that enrollment if the ALJ finds that (1) the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and (2) that the private placement is appropriate.

When a court examines whether a district has provided FAPE, the appropriateness of an IEP is not determined by a comparison between the private school unilaterally chosen by parents and the program proposed by the district. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Rather, the pertinent inquiry is whether the IEP proposed by the district offered FAPE with the opportunity for significant learning and meaningful education benefit within the LRE. G.B. and D.B. ex rel J.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., EDS 4075-06, Final Decision (June 13, 2007), <http://njlaw.rutgers.edu/collections/oal/>. Upon a finding that the district provided FAPE, the appropriateness of the private school program is irrelevant. H.W. and J.W. ex rel A.W. v. Highland Park Bd. of Educ., 108 Fed. Appx.

731, 734 (3d Cir. 2004). The District bears the burden of proof by the preponderance of the competent and credible evidence that it has provided a FAPE to Z.S. in the least restrictive environment. N.J.S.A. 18A:46 -1.1.

There was substantial evidence submitted to this venue, including the testimony from many witnesses and tangible, documentary evidence. This evidence supports the fact that Z.S. did not show progress in the fifth grade and that the IEPs the Edison Board of Education presented for the sixth and seventh grades were not reasonably calculated to provide Z.S. with a meaningful, individualized education.

Respondent's submission argues that Z.S. demonstrated academic progress and a lack of behavioral issues when he attended school in Edison and that the District provided a FAPE and that its IEP's were designed to provide Z.S. with a FAPE. The evidence presented at the hearing simply does not support this position. There was ample evidence presented that Z.S. demonstrated behavioral issues while in Edison School. The respondent argues that Z.S. exhibited few if any inappropriate behavior and belittles and focuses on what it finds to be minor inconsequential events. Yet A.S. cites numerous behaviors demonstrated by her son, which go far deeper and are more substantial than as set forth by the respondent.

Petitioners showed during the hearing that even though Z.S. moved forward from grade to grade, this does not show that a FAPE was provided to this student. In addition, although the respondent points to the STAR testing for allegedly showing progress by Z.S., the evidence is clear from both the respondent's and the petitioners' witnesses that the STAR tests were not a measure of progress, but rather used to assist teachers to educate a student and a diagnostic tool. I therefore reject the STAR scores and testing as proof of any progress for Z.S.

It was also clear from the evidence that Z.S. had an above-average IQ (110) and superior (130), yet received passing grades, with vague undefined progress in certain areas. The District provided little, if any, real evidence that this student was receiving a meaningful education while he attended the schools at Edison.

There was evidence presented at the hearing which showed, via Z.S.'s report cards, that the student was unable to meet his full educational potential while at Edison. Z.S.'s report cards were replete with documentation that he needed improvement in a number of areas of study and also showed declining grades in many areas. Furthermore, the evidence presented via progress reports (third, fourth, and fifth grades) noted zero goals and only a small percentage of goals mastered. Most concerning to me was the fact the Z.S.'s NJ ASK performance was declining in the area of language arts.

The meeting of a disabled student's unique needs requires addressing not only their academic but also their social, emotional, physical and behavioral needs. M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 393-94 (3d Cir. 1996), which found that an education for children with disabilities involves emotional, social and physical growth. M.S. & D.S. ex rel Hof M.S., Petitioners, 2006, 2005 WL 4209294, at *49 (EFPS Nov. 9, 2005). The compelling evidence presented sadly shows a student, with great potential, continuing to have social and behavioral issues while in Edison. These issues were ignored by the District and could have been managed through counseling and a proper educational setting.

Based on the medical conditions (Tourette's Syndrome) suffered by Z.S., this student had numerous serious challenges like impulsivity, lack of social awareness, weak pragmatic language skills, sensory issues, and fine motor weakness. There was further evidence presented that these issues had a direct impact on Z.S.'s learning, socialization, and poor behavior. I am befuddled by the District's position that Z.S. had no behavioral issues when, in fact, he was suspended on numerous occasions.

The IEPs developed for Z.S. are also tragically void of any reference to his poor attendance record. The District was well aware of this student excessive tardiness and absences, yet the IEPs make absolutely no mention of how to address the problems which clearly lead to these results.

