

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 8581-17

AGENCY DKT. NO. 2017-26189

N.P. AND A.P. ON BEHALF OF S.P.,

Petitioners,

v.

**PRINCETON REGIONAL BOARD OF
EDUCATION,**

Respondent.

Lori M. Gaines, Esq., for petitioners (Barger & Gaines, attorneys)

Brett E.J. Gorman, Esq., and **Kayleen Egan**, Esq., for respondent (Parker
McCay, P.A., attorneys)

Record Closed: April 2, 2018

Decided: April 20, 2018

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

The petitioners, N.P. and A.P. on behalf of their child S.P., allege that the special education program set out in the Individualized Education Program (IEP) offered by respondent Princeton Regional Board of Education (District) did not meet the requirements of Applied Behavior Analysis (ABA) instruction, and therefore would deny S.P. a free and appropriate public education (FAPE). As a result, petitioners argue that the District should be responsible to pay for S.P. to attend the Princeton Child

Development Institute (PCDI), an out-of-district school for children with autism in which petitioners unilaterally placed S.P.

PROCEDURAL HISTORY

On May 10, 2017, after the District made its special education program available to petitioner and decided against placing S.P. at PCDI, the petitioners filed a petition for a due-process hearing. The Office of Special Education Policy and Procedure (OSEPP) transmitted petitioner's claim to the Office of Administrative Law, where it was filed on June 19, 2017. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held with the Hon. Lisa James-Beavers, ALJ, on July 25, 2017. Judge James-Beavers issued a Prehearing Order on August 1, 2017, clarifying the issues in the case and scheduling the matter for hearing.

On September 7, 2017, petitioners filed a Notice of Motion to Compel Observation. On September 20, 2017, the District opposed the Motion. The undersigned issued a Letter Order dated September 28, 2017, granting petitioner's Motion.

The due-process Hearing was held on November 8 and 27, 2017, and January 19, 2018. A post-Hearing telephone hearing was held on April 2, 2018, and the record closed on that date.

FACTUAL DISCUSSION

Stipulated Facts

The following facts have been agreed upon and submitted by both parties, and are not in dispute:

1. S.P. was born on March 7, 2012.

2. S.P. is eligible for special education and related services under the classification categories of Preschool Child with a Disability and Autism for her school-aged classification.
3. S.P. is diagnosed with Autism Spectrum Disorder.
4. S.P. is diagnosed with General Epilepsy.
5. S.P. previously resided in Bethesda, Maryland.
6. S.P.'s prior school district provided S.P. with special education services, but did not provide S.P. with Applied Behavior Analysis (hereinafter "ABA") instruction during the day.
7. Petitioners sent a letter to the District on February 15, 2017, advising the District of their anticipated, job-related relocation to Princeton, New Jersey in the spring of 2017.
8. In the February 15, 2017 letter, petitioners notified the District that Anita Breslin, Psy.D., BCBA-2 (hereinafter "Dr. Breslin"), had evaluated S.P. and determined that S.P. required a full-time ABA Program. Petitioners attached a copy of Dr. Breslin's report to the letter.
9. In the February 15, 2017 letter, petitioners informed the District that through the research they did in anticipating their move to New Jersey, they had researched the Princeton Child Development Institute (hereinafter "PCDI") and "liked it very much."
10. Additionally, in the February 15, 2017 letter, petitioners informed the District that Dr. Breslin, who had previously assessed S.P. thought PCDI "would be a good match for [S.P.'s] needs."
11. Moreover, in the February 2017 letter, petitioners asked the District to consider PCDI, ". . . as it considers all of the possibilities for [S.P.]"

12. In March 2017, the District conducted assessments of S.P. including an Occupational Therapy assessment, a Social Assessment, and a Functional Preschool Assessment.
13. On March 27, 2017, the District also conducted an observation of S.P. at her instructional program located in Maryland. During the observation, district staff was informed that on February 7, 2017 and February 8, 2017, PCDI also observed S.P. at her instructional program located in Maryland.
14. The District proposed S.P.'s placement at the Riverside Elementary School's full day autism program, for the remainder of the 2016-2017 school year. This is a program within the school district.
15. In March 2017, petitioners observed the District's proposed program for S.P.
16. Petitioners arranged for Dr. Breslin to also observe the District's proposed program.
17. On March 10, 2017 and March 31, 2017, Dr. Breslin observed the District's proposed classroom for S.P.
18. In April 2017, petitioners officially relocated to Princeton, New Jersey.
19. On April 3, 2017, the District convened an IEP meeting and distributed an IEP formally calling for S.P.'s placement in her local public school's autism program.
20. The District's April 3, 2017, IEP called for S.P. to receive individual occupational therapy twice weekly for thirty minutes and group occupational therapy on a weekly basis.
21. The District's April 3, 2017, IEP called for S.P. to receive individual speech therapy three times per week for thirty minutes and group speech therapy on a weekly basis.

22. The District's April 3, 2017, IEP provided for Extended School Year services, which included occupational therapy, speech-language therapy, and behavior intervention consultation.
23. Pursuant to the April 3, 2017, IEP, S.P. would be provided with a one-to-one instructional paraprofessional aide.
24. Dr. Breslin reviewed the District's proposed April 3, 2017, IEP.
25. On April 4, 2017, Dr. Breslin rendered a letter report detailing her preliminary findings and determinations with regard to the District's proposed program for S.P., a copy of which was shared with the District upon petitioners' receipt.
26. Petitioners wrote to the District on April 4, 2017 and asked the District to reconsider its proposed program and placement for S.P. and to place S.P. at PCDI. Petitioners also wrote that if the District did not reconsider then it was their intention to unilaterally place her at PCDI on May 1, 2017.
27. On April 10, 2017, the District's Director of Student Services (hereinafter "the Director") wrote to petitioners and informed petitioners that the Child Study Team did not recommend placement at PCDI for S.P.
28. In the April 10, 2017 letter, the Director invited petitioners to conduct a second observation of the proposed program.
29. The Director also invited petitioners to meet with District staff and the Director herself to discuss any concerns regarding S.P.'s educational program.
30. On April 21, 2017, S.P.'s mother observed the District's proposed program for S.P. for a second time.
31. On April 24, 2017, N.P., S.P.'s mother, emailed the District and advised of petitioner's intention to unilaterally place S.P. at PCDI on May 1, 2017.
32. On May 1, 2017, petitioners effectuated a unilateral placement of S.P. at PCDI.

33. On May 10, 2017, petitioners filed a Petition for Due Process.

34. On May 23, 2017, the District filed an Answer to Petition for Due Process.

35. On June 12, 2017, Dr. Breslin rendered a Report of Determinations, a copy of which was shared with the District.

36. On August 23, 2017, petitioners provided the District with written notice, through counsel, of their intention to unilaterally continue S.P.'s placement at PCDI for the 2017-2018 school year.

37. S.P. is currently enrolled in programming at PCDI.

Testimony

For the respondent Princeton Regional Board of Education

Sara E. Leta (Leta) has been with the District for six years. She served as a social worker for the preschool and elementary levels, and as a case manager for special education cases, currently case managing approximately thirty students per year. She had been a school district social worker for thirteen years, case managing for certain students regarding their IEPs and connecting parents with service providers, such as psychologists, speech and language therapists, and learning consultants. She helped formulate IEPs for students, setting out a child's programming, goals and objectives. She has drafted approximately 800 IEPs, case managed approximately 800 students, been a social worker for over 1,000 students, and worked with approximately 300 autistic students. Leta confirmed that she had no college degree in psychology and never taught students with autism.

