



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

**FINAL DECISION**

OAL DKT. NO. EDS 09798-21

AGENCY DKT. NO. 2022-33446

**S.U. AND M.U. ON BEHALF OF B.U.,**

Petitioners,

v.

**BERNARDS TOWNSHIP BOARD OF  
EDUCATION,**

Respondent.

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**Maxine Checchi**, Esq., for petitioners (Checchi Law, LLC, attorneys)

**Cherie L. Adams**, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC,  
attorneys)

Record Closed: August 2, 2022

Decided: August 9, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

**STATEMENT OF THE CASE**

Petitioners S.U. and M.U. on behalf of their son, B.U., requested a due process hearing on the issue of whether respondent Bernards Township Board of Education (Board, District) failed to evaluate and classify B.U. for special education and related services in compliance with the District's child-find obligations, thereby failing to provide B.U. with a free and appropriate public education under the Individuals with Disabilities

Education Act (IDEA), 20 U.S.C. §§ 1400 to 1419. The petition seeks reimbursement for the petitioners' unilateral placement of B.U. at Rutgers Preparatory School (Rutgers Preparatory), an accredited non-special-education private school, and compensatory education. The District contends that the implementation of the Intervention and Referral Services (I&RS), and subsequent 504 Plan under the Rehabilitation Act of 1973, 29 U.S.C. § 794, in the general-education setting were appropriate to meet B.U.'s educational needs.

### **PROCEDURAL HISTORY**

The Department of Education, Office of Special Education, transmitted this matter to the Office of Administrative Law (OAL) on or about November 30, 2021. The parties appeared at a settlement conference on or about December 9, 2021, and the matter was not resolved. The case was assigned to the undersigned for a plenary hearing. Telephone conferences were held on December 16, 2021, January 13, January 20, and February 11, 2022. The plenary hearings took place on February 16, March 1, March 2, and May 19, 2022. The hearing scheduled for August 2, 2022, was adjourned. The record closed.

### **FACTUAL DISCUSSION**

#### **For Respondent**

**Stephanie Orr** (Ms. Orr) is the District child study team (CST) supervisor and coordinator of 504 and I&RS plans. Ms. Orr works closely with special-education teachers to make sure that individualized education programs (IEPs) are implemented, and modifications are met. She also coordinates the I&RS and 504 plans and works with the general-education teachers to ensure that the plans are implemented. Ms. Orr earned teacher, supervisor, and principal certificates. When she began working in the District in 2000, she taught general-education and special-education students at different levels, including as a resource-room teacher, reading specialist, and study-skills and social-skills class teacher.

The District trains teachers on District policies related to I&RS and 504 plans. I&RS policy number 2417 focuses on students who are experiencing learning, behavioral, or health issues. The District changed the name to “Response to Intervention,” or RTI. The enhanced RTI system collects data using Google Docs and provides the teachers with the ability to see each other’s progress notes and data. The District also utilizes Genesis, a Google program that shares information that parents can also view. The program breaks down grades into categories, sets forth homework assignments and quizzes, and helps determine students’ strengths and weaknesses. (R-3.) B.U. participated in the RTI process. Special-education policy number 2460 sets forth the responsibilities for CST members and teachers. (R-4.) District policy number 2418 provides the procedures for conducting 504 Plan meetings and drafting and annual review of plans. (R-5.)

Ms. Orr also takes measures to ensure that teachers receive and understand the I&RS plans, and seeks teacher feedback. The school counselor follows up with the parent and the student to get their feedback and determine whether any adjustments are needed.

B.U. began his freshman year in September 2019 at Ridge High School (Ridge), the high school located within Bernards Township. Ms. Orr first became involved in B.U.’s education during his eighth-grade year, after he sustained a concussion playing sports and a 504 Plan was implemented at the recommendation of Jill Brooks, Ph.D., a neuropsychologist who evaluated B.U. at that time. Thereafter, his medical issues resolved, and the 504 Plan did not follow B.U. into high school the next year.

In November 2019, petitioners requested a meeting to discuss accommodations for B.U., and provided the District with a neurological assessment conducted by Dr. Brooks. The evaluation was partly redacted. (R-6.<sup>1</sup>) Ms. Orr had been monitoring B.U. because of his previous 504 Plan. The I&RS and 504 Plan records were

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<sup>1</sup> Dr. Brooks, in her unredacted neurological assessment, reported, “overall the results from the current assessment, including measures completed by B.U.’s parents, clinical interviews, records and behavioral observations of B.U. point to a constellation of symptoms that characterize ADHD and unspecified anxiety disorder.” (P-3.) Dr. Brooks also noted that B.U. “often is awake at 2:00 a.m. watching Netflix or Facetiming with friends,” and recommended sleep hygiene.

gathered,<sup>2</sup> and the parents completed a questionnaire. (J-3; J-4; J-5.) The parents reported that B.U. had significant executive-function issues, in addition to a formal diagnosis of attention deficit hyperactivity disorder (ADHD). The parents' primary concern was lack of homework completion and the negative effects on B.U.'s grades when homework is not completed. Teacher feedback was also collected. (J-8; J-9; J-19.) B.U.'s counselor, Counselor Carrie Capozzi, met with B.U. to determine what interventions or accommodations, if any, were appropriate and next steps. Ms. Orr, Counselor Capozzi, student-assistance counselor Tony Anthony, school counselor Sydney McGivney, B.U.'s teacher Jennifer Collins, assistant principal Cheryl Howarth, and CST member Kim Surett attended the I&RS committee meeting. (J-11.)

The committee reviewed Dr. Brooks' report, discussed what B.U. felt was going on at school, and discussed what the teachers were already doing, what worked and what did not work, and recommendations. At the same time, a 504 Plan eligibility-determination meeting was conducted to determine the possible effects of his ADHD and unspecified anxiety disorder on his learning, thinking, and concentration. (J-12.) B.U. was also referred to the CST. The District recommended an I&RS Plan with interventions, instead of a 504 Plan, to support B.U.'s goal "to increase his homework completion for each subject," and his parents agreed. The plan addressed homework completion and the negative effect on grades when homework is not completed. (J-11; J-14; J-16.)

The I&RS Plan included interventions to chunk long-term assignments and provide intermittent due dates or check-ins throughout the length of the assignment; encourage the use of the tutorial center to complete work and provide extra help as needed; and redirect and refocus in-class attention to ensure he is getting all pertinent information. The plan also included proposed interventions at home such as encouraging the completion of homework and providing positive reinforcement for the completion and submission of homework. The Motivating Adolescent Performance (MAP) program was recommended for the second semester.

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<sup>2</sup> Records consisted of grades, including middle school and standardized testing.

The MAP program is a tiered-level support program for students. The class meets every day, either one-on-one or in a group, with psychologist Dr. Rachel Golum, to determine what is holding them back. Students learn to utilize resources like Google Classroom, and learn organizational and self-advocacy skills. Dr. Golum continued the class virtually during the COVID-19 pandemic.

Data was collected from teacher feedback and parent input, and the I&RS Plan was reviewed every eight to ten weeks. (J-20 through J-22.) When remote learning began in March 2020, the District set up recurring remote meetings between B.U. and Dr. Golum. (J-20.)