In order to show that a student is provided with a FAPE, a school district must develop an IEP that responds to the student's identified educational needs by setting

forth a student's present abilities, goals for improvement of the student's abilities, services to meet those goals and a timetable for reaching the goals by way of the services. Holmes v. Millcreek Twp. Sch. Dist., 205 F. 3d 583, 589 (3d Cir. 2000). The IEP must also set forth the appropriate objective criteria and evaluation procedures for measuring the child's progress towards goals. 20 U.S.C.A. § 1401 (a)(20).

The IEPs at issue in this case, did not state and were not based on Z.S.'s present, individual needs and abilities. The sixth and seventh grades IEP failed to set forth a statement of Z.S.'s present level of educational performance. In the sixth grade IEP, it set forth no specific grade levels and only stated an explanation of reading level. The seventh grade IEP provided no current information and was basically based on the previous IEP. The seventh grade IEP also provides no information regarding Z.S.'s education at SINAI, even though Z.S. was going to that school for over ten months. It is generally undisputed that Edison made no attempt to gather information from SINAI regarding his education, progress and services at that school. I find that the District's admission that it copied the fifth grade IEP in the IEPs for the sixth and seventh grades is inconsistent with the District's obligation to base its IEP on present information. Evans v. Bd. of Educ. Rhinebeck Cent. Sch. Dist., 930 F.Supp. 83, 95-96 (S.D.N.Y. 1996) wherein the Federal Court stated: "children develop quickly and a placement decision that may have been appropriate a year ago may no longer be appropriate today." A CST needs to revise the IEP to address lack of progress, necessary changes arising from reevaluation of the child and parental input. 20 U.S.C.A. § 1414(d)(1)(A)(4).

The sixth and seventh grades IEPs do not provide the proper mechanisms to objectively measure Z.S.'s educational progress. The IEP lack grade levels which measure whether Z.S. has been making meaningful progress. There is no other tool for the measurement of Z.S.'s progress. As correctly pointed out by the petitioners, the respondent relied on only one educational evaluation it created when Z.S. was at a very young age and never updated this evaluation as the student became older. This raises another issue, i.e., the fact that the IEPs relied on an out of date evaluation, did not obtain a new evaluation and basically ignored outside evaluations provided to the District by A.S. The District conducted evaluations in the areas of educational,

neurological, psychological and social, when Z.S. was in pre-school. Compelling evidence was received from Katz (an expert in speech, education, LD/TC speech and language therapy, and special education programming), which found that the District's reliance on such tests would not provide the most reliable data for measuring growth and "should be interpreted cautiously." The failure of the District to present any expert evidence challenging this position is most telling. The District further failed to recognize and acknowledge the independent evaluation that the parents provided to the School Board.

In addition, the IEPs failed to include the input and concerns of the parents of Z.S. It is clear that parental concerns and information provided by the parents must be considered when developing and revising IEPs. 20 U.S.C.A. § 1414(d)(3-4). There was confirming evidence from the District's own witnesses that all of such parental concerns were not included in the IEPs. The IEPs failed to include a Behavioral Intervention Plan, to address the parents' concerns regarding Z.S.'s behavior and the obvious failure to address same in the IEP. In the sixth grade IEP, counseling was removed based on Patel speaking with teachers and guidance counselors even though this issue was raised by A.S. In addition, the District did not provide speech therapy or did not even explain why such therapy was not provided (even though it was recommended by Caplan after her evaluation of Z.S.).

The District failed to provide an explanation for Z.S.'s placement as required. N.J.A.C. 6A:14-1.1-10.2. There are no summaries of any reports to justify Z.S.'s eligibility category. Lastly, the District did not provide an IEP for the eighth grade, because it argues that Z.S. was not enrolled in the Edison School. However, Z.S.'s enrollment in SINAI does not remove the District's obligation to develop an IEP for the eighth grade. See Mooretown Twp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057 (D.N.J. 2011); see also D.O. o/b/o Jackson Twp. Bd. of Educ., EDS 15299-15 and Jackson Twp. Bd. of Educ. v. S.G. & K.G. o/b/o A.G., EDS 00034-15, <http://njlaw.rutgers.edu/collections/oal/>.