Leta was accepted as an expert in case management of special needs students and as a social worker.

Leta met with N.P. and A.P. on March 6, 2017. Leta went to Maryland to observe S.P., both at home and school. Leta noted that S.P. had social problems, as well as problems focusing. She had developmental delays, such as with her speech and language and motor skills, which are typical of a child with autism. S.P. was able to socialize with one other student. When N.P., A.P. and S.P. moved to New Jersey from Maryland, Leta became S.P.'s case manager. Prior to Maryland, S.P. was living in Florida, where she had many therapists, such as a speech therapist.

Leta conducted a second evaluation. (Exhibit J-10.) Based on the delays in S.P.'s language skills, speech and language therapy was recommended for S.P. Leta noted that S.P. would hold non-edible objects to her mouth, a behavioral issue referred to as "oral-motor" development. This could be addressed by a speech-language pathologist, which should be required in S.P.'s IEP. S.P. displayed some academic skills, but had behavioral issues which held back those academic skills. In order to improve academic skills, basic skills, such as learning to wait and learning to sit still, had to be developed first. Leta recommended that S.P. receive ABA programming. (Exhibit J-11.) An occupational evaluation showed delays in S.P.'s fine motor skills. Leta concluded that S.P. needed occupational therapy, because certain muscles of hers lacked strength, and she lacked balance. For example, S.P. needed to develop the muscles necessary to sit up. Helping S.P. use her muscles more efficiently would make her more "present" in class.

A draft IEP was prepared, but was not consented to by N.P. (Exhibit J-14.) A final IEP was drafted (Exhibit J-20), in which the District offered S.P. special education classes at Riverside Elementary School (Riverside), occupational therapy twice per week, and speech and language therapy four times per week. The District program at Riverside consisted of a "Special Autism Class" in a large room with six personalized solo areas and play areas, meant to look like a general education class. There would be a special education teacher and two aides, so that the ratio would be three adults for one student, which exceeded the recommendation that S.P. have at least a one-on-one aide all day. There would be six and a half hours of ABA programming per school day. The teacher and aides would be ABA-trained. S.P. would leave class to receive her occupational training. The goal would be to get S.P. to apply these new skills into a

general education class (referred to as “generalizing her skills”). There would be Behavior Intervention twice per month, as well as home training by a Board Certified Behavioral Analyst (BCBA), who would teach the parents how to address these issues at home.

N.P. and A.P. never executed the IEP, the IEP was never implemented, and S.P. never attended a District school. If she had, she would have received behavior modification and more home programming. An IEP is reviewed after thirty days, to determine what the student had been able to generalize, but because the parents did not consent to the IEP, there was no IEP review conducted.

Leta opined that S.P. would have benefitted from the IEP. But N.P. rejected the IEP based on the opinion of Dr. Breslin, who opined that the District was not offering enough one-on-one programming. Leta disagreed with Breslin’s conclusion, indicating that Princeton’s plan offered six and a half hours per day of one-on-one ABA programming.

Breslin issued a letter dated April 4, 2017, the day after the date of the proposed IEP. (Exhibit J-16.) Breslin concluded that the District’s IEP showed no evidence of ABA. This was based on observing the Riverside program for only two half-days, and observing other students but never observing S.P. Leta disagreed with Breslin’s conclusion. Breslin opined that Ms. Van Driesen at Riverside, a BCBA, did not have enough hours available. Leta disagreed; Van Driesen no longer served the dual role she once served. Breslin found that the Riverside aides lacked training. Leta disagreed. The aides have received training and receive continuing training as to how to deliver an ABA program. Breslin also found the District to be haphazard in data collection. Leta disagreed. The District had collected a great deal of data. They do not have data directly on S.P., but only because S.P. is not enrolled as a student in the District.

Leta and Van Driesen went to PCDI on November 2, 2017, to observe its ABA programming. (Exhibit J-22.) They observed no oral-motor development on S.P.’s part, and saw no speech-language pathologist. S.P. displayed no core strength, and had

trouble sitting up. S.P. had trouble using writing utensils, leading to Leta's conclusion that S.P. needed an occupational therapist. PCDI did not provide occupational therapy to S.P. Leta noted that there were fewer interpersonal interactions than S.P. would have in Riverside, and that S.P. needs "peer models" (similarly-aged students who do not have autism). There were no "peer models" at PCDI; everyone there had autism.

The District performed a functional psychological evaluation. (Exhibit J-8.) During the District's observation, S.P. dumped a box of crayons; sang to herself; ran from the table; could only sit still for a few minutes at a time. The District attempted to do formal, standardized testing, and did obtain some results, but they could not get complete results because it was difficult to engage S.P. in standardized testing. Accordingly, the District used standardized testing as well as observation, whereby Fiorile relied only on observation.

Leta wrote a social history of S.P., based on records reviews, interviews and observations. (Exhibit J-9.) Leta found that S.P. required an ABA program (Exhibit J-10) and that the program set out in the District's proposed IEP was ABA. (Exhibit J-20.) Leta described the District program at Riverside: there was individualized activity, such as unpacking and self-care. The morning activities were group activities. (Exhibit J-40.) "Circle" activity was a group activity, as was "Foundations." "Sensory" could be either a group activity on a two-to-one basis or could be conducted one-on-one. "Work sessions" could be one-on-one or two-to-one, based on a student's needs. "Music" would typically be a group activity. "Technology" would be an individual activity, depending on the student's needs. The "Cooperative Game" would be two-on-one. "Peer Buddies" would be the reverse of "mainstreaming", in that it paired general education students with special education students. "Group" would be a group activity. Leta noted that one-on-one instruction is not the same as a one-on-one aide.

PCDI's progress reports noted that PCDI was addressing S.P.'s language skills. (Exhibit J-27.) But Leta found that while S.P. was in a language class, her oral-motor skills were not being addressed. PCDI was addressing sequencing and comprehension skills, but was not providing speech language therapy. Language skills are not the same as speech language therapy; speech language therapy was to be offered by a

speech therapist at Riverside, per the proposed District IEP. (Exhibit J-20.) PCDI taught name-writing skills, which is a motor skill, but was not dealing with S.P.'s muscle skills.

Diane Van Driesen (Van Driesen) is a Board Certified Behavioral Analyst (BCBA). She attended Trenton State College and Rutgers graduate school. She had been employed by the District for six years, in the dual role of BCBA and speech-language specialist, performing functional behavior programs and assessments. (Exhibit J-30.) She held a Certificate of Clinical Competence in speech and language pathology and a New Jersey Speech Specialist Certification. Van Driesen no longer served the role of speech-language specialist, although she did in April 2017. She previously worked for twenty-seven years at the Eden Autism Services, a private school, providing services such as speech and occupational therapy for approximately fifty students with autism, and implementing speech-language teaching programs and service plans. Eden was an out-of-district school to which school districts sent students. Van Driesen had always worked with autistic children regarding speech and language skills and the use of ABA programs. She also previously worked at Wawa House, implementing ABA-based family service plans. She had therefore worked at a public school as well as at an out-of-district school (Eden). Additionally, Van Driesen had a private autism practice. She had created programs for hundreds of students. Van Driesen was the only BCBA on staff for all of Princeton Township, that being for three elementary schools and two high schools. Although very busy, she was able to provide all the necessary services to District students.

Van Driesen was accepted as a speech language pathology expert with regards to autism, with expertise in ABA programs for students with autism.

Van Driesen was a consultant for the District's five autism programs, similar to the role she served at Eden. She worked with teachers regarding implementing programs for students with autism, as well as students with ADHD (Attention Deficit Hyperactivity Disorder).