In May 2020, B.U. S.U. and M.U. participated in a meeting with the District to review the I&RS Plan. Ms. Orr recalled that B.U. reported that some homework assignments felt like busywork that he did not need to do to learn content. B.U. wanted to know why he could not “do just the assignments that he wanted rather than all of the assignments.” (Tr. P 53, 7-11.) The I&RS committee discussed B.U.’s concerns and agreed to continue the plan, adding student choice and positive-reinforcement interventions. As part of the plan, B.U. also enrolled in Study Strategies, an elective one-semester class that specifically teaches students organization, time management, and self-advocacy. (J-26; J-29.) The desired outcome of the plan was for B.U. to increase the completion of assignments.

It was determined that a 504 Plan should not be implemented, and the I&RS Plan, with tiered level support, would be beneficial and teach B.U. executive-functioning skills. The parents agreed to the plan and were notified of the right to appeal the determination. (J-27; J-29; J-32.) B.U. earned all As and Bs for final grades that year. (J-30.)

In July 2020, Dr. Brooks provided Counselor Capozzi with the Behavior Rating Inventory of Executive Function (BRIEF) scores<sup>3</sup> and requested the implementation of a 504 Plan. The data was collected from B.U., his parents, and his teachers. Dr. Brooks

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<sup>3</sup> The BRIEF is a self-reported rating scale of an individual’s impairment of executive-function.

determined that “[w]hile the results from the BRIEF-2 indicate T-scores that were primarily in the average range, further analysis of the individual scores suggest[s] a pattern of regression to the mean and difficulties with working memory, planning/organizing shifting, and initiation of tasks.” Dr. Brooks pointed to a pattern of elevated scores in Global History, English, and support classes, which historically had not been the subjects B.U. found most interesting. Math, sciences, and Spanish teachers reported far fewer executive-skill difficulties. (P-8.)

Once B.U.’s sophomore-year schedule was set, his teachers were provided with the I&RS Plan. (J-31.) In October of that year, Ms. Howarth provided the parents with updated I&RS committee recommendations after teacher feedback indicated that B.U. was rushing through his work to get it done. The updated recommendations included additional interventions:

Chunk long term assignments and provide check ins throughout the length of the assignment, When possible, give shorter, specific due dates for sections. Work with student on completing outstanding assignments. Provide student choice when possible and appropriate. This may include choosing to work individually instead of [in] a group.

[J-32.]

The parents reviewed the recommendation and felt the response was “spot on.” The parents further reported that the teachers understood B.U.’s learning style and were “suggesting . . . accommodations to align with B.U.’s specific needs,” and they appreciated the teachers taking on an “active role.” (J-32.)

When Ms. Orr met with S.U. in January 2021, S.U. expressed concerns she had with teachers not posting grades and the District not taking ADHD seriously as a “disability or dysfunction.” (J-34.)

After additional information was gathered, the I&RS and 504 committee reconvened on February 8, 2021. Prior to that meeting, Ms. Orr spoke with S.U. by phone to explain that a 504 Plan provides accommodations, and an I&RS Plan provides

interventions that allow for teaching the student strategies that they need to be successful. S.U. agreed that the I&RS Plan was preferable because the plan would be reviewed more often and would allow for better updates to B.U.'s scholastic development and performance. (J-36.)

During the I&RS meeting, it was reported that "B.U. was happy with his grades, and he did not feel stressed." The report also stated that B.U.'s mom is micro-managing somewhat because she is frustrated, not with the teachers, but with the District's approach to students that need help staying on task and organizing work. She admitted it is a struggle for B.U. to complete assignments that he is not interested in. The Chemistry teacher reported B.U.'s grades are in the A range, just missed an A+, and is usually a day ahead in his assignments. The Geometry teacher agreed that B.U. is usually timely with his assignments, but he did not hand in a project worth 8% of his grade. The Spanish teacher had a similar report. Prior to finalizing the plan, the English teacher reported that the interventions were working, noting: B.U. advocates for himself and asks for clarification when needed. He also responds quickly to completing missing work when he is reminded. (J-36.)

Around March 2021, B.U. was offered a student-assistance counselor, in response to a parent email to Ms. Orr, Dr. Golum, and Ms. Howarth, about mental-health concerns. The District also notified the parents that he could enroll in Study Strategies, and provided them with directions on how to request a CST referral, if they wanted to do that. The parents were also invited to a teacher team meeting to review the I&RS Plan in April 2021. (J-39.)

At the April 2021 meeting, B.U.'s Chemistry, Math, and History teachers, as well as the MAP teacher and student counselor, all reported that B.U. was up-to-date with his assignments. The parents did not attend. At the meeting, the committee found him eligible for a 504 Plan because strategies were consistently being used, and the accommodations would be a way to ensure that B.U. had access to them. (J-43; J-44; J-47; J-48.<sup>4</sup>) The District provided the parents with the proposed 504 Plan. The

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<sup>4</sup> Including meeting minutes dating back to October 2020.

parents then sought an amendment to the current I&RS Plan interventions to “[p]rovide additional time for work to be completed with no grade penalization, with increased motivation to complete assignments being the accomplishment (retroactive to January 29, 2021 (beginning of MP3).)” (J-50.) The District explained to the parents that the request can be added to a 504 Plan, but since the requested action was not an intervention it could not be added to the I&RS Plan. (J-52.) The parents did not agree to the proposed 504 Plan. (J-55.)

On August 23, 2021, the District was informed that B.U. would be removed from the District to attend a private school. (J-57.)

Ms. Orr and Marie Wurtemberg (Ms. Wurtemberg) observed B.U. at the private school on February 3, 2022. (R-1.) Ms. Wurtemberg is the school psychologist and case manager at Ridge. They learned that B.U. utilizes strategies in general-education classes. During a study-class observation, Ms. Orr observed the instructor engaged with B.U. for about sixteen minutes during a one-hour class in the learning-supports program. They talked about whether B.U. needed help with college applications or writing a college essay. B.U. responded that he needed help with “the busywork.” The teacher offered to make a “chart” listing the work he needed to complete so that each item could be crossed off when it was done. The chart could also be shared with his parents. During the visit, Ms. Orr and Ms. Wurtemberg asked the administration for the curriculum, to see what strategies were being used for students in these classes. They were referred to the school website, where they did not see strategies or information referring to strategies. The accommodation plan created by Rutgers Prep did not include additional strategies that had not already been in place in the District. (R-56.)

Ms. Orr believes that B.U. was offered an appropriate program by the District and that he made meaningful progress, and B.U. did not require special education.

**Marie Wurtemberg** has worked at Ridge for seven years. Ms. Wurtemberg earned a master’s degree in psychology and educational specialist degree in school and community psychology, and a second master’s degree in educational leadership. She has a school psychologist certificate and supervisor and principal certificates. As



part of her duties, Ms. Wurtemberg is responsible for psychological assessments of students, counseling, and facilitating IEPs and their development, including monitoring student progress and adjusting the IEP as necessary.

Ms. Wurtemberg explained that a student is referred to the CST by a parent, a staff member, or even an outside agency. Typically, a school referral comes from the 504 or I&RS team. A parent referral is sent to the director of special services. Here, after B.U.'s parents referred him to the CST, the District provided the parents with Parental Rights in Special Education (PRISE) literature, a booklet on their rights and the special-education process. The referral was sent to the CST, which meets regardless of whether there are any previous implemented interventions. The family is contacted, and a meeting is scheduled. At the meeting, the CST reviews teacher information, current functioning in the classroom, and parent information to determine whether an assessment is warranted. The parents provided Dr. Brook's neuropsychology report diagnosing B.U. with a disability. If a teacher, for example, finds that a student has difficulty in the classroom, the team would ask, "how big of an effect did that have in the classroom and does the student require specialized instruction?" If the team answers that specialized instruction is required, then the team would proceed with an evaluation to determine whether or not there is a disability according to the IDEA.

