



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 07795-21

AGENCY DKT. NO. 2021-32998

C.L. AND J.L. ON BEHALF OF N.L.,

Petitioners,

v.

EDISON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Gary S. Mayerson, Esq., for petitioners (Mayerson & Associates, attorneys)

Rita Barone, Esq., for respondent (Flanagan Barone O'Brien, attorneys)

Record Closed: February 14, 2023

Decided: March 27, 2023

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

STATEMENT OF THE CASE

The petitioners, C.L. and J.L. on behalf of their minor child N.L., sought reimbursement for unilateral placement at SINAI at Joseph Kushner Hebrew Academy (SINAI), along with continued placement, transportation, compensatory education and reimbursement of all costs. Respondent, the Edison Township Board of Education (Edison, Board or District) asserted that the Individualized Educational Program (IEP) proposed for the 2020-21 school year would have provided N.L. a free, appropriate public education (FAPE) in the least restrictive environment and, alternatively, that the

petitioners' unilateral decision to place N.L. at SINAI was unreasonable and petitioners should be denied reimbursement.

PROCEDURAL HISTORY

On May 13, 2021, petitioners filed a Demand For Due Process. Respondent filed its Answer on June 12, 2021. The parties participated in Mediation on September 17, 2021, but did not reach a resolution. The Office of Special Education (OSE) transmitted petitioners' claim to the Office of Administrative Law, where it was filed on September 17, 2021, as a contested matter. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A settlement conference was scheduled for October 29, 2021, but both parties failed to appear. Telephone conferences took place on December 7, 2021, January 11, 2022, and January 20, 2022. Hearings were conducted, via Zoom due to ongoing COVID-19 pandemic protocols, on May 23, May 26, May 27, May 31, August 11, and August 16, 2022. Summation briefs were received on February 14, 2023, and the record closed on the same day.

FACTUAL DISCUSSION

Testimony

For respondent:

Alison Hines was qualified and admitted as an expert in learning disabilities and as an expert in the placement of students in the least restrictive environment (LRE) pursuant to IDEA requirements. N.L. transferred into the District in December of 2019. Exhibit J-5 was his IEP from Highland Park. In-state transfer rules required that respondent provide a comparable program. In-class resources (ICR) at the elementary level in Edison provided comparable supports to pullout resource settings elsewhere by using two teachers, one general education and one special education, both trained in Phonics First, with approximately twenty or twenty-one students, with a maximum of eight students with IEPs. They employed multiple teaching models, for instance co-teaching, tiered instruction, differentiated instruction and cross-curriculum teaching. They would

address reading and writing skills then provide phonics instruction for thirty minutes in a small group every day, as part of 125 minutes of daily language arts instruction, during Intervention and Enrichment (I&E), as set out in the District's first IEP from February 2020. (Exhibit J-8.) Comparing J-5 with J-8, Hines said that most of the goals remained similar.

N.L. was in-person at Edison for forty days before Edison went remote in response to the COVID-19 pandemic. Hines identified Exhibit J-9, respondent's IEP from June 2, 2020. Hines was not part of the IEP team, but she did review it, as well as N.L.'s progress reports.

Hines reviewed N.L.'s evaluations conducted prior to his being enrolled in the District. (Exhibits J-1 through J-4.) She reviewed his June 2020 IEP (Exhibit J-9), his District progress reports (Exhibit J-11), and Dr. Graffman's neuropsychological evaluation provided by petitioners completed after N.L. was unilaterally placed. Petitioners had concerns in the area of remote speech services and reading. Reading goals were included in the June 2020 IEP to address petitioners' concerns. Petitioners did not indicate that they wanted an out-of-district placement during the June 2020 IEP meeting. Petitioners transferred N.L. to SINAI on September 9, 2020. (Exhibit J-12.)

N.L.'s IQ was ninety-four, considered average. His processing speed index was seventy-seven, considered borderline. His listening comprehension was high/excellent, his oral word fluency was high/excellent, his reading comprehension was average, but his basic reading was extremely low.

Recommendations in Dr. Graffman's report were consistent with what the District offered in June 2020, although Graffman himself never observed N.L. in an Edison classroom. Graffman recommended a "small school and classroom environment" but did not define "small school." Edison was offering small group instruction. Graffman wanted N.L. in classes with other "average" level students, which Edison did. The ICR classroom was a language-based program which allowed for both small group and individual instruction through its tiered instruction model, and collaborative classroom to teach both interactions with others and for the student to learn to be independent. All teachers, including the special education teachers, received training in language-based programs

and strategies and attended monthly staff meetings to reinforce the use of such programs and strategies.

Hines discussed how executive functioning strategies were used in the ICR classroom and the IEP, such as the use of teacher modeling, picture schedules and mnemonic strategies, to address task behavior, reduced pacing where needed, raising hand to participate, and the use of cue cards to redirect attention. Other recommendations of the neuropsychologist covered in the ICR program included remediation of reading issues through direct instruction in Phonics First, which came under Orton-Gillingham, for thirty minutes daily (because Graffman's recommendation of sixty minutes was too long for a first grader), use of criterion-based assessments to assess progress, use of technology through a Chromebook and educational software, and social skills support through collaborative classroom and the availability of guidance social skills groups. The District offered many resources, including guidance counselors and child study team members, and regular communication between teachers and parents through parent/teacher conferences, progress reporting, and annual IEP meetings. N.L. should not be with students with significant behavioral issues; in Edison, he was not. Edison offered Extended School Year (ESY) programming for students who were regressing, although N.L. was not in Edison long enough to show signs of regression.

Hines opined that the February 2020 and June 2020 IEPs would have provided N.L. an appropriate education in the least restrictive environment. N.L. would have received FAPE in 2020-21 if he had stayed in Edison.

N.L.'s evaluations were recent and did not need to be redone by the District. His speech-language evaluation (Exhibit J-4) was done on November 18, 2019, and therefore was recent. Evaluations typically are done every three years, but the psychological and social evaluations were only months old.

N.L. had a specific learning disability (SLD), a reading disorder. Orton-Gillingham was used for dyslexia, with a minimum requirement of two hours per week; N.L. was not shown to have dyslexia, and was receiving two and a half hours per week. Five hours per

week would be too much. No neurologist report or outside screening report concluded that N.L. had dyslexia.

Per N.L.'s report card for the forty days he was in Marshall Elementary in Edison, he received all "Ns" (needs improvement). But N.L. was making progress, based on Hines' review of N.L.'s IEPs. N.L. had no interfering behaviors. The June 2020 IEP said N.L. had "ADD symptoms," which was not the same as "ADHD" because N.L. displayed no hyperactivity. At the current time, N.L. had not been diagnosed with either ADD or ADHD.

During the pandemic, District schools followed all CDC and BOE guidelines, including: sanitizers, six-foot distancing markers, one-way hallways, classrooms set up in rows to avoid grouping, and handwashing and mask wearing protocols, including mask training and mask breaks. Superintendent Dr. Bragan communicated with parents via surveys and notices and website posts. (Exhibit R-2 through R-4.) Health protocols were not in an IEP unless a specific child had a specific need.

Hines spoke with C.L. prior to the first IEP meeting in Edison, when N.L. still had a Highland Park IEP. C.L. inquired about pullout resources, where a child would get pulled out of a general education class. Hines said Edison had ICR, in-class resources, where a class would have both a general and special education teacher. Where pullout allowed a student to have only three special education classes per day, ICR allowed a student to have an entire day of special education. The same accommodations were available in either pullout or ICR. One must use the least restrictive environment, and there was no statutory requirement for pullout resources. If still seeing deficiencies in ICR, Edison would pullout the student for a thirty-minute period. The Edison IEP for 2021 recommended a thirty-minute pullout each day.