ABA is Applied Behavioral Analysis, asking whether interventions are responsible for one's behavior. People with autism need strategies. She had been working with ABA therapy since 1985. A "BCBA-D" is a Board Certified Behavioral Analyst who also has a doctorate or master's degree; Van Driesen is the equivalent of a BCBA-D.

The speech and language portion of the Functional Preschool Assessment (Exhibit J-10) was prepared by Van Driesen, based on direct assessment and observation. She met with S.P. and her parents, and conducted observations of S.P. In the first observation, S.P. used single words and simple language. During the second observation, she saw S.P. participate in various activities, including snack time, and observed S.P.'s interactions with other children.

Van Driesen prepared a formal assessment. She performed a test of early language development. S.P. tested in the first percentile. S.P. was asked to display understanding without words, like from a picture. S.P. was receptive and used expressive words. While S.P. does use some language, she showed significant language delays. S.P. was below average for a student her age in the "pragmatic language" exam. (Exhibit J-10, page 8.) Based on Van Driesen's observations, S.P. needed a highly structured class program. S.P. would also need occupational therapy and extensive "speech and language" therapy.

Speech and language therapy attempts to increase language use by addressing pieces of the production of words, to help with voice and fluency and putting sentences together. It focuses on mouth and breath control, and other physical aspects of speech. Where ABA gives the stimulus and waits for the response, in an attempt at teaching specific skills, speech and language therapy attempts to find where the child is in the physical development of talking (also employing occupational therapy towards that end).

An ABA therapist does not perform speech and language therapy. ABA alone is not enough for S.P. because she also needs speech and language therapy. The District's proposed IEP called for a specialized ABA program as well as speech and language therapy. (Exhibit J-20.)

Van Driesen recommended the District's preschool autism program. Van Driesen was involved with that class every day, because it employed ABA as well as occupational therapy and speech and language therapy. This program applied data to see if goals are being accomplished. The class was five times weekly, for the entire school day.

S.P. needed individual instruction in addition to being with other students. Meeting with another student would help "generalize" the student. Twice per month Van Driesen would provide an individual consultation with teachers. S.P. would have one-on-one instruction all day except twice per month, when she would have two-to-one instruction. The class would be able to handle up to six students plus each of their certified teachers. Each student had their own IEP and learning plan. S.P. would work on a one-on-one basis with a teacher, and also participate in group activities. S.P.'s parents would receive regular progress updates. Home service would be provided. (Exhibit J-20, p. 16.) The District would provide "generalization", that being opportunities to be with peers and classmates on a daily basis; the benefit is that children are more successful when they are around other children. Without this, students are only generalizing with teachers and adults. Generalization and speech and language therapy would be part of class time and play time.

Van Driesen observed S.P. at PCDI. (Exhibit J-22.) She stated that the District provided things PCDI did not: PCDI offered ABA for individuals only; there was no generalizing with peers. PCDI offered no speech and language therapy. PCDI offered no occupational therapy. Without these services, S.P. was not getting a full comprehensive program. Some motor functions and feeding issues were not being addressed at PCDI.

Van Driesen disagreed with Breslin's findings. Addressing the second item in Breslin's letter, Van Driesen said she would be able to give S.P. proper support because she no longer served dual roles; she now only served as a behavioral specialist (she was previously both a speech-language teacher/therapist and BCBA). (Exhibit J-16.) Breslin's item 3 was wrong, because the District did provide adequate

staff training and supervision. Breslin's item 4 was wrong because the District would have provided one-on-one and not just two-to-one instruction.

Breslin did not observe S.P. in a District classroom; she observed other students. But Breslin reached conclusions about the District's programs based on observations of students with whom Breslin had no familiarity as to their specific needs. Breslin's item 6 was also wrong, because home training was available from the District.

Van Driesen reviewed Breslin's analysis of the District programs versus the program at PCDI. (Exhibit J-38, p. 29.) Regarding the "applied" dimension, Breslin did not have enough information to reach a conclusion. Regarding the "behavioral" dimension, Breslin never saw how students were being tracked, nor did Breslin ask for or receive IEPs for the students she was observing in order to know what their program needs were. Regarding the "analytic" dimension, there were no written progress reports. Regarding the "conceptually-systems" dimension, Breslin never asked for or received IEPs for the students she was observing in order to know what their program needs were. Regarding the "technical" dimension, Breslin never asked for or received IEPs for the students she was observing in order to know what their program needs were. Regarding the "effective" dimension, initial IEPs typically do not have behavioral intervention plans. Both PCDI and Princeton schools offered progress reports. Regarding "generalization", Princeton provided this and PCDI did not. Therefore, Van Driesen found that the District did provide FAPE. PCDI did not provide FAPE, because it was missing some experts. A team approach would be required.

Van Driesen noted during her observations at PCDI that while S.P. was improving her sentence use at PCDI, she was not speaking at normal volume. She spoke so quietly as to be unintelligible. S.P. was not using pictures and words at PCDI.

The District's proposed IEP did not address behavioral interventions. Initial IEPs typically did not have behavioral intervention plans; these would be dealt with once S.P. were to be enrolled in a District school. Van Driesen said she would not have written behavioral interventions into the initial IEP. Regarding generalization, Van Driesen said this would not be analyzed until S.P. was enrolled in a District school. Breslin indicated

that S.P. did not have the skills to generalize with her peers (Exhibit J-21), and Van Driesen stated that the District analyzes generalization when a student is enrolled, and does not just throw students into generalization.

Similarly, motor weaknesses were not assessed by Van Driesen prior to the proposed IEP, because S.P. was not enrolled in a District school; once S.P. had been enrolled in a District school, Van Driesen would have put together a motor skills plan. (Exhibit J-22.)

Stipulation of Testimony of Eric Csolak

Petitioner and respondent stipulated to the entry of testimony in this matter by way of a written submission in lieu of live testimony from Eric Csolak. While petitioners waived their right to cross examine Eric Csolak, petitioners did not agree or stipulate to the veracity of any of the testimony in the Eric Csolak Stipulation. Petitioner stipulated only that such testimony was to be submitted for the Court's consideration in reaching a decision in this matter.

In accordance with the foregoing, if called to testify, Eric Csolak, Supervisor of Special Education for Pre-K to Grade 5, would have testified as follows:

1. Princeton Public Schools has a self-contained autism program at Riverside Elementary School.
2. The self-contained autism program uses a curriculum grounded in Applied Behavior Analysis (ABA) therapy.
3. To supplement the ABA curriculum, the occupational therapist who services the students in the self-contained program also employs some sensory integration therapy techniques during the school day.
4. One of those techniques involves the use of a weighted blanket.

5. Dr. Anita Breslin, who wrote a report based off her March 21, 2017, classroom observation wrote:

The teacher and aide assisted the students at/near the table. The aide directed Student A to remove his sneakers. Student A complied with this direction. Students B and C remained at the table, each with a bin of activities. Student A was guided to a large mattress, which had a soft cloth covering. The teacher folded the mattress with Student A sandwiched inside. This constituted a sensory time activity. The teacher pushed the top of half of the mattress and peeked inside. The teacher said “peek-a-boo” to Student A.

6. The sensory item described by Dr. Breslin as a “mattress” is a weighted blanket (65 x 35 in.) used to calm students and decrease tactile defensiveness. The students described were wrapped in the blanket for approximately thirty seconds and then returned to the group table for additional activities.

For the petitioners N.P. and A.P. o/b/o/ S.P.

