



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

**FINAL DECISION**

OAL DKT. NO. EDS 02925-22

AGENCY DKT. NO. 2022-34008

**T.S. AND M.S. O/B/O L.S.,**

Petitioners,

v.

**CHERRY HILL TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**Michael I. Inzelbuch**, Esq. for petitioners

**Eric L. Harrison**, Esq., for respondent (Methfessel & Werbel, P.A., attorneys)

Record Closed: July 7, 2023

Decided: August 1, 2023

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

**STATEMENT OF THE CASE**

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415, T.S. and M.S. requested a due process hearing on behalf of their daughter, L.S., who is classified as eligible for special education and related services. Petitioners assert that the Cherry Hill Township Board of Education (Board) failed to provide a Free and Appropriate Public Education (FAPE) to L.S. Specifically, petitioners maintain that

because the Board's Individualized Education Plan (IEP) proposed on December 17, 2021, was not appropriate, they had no choice but to remove their daughter and unilaterally place her at the Newgrange School in January 2022. Petitioners seek compensatory education, reimbursement, and payment for the unilateral placement, with round trip transportation.

### **PROCEDURAL HISTORY**

Petitioners filed a request for a due process hearing on March 13, 2022, which was transmitted to the Office of Administrative Law (OAL) and filed on April 13, 2022. By agreement the parties participated in settlement conferences with a settlement Administrative Law Judge. Thereafter, the matter was assigned to me, and I scheduled the pre-hearing conference on June 28, 2022. Because of a substitution of counsel for the Board, the pre-hearing conference was adjourned until July 11, 2022, and the hearing dates were scheduled for October 24, 2022, October 25, 2022, and October 31, 2022. After a joint request to adjourn the October 24, 2022, hearing date, the hearing began on October 25, 2022. The following hearing dates were added at the request of the parties: February 28, 2023, March 2, 2023, and May 3, 2023. Written summations were submitted in lieu of a final day of hearing on July 7, 2023, at which time the record closed.

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

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

L.S. was born on January 28, 2010. From first to fifth grade, L.S. attended her local elementary school, James F. Cooper, E.S., located within the Cherry Hill School District (Cherry Hill). During this time, L.S. was assigned the same case manager, Angelina Phelan.

Ms. Phelan is a Learning Disabilities Teacher Consultant (LDTC) and a full-time member of the K-5 Child Study Team (CST). For first and second grades, L.S. was classified as Communication Impaired, and placed in a multi-grade Language and Learning Disabilities (LLD) classroom. For inclusion and mainstreaming, L.S. was in a general education class for science and social studies. By the end of first grade, the CST recommended discontinuing the general education classes. After consultation with the parents, the consensus was to wait until her reevaluations before making any changes.

In second grade, L.S. had the following evaluations: Speech and Language on November 16, 2017, Occupational Therapy on November 14, 2017, Educational on November 2, 2017, and Psychological on October 18, 2017. The evaluations showed a cognitive deficit. After an IEP meeting, the CST changed L.S.'s classification from Communication Impaired to Mild Cognitive Impairment and her new IEP for third grade placed her in a self-contained LLD setting for all classes.

The student's IEPs admitted into evidence are as follows:

- January 10, 2019, revised IEP for January to June 2019, third grade. (R-3.)
- January 2, 2020, amended IEP for January to June 2020, fourth grade. (R-6.)
- October 19, 2020, IEP for November 2020 to June 2021, fifth grade. (R-11.)
- April 26, 2021, IEP for July 2021 to June 2022, sixth grade. (R-49.)
- December 17, 2021, revised IEP for January to June 2022, sixth grade. (R-26.)

In transitioning to third grade, L.S. started to demonstrate concerning behaviors. These behaviors consisted of aggression, elopement from the classroom, calling out, and being off task. On January 10, 2019, L.S.'s IEP was amended to include a Behavior Intervention Plan (BIP) and behavioral consults with a Board Certified Behavior Analyst (BCBA). (R-3.)

From September 3, 2019, until December 3, 2019, Julie Toub, a BCBA and consultant with Interactive Kids, collected data on L.S.'s vocal disruptions, aggression, refusals, disrespectful statements, disrespectful gestures, tantrums and earned

reinforcements. (R-4.) L.S. started the year with a Registered Behavior Technologist (RBT) as her one-to-one support. On January 2, 2020, L.S.'s IEP was amended without an agreement to include Behavioral Intervention Consultation with a BCBA, four times a month for sixty minutes and changes to her BIP. (R-6.)

According to L.S.'s fourth grade teacher, Ameetha Annese, L.S.'s behavior improved under the BIP. On March 18, 2020, Ms. Taub provided a summary of the improvements. (R-8.) The RBT support had been faded and removed by January 2020. As L.S. was continually meeting her goals, individual behavior consultation services were not recommended to be continued for fifth grade. Id.

For fifth grade, Ms. Annese was still L.S.'s teacher. Cherry Hill started on remote learning but with live instruction from the teachers. Although L.S. was due for her triannual evaluations on November 29, 2020, the CST postponed the evaluations until school was in full session. By November of the 2020-2021 school year, L.S. was attending school in person four days a week for a shortened day. She was also receiving remote group instruction on Fridays.

On April 26, 2021, the CST met to develop L.S.'s sixth grade IEP. As the case manager, Ms. Phelan developed the program and coordinated with the therapists and teachers. (R-49.) According to L.S.'s fourth and fifth grade teacher, Ms. Annese, L.S. had made meaningful progress given her cognitive level. With improving behaviors by the end of fourth grade, she made social and emotional gains.

Ms. Phelan had recommended a LLD program for L.S. for sixth grade because she had been in an LLD class for the five previous years. Although there were struggles, L.S. responded to the supports provided through her BIPs in third and fourth grades. In fifth grade L.S. was able to function under the class wide behavior management system. With supports, L.S. had been able to remain in a LLD classroom. According to Ms. Annese, L.S. made meaningful progress in her fourth and fifth grade goals given her cognitive disability. Placement at Beck Middle School, L.S.'s neighborhood school, provided the least restrictive environment.

The parents raised concerns at the annual review meeting about L.S.'s transition to sixth grade. They reported that L.S. was nervous, complaining of stomach aches, and not sleeping. To help alleviate L.S.'s anxiety, the parents asked if they could tour Beck Middle School in the summer. (R-49.) They wanted to be able to create a social story for L.S. to help her understand the transition. This technique was being used by Melissa Graham, L.S.'s long-time therapist, to help L.S. acclimate to new situations, with success. However, the tour of the new school was never scheduled or permitted.

Allison Schwartz, L.S.'s new case manager for sixth grade, sent a welcoming email to all new families. On August 16, 2021, upon receipt of the email, Mrs. S. immediately responded to inform Ms. Schwartz of their concerns about L.S.'s increasing anxiety about returning to school. Mrs. S. asked about the possibility of emailing with L.S.'s teacher to prepare L.S. Ms. Schwartz responded by stating that teachers could not be reached until the start of the school year. She invited the S. family to the new student orientation on August 31, 2021. (P-87, pgs. 4826-4828.)

On August 31, 2021, the night of the orientation, L.S. was so paralyzed with fear she refused to leave the car. The family remained in their car in the parking lot for the duration of the orientation meeting.

By all accounts, the first day of sixth grade for L.S. was a disaster. Janine Fiore Malone was L.S.'s sixth grade teacher. On the first day of school, Ms. Fiore Malone removed L.S. from the classroom due to her behavior and sent her to her case manager's office. This was Ms. Schwartz's first encounter with L.S., whom she described as agitated and aggressive. Ms. Schwartz considered L.S.'s behavior to be atypical for the first day of school.

The following days showed no improvement. On September 15, 2021, a telephone conference held via zoom was convened. Participating on the call were the parents, Sarah Woldoff, Ph.D., BCBA, who had been privately treating L.S. for many years, Ms. Schwartz, Ms. Fiore Malone, and L.S.'s guidance counselor, Regina James. Dr. Woldoff recommended data collection using an ABC data chart, training for L.S.'s one-to-one aide, and a social skills group as a start to address the immediate behavior concerns. Cherry

Hill was opposed to offering any training to L.S.'s aide. Cherry Hill agreed to the data collection but opted to use their provider, Interactive Kids.

On September 23, 2021, Dr. Woldoff sent an email to L.S.'s guidance counselor, Ms. James, including the ABC chart as an attachment. She believed an FBA was warranted; therefore, data was needed. Based on what Dr. Woldoff heard from the first-grade teacher during the September 15, 2021, conference, she believed that the curriculum may be too challenging. Given her insight into L.S.'s behavior, Dr. Woldoff opined that L.S.'s "misbehavior" and "blow-ups" were "a symptom of poor response to stress that is leading to an overactive fight or flight response." (P-114, pg. 5671.) Although Dr. Woldoff recognized the need to collect data for the behaviors, she also believed that therapy and social skills instruction should start immediately. She again questioned whether L.S.'s aide would undergo training. Id.