Susan Elsamna was qualified as an expert in learning disabilities under IDEA. She had been an ICR elementary school teacher in Edison. She had been certified as a learning disabilities consultant and worked on Child Study Teams (CSTs). She had administered Woodcock-Johnson thirty to forty times. She worked with Nora Project Platform, a national program for students in special education and general education and

was familiar with phonics training. Her role was to evaluate N.L.'s educational performance. Elsamna tested him on October 18, 2021. She reviewed N.L.'s District records including past evaluations, IEPs and the Graffman neuropsychological evaluation. (Exhibits J-1 through 11 and J-13). She observed N.L. through Zoom at SINAI.

N.L.'s IQ was 90, meaning average. He had SLDs in reading. Elsamna had dyslexia training, but N.L. had not been reported to have dyslexia. He met many grade level requirements in kindergarten in Highland Park, with a report card showing many "3s", meaning he met the appropriate level for his age. But the Highland Park IEP (Exhibit J-5), showed that N.L. had many reading needs.

She reviewed the Edison IEP of February 20, 2020, which showed that N.L. needed reading support and small group instruction, resulting in her administering the Woodcock-Johnson test to find discrepancies between his IQ and achievement levels. She reviewed the June 2020 IEP, which showed N.L. needed supports in reading and math.

N.L. did not make progress in reading or behaviorally at SINAI, but rather displayed significant regression in reading, spelling and academic skills. N.L.'s program resulting from the IEP meeting of November 18, 2021, was in a much more restrictive class. Elsamna observed N.L. at SINAI, for thirty minutes for reading and thirty minutes for math. N.L.'s behaviors escalated as the tasks became more challenging; he would get angry and display frustration. He was very distracted in a reading class, and the behavioral modification used by the SINAI teacher was not effective. In N.L.'s SINAI math class, where it was just him and two adults in the room, N.L. sat the entire time, with no opportunities to move around or breaks. He would have done better with other students in the room. The teacher was just giving N.L. the answers. No phonics or differentiated instruction were observed. While the SINAI progress report (Exhibit P-10) indicated that by June 2021 N.L. was independently, consistently and effectively using phonics strategies, during her evaluation on October 18, 2021, N.L. failed to employ those strategies. N.L. did not use math strategies such as counting on fingers when adding and subtracting, despite SINAI progress reports indicating he was independently, consistently and effectively using these strategies as of June 2021. Elsamna noted regression when

comparing N.L.'s 2018 standardized cluster scores with those of 2021. By example, his reading score dropped from 72 to 64; his academic skills went from 71 to 48, and his "academic application" went from 72 to 47. (Exhibit J-18.) SINAI gave N.L. high scores in "foundations," identifying letters and sounds. But this did not jibe with her own testing; SINAI said N.L. was able to read and identify letters but he was not able to do so when tested in November 2021. SINAI reported that N.L. had mastered addition, but he was unable to pass a simple math test when tested by Elsamna in February 2021. During math, he sat alone and yet was still highly distracted. N.L. made no social-emotional gains at SINAI. There were no behavior interventions. There was behavioral and academic regression at SINAI. N.L. struggled with letter name and sound identification at both SINAI and in District; this could improve with proper interventions.

Regarding dyslexia, there are certain indicators, such as difficulty reading and writing, and difficulty recalling sounds and putting sounds together. N.L. display some of the indicators of dyslexia. But Edison did not classify dyslexia; there is no classification of dyslexia in any district. N.L. is learning disabled.

SINAI provided inappropriate praise, talking to N.L. like he was a two or three-year old. SINAI fed N.L. answers.

N.L. would benefit from a larger class size where he would have appropriate supports and peer models. In a class of twenty-one students there would be two teachers, so one teacher could pull aside a student needing, for example, extra phonics time, and help the child. She disagreed that N.L. needed sixty minutes per day, five days per week of phonics instruction, because that was too much; thirty minutes per day was the minimum and that was an appropriate amount of time. She had never seen a student receive sixty minutes of Phonics First per day. In a general education setting N.L. would be getting all the instruction he needed.

Lai Danik was admitted as an expert in school psychology. She was assigned to be case manager for N.L. in September 2021, to coordinate reevaluation testing and observation agreed to by the parties to this litigation. She coordinated an observation of N.L. at SINAI, and reviewed Exhibit J-1 through J-10. She reviewed the

neuropsychological provided by the parents. (Exhibit J-13.) Because the neuropsychologist had conducted the WISC test, she administered the Woodcock Johnson and administered the BASC rating scale, which indicated hyperactivity and lack of focus. Records she reviewed indicated that N.L. had an average IQ of ninety-one or ninety-four (and therefore the sixty-eight she recorded earlier was most likely not accurate) and significant behavioral issues, including a diagnosis of ADD.

The first Edison IEP from February 2020 was meeting N.L.'s needs. There were no significant behavior issues noted at that time. The present levels in the June 2020 Edison IEP showed that N.L. was making behavioral progress. He benefited from breaks and could complete his work with minimal distractions. He benefitted from ongoing teacher support and small group instruction.

During Danik's testing of N.L. and observation at SINAI via Zoom, N.L. had trouble paying attention to his assignments. He was easily distracted during Danik's testing despite getting a lot of breaks and movement opportunities. At SINAI, in a class with two students and one teacher, N.L. was observed getting out of his seat, stopping his work, not waiting his turn, and talking over the other student and teacher. The only behavioral modification employed was verbal redirection, which Danik said was inappropriate to be used more than one time based on the level of N.L.'s inattention. Danik felt the proper response would have been employing visual aids. These behaviors also occurred in N.L.'s math class, where he was the only student. Danik's observations did not jibe with SINAI's June 2021 progress notes. Danik testified that the SINAI progress reports indicated that N.L. was able to stay on task for five minutes with teacher prompts, but Danik's observations did not confirm that. N.L. did not ask for breaks and did not use any of the coping skills which the SINAI progress reports indicated he had mastered.

The SINAI progress reports also were inconsistent with the Highland Park IEP which indicated that N.L. was well-behaved and followed directions, and the Edison IEPs which noted that N.L. benefitted from breaks and could complete his work with minimal distractions. The goals and objectives in the Edison IEPs were less restrictive than the SINAI behavioral/social-emotional goals and objectives; SINAI's goal was for N.L. to stay

on task for five minutes, whereas the Edison IEPs indicated that N.L. would participate and follow classroom routines and activities and maintain attention for entire school day.

Danik opined that N.L. had made no gains behaviorally while attending SINAI Schools. The Edison IEP meeting in November 2021 recommended a more restrictive program for N.L. at that time and changed his classification to “Other Health Impaired,” as his behavioral issues were now being the primary concern. These behavioral issues were not at the same level as when N.L. was in Highland Park or Edison. N.L.’s behavior was not as bad at the time of the 2020 Edison IEPs than when Danik tested him in 2021; not that he got significantly worse, but he was still exhibiting difficulties and yelling in 2021 like when tested by Highland Park in 2018, although she did not see meltdowns or physical acts in the more recent testing. It was petitioners, not Edison, who opted to move N.L. from Highland Park to Edison.

N.L. required extra time to complete tasks. Edison addressed processing speeds and N.L.’s needs in its IEPs. Danik’s IQ test did not yield an accurate result because N.L. needed two hours and fidgeted in his seat and asked for his mother and looked out the window.