Anita Breslin (Breslin) was a BCBA-D. She received a degree in psychology from Douglas College, and doctorates from Penn State University and Rutgers University. She has had a private psychology practice since 1992, serving young children and young adults. Breslin did not have a degree in behavioral analysis. She never worked for a school district or public school (except as a substitute school psychiatrist in 1992). Breslin was a consultant and did not provide ABA therapy or direct intervention. (A BCBA in a school district would most likely provide direct ABA interventions/services.) Breslin was qualified to provide ABA services but chose not to. Breslin was current with her continuing education requirements.

Breslin was accepted as an expert in psychology with a specialty in ABA for students with autism.

As a BCBA-D, Breslin dealt with the nature of behavior and how to change behavior in meaningful ways. Autism is a developmental disorder, displaying deficits in language and social functioning, as with S.P. There are behavioral issues that affected day-to-day functioning. All people with autism had language issues. A BCBA would analyze an individual's needs and find the proper educational program for that individual. Autism affects one's ability to learn. There are certain foundational issues, those being undeveloped skills such as sitting still, making eye contact, maintaining one's attention span, etc.

The aim of ABA was to determine the effect of environment on behavior and then find a solution. ABA helped find motivational methods to improve skills; differential methods, to reinforce more desirable behavior; and activity schedules, to get a student to prompt themselves. It used discreet trial teaching, where you wait for a child to respond. The entire ABA program was language-based. Speech and language skills would be introduced and then generalized.

Typical autism behaviors included pacing; babbling; and lining up objects (lining up toys instead of playing with them). You then decided if an intervention was required to deal with the problem behaviors. As skills were acquired, they replaced problem behaviors.

ABA principles included seven "dimensions": First, "applied", where you identified the problems that affected social and family interactions. Second, "behavioral", where you identified behaviors that required interventions. Third, "analytic", where you analyzed the interventions. Fourth, "technologies", those being instructions on how to teach a skill and deal with a child's responses, in essence creating a blueprint for instruction. Fifth, "conceptually-systematic." Sixth, "generalizations", when a student had behaviors where there had not yet been instruction, for outside the school/instruction zone. Seventh, "effective", where you monitor interventions to determine if they were affecting behavior.

All seven dimensions would be required for a program to be considered ABA. These dimensions would be tracked in a data notebook. ABA was very complex and

took a long time to develop. You needed to determine needs and create a staff training program. Staff training was ongoing. Under ABA there would be one main teacher. S.P. required one-on-one instruction. One teacher would be a trainer, and one an instruction overseer. Ideally, each ABA staff would have a customized training protocol for that student.

Under ABA, there were assessments, including providing information to parents and school districts. Every component of a program was reviewed. There were formal assessments of students, such as standardized testing. But standardized testing was not helpful with S.P., due to her specific challenges. It was usually difficult to conduct standardized testing of children with autism.

Breslin would not be able to access the personal documentation of students due to confidentiality laws, so she typically received sample instructional documentation, in order to determine if a program was ABA. She looked for the seven dimensions. Skills deficits should be systematically observed. She would ensure that problem behaviors were being addressed and that they were not being reinforced.

S.P.'s parents contacted Breslin while they were still living in Maryland. Breslin did not know the parents were moving to New Jersey.¹ Dr. Progar, executive director of PCDI, referred S.P.'s parents to Breslin. Breslin knew Progar from being in the same field, and also because Progar was a witness in a case she was involved in. This was not the only time Progar had recommended Breslin to parents. Breslin had been at PCDI for a gathering unrelated to S.P. Progar invited Breslin into his office and told her about S.P.'s parents' inquiry. Breslin had attended several fundraisers at PCDI. Parents paid for her fundraising tickets to PCDI the few times she attended; she did not recall the ticket prices.

Breslin concluded in her report that S.P.: was able to read but was hyperlexic (able to read the words but not understand all she read); lacked social skills; did not make eye contact; made non-contextual vocalizations; had trouble answering questions,

¹ Breslin was aware of this fact by the time she wrote her report, dated February 10, 2017. (Exhibit J-7, page 15.)

needing continuous prompts; did not initiate conversations; was unable to make choices; put objects in or near her mouth; had trouble transitioning between activities; used verbal scripting (she used phrases that she has heard); had toilet-training issues. Breslin concluded that S.P. was long-overdue for an ABA program, to be run by a team of trained behavioral analysts. Such a program should not be limited to a school year, but should provide services in the summertime comparable to those provided during the school year. Extensive parental training would be required. There would have to be systematic instruction to be generalized. The program should be at a school with ongoing data collection and analysis. (Exhibit J-7, p.9.)

While Breslin concluded that there was urgency to her recommendations, since S.P. was five years old (a key learning age), she did not issue her report based on her September 2016 observations until February 2017. Breslin said this was the normal amount of time for issuance of a report.

Breslin observed the District's program at Riverside on March 10 and March 31, 2017. (Exhibits J-16 and J-21.) It was not unusual for Breslin to write an ABA analysis based solely on observation. She was told that what she observed was representative of the District's program. She spoke with both Leta and Van Driesen. Breslin concluded in her report that: the program she observed at Riverside was not ABA, because the seven dimensions were not met; there was no evidence of proven methodologies to affect behavior (behavioral interventions); there were small and large groups but no one-to-one instruction; Van Driesen was serving a dual role: teaching and being a BCBA; there was no data collection. (Exhibit J-16, p. 2.)

Van Driesen's dual role gave her a very busy schedule, spending eleven to fourteen hours per week dedicated to speech-language therapy. Van Driesen said she had been spending seventy percent of her time as a BCBA and thirty percent as a speech-language therapist, but Breslin disagreed with this breakdown. Van Driesen's speech-language therapy time would take away from the time she could spend as a behavior analyst, and would prevent S.P. from receiving the proper number of hours of intervention. Despite no longer serving as a speech-language therapist, Breslin still thought Van Driesen would not have enough time to dedicate to students like S.P.

Van Driesen came into the class while Breslin was observing, and she did interact with a student. However, Breslin did not see Van Driesen providing ABA services. Further, Breslin found inadequate staff training, although Breslin reached this conclusion without having the IEPs of the students she was observing to know if the staff was providing the services those students required.

Breslin found the District's IEP to be inadequate. (Exhibit J-16, item 6.) The letter from the District to S.P.'s parents dated April 10, 2017 (Exhibit J-17, para. 4), contained peer language that was not acceptable. In Breslin's report of June 12, 2017 (Exhibit J-21, p.9), a follow-up to the District's letter of April 10, 2017, she indicated that she observed group activities at Riverside, but not the one-on-one instruction S.P. required. At the time of her observation, S.P. would not have been ready for group activities. For instance, Breslin observed morning activities, "circle time" and "letter identification," all of which were group activities, not ABA-compliant, and where no BCBA was present. These activities would have been a waste of time to S.P.

Breslin observed "centers", in which she saw students with problem behaviors, but nothing was being done to address those behaviors. This left Breslin lacking confidence with the staff. Breslin observed the lunch period, where no skills were being taught; lunchtime is generally a good time to teach socialization skills. At recess, Van Driesen was present but Breslin did not see her give any behavior-based guidance to staff members.

Breslin observed "sensory time", in which students were sandwiched between mattresses. This was not an ABA exercise, and would not have been a good use of S.P.'s time. Van Driesen was not present for sensory time. Breslin observed "work time", but this was not matched to S.P.'s needs. This was not one-on-one, but rather two-to-one. A teacher went back and forth between two students. Staff was present, taking notes.