Ms. Wurtemberg attended the CST identification meeting to, consider the disability set forth in the parents' evaluator's report; consider if the disability affects the student's ability to learn in the current environment; and consider if the student requires specialized instruction. B.U.'s I&RS Plan was in place at this time. To determine whether a disability or suspected disability affects the student's ability to learn, the team looks at the student's functioning in the classroom compared to his peers. (P-181.) The team reviewed Dr. Brooks' assessment, including the part that was "cut apart and put together," and the scores and recommendations. (P-3.) The committee determined that the recommendations set forth by B.U.'s neuropsychologist could be met in a general-education setting with interventions. At the identification meeting the team determined that it would be appropriate to see how B.U. responds to the interventions and a subsequent referral to the CST or the I&RS team could be made, if necessary.

(J-15.<sup>5</sup>) After the meeting, S.U. emailed the District saying that it was a “very good meeting with the child study team and special education was not B.U.’s current need.” (J-16.) No other referral was made to the CST while B.U. attended Ridge.

Ms. Wurtemberg also observed B.U. at the private-school placement. There she observed and stated similarly to Ms. Orr that during a sixty-minute class, B.U. seemed to have about sixteen minutes of interaction with the teacher in the learning-supports program. The interaction appeared to be casual. She did not observe any type of specialized instruction or special education.

### **For Petitioners**

**Dr. Gregory Alberts** (Dr. Alberts) testified on behalf of the petitioners. Dr. Alberts is a neuropsychologist who obtained his Ph.D. in clinical psychology from West Virginia University, and a master’s degree in psychology. He has been in practice for thirty years. His practice is primarily pediatric based with school-age children, who primarily have attention problems and executive-functioning impairment. Dr. Alberts recommends IEPs for a majority of the students he sees, but he could not say whether a majority of the students with executive-functioning issues have an IEP.

Dr. Alberts evaluated B.U. in the spring of 2021 at the request of his parents, who reported that B.U. was having academic struggles. Dr. Alberts conducted a comprehensive neuropsychological evaluation, and tested performance-effort or performance-validity measures to gauge whether or not the student put forth an appropriate effort in the evaluation, executive-function measures, and various academic-achievement measures. Dr. Albert’s testing found that “B.U.’s responses/ratings reflected no elevations in any of the executive-function domains.” B.U. endorsed that “often a problem was generally related to organization and follow-thru.” B.U. endorsed “moderate nervousness” associated with an upcoming social event, unrelated to the assessment or schoolwork. He did not endorse any other

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<sup>5</sup> The District provided written notification to the parents after the CST meeting stating, “the student is not suspected of having a disability which adversely affects the student’s educational performance, and is not in need of special education and related services.” (J-15.)

symptoms associated with anxiety, and B.U. “was feeling much better at the time he saw him.” Dr. Alberts stated that “B.U.’s mother endorsed significant concerns of attention problems and disorganization.” Dr. Alberts found that B.U.’s “own rating did not rise to the level of clinical significance; however, he indicated the following: I have problems finishing long-term projects (often); I forget to hand in my homework, even when it’s completed (often); I don’t plan ahead for school assignments (often); my backpack is disorganized (often).”

Dr. Alberts had a general knowledge of the I&RS process that he learned through speaking with other parents and teachers. He did not know that B.U. had a current I&RS Plan in place at the time of the evaluation or that a 504 Plan was recommended. He did not receive District records, and the only communication he had with the school was teacher feedback from two teachers that S.U. recommended he contact.<sup>6</sup>

Dr. Alberts recommended either a 504 Plan or an IEP; and did not recommend a change to the current classroom curriculum. He also recommended “family support”, to help “improve [B.U.’s] sleep hygiene”. He further recommended “laboratory studies” to “look for any potential underlying medical conditions that could influence focused attention, cognitive stamina”, and participation in “cognitive behavioral therapy”, a structured treatment that focused on skill development to address B.U.’s functioning problems. He recommended “Beyond BookSmart”, a coaching tool to help students plan, problem solve, and manage and complete projects.

In his report, Dr. Alberts specifically recommended that B.U. have “some structured guidance, strategy, instruction to help him sort or synthesize, summarize what he hears and sees on the whiteboard into written text in his notebook or notepad”, and a co-taught inclusion classroom placement that consists of a “regular-education teacher and a special-education teacher”. Dr. Alberts also recommended additional time on long-term projects, an accommodation to redirect and refocus B.U. in the class, chunking or breaking up longer-term assignments into small, more manageable parts,

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<sup>6</sup> One teacher reported that B.U. is distracted by smartphone (or similar device)—often. A second teacher reported that B.U. is distracted by smartphone (or similar device)—sometimes.

and checking in with B.U. for understanding of assignments and working with B.U. to prioritize assignments when appropriate.

Dr. Alberts reviewed reports from Dr. Brooks, Dr. Kathleen McCabe-Odri, a board-certified behavior analyst (BCBA), and Mr. Cohen, a speech-language pathologist who evaluated B.U. for assistive technology (P-16; P-17; P-18), and incorporated Dr. McCabe-Odri's recommendation to also include school-based counseling to facilitate executive-functioning support and to promote B.U.'s completion and turning in of homework assignments, note-taking, and training.

Dr. Alberts concluded that the issues identified in Dr. Brooks' report and the diagnoses would "very likely trigger an assessment or evaluation to get to better know the student." Dr. Alberts did not know that the parents were considering a private-school placement. (P-16.)<sup>7</sup>

**Colleen Pine** (Ms. Pine) is B.U.'s former tutor and testified on behalf of the petitioners. She has a background in English and journalism and worked as a substitute teacher. Ms. Pine is not a licensed teacher but became familiar with the curriculum and issues with ADHD when her own children were students in the District. Ms. Pine also joined Parents of Exceptional Children (PEC), a group of parents who share stories and who learn "firsthand" from one another about school-related issues. Ms. Pine operates a full-time tutoring business. She tutored B.U. from eighth grade until he left Ridge, once a week. She knew he had ADHD and executive-functioning issues, but she did not know he was on medication.

In addition to tutoring B.U., Ms. Pine helped him with his application essays for Rutgers Preparatory and assisted him in drafting email responses to teachers about his work. They worked on strategies such as chunking assignments and using the District's resource, Google Classroom, to break down assignments and set interim due dates. She found that these strategies helped B.U. a lot. Ms. Pine also reviewed B.U.'s

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<sup>7</sup> Rutgers Preparatory relied upon Dr. Alberts evaluative report to determine B.U. is a qualified student for an accommodation plan. (J-56.)

incomplete assignments and assisted him in determining which assignments he could forgo.

**Dr. Joe Chodl** (Dr. Chodl) is the upper-school principal at Rutgers Preparatory, a pre-kindergarten-through-twelfth-grade private school. Dr. Chodl has bachelor's and master's degrees in education, a master's degree in education administration and policy study, and a doctorate in educational policy studies and administration. Dr. Chodl explained that the school's small class size sets it apart from other high schools.