Although Dr. Kulikova said N.L. was dyslexic (Exhibit J-15), Edison did not use that term, but rather found that N.L. had ADHD. “Dyslexia” was a medical term; the proper educational term was SLD, and Edison used the educational terms.

N.L. had not been making much progress as of October 13, 2021, partly due to the pandemic (where all students were affected), and partly due to his ADHD not being addressed medically.

Andrew Kitchell was a special education teacher for Edison for sixteen years, working in an in-class resource classroom. He had a masters in special education. In Edison he had been trained in programs such as collaborative classroom, reading programs, and phonics program such as Phonics First, a systematic, step-by-step, multi-sensory reading program based on phonemic principles. He was trained in Wilson and was familiar with Orton-Gillingham. He taught first grade with the dually certified teacher

as his partner, meaning that he and the other teacher were both certified in general education and special education instruction. The two teachers provide instruction the entire day, using a co-teaching model that included whole group instruction, small group instruction and individual instruction.

N.L. started in January 2020, and was one of eight students assigned to Kitchell's first grade class in that 2019-20 school year. N.L. was shy but had a friendly rapport with Kitchell. He adjusted well to Kitchell's class. N.L. was making progress with in-person instruction. He needed praise and encouragement, like many students. N.L. was able to take breaks any time he needed but did not need many breaks. Kitchell did not need to spend a lot of time redirecting N.L. N.L. did not distract other students.

Kitchell had reviewed N.L.'s IEPs. The IEP from February 2020 indicated that N.L. required math and reading supports. Nothing indicated that ICR would be inappropriate, and while they were conducting in-person classes C.L. did not express any concerns. She wanted Kitchell to speak with N.L.'s previous teacher, which he did; that teacher never indicated that ICR would not be appropriate. Kitchell focused on letters and sounds with N.L. while in-person, and N.L. was making progress. N.L. enjoyed math and science, which were his strengths.

When the pandemic hit, Edison had a plan in place. Kitchell reached out to all eight of his students with IEPs and remained in constant contact with their parents. He met individually or via Zoom with each student. He continued to use the same learning tools over Zoom as he did in-person. N.L. continued to learn new letters.

Kitchell attended the June 2020 IEP meeting. The resulting IEP recommended ICR, which was still appropriate because N.L. was making progress; he asked good questions and his communication improved, he got better at dealing with his peers, he became more comfortable expressing his thoughts, he raised his hand more, and his number of sight words increased.

N.L. needed help with letter identification and when he first started at Edison, Kitchell gave him a "sight word assessment" to see how many letters he knew. On cross-

examination, when forced to approximate how many sight words N.L. knew, Kitchell guessed five to ten, which he said was similar to other students in his group. N.L. was able to write his name, as of January 2020.

Kitchell always used “differentiated instruction” (DI), adjusting curriculum to a particular student’s needs, which worked no matter the class size. With two teachers in a class, DI would work even with twenty students in a class. It helped to build a connection and rapport among everyone in the classroom.

Kitchell was in communication with C.L. She stated no concerns to him regarding the Phonics First reading program used by Edison. C.L. did have general concerns about N.L.’s reading. She complained that other students were distracting N.L. and/or disrupting classes, without giving specific names of those students; Kitchell disagreed, testifying that other students had not disrupted N.L.’s classroom learning. Kitchell had spoken with N.L. about this, and N.L. never told him that others were distracting him.

Kitchell disagreed with C.L.’s assessment that the majority of Zoom instruction was done with flashcards; they were used only as part of Phonics First and were interactive cards. Kitchell also used tiles, sentence boards, and reading together.

For petitioners

C.L. was a petitioner and mother of student N.L. She was a self-employed physician assistant and lactation assistant.

After discussing statements made by Andrew Kitchell to her, C.L. testified that N.L. first began receiving medication for ADHD in 2018, under the care of a physician; she could not recall which medications he was receiving. N.L. attended Highland Park at age five, after being in a private general education pre-school program. N.L. had three older siblings. N.L. qualified for early interventions at age three due to delayed speech. Highland Park offered pullouts in language arts and math. Highland Park qualified N.L. as SLD. He was in Highland Park for the second half of 2018-19 and the first half of 2019-

20. Petitioners moved from Highland Park because they were not in a good area of the township.

Petitioners requested ESY but were told by Edison that it was not appropriate for N.L. N.L. had problems with letter recognition and the sounds of letters. N.L.'s attendance in the Edison schools was good. Then Covid hit in March 2020 and Edison went virtual. Many assignments were to be uploaded and performed with a parent. N.L. was doing thirty minutes per week with Kitchell. Petitioner did not like the methods used by Edison during the pandemic virtual classes. Kitchell offered flash cards all the time and nothing else, which she found to be inappropriate. N.L.'s progress in the Edison schools was poor.

Between March 2020 and August 2020, petitioners received nothing from Edison saying what their plan was for returning to school during Covid in September 2020. C.L. did not recall ever checking the Edison website for information as to a pandemic plan from the township. Petitioners sent their letter regarding unilateral placement of N.L. on August 26, 2020. (Exhibit P-2.) Edison did not respond to this ten-day letter. They called petitioners' house regarding the truancy of N.L. as if Edison thought N.L. was still in their school.

Petitioners made an initial payment to SINAI on July 6, 2020, executed the contract with SINAI on July 31, 2020, and made a second payment to SINAI on August 4, 2020. The contract and contract payments were before their ten-day notice letter of August 26, 2020, and before the end of the ten-day notice period. (Exhibit P-4.) But the contract had a clause saying petitioners could get out of the contract if the child's old district offered them FAPE.

Covid affected SINAI's educational programming as well as Edison's. But there had been significant improvement in the second half of N.L.'s second year there, because there was no more virtual learning. N.L. has severe dyslexia.

C.L. was frustrated by Edison's rigid policy against pullouts. Edison's IEPs failed to recite all of her concerns. Edison's November 2021 IEP was the first time Edison

offered an aide and the first time N.L. was offered ESY. It was the first time Edison offered any pullout services and the first time a special class was offered.

N.L. started school in Edison in January 2020 not December 2019. She spoke with Kitchell four or five times in January 2020 and four or five times in February 2020. N.L. was in Edison until June 2020. School went virtual in March 2020. The Edison superintendent sent letters to parents on July 23 and July 24, 2020, but C.L. did not recall receiving them. C.L. acknowledged that she and her husband were not the only parents having to deal with the virtual/Zoom schooling of their children during the pandemic. The July 24, 2020, letter from Edison, as well as the July 29, 2020, letter from Dr. Bragen gave parents the choice of in-person learning with Covid protocols in place or virtual learning. C.L. did not recall receiving this letter. C.L. testified that she received nothing from Edison during the pandemic, but subsequently stated that maybe she received some items and that she had been inundated with correspondence from the school.

C.L. spoke with SINAI's principal Judy Karp regarding SINAI. She learned what supports N.L. would have but did not discuss the curriculum or specific programming. She could not recall when she first reached out to SINAI, nor when SINAI first offered a slot to N.L. But she recalled that SINAI met and accepted N.L. prior to the July 31, 2020, contract date. She hired legal counsel after she signed the SINAI contract but before the ten-day letter went out. N.L. began at SINAI in September 2020, with a school year ending in June 2021, with no ESY. SINAI was a hybrid of in-person and virtual instruction.

Mimi Krantz taught special education at the graduate level, in a mainstream classroom, and as a resource room teacher. She was associate director of SINAI schools in Livingston, New Jersey, handling the admissions process, teacher supervision, assembling curriculum and the IEP process, referred to as the Comprehensive Service Plans (CSP) at SINAI. She was accepted as an expert in special education.