Breslin observed "peer buddies", where a general education student would "buddy" with a special education student. S.P. would not have benefitted from being

with general education students. Similarly, “task recall” would not have been appropriate for S.P.

S.P. required an Extended School Year (ESY); but page 28 of the proposed IEP showed ESY “shortened days”, and that there would be reduced consultant time, both of which were unacceptable to Breslin.

S.P. was not ready to engage with general education students. She lacked the language skills, social skills and behavior skills to be with general education students. She could not follow two-step directions. She could not answer questions. She lacked peer initiation skills. She lacked certain academic skills. She had behavioral issues that would keep her from benefitting from being with regular students or other special education students. Someday S.P. may benefit from being with general education students, but not at the time of Breslin’s report.

Breslin observed the program at PCDI on August 7 and September 11, 2017, and at S.P.’s home on October 5, 2017. (Exhibit J-38.) She reviewed S.P.’s data notebook on August 7 and August 15, 2017, which notebook covered S.P.’s personalized programs. She interviewed Joyce MacDuff, who oversaw S.P.’s school and home programs. MacDuff was in S.P.’s classes every day. MacDuff saw only a small number of students. MacDuff was present on the dates Breslin observed at PCDI. MacDuff gave training and staff support and feedback, both at the school and at S.P.’s home, and made suggestions for what things needed to be done.

MacDuff was a behavior analyst, but not a BCBA. Thus, a non-BCBA was overseeing S.P.’s program at PCDI. Breslin saw evidence of all ABA requirements at PCDI. (Exhibit J-26.)

Breslin never wrote that S.P. should go to PCDI; she wrote that the District’s ABA program at Riverside was not acceptable for S.P.’s needs. (Exhibit J-7, p. 1.) Breslin’s observation was on September 29, 2016; before she released her report (February 10, 2017), the parents had decided to move to New Jersey.

Breslin compared the District and PCDI regarding the seven dimensions of ABA. (Exhibit J-38, page 29.) Breslin stated that there was insufficient evidence that students were being tracked and measured. (Exhibit J-38, page 30.) Breslin indicated that the township failed to provide her with program documentation (if it existed). Yet, without these programs documents, Breslin still proceeded to conclude that the District did not provide an authentic ABA program due to lack of all seven dimensions.

Breslin was employed by S.P.'s parents, but made independent decisions. Breslin was paid \$12,500 for her report and was being paid for her testimony. She noted that witnesses for the District were not paid for their testimony, as they were salaried employees. Breslin had testified both against and in favor of school districts in the past.

Carol Fiorile (Fiorile) was a BCBA-D. She stated that a BCBA-D had the same responsibilities as a BCBA. She had a degree in General Education from St. John's University and a Masters in Special Education and a Ph.D. from Columbia University. She was a New York State-licensed behavioral analyst for both general and special education. She was the head special education teacher at a speech clinic ("central speech and language"), and taught a class with two autistic children. In the afternoons, she conducted testing/assessments. She developed educational programs and ran parent workshops. (Exhibit J-35, page 5.) As an independent contractor working as the Director of Special Education programs at HTA of New York, Fiorile worked with preschoolers, implementing analytic strategies. (Exhibit J-36, page 4.) She trained special education professionals as well as parents. As the school's Director of ABA, she set up ABA programs where there were none, and recruited ABA staff. She wrote IEP goals and objectives.

Fiorile taught at Pace University and at the Queens College graduate program in special education. As a consultant, she worked with several New Jersey school districts, creating behavioral goals for IEPs. She had a private practice, helping parents who have children with behavioral problems (not necessarily special education students). She previously worked with hundreds of students per year, but now saw twenty-five to thirty students per year.

Fiorile was accepted as an expert in behavioral analysis for students with autism, but not as an expert in special education.

When addressing a new student, Fiorile would first meet with the parents. She would review their document history and review the child's current program. She would then observe the child in his or her current program and meet with the staff.

ABA would be implemented in two primary areas: First, "discreet trial instruction" was used to identify areas of deficit through various analysis tools. This covered short-term objectives which must be met on the way to achieving long-term goals. Second, "task analyses" (such as brushing your teeth) broke tasks down into tiny steps, using video modeling.

Fiorile was hired by S.P.'s parents to determine whether PCDI was appropriate. (Exhibit 39, page 2.) PCDI was well-renowned. Fiorile had been there once before. Other schools and programs followed PCDI's ABA model.

S.P. had several "interfering behaviors", behaviors that kept her from being a full participant in her education. "Interfering behaviors" was another term for problem behaviors. She had language deficits. She put things in her mouth. The ABA plan was to find the two most critical interfering behaviors and treat them.

Fiorile reviewed the Breslin and Van Driesen assessments before reaching her own conclusions. Fiorile normally recommended ABA plus speech-language therapy. In the within matter, however, she did not recommend speech-language therapy for S.P. in addition to ABA, despite finding that S.P. has significant language deficits.

Fiorile discussed "adaptive living skills", those being daily living skills. For instance, a six-year-old should be able to dress herself and brush her teeth. (Exhibit J-39, page 6.) She found that S.P. had good academic skills; she could count numbers and recite the alphabet. However, there were interfering behaviors at home and at

school. S.P. could not be in a group. Fiorile noted that the District did not recommend an individual behavioral intervention for S.P.

Fiorile observed S.P. at PCDI and issued a report entitled “PCDI Progress Report/IEP.” (Exhibit J-39, page 8.) She met with Joyce MacDuff, who had worked at PCDI for more than twenty years. MacDuff was not a teacher, but a supervisor. MacDuff worked with S.P. every day and had the opportunity to observe S.P.’s teachers every day. The key would be the “Inter Observer Data”; you needed an independent observer if there was more than one plan being implemented. It was common to have a supervisor involved with an ABA program. Natasha Naldzin also worked directly with S.P., and implemented instructional planning.

S.P. displayed non-contextual verbalization (for instance, S.P. would quote from television programs or books). This was disruptive behavior because it would keep a child from listening to a teacher. The teacher that Fiorile observed ignored S.P.’s non-contextual verbalizations, which was typical of ABA. (Exhibit J-39, page 11.) Fiorile observed PCDI’s reinforcement system, which was a behavior intervention plan. S.P. earned tokens for appropriate behaviors. This was typical of an ABA program. It delayed reinforcement (so that, for instance, S.P. could get enough tokens and later be permitted to use her I-Pad).

Fiorile noted “disruptive motor behavior”, which was a student’s response to behavior intervention. For instance, S.P. would press her hands to her head. These disruptive behaviors could cause bodily injury, in addition to keeping the student from learning. MacDuff told Fiorile that these behaviors were no longer affecting S.P.’s learning, which was a sign that the PCDI program was working. This led to an improved generalization of skills.

Fiorile’s opinion of PCDI was that it had an effective ABA program, meeting all seven dimensions, plus an eighth dimension: social validation. It is important that there be qualified on-site supervisors, like MacDuff. This helped provide immediate intervention, which S.P. required. (Exhibit J-39, page 18.) MacDuff personally oversaw the staff and nine students. MacDuff was not a BCBA; Fiorile testified that an ABA

program should be run by a BCBA, but that it was not required.² There were BCBA's at PCDI. (Exhibit J-27.)

The data provided by PCDI to Fiorile indicated that S.P. had been improving. (Exhibit J-39, page 23.) Fiorile did not, however, observe or collect her own data of S.P. in reaching this conclusion, but it is standard for a BCBA to review data and other people's observations in reaching conclusions.