It is axiomatic that the procedural requirements of the IDEA are essential to the fulfillment of that law. Case law has confirmed the importance of following such

procedures and the intent that the procedures provide that parents be involved in the planning: “It seems to use no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.” Rowley, supra, 458 U.S. at 205-06, 102 S. Ct. at 3050, 73 L. Ed. 2d at 711. As such, it can be said that procedural inadequacies alone can support a finding that a FAPE was denied if the violations impeded the child’s right to a FAPE, impeded the parents’ opportunity to participate in the decision-making process or caused a deprivation of educational benefits. Multiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not. R.E. v. N.Y. City Dep’t of Educ., 694 F.3d 167, 190 (2d Cir. 2012)

In this case, the District blatantly failed to measure and considers Z.S.’s present and evolving needs and develops a unique, tailored plan to meet and measure those needs. This position was reinforced by Katz who testified that Edison failed to provide a FAPE to Z.S. The District failed to present any expert testimony to the contrary.

I find that the IEPs were not properly drafted or offered to A.S. for Z.S. for the school years when Z.S. was in the fifth, sixth, and seventh grades. In fact, the District relied on an out of date Evaluation and ignored medical documents and evaluations which were provided to the District by A.S which referenced a more accurate diagnosis. It follows that FAPE was not provided for Z.S.

The District in its post-hearing submission, lists and advocates that there exists several items from testimony and evidence which show that Z.S. received FAPE, including: STAR Reports; Holistic Writing Rubric; Upper Spelling Inventory and Z.S.’s Report Card for 5th Grade and his Grade Book Scores. However, I find these items to not be compelling to show that Z.S. was receiving FAPE in Edison. I find that based on the totality of the testimony, the STAR Assessments is not evidence of progress for Z.S.

A glaring omission by the District is the fact that no one from the District had observed Z.S. at SINAI School. The evidence presented shows that this was NOT the

result of Z.S.'s parents' or the SINAI School's failure to cooperate. Further, inactivity on behalf of the District was the Case Manager Patel's acknowledgement to receiving prior evaluations of Z.S. but making absolutely no effort to contact the evaluators with reference to their findings.

The next consideration was whether the private placement by petitioners of Z.S. at SINAI, and the program provided to Z.S., was appropriate. SINAI is a New Jersey State accredited school for the education of children with special needs. The witnesses presented by petitioners testified in detail about the SINAI program and Z.S.'s progress in the program. Each witness detailed that the program at SINAI was appropriate for Z.S., and that he is, and has been, making meaningful educational progress in that program. The testimony of Caplan regarding the appropriateness of SINAI's program was particularly compelling as she has no direct association to SINAI. Conversely, the District did not provide any direct evidence that the program at SINAI was not appropriate for Z.S. There is nothing in the record which would lead to any conclusion other than that Z.S. was appropriately placed by his parents at SINAI, and that the program provided to Z.S. by SINAI is, and has been, appropriate for Z.S.'s meaningful educational progress.

SINAI regularly evaluated Z.S.'s progress and developed and adjusted Z.S.'s educational plan based on his condition at that time. SINAI looked at objective testing and progress results, as well as input from Z.S.'s parents and outside therapists and direct observations when crafting his education. SINAI conducts meetings with the parents at least two times annually. SINAI creates an annual Comprehensive Student Plan (CSP) which is similar to an IEP. It was testified to that SINAI is constantly writing and rewriting and trying new things in order to help Z.S. succeed behaviorally and academically. Whereas Edison phased out counseling for Z.S., SINAI provided Z.S. with counseling via Dr. Wasserman, speech and language therapy, occupational therapy, and frequent interaction between Z.S. and its high-level administrators, Karp and Weinstein. SINAI remained focused on behavioral teaching (through a behavioral contract) for Z.S. which resulted in academic and behavioral progress. Accordingly, Z.S. made social progress, lowered his noncompliance, and was able to participate in mainstream activities. Z.S. also achieved academic progress through these efforts.