Dr. Chodl acknowledges that Rutgers Preparatory is not an approved special-education school and does not necessarily employ teachers who are licensed or certified. Dr. Chodl does not know whether the two learning support teachers have teaching certifications. Students with a learning disability are provided with strategies in a mainstream setting that teaches students how to prioritize work that needs to be completed.

During the admission phase, B.U. took a placement test in Language, Science and Math and met face-to-face with the learning support team. Rutgers Preparatory relied upon Dr. Albert's neurological assessment to determine that B.U. qualified for an Accommodation Plan. (J-56.) As part of the accommodation plan B.U. meets with a learning specialist in the learning-support program seven to eight times each week. The learning-support program focuses on assignments and prioritizing work, but the plan does not apply to every class and the teachers do not have a lot of flexibility or leniency with homework dates. The plan includes extended test time, alternate test settings, study guides, notes, supplemental instruction in structured study hall, chunking long term assignments, prioritizing assignments, utilizing speech to text, and appropriate seating. (J-56, 58.) B.U. has a college counselor, but he does not have an emotional-support counselor.

Dr. Chodl did not review District plans, and he did not know that B.U. received support through an I&RS Plan or that a 504 Plan was proposed.

The school measures the success of the strategies by report-card grades.

B.U.'s final fall-semester grades consisted of a C+ in Physics, a B in Economics, a B+ in Algebra and Music Theory, and an A- in English. (P-27.)

Dr. Chodl primarily observed B.U. during the upper school student meeting held daily each morning in the gym. His knowledge of B.U.'s school performance is based on conversations he had with his teachers, advisors and grade deans. Dr. Chodl did not instruct B.U. and was not part of the learning support team.

**S.U.** testified that after B.U. was cleared from his concussion symptoms, she noticed more difficulties in his executive-functioning than he had before the concussion. He was also easily overwhelmed, stressed, anxious, and depressed.

At the start of B.U.'s freshman year, S.U. reported to the District that she was "not quite sure what to expect from his cognitive abilities." S.U. met with the school administration to discuss her concerns and agreed to "let this first marking period flush out, and then, you can expect that you'll hear from me at the end of that first marking period to have him evaluated for IEP to see where he stands." (P-4.)

Near the end of the freshman first marking period, S.U. received Dr. Brooks' neurological report and requested an evaluation for special education and an interim 504 Plan. (P-3.)<sup>8</sup> The request sought supports for executive-skills to facilitate B.U.'s homework completion, teachers who are "interesting, organized, consistent and non-mercurial and approachable," and a class schedule with his hardest classes in the morning, and English and Biology not scheduled back-to-back. (P-5.)

S.U. acknowledged that special education was not B.U.'s current need, and she agreed to an I&RS Plan, although S.U. thought it was "strange" when the District said having an IEP would make him a special-education student. The parents received written notification from the District and received the Parental Rights in Special Education (PRISE) materials. (P-5; P-9; J-15; J-16.)

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<sup>8</sup> S.U. reported "[a]s a child B.U. was a 'voracious reader' and had no trouble reading through a 300–500-page book in just a few days." Over time, B.U. has become externally distracted by his cell phone and other electronic devices. "I'd love to see him get back into reading." (P-3.)

S.U. understood that the I&RS Plan was to improve homework completion, and “[she] made it clear [that] [she] wanted it to be known” that B.U. had ADHD and there would be “some level of understanding and leniency.” In her view, grades should be based on “what’s handed in, [not] when it’s handed in.” S.U. did not realize from the onset that “all the onus was still being put on B.U.,” and there was “not a support system around teaching him the skills necessary that were causing the deficit for the work to be missing to begin with.” S.U. acknowledged that the accommodations recommended by Dr. Brooks were implemented in the I&RS Plan. (P-8.)

Three months after the I&RS plan was implemented it became clear to the parents that it was not working. The parents wrote to the District to let them know that B.U. does not hand in his work and he received many zeros. It was also reported that some teachers did not allow credit for late homework, and that B.U. had “no motivation to complete . . . the homework.” (P-9 at 126; Tr. at 37.) S.U. “constantly” asked B.U. if he handed in his homework and B.U. would say he “thinks he handed in the work . . . and he doesn’t understand why there is a zero.” (Tr. at 38, 42; J-7 at 125.<sup>9</sup>)

At a later point, S.U. became more frustrated knowing that the District did not feel that B.U.’s issues were significant enough to qualify for a 504 Plan when she knew the I&RS Plan was not working. She asked Dr. Brooks to obtain a rating scale from the teachers. She agreed that Dr. Brooks determined that “the . . . scores were primarily in the average range, and that the individual scores suggested a pattern of regression to the mean and difficulties with working memory, planning/organizing, shifting and initiation of tasks.” (P-8.) Even though Dr. Brooks recommended the implementation of a 504 Plan, the parents agreed that the I&RS included the accommodations that Dr. Brooks suggested, plus two others that they suggested about B.U.’s class schedule and participation in the MAP program. (P-8.)<sup>10</sup>

S.U. testified that she thought the MAP program would consist of learning executive-functioning skills. Instead of teaching strategies to complete work, including

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<sup>9</sup> B.U. earned: Algebra A; Biology B-; English B-; Global History B-; Health A-; Intro Law B+; Spanish II B, for final year grades.

planning and preparation skills, she found through email exchanges between Dr. Golum and the teachers that he helped B.U. figure out which work he could bypass. (Tr. at 85.)

An October 2020 meeting with the District took place to determine B.U.'s eligibility for a 504 Plan, and it was denied again. S.U. explained after that "it never occurred to me" to request an evaluation, especially because "I can't get a 504 Plan."

In January 2021, S.U. had an email exchange with Ms. Howarth about her frustration and concerns about grades not being posted, and teachers who had strict policies about late homework—within one week after the due date. (P-11 at 164.) S.U. also had concerns for long-term assignments, like a five-month History assignment where B.U. did not get specific help managing it. S.U. observed B.U. at home, "crying, deep depression, completely disengaged, disconnected, apathetic." Then on March 8, 2021, S.U. wrote to the District, including Dr. Golum, the school psychologist, reminding them that B.U.'s deficiency does not require just extra time, which she perceived he was being provided with, but rather time management. In response, S.U. testified that Dr. Golum recommended during a phone conference that the parents "consider . . . step[ping] back and . . . let[ting] [B.U.] fail."<sup>11</sup>

The District again proposed to convene a 504 Plan committee to review eligibility. (J-39; P-7.) By this time, petitioners had signed a tuition contract with Rutgers Preparatory.

S.U. determined that B.U. needed an additional evaluation and classroom observation. She hired an independent observer, Dr. Kathleen McCabe-Odri. Dr. McCabe-Odri observed him in a distance-learning setting on April 28, 2021, and in the classroom on June 3, 2021.

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<sup>10</sup> S.U., in an email to the District describes the testing results found B.U.'s ADHD to be "significant." (J-23.)

<sup>11</sup> In the email, S.U. stated, "[i]nitially in my gut I understood what she was saying, and it made sense. I am a huge proponent of failing forward." S.U. believed here that when you make the intentional decision to allow someone to fail it's best to do it in a safe environment where there are supports in place to teach him how to rise from the fall. (P-12 at 184.)