Krantz explained the admissions process at SINAI, stating that SINAI never completely rejected any applicant; if not accepted now, they may be accepted later. SINAI performed informal testing of applicants. They found that N.L. would benefit from SINAI's techniques.

Lori Rowe was N.L.'s homeroom teacher. There were two other teachers in the room, with six students the first year and nine the second year. They used "differentiated instruction," tailored to each student's individual needs. When N.L. first came to SINAI, he was distractible. SINAI used Foundations/Wilson Program for decoding, and Basel for reading, which was similar to Orton-Gillingham. Krantz was not aware of which programs N.L. had been exposed to before.

There were regular weekly staff meetings to discuss students, attended by Krantz, Associate Dean Judy Karp, Rowe, and N.L.'s math teachers. They discussed N.L.'s challenges with letters and sounds. They concluded that N.L. would have a difficult time learning in a large class because of his slow processing speed. Krantz was present when Edison observed N.L. at SINAI via zoom.

At SINAI, N.L. was given the Merrill Reading Program, "Jump Math," a math remediation program, and a technology-based math program called "Reflex Math." SINAI prepared progress reports for its students three times per school year. At the end of N.L.'s first year at SINAI, there was a wrap-up team meeting to discuss progress and what else could be done for him. N.L. continued to have challenges, but he also had made significant progress in identifying letters and sounds. He knew all the letters of the alphabet by the end of the year. He still needed to improve his decoding skills. N.L. was a good fit for SINAI. He would not do well in a larger class.

While SINAI was "middle states accredited," it was not approved by the New Jersey Department of Education. Krantz stated that N.L.'s classes all had students with similar reading levels and were grouped by similar ages and grades levels. But she then said that if a ten-year old read at a six-year-old level, he would be placed in a class for ten-year olds, so SINAI did not group by reading level.

"Differentiated instruction" (DI) could apply in larger classes. She had used DI in large general education classes. During the 2021-22 school year, she observed him weekly in his math and language arts classes. Sometimes the teacher used DI when they

had to teach N.L. at a different speed than the other student, although Krantz had no notes specifically recalling instances of DI being used at SINAI.

While Krantz was not involved with student tuition contracts, she was involved with applications. The application process would have started “a few months” before a contract was signed, meaning a few months before N.L.’s contract was executed on July 31, 2020. Krantz said she met N.L. and C.L. in person but changed her testimony to state that she met N.L. and C.L. on Zoom. Krantz confirmed that a student had to be accepted prior to a contract being signed.

Judy Karp was SINAI’s Director. SINAI’s intake procedure had been in place for twenty-six years: parents initiate contact with a phone call, then get invited to an open house; next, they converse and Karp reviewed the child’s files, and then the child would come in for an informal one-hour screening. Then Karp and her team would meet to discuss the applicant to see if SINAI was appropriate, considering academics, social/emotional, and peer groups. If appropriate, they would invite the child back for a full morning. They would also speak to the child’s previous school and any therapists, etc. Then SINAI would make an administrative decision. If the application was approved, the file would go to the business office to deal with tuition. SINAI did reject some applicants, such as children with social/emotional needs that SINAI could not address, or kids only used to one-on-one instruction. Karp assessed N.L.’s writing skills as part of his intake, by asking him to write his name. He could not, and no further writing assessment was performed. Karp used an informal assessment known as the Brigance. N.L. knew only six of the twenty-six letters. This confirmed that N.L. had significant reading issues.

Karp was a member of the assessment team alongside Dr. Borsuk and Ms. Krantz. They concluded that N.L. would be appropriate for SINAI and decided to accept him as a student. They had a strong reading teacher in Lori Rowe. N.L. started his first school year in SINAI in a group of three. It did not work well. The other two students were learning much faster than N.L. A decision was made to give N.L. a one-to-one reading class with Rowe. Karp oversaw this instruction. N.L. stayed engaged in the one-to-one,

and remained in that setting the entire 2020-21 school year. Rowe was not testifying because her SINAI contract did not allow her to work in the summer.

Karp said that the Wilson method was used with N.L. during his first year at SINAI. N.L. had auditory processing issues. When they saw in the fall how difficult it was for N.L. to work using Wilson, the decision was made to change from Wilson to the Merrill Linguistic program. N.L. passed Book A of Merrill and was on to Book B. Karp worked with Rowe to create the goals for N.L.'s reading program. Karp subbed for Rowe about six to eight times in the last two years.

N.L.'s parent first contacted her after the pandemic was underway, in Spring 2020. They were only able to do the one-hour screening outdoors, after the school day had ended. This happened in late May or June 2020. SINAI does not have a summer program but it did send summer homework. Some students regressed in the summer. Karp never tested N.L.'s summer progress; SINAI teachers test students upon return to school in September. Karp had no personal knowledge of N.L.'s summer progress or regression, and did not screen N.L. in September 2021. Karp never discussed N.L. with Edison.

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' 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-TEEX 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).

For respondent

Alison Hines displayed great knowledge and experience. She was highly educated. She taught and advocated for students. She was trained in least restrictive environment (LRE), and was fluent in special education issues and familiar with IEPs. She had numerous certifications. Hines was qualified and admitted as an expert in learning disabilities and as an expert in the placement of students in the LRE pursuant to IDEA requirements. She was familiar with the documents she was asked to testify about, and familiar with evaluations and assessments. She was enthusiastic about academics. She explained things in great detail.

On cross-examination Hines appeared perplexed by many of petitioners’-counsel’s questions, but did her best to answer. She remained calm and was clear about what she had worked on and what she had not worked on. I found her testimony to be credible.

Susan Elsamna was qualified as an expert in learning disabilities under IDEA. She was knowledgeable. She answered clearly and asked for clarification when she did not understand a question. She was familiar with the documents she testified about and about testing. She was unable to recall certain things on cross-examination, and circumvented some questions, but she did not allow petitioners’-counsel to put words in

her mouth. She was very good at explaining documents. Ultimately, I found her to be a credible witness.

Lai Danik was admitted as an expert in school psychology. She appeared knowledgeable. She testified in a direct manner, with very short answers and little elaboration. She was a very concerned school psychologist. She was familiar with the documents and tests she was questioned about, and often referred to those documents to refresh her memory. She often attempted to answer questions from petitioners'-counsel but he was working to get specific answers; as a result, she often had to ask questions of petitioners'-counsel in order to answer his questions. She remained calm on cross-examination. I found her testimony to be credible.

Andrew Kitchell had been a teacher in Edison for sixteen years. He answered clearly and was knowledgeable and experienced in teaching special education. He easily recalled information to answer questions and recalled having N.L. as a student. He appeared to be a caring teacher. He remained calm on cross-examination, being clear as to what he knew and what he did not know. His testimony was acceptable.

For petitioners

C.L. was a petitioner and mother of student N.L. She offered a great deal of unsupported hearsay testimony. She often chose to testify on her own, without answering her own attorney's questions. She offered a great deal of rehearsed, self-serving testimony. She attempted to provide testimony without having the exhibits in front of her.

Despite spending a good amount of time talking about her medical expertise, it was surprising that she was unable to recall what her son's medications were. She claimed to have experience evaluating learning disabilities, but that was based only on having raised four children. Without proving expertise in education, her testimony could at best only be given the weight of a fact witness.