The argument made by the District that placement at SINAI because it was too restrictive and less mainstreamed is misguided. The standard should be the least restrictive appropriate educational setting. It is clear from the evidence submitted that Z.S. appears to be on the road to a successful education experience. It appears to me that SINAI is providing an appropriate education and services to Z.S. that was tailored to his individual needs and then modified them as his needs and abilities changed.

A parental placement may be found to be appropriate even if it does not meet the state standards that apply to education provided by the SEA or LEAs. 3 C.F.R. § 300.148.

Accordingly, the courts recognize that parents who are compelled to unilaterally place their child [as in this case] by necessity to do so without the expertise and input of school professionals that is contemplated by a truly collaborative IEP process. The courts recognize that under these circumstances, parents essentially do the best they can. Accordingly, when a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act (IDEA) if the education provided by the private school is reasonably calculated to enable the child to receive educational benefits.

[K.B. and D.B. o/b/o L.B. v. The Morris Sch. Dist., EDS 15435-12, Final Decision (Nov. 2013), <http://njlaw.rutgers.edu/collections/oal/> (citing Florence Cty. Sch. Dist., *supra*, 510 U.S. at 15, 114 S. Ct. at 366, 126 L. Ed. 2d at 293).]

See L.M. v. Evesham Twp. Bd. of Educ., 25 F. Supp. 2d 290 (D.N.J. 2003); T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 581 (3d Cir. 2000).]

There was quite a bit of testimony that Z.S. was making significant progress at SINAI to the point that he was permitted to go into mainstream classes and participate in clubs which included mainstream students. Issues regarding Z.S.'s behavior in the beginning of the 2013 school year were addressed based on his medication being adjusted.

It is difficult to describe A.S.'s actions as being unreasonable. A.S. is obviously a caring and supportive mother to Z.S. Even the witnesses for the District stated that A.S. was cooperative in her submission of documents and reports to the District regarding her son and that she acted reasonably. A.S. registered her son after many years in the District. Where class size was a clearly expressed important issue for A.S., the class schedule admittedly failed to provide any information to A.S. in order to determine the size of those classes.

The District acknowledges that petitioner never withdrew or denied her consent for the District to observe Z.S. in his SINAI program. In addition, there is no evidence of uncooperativeness by A.S. A.S.'s actions with regard to the Edison School District did not constitute clearly unreasonable behavior. I also find that there is no evidence to support a finding that the petitioners withheld information, refused to act in accordance with the School Board policies and procedures and acted in bad faith. I hereby find that the actions of A.S. were practically without substantive alternative and were reasonable.

The placement will be acceptable if the education provided by the private school is reasonably calculated to enable the child to receive education benefits. Florence County Sch. Dist., supra, 510 U.S. at 11, 114 S. Ct. at 364, 126 L. Ed. 2d at 291. This case found that parents who withdraw their child from a public school and unilaterally place the child in a private school while challenging the IEP may be entitled to reimbursement of tuition costs and other expenses only if it is determined that the IEP proposed by the District was inappropriate and the private placement that the student seeks is appropriate under the IDEA. Id. at 15-16.

Based on the evidence presented at the hearing, it is clear that the SINAI School provided such educational benefits to M.S. Furthermore, it is clear that the sectarian nature of an otherwise appropriate private school does not bar reimbursement to the parents who so place their children. L.M. by his parents H.M. and E.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290 (D.N.J. 2003).

It is clear that "private schools' failure to comply with state's licensure requirements or state's educational standards was not a bar to tuition reimbursement."

Warren G. v. Cumberland Cty. Sch. Dist., 190 F.3d 80, 83 (1999). There was much evidence presented that despite some licensure shortcomings, the teachers at SINAI were providing a reasonable educational environment for Z.S. I was impressed with the general qualifications of the teachers at SINAI, the supervisors there, and their testimony at the hearing. The petitioners' witnesses were all in agreement that Z.S. was receiving an educational benefit and was making progress at the school from the fall of 2013 to the spring of 2014. SINAI used a Comprehensive Student Plan to provide Z.S. with an individualized educational program and to monitor his progress despite the District argument to the contrary in their closing brief.