Fiorile observed the District program at Riverside for one hour and ten minutes. (Exhibit J-39, page 25.) The school chose the time frame. Fiorile noted that the frequency of positive praise statements lacked behavior-specific verbal praise. Positive praise was good, but needed specific language to ensure that this bad behavior would not happen again. No behavior intervention was seen at the class she observed, and there was no supervisor oversight.

The District's proposed IEP included only two thirty-minute periods with a BCBA per month, which was insufficient. (Exhibit J-39, pages 6-7.) A student would need more than that. Riverside told Fiorile that no behavior intervention was required, and Fiorile disagreed. Some of the IEP goals were already achieved. An IEP should not have goals for things where it is documented that the student has already met that goal.

Socialization was an unreasonable goal. (Exhibit J-20, page 19.) Forcing socialization is a waste of time and would take away from educational time. Similarly, group instruction, with other classified students, was not a good idea. S.P. did not possess the prerequisite skills for this to be an appropriate goal at this time (although it is a future goal). While Leta and Van Driesen favored exposing S.P. to more peers, that was not a good goal. PCDI was actually introducing S.P. more to her peers, but for now her peers would not be able to deal with S.P.

Although the District found that S.P. had oral motor weakness, Fiorile disagreed. Regarding feeding, the District program had no goal of teaching S.P. feeding. PCDI

² Fiorile did not reference her source of ABA rules or guidelines.

was extensively involved with language skills, and far exceeded the proposed District goals.

Fiorile was not introduced to any of the teachers at Riverside. But she did observe a teacher who she later learned was Van Driesen. Van Driesen was a BCBA as well as a speech pathologist. Thus, Fiorile observed a BCBA at Riverside but not at PCDI. She found that Van Driesen was not supervising enough, because she was splitting time between speech and behavior, which was not acceptable. (Exhibit J-39, p.36.)

Fiorile testified that there was a home program at PCDI but that Riverside did not offer a home program. (Exhibit J-39, page 37.) She later acknowledged that the District IEP called for home programming, but said that sixty minutes per month was insufficient.

Fiorile was being paid to testify. N.P. and A.P. contacted and hired Fiorile, after S.P. was unilaterally enrolled in PCDI and after this matter was already in litigation.³ Fiorile was aware this matter was in litigation. She let the parents know she could testify for them when she first met them. Fiorile said being paid to testify did not affect her findings. She did not reach conclusions just to make her clients happy, and had in the past reached a conclusion in favor of the school district. N.P. and A.P. did not tell Fiorile what result they wanted her to reach.

Fiorile had testified in other cases. She was paid for her testimony, and was aware that teachers were not paid to testify because they testify during their paid work hours. There were at least three cases where parents hired Fiorile to help get the school district to pay for out-of-district placement.

Joyce MacDuff had been with PCDI for more than thirty-four years. She began as a trainee, providing ABA under another's supervision. She then served as a transition programmer, then as a data analyst. She later served as the provider of

³ Fiorile was not hired to assist in the IEP process.

home programs for one family, using ABA. Since 2007, she had been involved with intervention, training staff on how to teach more effectively. She did not train or supervise the teachers or instructors, just the staff.

MacDuff was not a BCBA. She was not a speech-language specialist. She had no post-graduate degrees. She would not be eligible to obtain a position as a special education teacher, although she supervised them.

PCDI was a private school for children on the autism spectrum who were between the ages of three and twenty-one. PCDI was approved by the State of New Jersey as a Special Education School. (Exhibit J-28.) Research was performed at PCDI, and they ran seminars and offered publications. PCDI used science-based interventions. Other schools in New Jersey employed the PCDI model, as did schools in other countries, such as Poland and Turkey.

ABA methods taught new skills for when a student had deficits. PCDI complied with the seven dimensions.

Currently there were thirty students at PCDI, all with autism. There was no generalization; teachers taught social skills, but there were no typical peers and no non-autistic students. It was more difficult to generalize without typical peers, but teachers still tried to teach social skills. Only one of the thirty students was doing well enough for PCDI to start moving him towards general education (that being the less-restrictive environment); the other twenty-nine of the thirty students were placed at PCDI by school districts.

There was no speech pathologist or speech-language programming at PCDI. PCDI used ABA to teach language skills. ABA was not sufficient to overcome all speech-language deficits; there was programming at PCDI which addressed some speech-language skills, such as “reciprocal interaction”, “Phrases and sentences” and “asking questions.” (Exhibit 27, pages 9 and 11.)

In S.P.'s class module, there were six students and six instructors (two of which were also teachers). PCDI had five BCBA's. S.P. had two instructors and two BCBA's. Students started out one-to-one, then moved to larger groups as their skills improved. Language skills were key; just about every student needed help with their language skills.

Data collection was important. Most skills had some way of being measured. Data was kept in a notebook for each student. Graphs were used to show progress.

Regarding home visits, there was a minimum of one home visit per week for young students. There was no maximum limit. In addition to home programs, parents came to PCDI for training. The programming was the same in the summer as it was during the school year, with the same staff and same programs.

It was difficult for S.P. when she first started at PCDI. First, they had to get S.P. to sit still. A Progress Report was issued on June 6, 2017, covering S.P.'s first month at PCDI. (Exhibit J-23.) There was not much progress regarding her "written activity." (Exhibit J-23, p. 2.) While there was some progress in the first month, there was not progress in every area. There was no intervention regarding S.P.'s behavior in the first month. They created some motivation systems; as of this time, PCDI was still employing motivational systems, and S.P. had shown some behavioral progress.

A second Progress Report was issued on June 16, 2017. (Exhibit J-24.) A report entitled "Goals and Objectives" was issued on October 6, 2017, created by MacDuff along with the BCBA Freeman and special education teacher Natasha Naldzin. (Exhibit J-25.) S.P.'s data notebook corresponded to a list of goals and objectives. (Exhibit J-26.) The data notebook addressed the teaching procedure and motivational method (Exhibit J-26, page 9); one would then look at the target response, then the measurement procedure, then look at the graph to see the data. (Exhibit J-26, page 39.)

Another Progress Report was issued on October 30, 2017. (Exhibit J-27.) Improved writing skills were noted; S.P. could now write four letters. (Exhibit J-27, page

6.) There was an improved use of prepositions. (Exhibit J-27, page 12.) There was improved tooth brushing. (Exhibit J-27, page 21.) S.P. was receiving two-on-two instruction, with one teacher and one prompter for two students. S.P. did not do well at first, and needed a lot of motivation to deal with a peer.

MacDuff reviewed Van Driesen and Leta's observations of PCDI. (Exhibit J-22.) These were accurate. The District said PCDI had no program for dealing with S.P.'s vocalizing; PCDI actually had a program, but it had no intervention or motivation system in place. (Exhibit J-22, page 2.) S.P. had improved with regards to her vocalizing. She had also improved as to her eating. S.P. also engaged in extra-curricular activities (gymnastics, swimming and horseback riding), but they were done on a one-to-one basis because S.P. was not ready for group activities or being with her peers.

The District had placed six students at PCDI. They all had language deficits. Two of those six eventually were placed back into general education. The District currently had students at PCDI, although MacDuff was not aware of whether the District sent them to PCDI or whether they were enrolled there pursuant to a settlement.