C.L. based her disapproval of remote learning on the unproven claim that Edison only offered flashcard instruction. She spoke of N.L. having dyslexia but could not answer

exactly when he was so diagnosed. She was unable to explain N.L.'s school absences. She testified that Kitchell told her that N.L. was not making progress but could not recall when he said that or what exactly he told her. She offered confusing testimony as to whether or not she had received any of the surveys or notices sent by the Edison superintendent during the pandemic. More specifically, she testified at one point that she received nothing from Edison during the pandemic, then later stated that maybe she received some items and that she had been "inundated with correspondence from the school."

Further, C.L. made efforts to avoid answering certain questions on cross-examination. C.L.'s testimony must be disregarded.

Mimi Krantz was accepted as an expert in special education. She often appeared knowledgeable and experienced. But petitioner-counsel had not produced all the tests and reports he sought to question her about, such as the Brigance Test. She often did not answer the question posed to her by petitioner-counsel, and often offered confusing, rambling testimony. Despite being admitted as an expert in special education, she was never asked to provide an expert opinion on anything.

Respondent was correct in arguing that Krantz's opinions should be given little if any weight. Her testimony regarding N.L.'s progress was not based on any base line assessments, either in terms of N.L.'s academic levels when he started at SINAI, or firsthand knowledge of any progress made by N.L. while attending SINAI. She testified about N.L.'s progress based on conversations with his teacher Ms. Rowe, but Rowe did not appear to testify herself. Her testimony regarding whether N.L. could receive a FAPE in Edison's ICR environment was of little value; Krantz never observed N.L. anywhere other than at SINAI. Additionally, Krantz had not been in the classroom since 2006, and she had very limited public school teaching experience. She had worked at a private Yeshiva and had only spent two years teaching general education. Further, Krantz was certified as a teacher in New York, not in New Jersey.

Krantz at one point testified that she had reviewed a neurological exam prior to N.L.'s acceptance in which N.L.'s distractibility was discussed. But what she actually had

reviewed was a psychological, not neurological, evaluation dated December 27, 2018, prepared for Raman Yeshiva, not by or for Edison Township. Krantz subsequently admitted that she did not recall reviewing anything from Edison showing that N.L. was distractible, restless, or lacked focus.

There were other inconsistencies. For instance, Krantz stated that N.L.'s classes at SINAI all had students with similar reading levels and were grouped by similar ages and grades levels. But she then said that if a ten-year-old read at a six-year-old level, he would be placed in a class for ten-year olds, meaning that SINAI did not group by reading level. And Krantz said N.L. could not write his own name as of September 2020, but Kitchell testified that he was able to as of January 2020.

Krantz was not a credible witness.

Judy Karp was the Director at SINAI. She was a nervous witness but appeared knowledgeable about SINAI. She was an administrator, not an educational evaluator. She said she assessed N.L.'s writing, but the entirety of the test was him trying to write his name. She was not admitted as an expert in any field. She handled admissions and was not a teacher. The better witness would have been Ms. Rowe, N.L.'s teacher. Karp testified based on having substituted for Rowe between six and eight times.

Karp testified that the level of skill for a student to start at Level A was generally knowing twelve letter sounds; however, when she screened N.L. in May or June 2020 before he started at SINAI, N.L. knew six letter sounds. While it seemed that N.L. therefore only learned six more letter sounds in the nearly two years before starting Merrill, Karp testified that SINAI had wanted N.L. to experience success and therefore they started him a "half-step down from where he is" in order for him to feel better.

I did not find her testimony deserving of any weight.

Accordingly, after carefully considering the testimonial and documentary evidence presented, I **FIND** the following to be the relevant and credible **FACTS**:

N.L. transferred into the District in December of 2019, from Highland Park, where he had an IEP; in-state transfer rules required that the new school district provide a comparable program to that previously provided under an IEP; N.L. met many grade level requirements in kindergarten in Highland Park, with a report card showing many “3s”, meaning he met the appropriate level for his age; the Highland Park IEP showed that N.L. had many reading needs; N.L.’s evaluations were recent and did not need to be redone by the respondent; N.L.’s speech-language evaluation was done on November 18, 2019, and therefore was recent, and N.L.’s psychological and social evaluations were only months old; evaluations were typically done every three years; when N.L. came to Edison from Highland Park, his IQ was reported as either ninety or ninety-four, considered average, and his processing speed index was seventy-seven, considered borderline; N.L.’s listening comprehension was high/excellent, his oral word fluency was high/excellent, his reading comprehension was average, but his basic reading was extremely low; N.L. began attending classes in Edison in January 2020, and was making progress with in-person instruction; N.L. did not need to be redirected often, and did not distract other students; N.L. enjoyed math and science, which were his strengths.

Respondent’s ICR at the elementary level provided comparable supports to pullout resource settings elsewhere by using two teachers, one general education and one special education, both trained in Phonics First, with approximately twenty or twenty-one students, with a maximum of eight students with IEPs; whereas pullout allowed a student to have only three special education classes per day, ICR allowed a student to have an entire day of special education; there was no statutory requirement for pullout resources; if still seeing deficiencies in ICR, Edison would pullout the student for a thirty-minute period; Edison employed multiple teaching models, including co-teaching, tiered instruction, differentiated instruction and cross-curriculum teaching; Edison addressed N.L.’s reading and writing skills with provide phonics instruction for thirty minutes in a small group every day, as part of 125 minutes of daily language arts instruction, as set out in the District’s first IEP from February 2020; N.L. was in-person at Marshall Elementary School in Edison for forty days before Edison went remote in response to the COVID-19 pandemic.

Recommendations in Dr. Graffman's report were consistent with what the District offered in June 2020, although Graffman himself never observed N.L. in an Edison classroom; Graffman recommended a "small school and classroom environment" but did not define those terms; Graffman wanted N.L. in classes with other "average" level students, which Edison did.

Executive functioning strategies were used in the ICR classroom and the Edison IEP, such as the use of teacher modeling, picture schedules and mnemonic strategies, to address task behavior, reduced pacing where needed, raising hand to participate, and the use of cue cards to redirect attention; Edison's ICR program included remediation of reading issues through direct instruction in Phonics First, which came under Orton-Gillingham, for thirty minutes daily; Graffman's recommendation of sixty minutes of direct reading instruction was too long for a first grader; Edison's ICR included use of criterion-based assessments to assess progress, use of technology through a Chromebook and educational software, and social skills support through collaborative classroom and the availability of guidance social skills groups; respondent offered resources such as guidance counselors and child study team members, and regular communication between teachers and parents through parent/teacher conferences, progress reporting, and annual IEP meetings; Edison offered Extended School Year (ESY) programming for students who were regressing; N.L. was not in Edison long enough to show signs of regression; N.L. should not be with students with significant behavioral issues, and in Edison he was not; N.L. received all "Ns" (needs improvement) per his report card for the forty days he was in Marshall Elementary in Edison, but N.L. was still making progress; there were no significant behavior issues noted during N.L.'s forty days in Edison; the present levels in the June 2020 Edison IEP showed that N.L. was making behavioral progress; N.L. benefited from breaks and could complete his work with minimal distractions, and benefitted from ongoing teacher support and small group instruction.

N.L. had no interfering behaviors; the June 2020 IEP said N.L. had "ADD symptoms," which was not the same as "ADHD" because N.L. displayed no hyperactivity; N.L. still had not been diagnosed with either ADD or ADHD; N.L. had a specific learning disability (SLD), a reading disorder; "dyslexia" was a medical term, not an educational term used by school districts; Orton-Gillingham was used for students diagnosed with

dyslexia, with a minimum requirement of two hours per week, and although N.L. was not shown to have dyslexia, he was receiving two and a half hours per week of Orton-Gillingham; five hours per week of Orton-Gillingham would be too much for a student like N.L.; per the February 2020 Edison IEP, N.L. needed supports in reading and math.