By email, dated September 24, 2020, Ms. Schwartz responded to Dr. Woldoff. (P-96.<sup>1</sup>) Ms. Schwartz advised that Cherry Hill created a chart to track the observable and measurable behavior occurrences. She also informed Dr. Woldoff of L.S.'s school-based services. Counselling was being provided by Eileen Conover, the Student Assistance Counselor. Social skills were provided through the speech-language therapist, three times a month for twenty-five minutes. (R-49.) Ms. Schwartz further stated that she would communicate the peer interaction and flexibility concerns to the speech-language pathologist. (P-96.)

Despite the September 15, 2021, conference, L.S.'s behaviors escalated, raising safety concerns for L.S., staff, and other students. During school, L.S. expressed that she wanted to shoot another student. This behavior initiated a school protocol, referred to as "S12." Under an "S12" Cherry Hill must report the threat and send L.S. home for a professional evaluation prior to readmittance to school. On September 28, 2021, Dr. Woldoff evaluated L.S. and cleared her return to school. (R-17.)

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<sup>1</sup> P-96 was used during the cross-examination of Dr. Woldoff. It was not moved into evidence by either party. However, for completeness, I am referencing it here.

On October 15, 2021, the CST conducted a reevaluation planning meeting and scheduled the following evaluations:

Speech and Language Evaluation Report (R-18) - Lara Gonzalez<sup>2</sup>, MS CCC/SLP evaluated L.S. on October 20, 2021, November 15, 2021, and November 16, 2021. Ms. Gonzalez administered the following tests:

1. Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) to assess L.S. overall expressive and receptive language skills. L.S.'s index scores were all in the low range, suggesting a moderate to severe deficit in receptive and expressive language.

2. Test of Language Development-Intermediate 5 (TOLD:1-5) is designed to assess a student's receptive and expressive spoken language competence relative to semantics and syntax. L.S. scored in the impaired range overall on the assessment.

The evaluator determined based on the test results that L.S.'s "presentation is consistent with a student with a moderate to severe receptive and expressive disorder." (R-18.) As a result, L.S. may have difficulty with "answering questions from a story, retelling a personal narrative, answering questions during classroom discussion, formulating grammatically correct sentences both orally and in written language, and learning new vocabulary." L.S.'s disorder "is negatively impacted by her short attention and difficulty with distractions (internal and external)." Id.

Functional Behavior Assessment (R-20) – Consultant, Camera Hamilton, MA Behavior Specialist, with Interactive Kids observed L.S. in the classroom on October 27, 2021, and November 3, 2021. Ms. Fiore Malone, L.S.'s sixth grade teacher completed a Behavior Profile Form. Under Academic Performance, Ms. Fiore Malone indicated that L.S. was failing all academic subjects. The Target Behaviors were reported as shouting out inappropriate comments, getting out of seat hourly during class, noncompliance and

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<sup>2</sup> Under her IEP, Ms. Gonzalez also saw L.S. for speech and language therapy. (R-49.)

physically resisting tasks, and not attending to lessons or engaged in tasks. Ms. Fiore Malone reported that L.S. engaged in screaming, shouting, and abusive language to get attention or to express frustration. She also reported that L.S. becomes aggressive by charging at staff, pushing, and hitting. Regarding social skills, Ms. Fiore Malone indicated that L.S. has no appropriate interaction with peers.

Using graphs, Ms. Hamilton charted L.S.'s positive and negative behaviors. Based on the teacher reports and Ms. Hamilton's direct observation, L.S.'s behaviors impacted her ability to access the curriculum and disrupted classroom presentation. As noted in the report, "[w]hen negative interactions occur, staff have had difficulty redirecting or de-escalating behaviors, at which times L.S. is typically sent out of the classroom to the guidance office or is given access to preferred items/activities." (R-20.) Based on the observation data, "L.S. would benefit from an individualized behavior intervention plan that should be implemented across the duration of the school day."

Psychological Evaluation (R-21) – Ms. Schwartz evaluated L.S. on November 1, 2021, and administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V). She authored a report on November 2, 2021. L.S. obtained a Full-Scale IQ (FSIQ) score of 52, placing her in the extremely low range of cognitive functioning. Her scores in all areas of testing were extremely low.

Educational Evaluation (R-22) – Ms. Brugnolo conducted L.S.'s learning evaluation on November 2, 2021, November 3, 2021, and November 24, 2021. Ms. Brugnolo utilized the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH), and administered reading, writing, and math subtests to L.S. Her reading, written language and mathematics results were in the very low range for a student her age. Ms. Brugnolo described L.S. as cooperative in completing all the expected testing activities.

Occupational Therapy Screening (R-23) – On November 18, 2021, L.S. was assessed by occupational therapist, Anna Marie Vinci-Marzocca. In her consultation with classroom staff, Ms. Vinci-Marzocca learned that L.S. requires consistent prompting throughout the day and may become oppositional and easily frustrated when transitioning. In the WOLD Sentence Copy Test, L.S. scored below second grade speed.



For typing, L.S. used a hunt/peck with her two index fingers. L.S. was functional for self-care and she possessed the fine motor abilities for school-based activities.

Psychiatric Evaluation (R-24) – Joseph C. Hewitt, D.O. evaluated L.S. on November 22, 2021. He noted in his report that L.S.'s disruptive behaviors began on the first day of school and have been unremitting. Dr. Hewitt described L.S.'s disconcerting behaviors as: high levels of verbal and physical aggression towards staff and students; threats; lack of response to behavior supports; little insight; sensitivity to noise; and work avoidance. Dr. Hewitt described L.S. as "impatient." He noted signs of neuroatypicality including: "[l]imited eye contact and ability to show social and emotional reciprocity; limited ability to perspective take; sensory vulnerabilities; egocentricity; and difficulties with flexibility and transitions." Id. From his conversations with Ms. Schwartz, and his review of teacher and school input, Dr. Hewitt reported that the level of L.S.'s disruptive behaviors were worrisome. Dr. Hewitt diagnosed L.S. with Autism with significant language and intellectual impairments, including Unspecified Anxiety Disorder. He supported adding Autistic to L.S.'s classification of Mild Intellectual Disability.

By letter, dated October 31, 2021, as the evaluations were progressing, Mr. and Mrs. S. advised Cherry Hill's administration of their concerns. (R-19.) Among their chief concerns was that the IEPs designed for L.S. lacked a formal, curriculum based social skills group. In this letter, Mr. and Mrs. S. referenced that L.S. was sent home from school twelve times in two months. They asserted that L.S. was being punished rather than supported for her disabilities. Mr. and Mrs. S. also advised that they received reports from L.S.'s therapist, that L.S. feels "threatened" and "in danger" while in this class. On Friday, October 29, 2021, an assistant principal at Beck Middle School, called their home to inform them that Ms. Fiore Malone filed charges or a report with the school resource officer. This information caused Mr. and Mrs. S. to contact the Cherry Hill Police Department but they were not able to get any more information. The uncertainty and lack of information from Cherry Hill regarding this incident only increased their concerns for their daughter's safety. Within the letter, Mr. and Mrs. S. highlighted eight areas where Cherry Hill was failing their daughter: 1) Lack of notice or documentation of L.S.'s behaviors that caused either in-school or out-of-school suspensions; 2) No plan in place on how to manage and address behaviors; 3) No oversight of L.S.'s teacher and her lack

of nurturing behavior towards L.S.; 4) Questioning why given L.S.'s low cognitive abilities, she is punished for failure to complete assignments; 5) Violated L.S.'s privacy rights by leaving detailed message about L.S.'s behavior with her grandmother; 6) Extreme school avoidance behaviors due to fear of her teacher that have gone unaddressed; 7) No IEP meeting or manifestation determination meeting to address L.S.'s behaviors; and 8) Multiple suspensions causing Mr. and Mrs. S. to leave their jobs and pick up L.S. from school with no plan to address the behavior. The parents closed the letter by informing Cherry Hill to address their concerns or they would proceed with litigation. The parents received no substantive response from Cherry Hill to their letter.

After the reevaluation process was completed, Ms. Schwartz drafted a new proposed IEP for L.S. (R-26.) The CST recommended a change in placement to the autism support program housed in a different middle school building. As Ms. Schwartz was not working at the Rosa Middle School, she observed the autism program on two separate occasions. The program had a low student-teacher ratio, where students worked at their own modified pace. There was an integrated social skills curriculum as part of the program. The students receive direct instruction and opportunities to address social situations throughout the school day. The program offered a one-teacher to two-student ratio. For every student in the class, there was an adult. Based on the recommendations in the evaluations, related services were being offered. L.S. had been receiving occupation therapy consultation, physical therapy consultation, and speech-language therapy in a group setting. An increase of the individual speech and language services was proposed. Based on her observation, Ms. Schwartz believed that the BIP outlined in the IEP could be implemented in the proposed autism class. Data collection to evaluate the effectiveness of the interventions was to be captured in fifteen-minute intervals. In the proposed IEP, Ms. Schwartz recommended that L.S. remain in special education for all academic subjects.