As such, I find that SINAI was reasonably calculated to enable Z.S. to receive educational benefits. Since fall of 2013 when Z.S. entered SINAI, he exhibited substantial progress to the point that he was entered into many mainstream classes in the school. Z.S.'s lack of filter was substantially reduced whereby improving his social skills through the use a behavioral plan. Z.S.'s language has progressed. Z.S. is substantially easier to work with, collaborative, follows directions, and is very interested in other children and how to relate to them. Z.S. has become more advanced socially Z.S. can work on math tests, is task-oriented, and can work without assistance at times. In sum, Z.S. has exhibited significant progress in SINAI since his current placement.

I find therefore that SINAI is a proper placement for Z.S. that provides this student with a properly tailored education, based on objective evaluations and the proper measurement of his needs and progress.

I find that the petitioners were compliant with N.J.A.C. 6A:14-2.10, which requires that the parents provide notice to the District of their concerns and their intent to enroll their child in a nonpublic school at the public's expense in writing at least ten days prior to the removal of the student from the public school. The petitioners have produced Exhibit P-61 as evidence of that intent. This document was confirmed by sworn testimony. I accept this document as sufficient evidence of such notice and do not find the District's arguments to the contrary as persuasive.

However, I also find that the petitioners are not entitled to reimbursement for the costs and fees associated with their private experts. The petitioners failed to follow the proper procedures in making a request for independent educational evaluations. As such, courts have ruled that the IDEA does not authorize the reimbursement for private expert fees or reports, even when the parents are the prevailing party, as in this case. Arlington Central Sch. Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526 (2006). Furthermore, the petitioners failed to adhere to N.J.A.C. 6A:14-2.5(c), which permits a parent to request an independent evaluation from the District upon completion of an initial evaluation or reevaluation if there is a disagreement with that evaluation. Reimbursement for expert reports and fees set up as a request for independent evaluations should be denied because they are in fact experts retained in anticipation of litigation and not true independent evaluations, as is the case here. See Arlington, supra 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526 (2006).

CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board did not offer to provide a free and appropriate education to petitioners, and, therefore, the parents' request for reimbursement for their unilateral out-of-district placement of Z.S. at SINAI, transportation, as set forth in the April 28, 2014, and June 25, 2014, petitions should be granted. In addition, petitioners are the prevailing party in this hearing and as such are awarded fees and costs. The District shall forward Z.S.'s records, schedule an intake and if accepted, send Z.S. to a New Jersey Department of education approved therapeutic school and render payment for tuition, related services, and pay for transportation.

ORDER

It is **ORDERED** that the relief requested by petitioners as set forth above is **GRANTED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2016). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

November 21, 2016
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____
jb

APPENDIX

WITNESSES

For Petitioners:

A.S.
Judith Leah Karp
Susan Caplan, M.Ed., LDTC
Dr. Karen Wasserman
Gloria Bland Katz, MA, LDTC
Karen T. Kimberlin, MS, CCC-SLP

For Respondent:

Mansi Patel, Case Manager
Catherine Rokosz
Christopher Conklin, Assistant Superintendent

EXHIBITS

Joint Exhibit:

J-1 NJ ASK 5th Grade

For Petitioners:

P-1 to P-20	Not in evidence
P-21	Social Assessment of Rachel Rosengarten, LCSW – June 19, 2007
P-22	Neuro-Developmental Evaluation of Dr. Jesse Mintz, M.D., F.A.A.P. – June 15, 2007
P-23	Psychological Evaluation of Janice Rhodes, M.A., M.S. – August 6, 2007
P-24	Educational Evaluation of Staci Fox, LDTC – May 15, 2008
P-25 to P-48	Not in evidence
P-49	Progress Reporting – December 7, 2010