At the end of August, 2021, S.U. notified the District that B.U. would attend Rutgers Preparatory. S.U. acknowledged that the parents did not ask for a referral to the CST and they did not agree to the proposed 504 Plan.

B.U. started Rutgers Preparatory for his junior year. According to the parents, he has progressed socially and emotionally, and continues to work on improving his academics. She feels B.U. benefits from its small class sizes and stronger, more individualized support.

After placing B.U. at Rutgers Preparatory, the parents did not have further discussion with the District in regard to B.U.'s education.

### **FINDINGS OF FACT**

It is my obligation and responsibility to weigh the credibility of the witnesses in order to make a determination. Credibility is the value that a factfinder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness, and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives, or bias of a witness is relevant, and a factfinder is expected to base decisions of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514.

In determining credibility, it is clear that District employees support the program they developed for B.U. and provided him with appropriate supports to reach his goals to improve executive functioning and increase homework completion. Stephanie Orr, District child study team supervisor and coordinator of 504 and I&RS plans, and Marie

Wurtemberg, school psychologist and case manager, testified credibly and knowingly about the District programs and the interventions and supports provided to B.U. while he was a student in the District. They reviewed teacher feedback, and records that included an evaluation report by petitioners' evaluator, Dr. Brooks, to assess B.U.'s needs to support his education. The District incorporated Dr. Brooks' diagnosis and suggested supports into the I&RS Plan while diligently and consistently monitoring and modifying the plan when necessary or requested by the parents. Furthermore, both Ms. Orr and Ms. Wurtemberg provided testimony that was consistent with that of the other as to their observations and the evaluation of B.U.'s program at Rutgers Preparatory.

S.U. testified on behalf of her son, B.U. It was clear from her testimony that she and her husband wanted to ensure that his learning environment sufficiently responded to his needs. To her credit, when B.U. was about to enter high school, S.U. expressed her concerns to the District about the concussion he suffered that disrupted his schooling during the last part of his eighth-grade year. Since that time, she observed executive-functioning issues that B.U. displayed in grammar school, had become more significant. She also felt he was easily overwhelmed, stressed, anxious, and depressed.

However, S.U.'s testimony and reports to the school were contrary to the determinations made by petitioner's evaluators, teacher feedback, and the BRIEF scores that Dr. Brooks interpreted at S.U.'s request after insisting at the conclusion of his freshmen year that the District needed more data to get a better look at what she saw as B.U.'s severe challenges. Instead, B.U.'s teachers reported that B.U. was progressing and the interventions were working, even better in the classes that B.U. found more interesting and engaging. Teachers also reported that B.U. reported to his counselor that he was happy with his school performance, earning all As and Bs for his final grades, and he did not feel overly anxious. S.U. could not explain why the parents' indicated agreement to the I&RS Plan if they did not believe, as she testified, that it was appropriate, and did not appeal any of the Board's decisions or request a second CST meeting.

Furthermore, her allegation that B.U. is unable to complete his homework and that this inability is evidence of a disability requiring classification for specialized education is not supported by the record, which shows that he routinely completed all of the assigned homework in a timely manner in some courses, and he completed a partial amount of the assigned work in others. Moreover, as documented in District records, the student himself admitted to not wanting to do all of his homework assignments, especially “busywork.” In addition, there was no evidence in the record, including from the parent evaluators, that B.U.’s ADHD and unspecified anxiety disorder diagnosed by the parent evaluator adversely affected his ability to learn course content, requiring specialized education. Furthermore, B.U. continued to meet the desired outcome of the plan to improve homework completion, and the parents agreed, B.U. is not receiving specialized instruction at his new school.

Even though S.U. spoke frequently of an alleged diagnosis for depression, her testimony was not supported by a medical professional. In addition, despite reports from parents, evaluators, and teachers about B.U.’s excessive use of electronic devices that distracted him in class, and as Dr. Brook’s report indicated, dissuaded his once voracious reading habit, and disrupted his sleep, there was no explanation from the District or his parents as to why his excessive cell phone and social-media use was not limited.

In addition, S.U.’s testimony about B.U.’s school performance was contrary to that of Dr. Alberts, whom the parents hired to conduct an evaluation of B.U. in spring 2021, who testified on petitioners’ behalf. Although Dr. Alberts conducted testing, he did not testify thoroughly about the results of the testing other than to explain that “B.U.’s mother endorsed significant concerns of attention problems and disorganization,” whereas Dr. Albert found that B.U.’s “own rating did not rise to the level of clinical significance.” He also reported that B.U. “was feeling much better at the time he saw him.” His conclusions mirrored the District’s plan in place to support B.U.’s executive-functioning and homework completion, even though he was unaware that B.U. had an I&RS Plan and that a 504 Plan was proposed around the time of his evaluation. The parties do not dispute that except for Dr. Brooks, Dr. Albert’s evaluation took place after the parents signed a tuition contract with the out-of-district school, and

his evaluation report,<sup>12</sup> was not provided to the District when decisions regarding B.U.'s education were being made.

Ms. Pine, B.U.'s former tutor, who is not a licensed teacher and was hired by the parents to tutor B.U., testified credibly that she uses strategies similar to those used by the District to improve B.U.'s executive-functioning skills and homework completion, and she found these supports to be working well for B.U..

Dr. Chodl, the superintendent of Rutgers Preparatory, also testified on behalf of the petitioners. He testified credibly as to the resources available to students who need educational support and acknowledged that the school is not approved by the State of New Jersey to provide services for students with disabilities. Dr. Chodl was not aware that an I&RS Plan was in place for B.U., or that a 504 Plan was proposed. He unknowingly testified in support of the District by describing his school's learning-support class in a mainstream setting that incorporated supports similar to those offered in the program the parents complained of at the District, although this school could not apply supports for B.U. in every class, and the school did not provide a school assistance counselor. In addition, except for administering a placement test, Rutgers Preparatory did not evaluate B.U. for special education. Dr. Chodl did not instruct B.U. and was not part of the learning support team.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

S.U. and M.U. are the parents of B.U., a student at the District's high school from 2019 to 2021. During his eighth-grade year, B.U. sustained a concussion while playing sports. B.U. was evaluated by Jill Brooks, Ph.D., and a 504 Plan was implemented as a result of the concussion.<sup>13</sup> Thereafter his medical condition resolved, and the 504 Plan

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<sup>12</sup> Neurological assessments were conducted and reports were issued by Dr. Gregory Alberts dated May 28, 2021. In addition to neurological assessments by Dr. Brooks and Dr. Alberts, petitioners hired Kathleen McCabe-Odri, BCBA, who issued a report dated July 28, 2021 and Mr. Cohen, a speech-language pathologist who issued a report dated August 17, 2021.

<sup>13</sup> Jill Brooks, Ph.D. did not appear and testify, accordingly the content of her report is hearsay.

did not follow B.U. into high school the next year. B.U. began his freshman year in September 2019 at Ridge. Just before the school year began, B.U. underwent a second evaluation with Dr. Brooks, who diagnosed B.U. with ADHD and unspecified anxiety disorder. That report was provided to the District in late November 2019, in a partially redacted form. Around the same time, at the request of the parents B.U. was referred to the child study team. The parents were provided with a questionnaire and the District gathered additional records, along with teacher feedback.