The CST convened a reevaluation eligibility IEP meeting on December 17, 2021. The parents and their advocate attended the meeting. As the psychiatric evaluation supported a diagnosis of autism for L.S., there was a discussion about L.S.'s classification. As L.S. continued to meet the classification eligibility of mild intellectual cognitive disability, the CST elected to remain consistent. The parents asked to observe

the proposed autism class with their expert. As December 17, 2021, was a Friday, time was of the essence for the observation to occur before the holiday break scheduled to begin after a half/day of school on December 23, 2021.

On December 17, 2021, the parents signed a letter advising Cherry Hill of its intention to unilaterally place L.S. at the Newgrange School beginning on January 6, 2023. (R-27.)

Having not received the forms permitting the observation by December 22, 2021, Mrs. S. sent an email to Ms. Schwartz inquiring about the scheduling of the observation. (P-87.) On December 23, 2021, Ms. Schwartz sent the necessary forms to move forward and schedule an observation. Id.

The parents obtained a private Neuropsychological Evaluation from Jaime Lehrhoff, MA, LDT-C, that was not completed in time for the December 17, 2021, IEP meeting. (R-12.) Previously, on November 11, 2021, Ms. Lehrhoff had observed L.S.'s LLD math class and reading class. She opined that L.S. had been unable to keep up with the demands of the lessons. The pace was too fast for L.S., and she required more wait time than the other students.

As part of her evaluation, Ms. Lehrhoff reviewed Cherry Hill's recent evaluations, interviewed L.S. on November 12, 2021, and December 6, 2021, and administered her own testing. On January 5, 2022, L.S. met with Ms. Lehrhoff's colleague, Dryden Watner, PhD., to complete the testing. Ms. Lehrhoff administered the Comprehensive Test of Nonverbal Intelligence 2<sup>nd</sup> edition (CTONI), which is a non-verbal intelligence test. Her scores were generally very poor. Ms. Lehrhoff also administered the Test of Integrated Language and Literacy Skills (TILLS) to test L.S.'s oral and written language skills. L.S. was unable to complete all the subtests because of lack of attention and willingness to participate. The task of social communication was extremely difficult for L.S.

Dr. Watner administered the Autism Diagnostic Observation Scale-2 (ADOS-2) and L.S.'s score exceeded the cut-off for Autism.

In her summary, Ms. Lehrhoff remarked that L.S. “often appeared frustrated or distracted, especially when tasks were challenging.” Id. L.S. also showed defiant behaviors. Id. According to Ms. Lehrhoff, the testing showed that “L.S. is still at the emerging levels of reading, writing and mathematics.” Id.

Ms. Lehrhoff understood that the proposed IEP recommended a change in placement. She acknowledged that she had not observed the placement and welcomed the opportunity to observe it. However, she recommended that L.S. be placed in an out-of-district placement. Id.

On April 7, 2022, Ms. Lehrhoff observed the proposed autism classroom at Rosa. (R-37.) At the time of the observation, there were five students and five adults in the classroom. Each student was at his or her own table and accompanied by an adult. Some students used the Reading Mastery program, and another student used the Edmark program. Every program was based on the student’s level. Ms. Lehrhoff believed the classroom was well-managed with an excellent teacher to student ratio. However, she noted that it was very noisy. She also noted that there was an incredible amount of support, with little independence.

She also viewed a second autism classroom. There were four boys in that class with more severe behavior issues.

On April 11, 2022, Ms. Lehrhoff observed L.S. at Newgrange. Her impression was that L.S. was extremely confident in her classroom setting. She was grasping concepts and working with another student. Based on her observations, Ms. Lehrhoff believed that L.S. should remain at Newgrange.

## **DISCUSSION AND ADDITIONAL FINDINGS OF FACT**

### **Summary of Testimony:**

**Angelina Phelan, MS LDT/C** testified as an expert witness in the fields of special education programming and educational programming for children with autism. (R- 46.)

According to Ms. Phelan, L.S. started to exhibit behavior that interfered with her learning at the beginning of third grade. Ms. Phelan partially attributed L.S.'s behaviors to the transition from a multi-grade class with students who were younger than her to adjusting to a setting with students who were older than her. She acted out while processing this adjustment. To help with the behaviors, the school enlisted the aid of a BCBA and met with the parents. The CST recommended an FBA and a psychiatric evaluation. The parents only consented to the FBA; so, a psychiatric evaluation was not done.

In the spring of L.S.'s third grade year, the CST discussed with the parents that L.S. was showing signs of autism and suggested an autism programming for L.S. for the increased support. As L.S. had not been diagnosed with autism, the parents did not want a change in programming.

The plan for fourth grade was an extensive behavior plan with one-to-one assistance from a RBT. In fourth grade, L.S. showed great improvement, so her RBT was eventually removed, but her one-to-one aide continued.

The parents expressed dissatisfaction with the classification of a cognitive impairment, but the CST felt it was appropriate given her evaluations. However, because her negative behaviors improved, the CST suggested mainstreaming L.S. into music. In March 2020, due to the COVID 19 pandemic, the district went to remote learning for everyone.

Ms. Phelan explained that it was a joint decision to postpone the evaluations during the pandemic. Evaluations are used for two purposes: eligibility and planning. In L.S.'s case there was no question about her eligibility. The consensus of the CST was that standardized assessments would not paint a true picture of LS.'s needs, without school being in session. An alternative assessment was proposed using the Dynamic Learning Maps (DLM) to assess whether L.S. was moving towards her grade level goals. Although Ms. Phelan recommended assessing L.S. using the DLM, the parents opted out of the testing. (R-16.)

At the end of the 2020-2021 school year, the school district held a compensatory education determination meeting for all special education students to determine if services were missed or if learning was impacted due to the pandemic shut down. For L.S., the CST determined that she required seven hours of compensatory education in reading and occupational therapy. (R-13.) Her progress goals for speech had slowed and she was only making gradual progress. (R-15.)

Although her case manager duties ended after fifth grade, Ms. Phelan assisted with drafting the sixth grade IEP. The IEP meeting occurred on April 26, 2021. As the case manager, Ms. Phelan developed the program and coordinated with the therapists and teachers. (R-49.) The meeting was productive. L.S. had made progress and now they were planning for middle school. The IEP for sixth grade did not contain behavioral interventions because L.S.'s behavior had improved. For fifth grade L.S. was able to function under the class wide behavior management system with support from her one-to-one aide.

Ms. Phelan opined that through fifth grade, L.S. made meaningful progress. Her conclusion was based on her personal observations of L.S. in the classroom, review of data from the teachers, and review of her progress with the therapists. The observations were informal, akin to occasional visits to the classroom.

Ms. Phelan had recommended a LLD program for L.S. for sixth grade because she had been in a LLD class for five years and there was nothing to suggest she should have been moved from this trajectory. Ms. Phelan did only one formal observation of L.S. when she evaluated her in second grade.

**Ameetha Annese** testified as an expert in special education. She was L.S.'s teacher for three years. She taught L.S. in first grade and again in fourth and fifth grades. In the third semester of fourth grade, the school shut down due to the COVID-19 pandemic. Ms. Annese was able to have a few virtual meetings with L.S. and her parents. She sent work home through "google docs."

During the 2020-2021 school year, Ms. Annese believed L.S. was appropriately placed. She made social and emotional gains. L.S. made meaningful progress given her cognitive level.

Placement of L.S. in the LLD class for sixth grade was based on the successes she had in the LLD class for fourth and fifth grades. L.S. was familiar with the LLD class and she had made positive gains academically, socially, and emotionally. She believed the goals were written for her to succeed in a sixth grade LLD class.

Ms. Annese recalled speaking to L.S.'s sixth grade teacher at the end of September. Ms. Fiore called her asking for insight into L.S. as a learner. Ms. Annese recalled telling her that L.S. had difficulty with transitions.

**Allison Schwartz** is a school psychologist. She started working for Cherry Hill in 2018 at the high school. For the 2021-2022 school year, she moved to the middle school and was L.S.'s case manager. She testified as an expert in school psychology and special education.

In July 2021, Ms. Schwartz recalled receiving an email from Mrs. S. asking for a meeting with L.S.'s teacher, before the start of school. Ms. Schwartz was not able to accommodate that request. She recommended the family attend the sixth-grade orientation at the middle school. Ms. Schwartz did not know whether they attended.

Ms. Schwartz' first interaction with L.S. was in her office at the end of the first day of school. Emails were exchanged with the parents. There were multiple similar days.

On or about September 15, 2021, the guidance counselor, Regina James, called for a general conversation conference. The parents had advised that L.S. was receiving counseling services from Sarah Woldoff, Ph.D., BCBA, so she participated on the zoom conference call. Ms. Schwartz recalled that the parents mentioned that L.S. was experiencing intense anxiety. At this time, there were no direct changes to the IEP.

Ms. Schwartz was aware that L.S. was prescribed Adderall as a medication but had no other information about L.S.'s medication.