PCDI did recommend experts to parents. PCDI had recommended Breslin and Fiorile to parents. She had seen Breslin at PCDI fundraisers every year. She had not seen Fiorile at a PCDI fundraiser.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder “is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” Id. at 521–22; see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as “inherently incredible” when “it is inconsistent with other testimony or with common experience” or “overborne” by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), *certif. denied*, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep’t of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

After having the opportunity to review the evidence and observe their testimony, I accept all the witnesses’ testimony as truthful and credible. There was, however, the potential for bias on the part of the witnesses for petitioner, in that PCDI had been a source of remuneration for them. Similarly, witnesses for the respondent might be biased in that they work for and are paid salaries by the District. It is not surprising that school employees would be defensive of their own programs and proud of the work they did at or for that school. These potential biases were taken into consideration when assigning weight to their individual testimony.

It is not unusual for highly qualified experts on both sides of litigation to disagree on fundamental issues and interpretations. The two key expert witnesses involved with this matter, prior to petitioner filing for due process, were Breslin and Van Driesen. Breslin lacked experience working in public schools, having spent most of her career outside of public school systems. She lacked experience providing ABA instruction to students in ABA programs. She did not provide any direct intervention. The main thrust of her review of the District’s program was that it was not an authentic ABA program

because she did not witness the ABA “seven dimensions” when she was observing the District program. However, this argument lacked weight because neither petitioners nor Breslin proffered any ABA materials which could have definitively set out the requirements of an ABA program. No textbooks, treatises or magazine articles regarding ABA were submitted by petitioners or referred to by Breslin which could have delineated the requirements of ABA or discussed the seven dimensions. Breslin stressed the importance of complying with the seven dimensions of ABA without identifying the source of that requirement.⁴

Further, Breslin reached certain conclusions without having sufficient background information. For instance, she took issue with certain activities she saw at the District, such as the sensory/“mattress” activity. She rejected those activities without knowing the specific needs of those participating students, concluding that activities served no purpose and were not ABA without knowing what the students’ IEPs called for or what the instructors’ motivations were in running those activities. Additionally, Breslin concluded that the District’s program was not ABA because there was no evidence of proven methodologies to affect behavior (behavioral interventions); further research would have informed Breslin that while PCDI introduced behavior interventions upon enrollment of a student, the District introduced behavior interventions after a student had been enrolled and attending their school a while and the staff had a clearer picture of what the child required.

Van Driesen, however, had over thirty years’ experience working directly with students in providing ABA therapy. She worked with the twenty-seven autistic students currently enrolled in the District’s various programs for students with autism. She had daily involvement with the District’s ABA programming. She consulted with instructors regarding behavioral educational services and the providing of training to staff

⁴ Petitioner’s witnesses all spoke of the “seven dimensions” of ABA without revealing the source of those seven dimensions, or providing documentation that the seven dimensions were an absolute requirement. Petitioner did not provide any evidence that an ABA program was an absolute prerequisite to FAPE. It was Fiorile who also introduced the notion of an eighth dimension: social validation. Again, no resource materials were identified as the source of either the “seven dimensions” or “eight dimensions.” No further testimony was offered as to whether the accepted educational standard for ABA was seven or eight dimensions.

members. She discussed the requirements of ABA programming with the authority of a person who had been deeply involved in the providing of ABA therapy.

It was Van Driesen who concluded that S.P. would benefit from both ABA programming as well as speech and language therapy. She denoted the difference between ABA therapy and speech and language therapy; while ABA focused on stimuli to elicit responses, speech and language therapy focused on the sequence of development of language, looking at the entire developmental picture rather than simply putting out stimuli. Van Driesen opined that S.P. needed the extra programming which the District offered and PCDI did not: speech and language therapy, occupational therapy, and opportunities for generalization and socializing with same-aged peers. Van Driesen was also persuasive in discussing behavioral interventions. She opined that the District program was better than PCDI's program because the District did not merely write a generic behavioral intervention plan into its IEP; rather, the District gave the student a period of time to begin his or her education in the District program, and would then write a closely-tailored behavioral intervention program for the student.

Accordingly, after carefully considering the testimonial and documentary evidence presented, and having found Van Driesen to be the more qualified and persuasive expert witness, I **FIND** the following to be the relevant and credible **FACTS** in addition to the above-referenced stipulated facts: The ABA program offered by the District's proposed IEP was a sufficient, acceptable ABA program, and would meet S.P.'s documented needs. The District's IEP was reasonably calculated to enable S.P. to receive educational benefits. Both the District and PCDI offered curriculum grounded in ABA instruction at their school. Both the District and PCDI offered behavior modification and home programming. PCDI introduced behavior interventions upon enrollment of a student; the District introduced behavior interventions a short period after the student had been attending their school, and therefore did not write behavior interventions into its IEP. Both schools offered significant periods of one-on-one instruction. PCDI addressed speech and language issues through its ABA program, while the District addressed speech and language issues with an additional and separate program of speech and language therapy. Both schools had at least one BCBA. The District program offered occupational therapy. Both schools had continuing

staff training in ABA. Both schools offered extensive parental training and ongoing data collection and analysis. All the students at PCDI had autism, and therefore there was no generalization, and no typical peers or non-autistic students. The District program offered generalization and peer opportunities.

LEGAL ANALYSIS

The first issue is whether the program set out in the District's proposed IEP would provide a free and appropriate public education (FAPE) for S.P. If not, the second issue is whether the District should be responsible to pay for S.P. to attend the Princeton Child Development Institute (PCDI), an out-of-district school for children with autism in which petitioners unilaterally placed S.P.

As to the first issue, when considering FAPE, the starting point is the Individuals with Disabilities Education Act (IDEA). 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).

The responsibility to provide FAPE, including special education and related services, rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C.

6A:14-1.1 et seq.; N.J.A.C. 6A:14-1.1(d). In accordance with N.J.S.A. 18A:46-1.1, the burden of proving that FAPE has been offered likewise rests with school personnel. The District will have satisfied the requirements of law by showing that it offered to provide S.P. with personalized instruction and sufficient support services “as are necessary to permit [her] ‘to benefit’ from the instruction.” G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009) (citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189, 102 S. Ct. 3034, 3042, 73 L. Ed. 2d 690, 701 (1982)).

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). The IEP is the agreement between the parties that specifies how special education and related services will be delivered. 20 U.S.C.A. § 1414(d)(1)(A). It is the vehicle through which a child receives FAPE. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); Lascari v. Bd. of Educ. of the Ramapo-Indian Hills Reg’l Sch. Dist., 116 N.J. 30 (1989).

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 IDEA when developing the IEP, and second, whether the IEP developed through the IDEA procedures is “reasonably calculated to enable the child to receive educational benefits.” Rowley, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. While 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).

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, 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, 183-184 (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).

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, 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, 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 a FAPE. Ridgewood, 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).

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 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, 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, 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.

In addition, 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 does 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). A school district is

deemed to have satisfied its requirement to provide a FAPE to a disabled child “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690.

The District’s child study team identified that S.P. had emerging academic skills, but that she required assistance in developing her pre-readiness skills. They found that S.P. would require a structured, intensive educational environment that would give her ABA training. The District designed an IEP that provided for a structured, intensive program. The ABA program offered by the District was a sufficient, acceptable ABA program, narrowly designed to meet S.P.’s needs. The District did not write behavioral interventions into its IEP, but did provide behavioral interventions once a child had spent a sufficient period of time in a District school. As S.P. had difficulty generalizing the skills she possessed in different environments, the District’s proposed IEP called for S.P. to be placed in its autism program, and not into its general education classes. To comply with the requirements of FAPE, the District’s IEP offered a plan to provide S.P. with one-on-one ABA therapy from a trained instructional assistant, under the supervision of a certified special education teacher and a BCBA. That program would have given S.P. the chance to generalize her skills with peers in her class in addition to the other typically developing peers at the District’s Riverside Elementary School. This would meet the requirement that FAPE be provided in the least restrictive environment, one in which S.P. would be able to make progress in light of her circumstances. Accordingly, it appears that the District’s IEP offered personalized instruction and support services sufficient to permit S.P. to benefit from the instruction. G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, thus meeting the requirements of FAPE.