The District conducted the I&RS meeting, and proposed an I&RS Plan that was regularly monitored and adjusted to assist B.U. in completing his homework and improving his executive-functioning skills, that included recommendations made by the parent evaluator. The I&RS Plan contained interventions to chunk long-term assignments and provide intermittent due dates or check-ins throughout the length of the assignment; encourage the use of the tutorial center to complete work and receive extra help as needed; and redirect and refocus in-class attention to ensure that B.U. is getting all pertinent information. The plan also included proposed interventions at home such as encouraging the completion of homework and providing positive reinforcement for the completion and submission of homework. The plan included Genesis, a Google program, an online record of teacher assignments and teacher feedback viewable to B.U. and his parents. B.U. was also placed in the MAP class, that specifically works on executive-functioning, organizational skills, and self-advocacy.

Shortly thereafter, the CST met, with the parents, and determined that B.U. did not need to be evaluated, he was best supported by an I&RS Plan, and he did not require specialized education. (J-16.)

In March 2020, virtual learning began for all students. The April 2020 Teacher Distance Learning Feedback indicated that B.U. missed some homework assignments in each class, except for Algebra, where he was up-to-date and had an A average. The notes also indicated that B.U. was advocating for himself and communicating with his teachers. (J-21; J-22.)

In May 2020, S.U. emailed the District to share her “frustration and

disappointment” with the I&RS Plan. The District informed the parents of its willingness to reevaluate B.U. for a 504 Plan. (J-23.) Teacher feedback indicated that B.U. was up-to-date on all assignments in Math and had an A average. In Biology, B.U. had a few missing assignments, and he was communicating with his teacher about the work. In English, it was reported that there had been some missing assignments, and B.U. was in contact after collecting and evaluating the data, which also included parent feedback in addition to teacher feedback, the I&RS Plan continued and S.U. would attend the MAP class and take Study Strategies class in tenth grade. (J-29.) It was determined that B.U. did not need “checking for understanding of content and extended time, which would be better implemented in a 504 Plan”. (J-25; J-27.) B.U. finished ninth grade with all As and Bs in general-education classes. (J-30.)

The parents agreed with the I&RS Plan, and even made a specific request for the plan to continue in tenth grade. (J-29.)

On or about May 18, 2020, the District cooperated with the parent’s request to collect data for a BRIEF test. The parents believed it would “further expose the executive-function challenges B.U. faces and perhaps will give . . . the District better data to work with for B.U.’s needs for next year.” (J-25.) It did not. Dr. Brooks interpreted the BRIEF scores and determined that “the . . . scores were primarily in the average range, and the individual scores suggested a pattern of regression to the mean and difficulties with working memory, planning/organizing, shifting and initiation of tasks.” (P-8.) Dr. Brooks found far fewer executive-functioning issues in Math, Science and Spanish, noting that without the interest and motivation that B.U. exhibits in those three classes, his attention “waned and executive skill challenges are more prominent.” The accommodations outlined in the BRIEF report had been previously incorporated into the I&RS Plan that the parents agreed to at the last meeting.

Soon after tenth grade began, the District informed the parents that teachers reported that B.U. was rushing through his assignments “just to get them done”. The District recommended shorter, specific due dates for sections, and a choice to work individually instead of with a group. The parents responded that these recommendations were “spot on.” (J-32.)

By the third quarter of B.U.'s sophomore year, the parents expressed concern for teachers not posting grades and B.U.'s mental health. (J-34.) The District offered to include counseling in B.U.'s plan, and informed the teachers about the importance of consistently posting grades, as a checks and balance for students with ADHD that helps to manage missing assignments. The District also met in February 2021 to review teacher feedback and data to determine whether B.U. would stay with an I&RS Plan or be eligible for a 504 Plan. (J-35.) B.U.'s Chemistry teacher reported that B.U. earned an A and had just missed an A+ the prior marking period and was "usually a day ahead with assignments." The Geometry teacher agreed that B.U. was usually timely with assignments, although he opted not to turn in a project that was worth 8 percent of his grade even after receiving modifications. The Spanish teacher had a similar report, as did the English teacher, who added that B.U. advocated for himself and asked for clarification when necessary. Counselor Capozzi reported that B.U. was happy with his grades and did not feel stressed. The parents admitted that it was a struggle to get B.U. to complete assignments that he was not interested in. (J-35; J-37.)

The following month, S.U. reported that B.U.'s motivation to perform and complete the work was at an all-time low. The parents resisted what they described as Dr. Golum's consideration for them "to step back and let B.U. fall and fail". (J-39.) By March 24, 2021, the parents signed a tuition contract with Rutgers Preparatory. (J-42.)

In April 2021, the District developed and recommended a 504 Plan to incorporate the accommodations and interventions. The parents did not accept or reject the 504 Plan, and instead asked for a revision to the I&RS Plan. (J-43.)

For tenth grade, B.U. earned As and Bs, except in Principles of Marketing, he earned a C+. (J-48.)

In August 2021, the parents notified the District that B.U. would attend Rutgers Preparatory in the fall.

Rutgers Preparatory did not evaluate B.U. for special education and related services. For his first semester, B.U. earned a C+ in Physics, B in Economics, B+ in Algebra and Music Theory and an A- in English.

It is also not in dispute that B.U. never received special education and related services while a student at the District or after he enrolled at Rutgers Preparatory, and no challenge was filed by the parents to the I&RS Plan, the 504 determinations, or the decision not to evaluate for special education and related services during the time B.U. attended the District school.

I further **FIND** that the District's determinations to provide B.U. with an I&RS Plan and to subsequently propose a 504 Plan incorporating the interventions that B.U. needed to succeed in general education were fully supported by the record, and there was no proof or indication that it was necessary to evaluate B.U. for special education. The District's decision was consistent with documentary evidence, such as teacher feedback, student records and grades, and petitioners' private evaluators' reports, and with testimony, including that of the principal of B.U.'s new school, the former tutor, and petitioners' evaluator, Dr. Alberts.

### **LEGAL ANALYSIS AND CONCLUSIONS**

The issue is whether the District violated the IDEA's child-find requirements by not evaluating a high-school student, who was diagnosed with ADHD and unspecified anxiety disorder, and classifying the student for special education and related services, thereby failing to provide the student with a free and appropriate public education (FAPE) under the Individuals with Disabilities Education Act. The District provided the student with an I&RS Plan containing interventions and supports and recommended a 504 Plan.

State and federal laws require local public-school districts to identify, classify, and provide a free and appropriate public education to children with a qualifying disability(ies) who have a need for special education and related services. 20 U.S.C. § 1412; N.J.S.A. 18A:46-8, -9. The child-find obligation requires school districts to



identify, locate, and evaluate students reasonably suspected of a disability under the IDEA and § 504 of the Rehabilitation Act within the district. See J.M. v. Summit City Bd. of Educ., 77 IDELR 224 (D.N.J. 2020), aff'd, 2022 U.S. App. LEXIS 18378 (3<sup>rd</sup> Cir. 2022), stating that I&RS are interventions or accommodations in general education, while special education usually includes a modification of curriculum that can also require students to be removed from the general-education setting.