During the pandemic, District schools followed all CDC and BOE guidelines, including sanitizers, six-foot distancing markers, one-way hallways, classrooms set up in rows to avoid grouping, and handwashing and mask wearing protocols, including mask training and mask breaks; health protocols did not belong in an IEP unless a specific child had a specific need; District Superintendent Dr. Bragan communicated with parents via surveys and notices and website posts; N.L.'s special education teacher Kitchell reached out to all eight of his students with IEPs, and remained in constant contact with their parents; Kitchell met individually or via Zoom with each IEP student; Kitchell continued to use the same learning tools over Zoom as he did in-person; Kitchell used flashcards as part of Phonics First, which were interactive cards; flashcards were not the major or sole instruction tool used by Kitchell during Zoom instruction, as he also employed tiles, sentence boards, and reading together; N.L. continued to learn new letters during virtual learning; in Edison, N.L. asked good questions and his communication improved, he got better at dealing with his peers, he became more comfortable expressing his thoughts, he raised his hand more, and his number of sight words increased; N.L. was able to write his name, as of January 2020.

Petitioners made initial contact with SINAI sometime in May 2020; petitioners did not indicate to respondent that they wanted an out-of-district placement during the June 2020 IEP meeting; petitioners made an initial payment to SINAI on July 6, 2020; petitioners executed a contract with SINAI on July 31, 2020; petitioners made a second payment to SINAI on August 4, 2020; petitioners' ten-day notice letter was sent to respondent on August 26, 2020; the contract had a clause saying petitioners could get out of the contract if the child's old district offered them FAPE before October 2020.

N.L. did not make progress in reading or behaviorally at SINAI; N.L. displayed significant regression in reading, spelling and academic skills at SINAI; at SINAI, N.L.'s behaviors escalated as the tasks became more challenging, and N.L. would get angry

and display frustration; N.L. was distracted in the SINAI reading and math classes, and the behavioral modification used by the SINAI teachers—verbal redirection—was not effective; verbal redirection was inappropriate to be used more than one time based on the level of N.L.’s inattention, and the proper response would have been employing visual aid; in N.L.’s SINAI math class, where it was just N.L. and two teachers in the classroom, N.L. sat the entire time, with no opportunities to move around or breaks; N.L. would benefit from a larger class size where he would have appropriate supports and peer models; N.L.’s SINAI math teacher was providing N.L. with the answers; no phonics or differentiated instruction were observed in N.L.’s SINAI reading class and N.L. was not employing phonics strategies, despite the SINAI progress report indicating that by June 2021 N.L. was independently, consistently and effectively using phonics strategies; N.L. did not use math strategies such as counting on fingers when adding and subtracting, despite SINAI progress reports indicating he was independently, consistently and effectively using these strategies as of June 2021; N.L.’s regression at SINAI was noted when comparing N.L.’s 2018 standardized cluster scores with those of 2021—N.L.’s reading score dropped from 72 to 64, his academic skills went from seventy-one to forty-eight, and his “academic application” went from seventy-two to forty-seven; the high scores SINAI gave N.L. in identifying letters and sounds did not correspond to Edison’s later evaluations—SINAI said N.L. was able to read and identify letters but he was not able to do so when tested in November 2021; SINAI reported that N.L. had mastered addition, but he was unable to pass a simple math test when tested by Edison in February 2021; N.L. made no social-emotional gains at SINAI and there were no behavior interventions.

The SINAI progress reports were inconsistent with the Highland Park IEP which indicated that N.L. was well-behaved and followed directions, and the Edison IEPs which noted that N.L. benefitted from breaks and could complete his work with minimal distractions; SINAI’s goal was for N.L. to stay on task for five minutes, whereas the Edison IEPs indicated that N.L. would participate and follow classroom routines and activities and maintain attention for the entire school day; N.L. had not been making significant progress at SINAI as of October 13, 2021, partly due to the pandemic (where all students were affected), and partly due to his ADD symptoms not being addressed medically.

LEGAL ANALYSIS

The issue is whether the respondent District met its burden of proving by a preponderance of the evidence that its IEP proposed for the 2020-21 school year would have provided N.L. a FAPE in the least restrictive environment and, alternatively, that the petitioners' unilateral decision to place N.L. at SINAI was unreasonable and petitioners should be denied reimbursement.

When considering FAPE, the starting point is the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415 et seq. The IDEA was enacted to assist states in educating disabled children. It required states receiving federal funding under IDEA, such as New Jersey, to have a policy in place that ensured that local school districts provided disabled students with FAPE designed to meet their unique needs. See 20 U.S.C. § 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 (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. § 1401(9).

N.J.A.C. 6A:14-3.5 sets forth a three-prong test to determine whether a student qualifies for special education and related services. It states:

A student shall be determined eligible and classified "eligible for special education and related services" . . . when it is determined that the student has one or more of the disabilities defined in (c)1 through 14 below; the disability adversely affects the student's educational performance, and the student is in need of special education and related services. Classification shall be based on all assessments conducted,

including assessment by child study team members, and assessment by other specialists as specified below.

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

The District did not dispute that N.L. had a “specific learning disability” (SLD) as defined at N.J.A.C. 6A:14-3.5(c)(12), and therefore was entitled to special education and an IEP. In proposing an IEP in November 2021, the District agreed that N.L. was still eligible for special education “Other Health Impaired,” due to behavioral issues.

The mechanism by which IDEA ensured a FAPE was the development and implementation of an IEP. 20 U.S.C. § 1401(9) (defining a FAPE as “special education and related services that . . . are provided in conformity with the [IEP] required under section 1414(d) ”); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985). An IEP is “a detailed written document which describes the student's educational goals for an academic year and establishes a plan to achieve those goals.” Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B., 702 F.3d 1227, 1230 (10th Cir.2012). While IDEA put in place detailed procedural requirements for an IEP to be created and maintained, Congress “left the content of the programs entirely to local educators and parents.” Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P., 540 F.3d 1143, 1151 (10th Cir.2008). IDEA does not dictate the substantive level of achievement required for a FAPE; rather, the substantive adequacy of an IEP had for a long time been based on the standard set out in Rowley, 458 U.S. at 207: the IEP must be “reasonably calculated to enable the child to receive educational benefits.” In Andrew F. v. Douglas Cnty. Sch. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015), remanded 137 S.Ct. 988 (2017), the standard was clarified to be that a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

IDEA allows parents who believe their children were not receiving a FAPE in state schools the option to pull their children from public school, enroll them in private school, and then request reimbursement from the school district. 20 U.S.C. § 1412(a)(10)(C)(ii). Section 1412 states:

If the parents of a child with a disability, who previously received special education and related services under the

authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment.

[20 U.S.C. § 1412(10)(C)(ii).]

Parents who take unilateral action, however, do so at their own financial risk. Jefferson Cty., 702 F.3d at 1232. Petitioner cited to Andrew F. in advising of a three-pronged test to be applied by this court. Petitioner asserted that Prong I was for respondent to fulfill its burden of proving by competent, relevant and admissible evidence that a FAPE was offered to the student. Prong II was the appropriateness of the student's unilateral placement, which burden would be on the petitioners. Towards that end, petitioners argue that their burden was more relaxed than the District's Prong I burden. Petitioners then advised that Prong III for reimbursement was a balancing of the equities in the case.