Although Ms. Schwartz recalled some positive days, most were not. She described L.S.'s behaviors as escalating. There were growing concerns about safety for L.S., staff, and other students.

On October 15, 2021, the CST conducted a reevaluation planning meeting. According to Ms. Schwartz, the best practice is to leave the student in a placement for thirty days as a trial period to get a true sense of a student's abilities and the appropriateness of the placement. Evaluations were completed prior to making any changes to the program or placement.

On November 1, 2021, Ms. Schwartz performed a Psychological Evaluation and wrote a report. (R-21.) She observed L.S. and administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V). L.S. obtained a Full-Scale IQ (FSIQ) score of 52 (0.1 percentile), placing her in the extremely low range of cognitive functioning. Her scoring was consistent with her prior testing. Ms. Schwartz reviewed all the new evaluations. They were consistent with prior evaluations. Ms. Schwartz explained that for a student with cognitive disabilities, there is a much smaller gap between a language learner disability at the kindergarten level and a cognitively impaired student. L.S. faced challenges in third grade and there was consideration about changing placement. Supports were implemented and the behaviors faded. Then the pandemic hit, and remote learning was instituted. There was a good return to fifth grade, but behaviors returned by the end of fifth grade. By sixth grade, the cognitive gap between L.S. and other LLD students had grown.

An FBA was recommended to try and get to the root of what was causing the behavior. The behavior was preventing L.S. from remaining in the classroom.

On October 27, 2021, and November 3, 2021, Camera Hamilton, MA, Behavior Specialist, conducted an FBA. (R-20.) The FBA attributed the root cause of L.S.'s behavior to attention-seeking behaviors in all subject areas. Because of this concern, the



proposed placement offered a much lower student-teacher ratio. It was apparent that L.S.'s present placement was not appropriate, but change is not recommended without data-informed information. Parents did not request an immediate change before the evaluations were completed.

Ms. Schwartz drafted a new proposed IEP for L.S. after the reevaluation process was completed. The CST recommended a change in placement to the autism support program housed in a different middle school building. The psychiatric evaluation supported a diagnosis of autism for L.S. At the IEP meeting, there was a discussion among the CST members about changing the classification eligibility category, but the result was to keep the mild intellectual disability classification. L.S. met the criteria for autism, so it was offered as an eligibility classification. However, L.S. continued to meet the classification of mild intellectual disability. Either category was appropriate for L.S. While she could have been classified as multiply disabled, the intellectual disability appropriately related to her functioning in the classroom considering her cognitive abilities. In her expert opinion, Ms. Schwartz did not agree that classification drives placement. Classification makes a student eligible for special education. Services and programming are based on the individual student's needs. Had L.S.'s classification been changed to autism; her proposed program would not have been different.

Ms. Schwartz supported the December 17, 2021, proposed IEP (R-26) as appropriate for L.S.'s needs and offering her a FAPE in the least restrictive environment. The program had a low student-teacher ratio, where students worked at their own modified pace. There was an integrated social skills curriculum as part of the program. The students receive direct instruction and opportunities to address social situations throughout the school day. The program offered a one-teacher to two-student ratio. For every student in the class, there was an adult. Based on the recommendations in the evaluations, related services were being offered. L.S. had been receiving occupation therapy consultation, physical therapy consultation, and speech-language therapy in a group setting. An increase of the individual speech and language services was proposed. Based on her observation, Ms. Schwartz believed that the BIP outlined in the IEP could be implemented in the proposed autism class. Data collection to evaluate the effectiveness of the interventions was to be captured in fifteen-minute intervals. In the

proposed IEP, Ms. Schwartz recommended that L.S. remain in special education for all academic subjects.

The evaluations and testing were summarized in the proposed IEP. L.S.'s scores on Woodcock-Johnson and Wechsler testing were in the one percentile, which were similar results from prior evaluations.

Ms. Schwartz was aware that the parents were very unhappy with L.S.'s sixth-grade teacher. Ms. Schwartz observed Ms. Fiore Malone on multiple occasions and found her teaching to be meeting expectations. She noted that Ms. Fiore Malone was appropriate in demeanor, classroom management, and presentation of materials. The concern was that L.S. was not meeting the standards and expectations of the other students in the LLD classroom.

Prior to the meeting, the parents advised the CST that they would be bringing their advocate, Andrew Morgan. As a result, the Board had their attorney present. After discussing each evaluation, the proposed IEP was reviewed. At the end of the meeting, Mr. Morgan announced that the parents would be unilaterally placing L.S. out of district at Newgrange Academy. Ms. Schwartz was surprised by the parents' decision.

The parents were offered the opportunity to observe the district's autism program. The parents wanted their expert to observe the program. While Ms. Schwartz was responsible for getting the forms to set this up, the observation did not occur before L.S. left the district. When Ms. Schwartz received the forms for the observation, there were new COVID protocols in place that prevented outside observers from coming into the building.

On December 19, 2021, Ms. Schwartz received the letter for unilateral placement. (R-27.) The letter was brought to school by L.S., it had been placed in her backpack. Ms. Schwartz forwarded the letter to the Director of Special Education.

L.S. did not return to Beck after the winter break. Ms. Schwartz attempted to contact the parents to confirm that L.S. was attending Newgrange. Confirmation of L.S.'s enrollment in Newgrange was through the Board's attorney.

On February 2, 2022, Ms. Schwartz received a copy of Ms. Lehrhoff's Neuropsychological Evaluation. (R-12.) After reviewing the report, Ms. Schwartz believed that it corroborated the CST evaluations. Ms. Schwartz had accompanied Ms. Lehrhoff when she observed L.S. at Beck. Ms. Schwartz did not disagree with Ms. Lehrhoff's classroom observations that the pace in the LLD classroom was too fast for L.S. There was no dispute that L.S.'s placement needed to be changed. When Ms. Lehrhoff asked to review the new proposed placement at Rosa Middle School, L.S. had already been placed out of district. Ms. Schwartz reviewed the recommendations made by Ms. Lehrhoff. In her professional opinion, the program offered by the District for L.S. met those requirements.

Five evaluations and one screening were completed for L.S., prior to offering a new program and placement. While there was nothing surprising about the results, the CST did not have a psychiatric evaluation. The new information was Dr. Hewitt's Autism diagnosis. (R-24.)

There were quite a few "S12" events involving L.S. while she attended Beck. L.S.'s behaviors were discussed at the reevaluation planning meeting. Her behaviors were impacting the classroom environment, so Ms. Schwartz was focused on finding an appropriate classroom environment to reduce the behaviors. Ms. Schwartz was aware that the parents had been asked to pick up L.S. from school due to her behaviors. None of the evaluations specifically stated that L.S. could not be educated in an LLD classroom.

When L.S.'s behaviors escalated, she was removed from the situation to deescalate until she was calm enough to return to the classroom. Her desk was moved, privacy screens were erected to avoid direct contact with the student she was targeting, but the behaviors continued. There was no behavior plan enacted while L.S. remained in Ms. Fiore Malone's classroom.

By the IEP meeting, Ms. Schwartz acknowledged that there were points of contention with the parents, but the parents cooperated with the evaluation process.

Prior to the start of the school year, the parents had asked for a transition meeting. They were not granted a transition meeting but offered orientation night as an alternative. Ms. Schwartz was not aware that the parents tried to attend, but L.S. was too anxious to leave the car.

Ms. Schwartz did not make any attempt to find out about L.S.'s medication. She was only aware of medications from notes that went to the nurse.

There were twelve students in L.S.'s sixth grade class and four adults. Regardless of the program, L.S. had her own one-to-one aide. Ms. Schwartz understood L.S.'s disabilities as cognitive impairment, autism, ADHD, unspecified anxiety disorder, and sleep difficulties. She opined that classification helps gain a global understanding of the child.

Ms. Schwartz stated there were questions about the appropriateness of the placement as early as September 2021. L.S. received failing grades in four subjects. Her grades were due to lack of work completion. The other children had IQ levels in the seventies while L.S.'s cognitive levels were in the fifties. The classroom teacher brought this discrepancy to Ms. Schwartz' attention. Approximately two weeks into the school year, Ms. Schwartz called the fifth-grade case manager, Ms. Phelan, who provided some background information about a similar situation in third grade that was resolved.

Ms. Schwartz recommended the autism classroom because it had a lower student-to-teacher ratio. The pace of the instruction was more individualized, and it incorporated the social skills component.

When asked on cross-examination why none of the evaluations recommended social skills, Ms. Schwartz responded that during the FBA, L.S. was observed in the classroom. However, none of the other evaluators did a classroom observation. Ms.

Schwartz had observed L.S. in the classroom multiple times but did not do a structured formal observation.

Ms. Schwartz was not aware of the IQs of the other children in the Rosa autism problem. She acknowledged that the IQ discrepancy had caused a problem for L.S. in her LLD placement.

L.S. did not receive social skills in her LLD placement. Ms. Schwartz stated that social skills was a primary request from the parents and L.S. was having social interaction difficulties. These difficulties were not evident during fourth and fifth grade. L.S. had done very well until the last two weeks of fifth grade, when behaviors increased.