The District’s proposed IEP also provided for individual speech-language therapy for S.P., based on S.P.’s significant language delays. The IEP provided individual occupational therapy, to address S.P.’s fine motor skills issues. These two therapies further evidence that the District’s IEP met the definition of FAPE denoted by the courts, by calling for specifically designed instruction that was tailored to S.P.’s unique needs.

Under N.J.S.A. 18A:46-1.1, the burden of proving that FAPE has been offered rests with the school. The District has satisfied this burden by showing that its IEP laid out a plan to provide S.P. with personalized instruction and sufficient support services as were necessary to allow her to benefit from its program. Regarding the FAPE two-part inquiry, the District has demonstrated that it has complied with the procedures of IDEA when developing its IEP, because its IEP was reasonably calculated to enable S.P. to receive educational benefits. Rowley, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. The District evidenced that its IEP would maximize S.P.'s potential and provide meaningful access to education and would confer some educational benefit upon S.P. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999) (citations omitted); Lascari, 116 N.J. at 48.

I **CONCLUDE** that the District has complied with the procedures of IDEA in developing an IEP for S.P., and that its IEP was reasonably calculated to enable the child to receive educational benefits. Accordingly, the District has met its burden of proving that its proposed IEP would have provided S.P. with FAPE.

The second issue is whether the District should be responsible to pay for S.P. to attend PCDI, an out-of-district school for children with autism in which petitioners unilaterally placed S.P.

When a school district fails to ensure that a FAPE is being provided, parents have the right to unilaterally place their child in a private school and receive reimbursement from the school district for tuition. Burlington, 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 FAPE. N.J.A.C. 6A:14-2.10(a); L.M. v. Evesham Twp. Bd. of Educ., 256 F.Supp. 2d. 290, 292 (D.N.J. 2003). Unilateral placement is always at the parent's own financial risk. Sch. Comm. of Burlington, 471 U.S. 359, 370, 105 S. Ct. 1996, 2005, 85 L. Ed. 2d 385, 398.

If 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, 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. But in order to be eligible for reimbursement, the unilateral placement must be appropriate for that particular student’s educational needs. 34 C.F.R. 300.148.

The New Jersey Administrative Code requires that certain prerequisites be fulfilled before an 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 least restrictive environment. 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 in the least restrictive environment. N.J.S.A. 18A:46 -1.1.

The first threshold for reimbursement under N.J.A.C. 6A:14-2.10(b) is whether the school district made FAPE available to that student in a timely manner. Having concluded that the District had complied with the procedures of IDEA in developing an IEP for S.P., and that its IEP was reasonably calculated to enable the child to receive educational benefits, the District has met its burden of proving that its proposed IEP would have provided S.P. with FAPE. I therefore **CONCLUDE** that no reimbursement is warranted in this matter, and that the second prong of the reimbursement test set out in N.J.A.C. 6A:14-2.10(b) need not be addressed. No further analysis of petitioner's placement of S.P. at PCDI is required. It is of no consequence whether PCDI is an appropriate school, whether it provides ABA, or whether it is or might be a better school or offer better programming than the District's school. It is irrelevant whether N.P. and A.P. predetermined to enroll S.P. at PCDI before considering the District's proposal. Once a school district proves that its IEP provides FAPE in compliance with IDEA, it has met its obligation and cannot be required to reimburse parents for a unilateral placement at an out-of-district school.

It is recognized that it is not preferable to move a student from one school to another, which could serve to disrupt both the student's educational process as well as his or her socialization. Nothing hereunder is requiring that S.P. be enrolled in Riverside Elementary School. It is the decision of S.P.'s parents whether to keep S.P. enrolled at PCDI or enroll her at Riverside. But if N.P. and A.P. decide to keep S.P. enrolled at PCDI, it will have to be at their own expense.

CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board offered to provide a free and appropriate education (FAPE) to S.P., and, therefore, petitioners are not entitled to reimbursement for their unilateral out-of-district placement of S.P. at PCDI.

ORDER

I hereby **ORDER** that petitioner's request for reimbursement for their unilateral out-of-district placement of S.P. at Princeton Child Development Institute (PCDI) is **DENIED**. I further **ORDER** that the respondent, Princeton Regional Board of Education, is not responsible for paying tuition for S.P. to attend PCDI. Petitioners' appeal is hereby **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2017). 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.

April 20, 2018

DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency

April 20, 2018

Date Mailed to Parties:

April 20, 2018

JNR/cb

APPENDIX

WITNESSES

For petitioners:

Anita Breslin
Carol Fiorile
Joyce MacDuff

For respondent:

Sara E. Leta
Diane Van Driesen

EXHIBITS

Joint Exhibits:

- J-1 Letter from N.P. to Micki Crisafulli, dated February 15, 2017
- J-2 IEP Documents from Westbrook Elementary in Bethesda, Maryland
- J-3 Functional Behavioral Assessment completed by Montgomery County Public Schools, dated August 2014
- J-4 Letter from Roberto Tuchman, M.D., dated March 27, 2014
- J-5 Letter from Roberto Tuchman, M.D., dated June 3, 2015
- J-6 Letter from Roberto Tuchman, M.D., dated September 14, 2015
- J-7 Dr. Breslin Report of Determinations, dated February 10, 2017
- J-8 Initial Evaluation Planning Meeting documentation, dated March 6, 2017
- J-9 Social History, dated March 17, 2017
- J-10 Functional Preschool Assessment, dated March 20, 2017
- J-11 Psychological Observation, dated March 8, 2017
- J-12 Occupational Therapy Evaluation, dated March 24, 2017
- J-13 Letter from Maria T. Acosta, M.D., dated March 9, 2017
- J-14 Individualized Education Plan, dated April 3, 2017
- J-15 Letter from N.P. to Micki Crisafulli, dated April 4, 2017
- J-16 Letter from Dr. Breslin to N.P. and A.P., dated April 4, 2017

- J-17 Letter from Margaret Crisafulli to N.P. and A.P., dated April 10, 2017
- J-18 Conference Summary, dated April 21, 2017
- J-19 Emails between Margaret Crisafulli and N.P., dated April 25, 2017
- J-20 Notification of Initial Individualized Education Program (IEP) Development, dated April 26, 2017 and Consent for Initial IEP Implementation Form.
- J-21 Report of Determinations by Anita Breslin, Psy.D., BCBA-D, dated June 12, 2017
- J-22 Observation Report of Leta and Van Driesen
- J-23 PCDI Progress Report/IEP, dated June 6, 2017
- J-24 PCDI Progress Report/IEP, dated June 16, 2017
- J-25 PCDI Goals and Objective, October 6, 2017
- J-26 PCDI Data Notebook, end date October 25, 2017
- J-27 PCDI Progress Report/IEP, dated October 30, 2017
- J-28 PCDI Website Information
- J-29 Resume of Sara Leta, MSW, LCSW
- J-30 Resume of Diane Van Driesen, M.S., CCC/SLP, BCBA
- J-31 Resume of Emily Keefe, M.A., LDTC
- J-32 Resume of Micki Crisafulli, M.Ed.
- J-33 Resume of Jessica Velazquez, M.Ed.
- J-34 Resume of Dr. Breslin
- J-35 Resume of Joyce MacDuff
- J-36 Resume of Dr. Fiorile