The test for when a court may order reimbursement after a school district had denied it, however, appeared to be only if (1) the public placement violated IDEA, and (2) the private school placement was proper under the Act. Jefferson Cty., 702 F.3d at 1232. Regarding that first prong, in Andrew F. the court stated that in determining whether a school district provided a student with a FAPE, one must follow a two-step analysis and ask (1) whether the district complied with IDEA's procedural requirements, and (2) whether the IEP developed by those procedures was substantively adequate such that it is "reasonably calculated to enable the child to receive educational benefits," citing Rowley, 458 U.S. at 207.

Recognizing that the IDEA also required that a FAPE be provided in the least restrictive environment, per 20 U.S.C. § 1412(a)(5)(A), and the issues then became whether the respondent, Edison Township Board of Education, followed the guidelines of IDEA and offered a FAPE in the least restrictive environment to petitioner student N.L. If

not, and the District violated IDEA, then the issue became whether the placement of N.L. at SINAI was proper.

Petitioner did not argue that respondent made procedural errors under IDEA in how they offered their two IEPs and attempted to offer a FAPE. Accordingly, a discussion of whether respondent offered a FAPE in the least restrictive environment to student N.L. must address the substantive issues regarding FAPE and the IEP.

A qualified student under the IDEA would receive a FAPE if the IEP demonstrated that the student would educationally benefit from the individualized instruction and support services proposed; maximization of the student's potential was not required. Rowley, 458 U.S. at 189. It needed to be more than a de minimis educational benefit. Rowley, 458 U.S. at 206-7. The significant learning or meaningful educational benefit needed to be in line with the capabilities of the individual student. Ridgewood Bd. of Education v. N.E., 172 F.3d 238, 247-8 (1999). Again, in Andrew F. it was held that a student's IEP must be "reasonably calculated to enable the child to receive educational benefits" and make progress appropriate in light of the child's circumstances. Andrew F., 137 S.Ct. at 995-6.

Regarding LRE, the determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment." D.T. and S.T. o/b/o A.T. v. Montville Township Board of Education, OAL Dkt. No. EDS 08418-15, 2016 WL 4432537 (N.J. Adm.) (Final Decision August 15, 2016). Respondent argued that its proposed programming would meet the LRE requirement, as N.L. would have some small group classes as well as larger classes that included a general education teacher.

Petitioners argued that in reviewing an IEP to see whether the school offered a FAPE, one must adhere to a "four corners" rule, and therefore it was not permissible for a reviewing court to allow or rely upon the admission of "retrospective" testimony that sought to bolster or validate a challenged IEP by noting what "could have" or "would have" been done when a particular educational programming item did not actually appear within the written contents of the IEP. The Third Circuit's "four corners" rule was set out in R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012). Petitioners offered a commonsense argument to support this position, arguing that at the time parents must choose whether

to accept the school district recommendation or place the child elsewhere, they had only the IEP to rely upon, and that prohibiting rehabilitative testimony regarding an IEP would prevent a 'bait and switch' by the school district.

Respondent argued that the four corners rule did not mean that this court should discount testimony from District witnesses concerning how the IEP would evolve once the student was in the program. See S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 265 (3d Cir. 2003) and S.A. o/b/o G.A. v. Delanco Township Board of Education, 2004 WL 2266849, at *8 (N.J. O.A.L. 2004) ("Petitioner must bear in mind that an IEP is a document that continuously evolves....").

The language contained in an IEP would be absolutely key to any discussion of FAPE, but it would be unwise for this court to disregard all testimony from a school district explaining the terms in an IEP. Expert testimony, for example, would be greatly helpful, because experts in education, and special education in particular, are able to explain the often labyrinthine text of an IEP. Similarly, it would be imperative to have credible testimony explaining the reality of whether or not a requirement in an IEP had actually been effectuated, or what a particular program in an IEP would mean in the future to a student with particular educational needs or traits. Directly to the point, in Endrew F. cited by petitioners, it was held that "a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." Endrew F., 137 S.Ct. at 988. Accordingly, testimony on behalf of the school district is permissible and necessary in interpreting an IEP.

The proposed Edison IEP dated June 20, 2020 (Exhibit J-9), covered the 2020-21 school year, which would have been N.L.'s second grade year, and was substantively similar to the February 2020 IEP. (Exhibit J-8.) It indicated that N.L. qualified for "Special Education and Related Services" as "Specific Learning Disability" (SLD). It offered modifications and supplementary aids, services, and supports for school personnel. It called for ICR in language arts, one time per day for 130 minutes. It called for ICR in math, one time per day for 65 minutes. It called for individual occupational therapy two times per week for thirty minutes each. It called for speech and language therapy in a

group not to exceed three people, six times per month for thirty minutes each. It set out in great detail the goals and objectives to be fulfilled by Edison's educational programming. It appeared that Edison's goal was to continue N.L.'s first grade programming. N.L. would have continued to have two dually certified teachers who would have provided whole group, small group and individualized instruction to N.L. in a classroom that was language based throughout his entire day. As explained by respondent, N.L. would have received small group reading instruction in Phonics First thirty minutes per day as part of his 120-130 minute a day language arts block. He would have received another period of intervention or enrichment, 45 minutes a day, to work on individual weaknesses including more phonics and reading instruction. He would have received small group instruction, in addition to a classroom model emphasizing engagement with his peers.

Respondent's ICR at the elementary level provided comparable supports to pullout resource settings elsewhere by using two teachers, one general education and one special education, both trained in Phonics First, with approximately twenty or twenty-one students, with a maximum of eight students with IEPs. Although petitioners stressed a need for pullout classes, pullout allowed a student to have only three special education classes per day, whereas ICR allowed a student to have an entire day of special education. Edison employed multiple teaching models, including co-teaching, tiered instruction, differentiated instruction and cross-curriculum teaching. Executive functioning strategies were used in the ICR classroom and the Edison IEP, such as the use of teacher modeling and picture schedules and mnemonic strategies to address task behavior, reduced pacing where needed, raising one's hand to participate, and the use of cue cards to redirect attention. Edison's ICR included use of criterion-based assessments to assess progress, use of technology through a Chromebook and educational software, and social skills support through collaborative classroom and the availability of guidance social skills groups. Edison offered resources such as guidance counselors and child study team members, and regular communication between teachers and parents through parent/teacher conferences, progress reporting, and annual IEP meetings.

A four corners reading of the proposed June 2020 IEP, as further explained by respondent witnesses, therefore appeared to be an IEP reasonably calculated to enable N.L. to make progress appropriate in light of his particular circumstances.

N.L. began attending classes in Edison in January 2020, and although he only attended forty days' worth of in-person classes in Edison before Covid forced schools to teach virtually, he was making progress with in-person instruction. N.L. did not need to be redirected often, and did not distract other students. N.L. enjoyed and did well in both math and science. The present levels in the June 2020 Edison IEP showed that N.L. was making behavioral progress. Testimony from respondent witnesses indicated that N.L. had made academic progress and would have continued to show progress if he had continued at Marshall Elementary. With only forty days of in-class time in Edison, N.L. had not been in the Edison school system long enough to display signs of regression. Petitioners offered no credible evidence that N.L. failed to make progress under the February 2020 IEP.

I **CONCLUDE** that respondent met its burden of proving by a preponderance of the evidence that its IEP proposed for the 2020-21 school year was substantively adequate and reasonably calculated to have provided N.L. a FAPE in the least restrictive environment during the 2020-21 school year.

Having reached that conclusion, there would be no need to discuss the second prong, that being the adequacy of the school where the student had been unilaterally placed. However, this issue was addressed in great detail during the six days that it took for the within hearing to be completed and should be briefly addressed.