L.S.'s progress monitoring for the first half of sixth grade, mostly showed that her goals were not introduced or not applicable. When an item was marked it showed "not achieved." On her report card, she received "Fs" in all core subjects. L.S. had not been able to keep up with the pace of the work.

### **Petitioner's Witnesses**

**Janine Fiore Malone** has worked for the District for twenty-one years, the last eleven years in special education. She is certified in special education and elementary education. She taught L.S. in a self-contained LLD classroom for the first half of sixth grade during the 2021-2022 school year. There were always two educational assistants assigned to her classroom, as well as L.S.'s one-to-one aide.

L.S. struggled academically and behaviorally in Ms. Fiore Malone's class. Her behavior was not typical of the other students. She was not able to complete the work and her behaviors were not appropriate for the classroom. Ms. Fiore Malone did not believe this was an appropriate placement for L.S.

There were twelve sixth-grade students, but for certain subjects, four seventh grade students joined the class with L.S. L.S. behaviors were different from every other student in the class.

The first day of school was difficult for L.S. Although L.S. had a one-to-one aide, she was not able to help Ms. Fiore Malone with L.S.'s behavioral or academic challenges. Ms. Fiore Malone reached out to L.S.'s case manager, Ms. Schwartz, the director of special education, and the principal about her concerns.

In October and November, a behaviorist did observe L.S. in the classroom, but no behavior plan was developed or implemented. The behavior plan was discussed at the December 17, 2021, IEP meeting.

Ms. Fiore Malone taught social skills but there was no social skills curriculum. She incorporated social skills throughout the day when a teachable moment presented itself. However, because of L.S.'s behaviors, L.S. did not benefit from the social skill lessons during class. Ms. Fiore Malone agreed with Dr. Woldoff's assessment that the curriculum was too challenging for L.S., leading to frustration and anxiety. (P-114, pgs. 5671-5673.) Ms. Fiore Malone attempted to modify L.S.'s work but it did not help the behaviors.

L.S. would leave the classroom without permission or be sent from the classroom for her disruptive behavior. L.S. called Ms. Fiore Malone a drunk and a whore. She charged at a student with a pencil. She would scream and run around the room. When L.S. threatened to kill a student, Ms. Fiore Malone was required to report the threat to a guidance counselor. A write-up was required, but it was not done by the teacher. Ms. Fiore Malone never saw the actual report. L.S.'s aide would have written the anecdotal notes about the incident, but the formal paperwork is done by administration.

In eleven years of teaching, it was rare for Ms. Fiore Malone to give a special education student a failing grade. Ms. Fiore Malone could not get L.S. to produce any work, so she received failing grades in four subjects in the first marking period. (R-28.) L.S.'s behaviors overpowered her ability to do her work. This happened almost daily until December.

In December, L.S.'s demeanor changed in a positive way. She was quieter and not having outbursts. Ms. Fiore Malone brought this change to her supervisor and L.S.'s case manager. She also let the parents know that L.S. was lethargic in class. L.S. was also complaining of a belly ache. Even with her improving behaviors, L.S. could not keep up with the classroom demands.

At the beginning of the school year, Ms. Fiore Malone called L.S.'s fifth grade teacher and prior case manager because she felt that L.S.'s behaviors were omitted from the IEP. The teacher told Ms. Fiore Malone that she had seen some similar behaviors but not as frequently. In response to why the behaviors were not in the IEP, Ms. Fiore Malone was told they did not want to upset the parents. However, the teacher also said the behaviors had improved. For the academic concerns, her prior teacher thought L.S. needed more time to adjust.

According to Ms. Fiore Malone, L.S. made no reading gains. She could write a full sentence, but it lacked capitalization and punctuation. L.S. was able to solve basic addition and subtraction facts but in Ms. Fiore Malone's room, the math was beyond L.S.'s ability. She was not able to answer "wh" questions. Her behavior impeded her learning and the learning of others.

L.S.'s sixth grade IEP was dated April 26, 2021. (R-49.) L.S. came into school on day one and exhibited behaviors that impeded her learning. Ms. Fiore Malone stated that L.S.'s mother contacted her in August, before the start of school to share some strategies to help L.S.'s anxieties over transitioning. When Ms. Fiore Malone experienced the behaviors, she contacted the parents, but they had no additional information to share.

Ms. Fiore Malone talked to the case manager about an IEP meeting to change the goals. She thought the goals were too high. Ms. Schwartz suggested more time was needed for adjustment. She also asked for support because L.S.'s behaviors were adversely impacting the other students in the class. Ms. Fiore Malone also sought help from L.S.'s case manager on how to record the goals and objectives from the IEP. (R-29.)

On one occasion, L.S. tried to stab Ms. Fiore Malone in the arm with a pencil. As a result of the incident, Ms. Fiore Malone sent an email to her supervisor, L.S.'s case manager, and administration. When no one responded, her union advised her to complete a report with the security officer for Beck. Nothing moved forward, the report was for documentation. She was also told by her principal, that administration would handle contacting the parents.

Even with a behavior plan, Ms. Fiore Malone believed L.S. would have struggled academically in her classroom. L.S.'s academic level was kindergarten to first grade.

**Jaime Lehrhoff** is an LDTC and the owner and director of Livingston Educational Center, LLC. Her company provides tutoring services, evaluations, and private testing. She partners with a psychologist, Dryden Watner, Ph.D., to perform neuropsychological evaluations and testing for a company called, Better Everything. Currently, she is working part-time for Oceanport School District as a LDTC, doing case management, evaluations, and preparing IEPs. Ms. Lehrhoff testified as an expert in the fields of LDTC, reading specialist and consultant, education expert, education of learning-disabled children, and special education programming. (P-121.)

L.S.'s parents hired Ms. Lehrhoff to evaluate L.S. and prepare a report. (R-12.) For L.S.'s evaluation, Ms. Lehrhoff worked with Dr. Watner. They performed a record review of all the information they had been provided. Dr. Lehrhoff observed L.S. during a math and reading lesson at Cherry Hill. In her opinion, the assignments were too high functioning for L.S. She was not able to process the lessons. L.S. appeared to spend all her time trying to copy from the board. Ms. Lehrhoff did not observe any behaviors but noted that L.S. was a little upset just trying to keep up.

Ms. Lehrhoff administered the Wexler Individual Achievement Test, because the District had just done the Woodcock Johnson. Her academic testing revealed very low scores and Ms. Lehrhoff sensed L.S.'s frustration during moments of testing. As a result, she administered the ADOS2, which is geared to rule out whether a student is autistic. Dr. Watner's testing showed that L.S. has autism.



Dr, Lehrhoff used TILLS to test language and literacy skills. L.S. struggled with the combination of those skills, which showed she needed foundational basic skills in reading and math. She needs basis skills in social, emotional, language functioning, and communication.

The WIAT4 testing showed how hard it was for L.S. to complete a thought and write a sentence.

In testing for comprehension and fluency, L.S. read a passage aloud. When the passage was too hard for her, L.S. started to make up the story. This showed Ms. Lehrhoff that she wanted to persevere, but she could not read the passage.

In mathematics, Ms. Lehrhoff highlighted that L.S. could barely add and subtract, which explained why she could not keep up with her classroom math lesson on understanding value using unit rates. The lesson was way above her level, leading to frustration.

Based on her observation and testing, Ms. Lehrhoff believed the placement in the sixth grade LLD class was inappropriate. The pacing was too fast for L.S. to follow and the tasks were too challenging. Her frustration led to acts of defiance. However, on the day Ms. Lehrhoff observed, L.S. was able to be redirected with positive encouragement.

L.S.'s reading level was basically that of a first grader. The classroom book was considered a fifth/sixth grade book. The peers in L.S.'s class appeared to be able to do the work. L.S. received Fs on her report card for the first marking period. For a special education student, failing grades speak volumes about the appropriateness of the work.

In critiquing the December 17, 2021, proposed IEP, Ms. Lehrhoff criticized the lack of specifics as to programming. The IEP did not provide the reader with enough information as to how the goals would be achieved. However, Ms. Lehrhoff acknowledged that in the field of special education, the actual methodology being used in the classroom is left to the discretion of the teacher and would not be set forth in an IEP.

Ms. Lehrhoff believed that L.S.'s classification should have been multiply disabled because L.S. has multiple disabilities.

On April 7, 2022, Ms. Lehrhoff observed the proposed autism class and documented her observation in a second report. (R-37.). There were five students, four aides, and one teacher in the class. Ms. Lehrhoff observed multiple activities. Every student's program was based on the student's own level and led by an adult. It was a noisy classroom, but very organized. Although Ms. Lehrhoff thought the program was well run, it was not appropriate for L.S. because it was too restrictive. Despite her criticism, Ms. Lehrhoff had recommended similar programming with the need for support in her Neuropsychological Evaluation. (R-12.)

Ms. Lehrhoff opined that L.S. is very social. The autism program provided no interaction with other students. Ms. Lehrhoff believed L.S. needed exposure to a wide range of students to see what good communication looks like and what socialization should be.