The IDEA sets up a three-part test for determination of eligibility: (1) the student has one or more of the disabilities defined in N.J.A.C. 6A:14-3.5(c)1 -14; (2) the disability adversely affects the student's educational performance; and (3) the student needs special education and related services. H.M. v. Haddon Heights Bd. of Educ., 822 F. Supp. 2d 439, 450 (D.N.J. 2011). The use of the conjunction "and" means that all three criteria must be met. In turn, special education is defined in accordance with the IDEA as "specially designed instruction . . . to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29); N.J.A.C. 6A:14-1.3. "Specially designed instruction" is defined as

adapting, as appropriate to the needs of an eligible child under [the IDEA], the content, methodology, or delivery of instruction—(i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

[34 C.F.R. § 300.39(b)(3) (2022) (emphasis added).]

Interventions may be provided before referring a student for special-education evaluations. Schools need not rush to judgment or immediately evaluate where a student demonstrates academic progress. D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012).

School districts are required to utilize strategies and interventions in the general-education classroom prior to referring the student for an evaluation. N.J.A.C. 6A:14-3.3(b) provides:

Interventions in the general education setting shall be provided to students exhibiting academic difficulties and shall be utilized, as appropriate, prior to referring a student for an evaluation of eligibility for special education and related services.

The District began the I&RS process after parents requested accommodations and responded to petitioners' request to evaluate B.U., which included a CST meeting that determined that B.U. did not have a qualifying disability that demonstrated a need for specialized instruction. The evidence demonstrated that the Board comprehensively considered the data that was collected during the RTI process, as well as the parent evaluator's findings, and provided interventions to B.U. in general education to address his difficulties with executive-functioning and homework completion. These supports included a MAP class where general-education students work on executive-functioning and organization skills, self-advocacy, and a study-skills class.

It is only when those progressive interventions are unsuccessful in allowing the student to access the general curriculum that the student may be further evaluated for special education. The District team appropriately monitored B.U.'s progress and implemented increasing interventions in the general education setting when necessary to support B.U. and to address concerns raised by the parents. Here, the evidence demonstrates that B.U. benefitted from the interventions put in place in his general-education classes, and both the District and the parents' private evaluators agreed that he did not display academic challenges that would require specialized instruction. Moreover, while B.U. was a student at the District, the further evaluative reports did not in any way diminish the District's understanding of the student's needs related to executive-functioning and homework completion.

Even the testimony of parent's expert, Dr. Alberts, supports the District's recommendations for B.U. and acknowledged that he does not need special education. Ridley Sch. Dist. v. M.R., 680 F.3d 260, 272 (3d Cir. 2012) (there was no child-find violation where the district addressed the student's needs and provided intervention before rushing to special-education identification); see also J.M. v. Summit, 77 IDELR at 20 (even if the student had a diagnosed disability at the time, the district had a

reasonable basis to determine that the student did not need special education; on appeal citing W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 145 (2d Cir. 2019) (finding no child-find violation where “there was no reason to suspect that special education was needed to remedy [the child’s] disability”). J.S. v. Green Brook Twp. Pub. Sch. Dist., 2020 U.S. Dist. LEXIS 224025 (D.N.J. Nov. 30, 2020) (the IDEA does not require a district to evaluate every struggling student).

Having a learning disability is not necessarily the cause of a high-school student’s struggle with executive-functioning skills and homework completion that must be addressed with specialized education and related services.

I **CONCLUDE** that B.U. did not have an eligible disability that required specialized education and related services. The District responded and provided B.U. with appropriate supports and interventions and he made academic progress in general-education classes while he was a student at the District. B.U.’s solid performance documented in his report cards in general-education classes, in addition to the data and feedback from teachers, parent evaluators, and the student himself, provided a preponderance of sufficient evidence that he did not require any adaptations in methodology or delivery of instruction to meet the general-education standards for all District students. Furthermore, B.U. is not receiving special-education services at his new school, and while he was a student in the District the parents did not file a challenge to the I&RS Plan or the 504 Plan or the determination not to evaluate for special education and related services during the course of his education, even though they were provided with sufficient notices of their appeal rights and the PRISE booklets, and they were fully aware of their right to do so.

Even if the additional evaluations secured by the parents reported concerns with B.U.’s progress, those evaluations took place after B.U. was scheduled to be removed from the District and were never provided to the District, or communicated to the District at the time decisions were made regarding B.U.’s academic supports, and are not relevant. A child-find issue should be based upon the information and resources

possessed by the district at the time of the evaluation and decision making. Ridley, 680 F.3d at 271.<sup>14</sup>

Accordingly, I **CONCLUDE** that the District's decision not to evaluate B.U. for special education was appropriate and consistent with the law. I **CONCLUDE** that the District has established by the preponderance of the credible evidence that it has satisfied its child-find obligations and the requirements of the law by providing B.U. with appropriate academic supports and interventions to assure his academic success, in an I&RS Plan and proposing a 504 Plan, and he made academic progress. I further **CONCLUDE** that the preponderance of the credible evidence does not support that B.U. requires specially designed instruction.

Petitioners also seek reimbursement for their voluntary placement of B.U. at Rutgers Preparatory.

Parents who withdraw their child from public school and unilaterally place the child in a private placement may be entitled to reimbursement.

If parents believe that the school district is not providing a FAPE for their child, they may unilaterally remove him from the school, enroll him in a different school, and seek tuition reimbursement for the cost of the alternative placement. [Mary Courtney T. v. Sch. Dist., 575 F.3d 235,] 242 (citing 20 U.S.C. § 1412(a)(10)(C) and Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 374, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)). Parents who change their child's placement without the consent of state or local officials, however, "do so at their own financial risk." Burlington, 471 U.S. at 373–74. A court may grant the family tuition reimbursement only if it finds that the school district failed to provide a FAPE and that the alternative private placement was appropriate. See Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15–16, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993).

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<sup>14</sup> Other private evaluator reports referenced by Dr. Alberts, in his report, were also not provided to the District to consider prior to B.U.'s transfer. Moreover, other than Dr. Alberts, the evaluators, including Dr. Brooks, who made the diagnosis of ADHD and unspecified anxiety disorder, did not testify, and the references in their reports are hearsay.

[Munir v. Pottsville Area Sch. Dist., 723 F.3d 423, 426 (3d Cir. 2013).]

The District bears the burden of demonstrating that it complied with the IDEA in deeming B.U. to be ineligible for special-education services because he did not require specialized education. M.B. v. S. Orange/Maplewood Bd. of Educ., 2010 U.S. Dist. LEXIS 78163 \*17 (D.N.J. Aug. 3, 2010), but the petitioners bear the burden of showing that Rutgers Preparatory was an appropriate educational placement if the District indeed failed to provide FAPE. W. Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ. v. J.S., 2005 U.S. Dist. LEXIS 25855 (D.N.J. October 28, 2005); Molly L. v. Lower Merion School District, 194 F.Supp.2d 422, 429 (E.D.Pa. 2002). A private-school placement is appropriate if it “provides significant learning” and “confers a meaningful benefit.” Lauren v. DeFlaminis, 480 F.3d 259, 276 (3d Cir. 2007).

It is undisputed that B.U. did not receive special-education services while at the District and he is not receiving special education at his new school. Moreover, B.U.’s parents had already decided to enroll B.U. at Rutgers Preparatory in March 2021, and never responded to the District’s 504 Plan proposed in April 2021. In doing so, they failed to fully participate in the collaborative process with the District in developing a plan for the 2021–2022 school year. Accordingly, I **CONCLUDE** that the parents are not entitled to reimbursement for the unilateral placement of B.U. at Rutgers Preparatory. Furthermore, having concluded that B.U. was not denied a free appropriate public education by the District, I further **CONCLUDE** that the petitioners are not entitled to an award of compensatory education.