SINAI may have been "middle states accredited" but it was not approved by the New Jersey Department of Education. Being accredited in New Jersey may not be dispositive, but the facts were that N.L. did not make progress in reading or behaviorally at SINAI, displaying significant regression in reading, spelling and academic skills. His behaviors escalated as the tasks became more challenging. N.L. would get angry and display frustration. N.L. exhibited distraction in the SINAI reading and math classes. The behavioral modification used by the SINAI teachers was not effective.

No phonics or differentiated instruction were observed in N.L.'s SINAI reading class. N.L. was not employing phonics strategies, despite the SINAI progress report indicating that by June 2021 N.L. was independently, consistently and effectively using phonics strategies. In comparing N.L.'s 2018 standardized cluster scores with those of 2021, N.L.'s reading score dropped from seventy-two to sixty-four, his academic skills went from seventy-one to forty-eight, and his "academic application" went from seventy-two to forty-seven. SINAI said N.L. was able to read and identify letters but he was not able to do so when tested in November 2021.

SINAI reported that N.L. had mastered addition, but he was unable to pass a simple math test when tested by Edison in February 2021. N.L. did not use math strategies, despite SINAI progress reports indicating he was independently, consistently and effectively using these strategies as of June 2021. The 2021-22 Progress Monitoring Data/Acadience Math (Exhibit P-23) showed N.L. falling well below the end of year goals in mathematics.

Yet petitioners moved quickly to transfer N.L. to SINAI and remove him from the Edison school system. This may have been a reaction to the effects of the Covid-19 pandemic shutdown, although the switch to virtual learning seemed to have generally affected all students and all school districts. As a result, respondent argued that where parents failed to act in good faith by not giving the public school district an opportunity to demonstrate that its proposed IEP was able to provide the student with a meaningful educational benefit, they should not be entitled to reimbursement. K.G., 2018 WL 4489672 (citing C.H. v. Cape Henlopen School District, 606 F.3d 59, 72 (3d Cir. 2010)).

Here, petitioners did not give Edison a fair and objective opportunity to teach N.L. They provided no notice to respondent that they were considering placing N.L. in an out-of-district educational setting. They did not mention placement at SINAI while going through the two-to-three month application period at SINAI, and did not advise respondent during the June 2020 IEP meeting. Although they provided the statutorily-required ten-day notice to respondent on August 26, 2020, they actually made initial contact with SINAI by May 2020. Petitioners made an initial payment to SINAI on July 6, 2020, executed a contract with SINAI on July 31, 2020, and made a second payment to SINAI on August

4, 2020. Therefore, they had made the decision to unilaterally place N.L. out-of-district long before they advised respondent of their intention. Although petitioners provided a letter to the District on August 26, 2020, they immediately withdrew N.L. from the Edison school system, did not file for due process until May 2021, and did not provide any evaluations for the District to consider until June 2021, at which point the 2020-21 school year was over. Further, arguing that the SINAI contract had a clause allowing petitioners to void the contract if the child's former school district offered them a FAPE before October 2020 was disingenuous; respondent Edison Township offered petitioners two IEPs, in February 2020 and June 2020, both of which on their face offered N.L. a FAPE in the least restrictive environment.

I **CONCLUDE** that petitioners failed to meet their burden of proving the appropriateness of their unilateral placement of N.L. at SINAI School.

CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the respondent, Edison Township Board of Education, met its burden of proving by a preponderance of the evidence that its IEP proposed for the 2020-21 school year would have provided N.L. a free and appropriate public education (FAPE) in the least restrictive environment. I further **CONCLUDE** that petitioners failed to meet their burden of proving that their unilateral decision to place N.L. at SINAI was appropriate. I **CONCLUDE** that petitioners should be denied reimbursement of expenses for their unilateral placement of N.L. at SINAI, and denied continued placement, transportation, compensatory education and reimbursement of all costs.


ORDER

I hereby **ORDER** that respondent's determination that petitioners were not entitled to tuition reimbursement for their unilateral placement of N.L. at SINAI, or continued placement, transportation, compensatory education or reimbursement or payment of other associated costs, is hereby **AFFIRMED**. This due process 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 (2021) 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 (2021). 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.

March 27, 2023 _____

DATE



JEFFREY N. RABIN, ALJw

Date Received at Agency

March 27, 2023 _____

Date Mailed to Parties:

March 27, 2023 _____

JNR/dw

APPENDIX

WITNESSES

For respondent:

Alison Hines
Susan Elsamna
Lai Danik
Andrew Kitchell

For petitioners:

C.L., petitioner
Mimi Krantz
Judy Karp

EXHIBITS

Joint exhibits:

- J-1. Psychological Evaluation, dated December 27, 2018
- J-2. Educational Evaluation, dated December 27, 2018
- J-3. Occupational Therapy Evaluation, dated April 15, 2019
- J-4. Speech Evaluation, dated November 18, 2019
- J-5. Highland Park IEP, dated December 13, 2019
- J-6. 2019-20 Highland Park Report Cards
- J-7. December 2019 through June 2020 Edison Attendance Record
- J-8. Edison IEP, dated February 20, 2020
- J-9. Edison IEP, dated June 6, 2020
- J-10. 2019-20 Edison Report Cards
- J-11. 2020 IEP progress report
- J-12. Transfer Card, dated September 8, 2020

- J-13. Neuropsychological Evaluation, dated April 16, 2021
- J-14. Multi-disciplinary Evaluation, dated November 1, 2021
- J-15. Neurological Evaluation, dated November 1, 2021
- J-17. Edison IEP, dated November 18, 2021
- J-18. Score Comparison Chart
- J-20. Resume Susan Elsamna, LDTTC
- J-21. Resume Alison Hines, LDTTC and Supervisor of Special Services
- J-22. Resume Lai Danik, School Psychologist

For respondent:

- R-1. Article: Effects of Placement on Academic and Social Skill Outcome Measures of Students with Disabilities by Conrad Oh-Young

For petitioners:

- P-1. Demand for Due Process, dated May 13, 2021
- P-2. Ten Day Letter, dated August 26, 2020
- P-3. Resource Room ELA and Math Progress
- P-4. 2020/2021 Tuition Contract by SINAI
- P-5. 2020/2021 School Program by SINAI
- P-6. 2020/2021 Distance Learning Plan by SINAI
- P-7. 2020/2021 Remote Learning Information by SINAI
- P-8. Tuition Affidavit by SINAI, dated April 4, 2021
- P-9. 2020/2021 Attendance Record by SINAI
- P-10. 2020/2021 Comprehensive Student Plan by SINAI
- P-11. 2020/2021 Student Schedule by SINAI
- P-12. Math Progress Monitoring by SINAI, dated January 6, 2021
- P-13. BASC 3 Teacher Rating Scale by SINAI, dated March 10, 2021
- P-14. BRIEF 2 Teacher Form by SINAI, dated March 10, 2021
- P-15. Connors3 Teacher Form by SINAI, dated March 10, 2021
- P-16. Teacher Questionnaire by SINAI, dated March 10, 2021
- P-17. NICHQ Vanderbilt Assessment Scale by SINAI, dated March 10, 2021
- P-18. WADE Math Progress Monitoring by SINAI, dated June 7, 2021

- P-19. WADE ELA Progress Monitoring by SINAI, dated June 7, 2021
- P-20. 2021/2022 Comprehensive Student Plan by SINAI
- P-21. Undated License of Dr. Melissa Fiorito-Grafman
- P-22. Undated Credentials of Mimi Krantz
- P-23. 2021-22 Progress Monitoring Data/Acadience Math
- P-24. Merrill Reading Program Test, dated May 9, 2022
- P-25. Undated Credentials of Judy Karp