Ms. Lehrhoff also criticized the proposed IEP because it did not adequately address L.S.'s speech and language deficits. The proposed IEP called for three individual and three group sessions a month and Ms. Lehrhoff recommended at least three sessions a week. (R-26.)

On April 11, 2022, Ms. Lehrhoff observed L.S. at Newgrange and documented her observation in a report. (R-37.) Ms. Lehrhoff saw a happy confident student, who could independently walk to her different classrooms and to gym. The aide was in the background. At Newgrange, L.S. has freedom to walk from class to class, like any other middle school student. She would not have that autonomy in the autism class in District. She looked confident which contributed to her success. She was compliant, independent, and learning.

The autism class in District used a reading program called Edmark, which is a sight word-based program. They also used Basal, which encompasses everything from

reading comprehension to basic reading skills. Ms. Lehrhoff did not agree that Edmark was appropriate because L.S. would struggle to remember sight words. This does not teach her how to read, it teaches her how to memorize, which is a weakness for L.S. Ms. Lehrhoff admittedly did not have familiarity with the Basal reading program.

At Newgrange, L.S. receives a Wilson program that is taught in a systematic multi-sensory way. L.S. was assessed using the Wilson Assessment for Decoding and Encoding (WADE). L.S.'s scores had been stagnant but started to progress by September 2023.

Newgrange also used visuals, which was helpful for L.S. She could check tasks off her list. It also helps with her anxiety, when she can see that a difficult task was almost over.

Ms. Lehrhoff believed that Newgrange was very appropriate for L.S. and constituted the least restrictive environment. However, she acknowledged that under the regulations, Newgrange is the most restrictive placement for L.S. The autism class was housed within the Rosa Middle School, which also serves general education students. Newgrange is populated exclusively by classified students.

On cross-examination, Ms. Lehrhoff agreed that because the LLD classroom had proven academically overwhelming, it was reasonable to propose a new program with an incredible amount of structure. As Ms. Lehrhoff noted the students in the autism class required a tremendous amount of support both academically and behaviorally. She did not disagree that L.S. fit within this category of students.

**Dr. Sarah Woldoff** is a licensed psychologist specializing in neuropsychology. She has a national credential that allows psychologists to apply and practice in multiple states (PSYPACT). She is also a BCBA. (P-143.) Dr. Woldoff testified as an expert in autism, behavior analysis, neuropsychology, program evaluation and program design in autism.

Dr. Woldoff first evaluated L.S. in 2014 while she was working at the Center for Neurology and Neurodevelopmental Health (CNNH). She started providing weekly counselling sessions to L.S. in 2020. Dr. Woldoff currently sees L.S. once every three weeks, with the goal of further reduction. Therapy was weekly during the height of L.S.'s anxiety in the summer and fall of 2021. After four months at Newgrange, L.S. had less anxiety, so her therapy sessions were able to be reduced.

At Newgrange, L.S. receives a social skills curriculum. The skills learned in school are reinforced in L.S.'s sessions with Dr. Woldoff. This reinforcement between private therapy and school therapy did not happen when L.S. was at Cherry Hill.

As L.S.'s therapist, Dr. Woldoff saw first-hand the difficulties L.S. endured upon entering sixth grade at Beck. Dr. Woldoff wrote two psychiatric clearances for L.S. to return to school after she had been removed for homicidal threats. After those events, Dr. Woldoff evaluated L.S. and determined that it was safe for her to return to school.

After attending a zoom meeting with the parents, the teacher and members of the CST, Dr. Woldoff followed up with a letter, dated September 23, 2021. (P-114.) Dr. Woldoff wanted to share her insight and hoped that the private therapy sessions would be reinforced in school in a social skills class. She advocated for an immediate FBA and training for L.S.'s one-to-one aide. Her preference would have been a replacement of the aide with an RBT. She believed that these changes could have been implemented immediately.

L.S.'s anxiety started before her transition to middle school. She made recommendations for L.S. to have frequent visits to the school over the summer and meet the teacher. These visual images were needed for L.S. to construct a story board with pictures as a coping mechanism. None of that happened over the summer.

At the zoom September meeting, Dr. Woldoff got the chance to meet Ms. Fiore Malone. Dr. Woldoff's impression was that Ms. Fiore Malone personalized L.S.'s behavior, which was inappropriate when teaching a child with disabilities.

On December 1, 2021, Dr. Woldoff wrote a letter addressed “To Whom It May Concern,” because L.S. was in crisis. (P-95 at 5173.) L.S. even hit Dr. Woldoff which was something she had never done. Afterwards, she laid in a ball on the floor hysterically crying. During therapy sessions, L.S. replayed scenes in her head from events of the school day. Dr. Woldoff wrote the letter because of what she was seeing and hearing from L.S. on a weekly basis. L.S. was traumatized to the point of psychosis. Her lack of social skills kept her in a constant state of fight-or-flight. Dr. Woldoff believed the school had become a harmful environment for L.S.

Dr. Woldoff described Beck Middle School as a discriminative stimulus. It had a triggering effect on L.S. Even after transferring schools, L.S. sought assurance from Dr. Woldoff about not having to return to Ms. Fiore Malone and Beck Middle School.

Despite her concerns about the LLD classroom, Dr. Woldoff did not believe an autistic classroom was appropriate for L.S. While L.S. shows features of an autism spectrum disorder, she is very verbal, social, and has great language skills. Dr. Woldoff believed L.S. needed to be around peers that have a higher linguistic ability so L.S. could scaffold some of those skills. Plus, L.S. does not have just one disability. For L.S., Dr. Woldoff did not believe L.S. needed a ratio of five students to five staff members. She believed L.S. needed specific programming with exposure to peers that have greater skill levels than her. The programs need to target her deficiencies.

Dr. Woldoff is familiar with Newgrange. She believes it is appropriate for L.S. because the programming adapts to L.S.’s needs. Since L.S. transferred, Dr. Woldoff has personally noticed L.S.’s reading growth. Previously, L.S.’s reading was so delayed, Dr. Woldoff relied on videos. Now, Dr. Woldoff can use books and worksheets in her sessions, and L.S. is able to read along with her. L.S.’s confidence is building which shows in how she talks about school and expresses her thoughts. Dr. Woldoff has also seen improvement in L.S.’s writing. Her writing is legible, and her sentences make sense.

Dr. Woldoff is familiar with the Social Strides social skills program at Newgrange. This program is geared for children with high functioning autism but also for children with

social-emotional challenges or ADHD. This is an empirically driven nationally recognized program.

The proposed autism program at Rosa provided for a social skills program. The program was described in the proposed IEP (R-26) as follows:

“The autism support program will also provide increased instruction in social skills and has opportunities to use those skills embedded throughout the day. This will help L.S. increase positive prosocial interaction skills.”

Dr. Woldoff considered the statement in the IEP to be vague, lacking in specific goals and objectives and did not articulate a program. She prefers detailed IEPs.

In comparing the IEP created by Newgrange, the goals and objectives are similar, except for the identification of the Social Strides, social skills program. Dr. Woldoff opined that L.S. is making meaningful progress at Newgrange, while admitting that the IEP does not create the level of detail she prefers.

Dr. Woldoff observed L.S. on four occasions at Newgrange. Two observations were specifically for L.S. and the other two happened when Dr. Woldoff was observing another student, but she checked-in on L.S.

After the initial meeting on September 15, 2021, Dr. Woldoff did not believe that her help was welcomed by Cherry Hill. She did not observe the proposed autism program. Yet, she described the program as one size fits all.

Dr. Woldoff was not aware of L.S.’s medication and she does not prescribe medication. She believed that L.S. was prescribed Adderall for her ADHD. On cross-examination, Dr. Woldoff was asked to review the psychiatric evaluation prepared by Dr. Gandhi on October 5, 2021. (P-15.) In the report, Dr. Gandhi quoted Dr. Woldoff when he stated that “L.S. has tried many medications.”

Using her therapy hat, Dr. Woldoff noted that the extreme behaviors that were present when L.S. was in sixth grade at Beck are no longer present in her new environment. She based her opinion on L.S.'s clinical presentation.

**Dana Lynn Morris** testified as an expert in special education. Mrs. Morris is very familiar with L.S. based on her observations of L.S. at Newgrange and her weekly telephone calls with L.S.'s parents. If L.S. has a problem during the school day, she knows she can go to Mrs. Morris. L.S. also interacts with Mrs. Morris because L.S. is part of a group of students who do the morning announcements.

For her Wilson reading program, L.S. is in a class with one other student, every day for forty minutes. L.S. uses a metacognitive strategy for reading because she struggles with comprehension. All subjects utilize the step-by-step approach, charted on a card pyramid. (P-73, p. 3948.) L.S. uses her card pyramid to create a paragraph.

Under the Framing Your Thoughts program, L.S. has made significant progress in sentence writing. She can now write three complete sentences.