P-50	Not in evidence
P-51	Progress Reporting – March 9, 2011
P-52	Progress Reporting – November 18, 2011
P-53 to P-60	Not in evidence
P-61	Placement Notification of petitioners to District – August 19, 2013
P-62	Not in evidence
P-63	Past e-mails between District and petitioners
P-64	E-mails between District and petitioners
P-65	District Records – September 18, 2013
P-66 to P-83	Not in evidence
P-84	CV and Certification of Susan K. Caplan, M.Ed.
P-85 to P-110	Not in evidence
P-111	SINAI – Psychological Progress Report of Dr. Karen N. Wasserman – June 2014
P-112	SINAI School – Psychological Progress Report of Dr. Karen N. Wasserman – June 2015
P-113 to P-155	Not in evidence
P-156	Resume and Certifications of Dr. Karen Wasserman
P-157 to P-161	Not in evidence
P-162	Correspondence of M. Inzelbuch, Esq. to ALJ Antoniewicz dated May 24, 2016, with “P-106” corrected “Table of Scores”
P-163	Not in evidence
P-164	Not in evidence
P-165	SINAI – Progress Monitoring Data/Standardized Reading Inventory- 2 Assessment 2013 / 2014 / 2015 / 2016
P-166	Not in evidence
P-167	SINAI – Psychological Counseling Progress Report of Dr. Karen N. Wasserman – June 2016
P-168 to P-180	Not in evidence
P-181	KeyMath Test Results (Grades 6 to 8)
P-182	Comprehensive Student Plan (Grade 8) 2015-2016
P-183	Resume of Gloria Bland-Katz, MA, LDTC
P-184	Edison evaluations 2007-2008

P-184A Edison Educational Evaluation

For Respondent:

- R-1 Notice of Re-evaluation/Consent to Evaluate dated May 20, 2011
- R-2 Eligibility Conference Report dated June 21, 2011
- R-3 Notification of IEP, including proposed IEP for the 2011-2012 School Year dated May 20, 2011, and June 21, 2011
- R-4 Amendment to 2011-2012 IEP dated January 27, 2012
- R-5 IEP 2012-2013 (Grade 5)
- R-6 IEP 2013-2014 (Grade 6)
- R-7 Diagnostic Reports, Mathematics
- R-8 Diagnostic Reports, Reading
- R-9 Holistic Writing Rubric dated October 22, 2012
- R-10 Holistic Writing Rubric dated January 18, 2013
- R-11 Holistic Writing Rubric and Benchmark Assessment dated April 11, 2013
- R-12 Feature Guide, Upper Spelling Inventory dated May 21, 2013
- R-13 Oral Reading and Comprehension Recording Form dated May 22, 2013
- R-14 Individual Assessment Grid, Grade 5 for 2012–2013 School Year
- R-15 NJ ASK Scores – Spring 2011
- R-16 NJ ASK Scores – Spring 2012
- R-17 Report Card – Grade 3
- R-18 Report Card – Grade 4
- R-19 Report Card – Grade 5
- R-20 Attendance Reports 2011-2012 and 2012-2013 School Years
- R-21 Not in evidence
- R-22 Sample Schedule for the 2013-2014 School Year (Grade 6)
- R-23 E–mail correspondence 2012-2013 School Year, Christopher Conklin, Assistant Superintendent for Pupil-Special Services
- R-24 E-mail Correspondence 2012-2013 School Year, Mansi Patel
- R-25 E-mail Correspondence 2012-2013 School Year, Catherine Rokosz, Special Education Teacher

R-26	Not in evidence
R-27	Communication Notes 2012-2013 School Year, Mansi Patel, Case Manager
R-28	Not in evidence
R-29	C.V. of Christopher Conklin, Assistant Superintendent of Pupil-Special Services
R-30	C.V., Certificate of Mansi Patel
R-31	C.V., Certificate of Catherine Rokosz (Galgani)
R-32	Not in evidence
R-33	Not in evidence
R-34	Class Report of Running Records for Grade 4 (2011-2012 School Year) and Grade 5 Projections – 2012-2013 School Year
R-35	Math Grade Book 2012-2013
R-36	Language Arts Grade Book 2012-2013
R-37	Writing Grade Book 2012-2013
R-38	Social Studies Grade Book 2012-2013
R-39	Science Grade Book 2012-2013
R-40	Letter from Christopher Conklin to petitioners dated May 5, 2014
R-41	Letter from Board's Attorney to petitioners' Attorney dated May 20, 2014
R-42	Waiver of Triennial Reevaluation and Planning Meeting form dated June 11, 2014
R-43	Proposed IEP 2014-2015 school year dated June 11, 2014
R-44	Letter from petitioners to Mansi Patel dated August 12, 2014
R-45	Letter from Christopher Conklin to petitioners dated September 3, 2014