I **CONCLUDE** that the District did not fail petitioners in its child-find obligations and that the preponderance of the credible evidence supports its decision not to classify B.U. under the IDEA. I further **CONCLUDE** that the District has met its burden of proof that the I&RS Plan and then the 504 Plan proposed by the District for the 2019–2020 and 2020–2021 school years were appropriate to support B.U.’s education and assure his academic success, and he made academic progress. I **CONCLUDE** that an out-of-district placement was not appropriate or necessary for B.U. to access his education.

Accordingly, the petitioners' request for reimbursement of their voluntary placement of B.U. at Rutgers Preparatory School and compensatory education shall be **DENIED**.

**ORDER**

I **ORDER** that the petitioners' complaint for due process be **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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.

August 9, 2022  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
MARY ANN BOGAN, ALJ

Date Received at Agency \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

MAB/nn

**APPENDIX**

**WITNESSES**

**For Petitioners:**

Dr. Gregory Alberts  
Colleen Pine  
Dr. Joe Chodl  
S.U.

**For Respondent:**

Stephanie Orr  
Marie Wurtemberg

**EXHIBITS**

**Joint:**

- J-1 504 Plan, dated April 18, 2019
- J-2 Feedback / William Annin School
- J-3 MAP scores
- J-4 Middle school grades
- J-5 Parent questionnaire, December 2019
- J-6 NJAC & Parental Rights Books
- J-7 Grade Book / Genesis
- J-8 Minicozzi anecdotal report
- J-9 Cascarelli feedback
- J-10 Invitation for Initial Identification and Evaluation Planning meeting
- J-11 Meeting minutes, dated January 14, 2020
- J-12 Eligibility review, dated January 14, 2020
- J-13 Email from Howarth to teachers
- J-14 IR&S Action Plan
- J-15 I&RS Meeting evaluations not warranted

- J-16 Email from S.U. to Howarth
- J-17 Email from Howarth to parent addressing parental inquiry
- J-18 From Capozzi to parents
- J-19 Kohut feedback
- J-20 Reply email from Howarth to Parents, dated April 30, 2020
- J-21 Teachers' feedback re: distance learning
- J-22 Email from Capozzi to parents and M.U. response, dated May 1, 2020
- J-23 Email from Howarth to parent to set up a meeting to review B.U.'s plan and 504 eligibility
- J-24 M.U. email request Zoom meeting
- J-25 Partial email from S.U. with requests for meeting
- J-26 Updated I&RS Plan 2020-2021
- J-27 504 Notification to parents
- J-28 Notice of Determination and updated I&RS Plan to teachers
- J-29 Confirmation from Howarth re: plan and review October 2020
- J-30 Report cards
- J-31 Letter re committee meeting
- J-32 Email from Howarth and parent response re update I&RS
- J-33 Email correspondence between BU and Laurel Veil regarding extra help
- J-34 Emails from Stellitano to parents
- J-35 Meeting minutes, dated October 26, 2020
- J-36 Meeting minutes, dated February 8, 2021
- J-37 Email from Howarth to teachers
- J-38 Email from Vail to parent regarding tutorial for US History
- J-39 Email from S. Orr to parents
- J-40 Email from Vail to Golum regarding Social Studies tutorial
- J-41 Essays written by B.U.
- J-42 RPS enrollment contract
- J-43 Meeting minutes, dated April 5, 2021
- J-44 504 Plan sent to parents
- J-45 Email from Howarth to Mitchell regarding draft 504
- J-46 Email correspondence between Howarth and parent regarding draft 504
- J-47 Running document feedback



- J-48 Marking period 2 feedback
- J-49 Email from Capozzi providing an update on B.U.
- J-50 Email from S.U. requesting amendment to I&RS plan
- J-51 Email from S.U. requesting confirmation of amendment
- J-52 Email from S. Orr to S.U. in response
- J-53 Observation Note – by Stephanie Isaacson
- J-54 Report Card by Marking Period
- J-55 B.U. transcript 2019-2020 and 2020-2021
- J-56 Rutgers Accommodation Plan
- J-57 Parents notice to District advising of B.U.'s unilateral placement
- J-58 Letter by Sara Nardulli, Director of RPS reflecting accommodations provided to B.U.
- J-59 District's response letter to notice of unilateral placement.
- J-60 Email from parent to Jean providing copies of assessments.
- J-61 Amended Petition for Due Process
- J-62 District's Answer to Due Process

**For Petitioner:**

- P-2 William Annin MS-504 related, spring 2019
- P-3 Neuropsychological Assessment of Dr. Jill Brooks, dated July 25 and 29, 2019
- P-4 Parent-Introductory and correspondence from parent raising 504/ Parent-teacher correspondence, dated September 4, 13 and November 26, 2019
- P-5 Parent referral for an evaluation, dated December 4, 2019
- P-6 Emails between B.U. and teachers, 2019-2020
- P-7 Emails between Ridge and District Staff discussing referral, level of support for B.U. and addressing questions raised by staff, various dates
- P-8 Letter from Dr. Jill Brooks to Carrie Capozzi following 2019 update to assessment, dated July 6, 2020
- P-9 Emails between parents and Ridge Staff-B.U.'s struggles, requests support, works with school, follow ups on missing assignments dated January 16 through June 10, 2020

- P-10 Emails between Parents and Teachers about missing assignments and strategies, dated September 23 and February 11, 2020
- P-11 Emails between Parents-Ridge Staff and District Staff about missing assignments, strategies and accommodations; parent email about independent observation, dated January 15 through June 3, 2021
- P-12 Parent expressing frustration to Cheryl Howarth, Rachel Golum and Stephanie Orr, dated March 8, 2021
- P-13 Internal Ridge emails discussing accommodations; parent requesting information about 504; parent requesting update to I&RS, dated April 16, 2021 through May 18, 2021
- P-14 Emails between parents, teachers and school psychologist acknowledging Executive Functioning difficulties, dated June 3 and 4, 2021
- P-15 504/I&RS related, various dates
- P-16 Neuropsychological Assessment, Dr. Gregory Alberts, dated May 28, 2021
- P-17 Educational Assessment, Kathleen McCabe-Odri, Ed.D., BCBA-D, dated April 28 through May 10, 2021
- P-18 Assistive Technology Consultation, dated April 28 and May 10, 2021
- P-19 Ridge High School Transcripts, dated 2019-2020 and 2020-2021
- P-20 NJDOE Complaint Investigation Report, dated June 1, 2021
- P-21 Correspondence, Notice to District, dated August through September 2021
- P-22 Rutgers Prep Progress Reports/1st term report card, various dates 2021-2022
- P-23 Rutgers Prep Learning Profile and Letter, dated October 2021
- P-24 Rutgers Prep Enrollment Agreement, dated march 24, 2021
- P-25 Gregory Alberts, Ph.D., CV
- P-26 OSEP Memo 15-08, dated April 17, 2015
- P-27 Fall Final Rutgers Prep Report Card and Attendance, dated February 22, 2022

**For Respondent:**

- R-1 Notes by Wurtemberg

- R-2 Parents Rights in Special Ed
- R-3 District Policy 2417
- R-4 District Policy 2460
- R-5 District Policy 2418
- R-6 Report of Dr. Jill Brooks, Ph.D.