Social skills are embedded throughout the school day. During the period of gym and health, the students have a social skills class taught by a social worker once a week for forty minutes. In addition, Social Strides is taught twice a week for thirty minutes by the homeroom teacher. (P-68.)

Mindfulness is a period where students are taught calming techniques focused on breathing. Lunch can be overstimulating, so this is a way for L.S. to refocus. There are two homerooms that mix for specials. L.S. has four students in her homeroom, language arts, social studies, and science classes. In math and Wilson reading, L.S. is one on one with the teacher. In Wilson, L.S. started at book one subset 1.1 and progressed to Book 3.

When L.S. started she had basic skills but lacked confidence. She was very fearful and anxious about leaving Newgrange. Utilizing a social skills program called the Zones

of Regulation has helped L.S. identify her emotions using colors. She is learning useful strategies to help regulates herself when she is overanxious or dysregulated.

L.S.'s aide at Newgrange, Ms. Kim, is a special education teacher. She is a calming voice that L.S. can turn to for support.

**Monica Ehring Bruder** testified as an expert in special education and social skills training and instruction. (P-119.) At Newgrange, Ms. Bruder is a teacher and the social strides coordinator.

She discussed an executive functioning strategy of “do, ready, done” which helps L.S. visualize the steps. This has proven very effective. In social strides, L.S.'s goal was to make friends. All the social skill lessons are enforced throughout the day.

The first time Ms. Bruder taught L.S. was during ESY in 2022. She recalled that L.S. had a positive ESY experience. At the start of the 2022-2023 school year, L.S. was assigned to Ms. Bruder's homeroom, which was a class of eight students. As the homeroom teacher, Ms. Bruder taught L.S. Social Strides, language arts, and science class. As the school year progressed, L.S.'s anxiety behaviors started to accelerate and L.S. was not doing as well towards her social skills' goals. This prompted the change to a new classroom. In January 2023, Newgrange placed L.S. in a new homeroom with only four students. Newgrange adjusted L.S.'s placement to accommodate her needs. When L.S. started the seventh-grade school year in the larger class, she would perseverate and become anxious. Some of the students in the original placement had strong personalities which did not support L.S.'s ability to manage her anxiety. L.S. had difficulty regulating her behavior, but now in the smaller class, she can use her tools and strategies to help her cope.

Since coming to Newgrange, L.S. has made friends and has a boyfriend. Ms. Bruder considered that to be socially good for L.S.

**Melissa Graham** is a certified speech and language specialist. She owns and operates NJ KIDZ, LLC. For approximately three years, Ms. Graham worked as an



independent contractor for Cherry Hill. She is also certified in Social Thinking Level 1, a social skills program. She is a member of the American Speech and Hearing Association (ASHA). (P-144.) Ms. Graham testified as an expert in speech and language.

When L.S. was only four years old, she began working with Ms. Graham for speech and language therapy. Their relationship continued through April 2022.

From September through December 2021, L.S. had approximately twenty-two therapy sessions with NJ KIDZ, LLC. Of those time, Ms. Graham saw L.S. for twelve of those visits.

In September 2021, when L.S. was at Beck, Ms. Graham noticed escalating anxiety but also aggression, which was a new behavior. She had extreme difficulties and anxiety with transition. It became a struggle for L.S. to transition from her car into the clinic. Once in the building, L.S. refused to enter the treatment room. These were familiar spaces for L.S. For about seven sessions, they just worked on getting L.S. into the treatment room. Nothing else was accomplished.

Ms. Graham utilized strategies to have L.S. voice her feelings. She gave her paper and pencil to draw about an experience. L.S. verbalized that she was not happy at school, and she was sad. She stated that her teachers yell at her. It was a hurdle getting L.S. to express her emotions. The behaviors were new. Ms. Graham was unable to focus on pragmatic language and speech skills because of the behaviors.

On October 12, 2021, Ms. Graham sent an email to Ms. S. to let her know what L.S. had expressed during their session. L.S. wrote about Ms. Fiore Malone. (P-94, pgs. 5170-5172.) This was the first time Ms. Graham and L.S. were able to be in the room together without L.S. eloping or engaging in behaviors, so Ms. Graham suggested that L.S. write about her feelings.

Ms. Graham had tried to help L.S. with her transition to Beck without success. She also worked with the family regarding L.S.'s transition to Newgrange. L.S.'s only had a short adjustment period for Newgrange. By the third week, Ms. Graham was able to

return her focus to L.S.'s goals for reading comprehension, cognitive skills, and pragmatic language.

**Mrs. S.** testified that in sixth grade, L.S. was taking Adderall but then her doctor added Abilify. Abilify was added in the middle of November of 2021. L.S. had trouble with the extended-release Adderall, so her doctors switched her to regular Adderall but added Abilify.

Mrs. S. first raised concerns at the annual review on April 26, 2021, about L.S.'s transition to sixth grade. (R-49.) L.S. started to get nervous. She complained of stomach aches, and she was not sleeping. Mrs. S. asked Ms. Phelan about touring Beck Middle School in the summer or meeting with her teacher, but her requests were denied.

After receiving the welcome letter from Ms. Schwartz on August 16, 2021, Mrs. S. emailed Ms. Schwartz and advised her of their concerns and L.S.'s anxiety. Ms. Schwartz responded with information about the new student orientation. (P-87, pgs. 4826-4828.)

On August 31, 2021, the night of the orientation, L.S. was so paralyzed with fear she refused to leave the car. L.S. did not act out, she was just afraid to get out of the car. The family sat in their car for the duration of the orientation event.

The first day of school did not go well. L.S.'s teacher removed her from the classroom due to her behavior. L.S. was sent home from school between fifteen and twenty times from September through December 2021. Yet, the parents only received one written notification from the school. Her behaviors varied from elopement to threatening other students, cursing, and screaming.

Within two weeks, Mrs. S. requested a meeting to discuss their daughter's extreme behavior and her distress. Thinking it would be beneficial, the parents brought Dr. Woldoff to the meeting. Dr. Woldoff had been treating L.S. for years and knew her the best. They wanted to collaborate with the teacher and CST. The meeting was via zoom on September 15, 2021. Dr. Woldoff, the parents, Ms. Schwartz, and Ms. Fiori were all present. Mrs. S. sensed that Ms. Fiori and Ms. Schwartz were both angry. Ms. Schwartz

mentioned S12 violations which pertain to homicidal threats. They did not seem concerned about supporting L.S. When Dr. Woldoff asked about whether the paraprofessional would receive training, she was met with a decisive no. Dr. Woldoff asked about data collection and the District was receptive to that suggestions. Dr. Woldoff wanted to observe the classroom to gain some insight, but that request was denied. Mrs. S. felt that Ms. Fiore Malone acted like a victim and showed no concern for L.S.'s distress. She claimed that Ms. Fiore Malone yelled at them about withholding information from the IEP about L.S.'s behavior issues. According to Mrs. S., the meeting had not been helpful and there was no plan.

Initially, Mrs. S. believed that Ms. Fiori Malone was not an experienced special education teacher. The academic work was way beyond L.S.'s ability. She was in a class of twelve boys. There was no one from her previous school in her class. Ms. Fiore Malone did not seem to understand that L.S.'s behavior was related to her anxiety.

L.S. was defeated. She could not do anything right. She had such a hard time, just trying to keep up with a fast passed curriculum that was way above her head.

On October 29, 2021, at the end of the school day, the vice principal called Mr. S. to tell him that a police report had been filed against their daughter by the Cherry Hill Police. Apparently, the incident occurred the day before, but this was the parents first notification. The vice principal claimed to have no other information. Mr. S. contacted the Cherry Hill Police Department and the Prosecutor's Office. She gained no further information. They were terrified. Despite repeated questions, they received no answers until during this hearing.

On October 31, 2021, the parents wrote a letter because of all that their daughter had endured. (R-19.) Despite outlining eight points of contention, the District offered no substantive response.

The IEP meeting was scheduled for December 17, 2023. The parents had received copies of the evaluations but not a draft IEP. Mrs. S. had many questions about the proposed program that could not be answered because the teacher of the program

was not present. Mrs. S. asked Ms. Schwartz to explain their rationale for placing L.S. in the autism class. Her only response was lower student to teacher ratio. She did not explain that it was one teacher, and the rest of the staff were paraprofessionals. There was no response to the request about social skills programming. No response to the parents' questions about reading or math programs. Mrs. S. learned there would be no mainstreaming. She would be in the same classroom all day. There was an FBA, but no plan to address her emotional state or provide counseling. The parents had multiple concerns that were not addressed. None of the parents' concerns were put into the IEP. (R-26.) They asked to see the proposed program. Initially, Ms. Schwartz stated she would send the paperwork home that day. The paperwork was received on December 23, 2021, the last day of school before the winter break, defeating any chance of observing the program.

The parents wanted to make sure that L.S. would be able to interact with her classmates. They were also concerned that L.S. would be educated properly using the right programs to help her succeed. Mrs. S. also wanted to gauge the temperament of the staff, given her daughter's recent experience. The intent was to view the program on the Monday following Friday's IEP meeting. The school's failure to provide the forms denied them that access.

At the conclusion of the meeting, the parents, through their advocate, gave notice of their intention to unilaterally place L.S. at Newgrange. The IEP meeting and the draft IEP provided very little information about the proposed program. They were not willing to accept the program without observing it. Mrs. S. testified that their minds were not made up. They were willing to keep L.S. in District in an appropriate program.

On June 9, 2022, Mrs. S. visited the proposed classroom. The classroom had five or six students, four paraprofessionals and one teacher. The students were low functioning. They were very noisy. There was vocalizing, stimming, flapping, and perseverating, while the teacher was attempting to teach. Mrs. S. thought the social skills lesson was very young. The teacher's son, who appeared to be about sixteen was sitting in the classroom. One student kept yelling. The aide appeared to lack training on how to redirect and the teacher never intervened. This was distressing for Mrs. S. to watch.

Mrs. S. noticed that there was nothing hanging on the walls. There was no evidence of any academic work by the students. There was a big interactive sensory gym in the middle of the classroom. It did not make sense to Mrs. S. to have that gym taking up valuable classroom space.

Mrs. S. did not feel this was an appropriate placement for her daughter. The students were micromanaged, with no independence. It was hard to tell if the students were verbal. There was no interaction between the students. L.S. is highly verbal and very friendly.

Since attending Newgrange, L.S. has made so many positive changes. She has friends and can initiate conversations. She is considerate of other's feelings. She introduced herself to new neighbors across the street and has become friends with the family and their daughter. Her social skills are improving because the skills are reinforced throughout her day. L.S. uses those skills at home and in the community. Her anger and aggression have dissipated significantly. Her moods are more consistent with those of a thirteen-year-old girl. She can regulate her emotions by using the tools that she has learned. She can even explain the different zones of regulation.

She still has anxiety related to the Cherry Hill schools. The parents do everything they can to avoid driving past the schools.

L.S. has never been sent home from Newgrange. There have never been any screaming incidents. L.S. loves school and had perfect attendance during the 2022-2023 school year. She participates in extracurricular activities at Newgrange. She is in the baking club, intramural sports, and the theater arts program.

L.S. is reading recipes, directions, and fliers sent home from school. She can fill out forms. She can count basic money.

Mrs. S. described L.S.'s experience at Cherry Hill as a fire pit of hell. Newgrange gave them back their daughter.

## **Credibility**

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility conclusions "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

In determining credibility, I am aware that District employees support the programs they developed for their student and would represent that the program provided L.S. with FAPE. Ms. Phelan testified as an expert witness in the field of special education programming and special education. Ms. Annese testified as expert witnesses in special education for respondent. Ms. Phelan was L.S.'s case manager from kindergarten through fifth grade. She was part of the CST responsible for drafting L.S.'s IEPs, placing and keeping her educational programming in an LLD classroom, and deciding on her classification. Ms. Phelan also performed a formal evaluation of L.S. in 2017, when L.S. was in second grade. She was familiar with L.S.'s cognitive ability. Ms. Annese was also familiar with L.S. as a student with cognitive disabilities having taught her in first, fourth, and fifth grades. Both experts had a long history with L.S. and her parents. I accept Ms. Phelan's testimony that in adherence to the collaborative process, in first through fifth grades, the parents' sensitivities were considering factors in L.S.'s classification as Mild Cognitive Impairment, her placement in an LLD classroom, and mainstreaming decisions. Ultimately, CST decisions were made concerning classification, placement, and programming. I also accept Ms. Annese testimony as to L.S.'s meaningful progress towards goals in fourth and fifth grades.

However, Ms. Phelan and Ms. Annese were both aware of L.S.'s difficulties with anxiety and behavior in transition. Ms. Phelan recognized that third grade was particularly

difficult. L.S.'s behaviors interfered with learning in third and fourth grades. Through the utilization of a BCBA and an RBT the behaviors faded by January 2020 of fourth grade. L.S. did not have behavior issues that interfered with her education in fifth grade, but the behavior had resurfaced in the last few weeks of school. Moreover, at the April 24, 2021, IEP meeting, the parents alerted the CST to L.S.'s increasing anxiety and need for a transition plan for sixth grade. Given L.S.'s known patterns, sixth grade was going to be a difficult transition for L.S. Not only was she going to a new school, but she would again be among the youngest students in the class. Ms. Phelan recognized the correlation between L.S.'s behavior in third grade when L.S. moved from a multi-grade class with students who were younger than her to adjusting to a setting with students who were older than her. She acted out while processing this adjustment. This gap between L.S.'s cognitive ability and her grade level would be even more pronounced in middle school. Given Ms. Phelan's expertise in special education programming, I was not swayed by her testimony that the CST did not see any reason to change L.S.'s IEP from basically the same IEP that she had in fifth grade. I was also not swayed by Ms. Annese's testimony supporting the sixth grade IEP because she was L.S.'s teacher in fourth grade when the behaviors were still present and she was aware of the behaviors resurfacing at the end of fifth grade. There was no credible testimony from either expert explaining why the IEP for sixth grade failed to include appropriate behavioral interventions in the IEP or social/emotional/behavioral support given L.S.'s known history when transitioning to a higher grade and the presence at the end of the year of returning behaviors.

L.S.'s case manager for sixth grade, Ms. Schwartz, testified as an expert in school psychology and special education for the District. Ms. Schwartz testified in a professional, clear, and direct manner. Despite her expertise, her email response to Mrs. S.'s request for help with her daughter's anxiety in August and transition to sixth grade was not satisfactory. Despite the warning signals, the atypical first day behavior, the escalating behaviors, and the inappropriateness of the placement, Ms. Schwartz had no adequate response, other than to maintain status quo until the December 17, 2021, IEP meeting. Ms. Schwartz also provided no satisfactory response to the failure in scheduling an observation of the autism placement.

Ms. Fiore Malone was professional in her testimony and assistive in portraying L.S.'s experience in her sixth-grade classroom.

Ms. Lehrhoff testified in a professional, clear, and direct manner regarding her evaluation process and recommendations. Her observation of the sixth-grade classroom at Beck is not in dispute. Ms. Lehrhoff's testing scores of L.S.'s cognitive abilities supported the results of the District's evaluations. In her independent evaluation report, she also recommended a great deal of support in all areas with direct teacher instruction in small groups. Ms. Lehrhoff's critique of the proposed autism program would have been more meaningful had she been able to observe the autism program, prior to the unilateral placement.

Dr. Woldoff and Ms. Graham were both expert witnesses for petitioner. Their testimony was particularly insightful because of their years of working with L.S. They both knew her well and worked with her during her transition to sixth grade at Beck. In their expertise, they were also able to present a picture of L.S. before and after Newgrange.

Mrs. Morris and Ms. Bruder testified in a professional, clear, direct, and enthusiastic manner regarding L.S.'s time as a student at Newgrange. They believe in their program and its benefit for L.S. They were honest about difficult behaviors that are still present that interfere with L.S.'s learning. With supports in place, L.S. is making reading and math progress and showing social and emotional growth.

Mrs. S.'s testimony was heartfelt, sincere, and believable. I am aware that Mr. and Mrs. S. are loving parents, who only want the best for their daughter.

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 additional **FACTS**:

In accordance with the undisputed expert testimony of Ms. Phelan and Ms. Annese, L.S. made meaningful progress in the least restrictive environment appropriate to her needs in light of her intellectual capabilities during fourth and fifth grades.



At the April 24, 2021, IEP meeting, the CST offered an IEP for sixth grade at Beck Middle School, that was similar to L.S.'s fifth grade IEP (R-11), but with a decrease in related services. (R-49.) For sixth grade, L.S. would receive group speech and language therapy three times a month for twenty-five minutes, with no individual speech-language therapy. There was no mention in the IEP about L.S.'s behaviors upon transitioning or her parents' concerns with her increased anxiety. The parents requested the opportunity to visit Beck and this request was listed on the IEP. The District presented no justification for refusing this request. The CST was aware of L.S.'s difficulties with transition.

L.S.'s longtime psychologist, Dr. Woldoff, and speech and language therapist, Ms. Graham noticed alarming, and unusual behaviors during the summer before sixth grade. Both recommended visualization as a technique to help reduce L.S.'s anxiety. Mrs. S. advised Ms. Schwartz of her daughter's anxiety. The District has provided no justification for their refusals to accommodate the parents' reasonable requests to help L.S. transition. Ms. Schwartz was aware that L.S. had faced similar situations in the past and recognized that by sixth grade, the cognitive gap between L.S. and other LLD students had grown.

L.S.'s placement in Ms. Fiore Malone's sixth grade classroom consisted of twelve to thirteen students. All the other students had FSIQ's in the seventies range and L.S.'s FSIQ was only in the fifties.

The meeting convened on September 15, 2021, failed to add any additional support for L.S. to address the behavior concerns. Ms. Schwartz did not offer anything more than the group speech language therapy already in L.S.'s IEP. (R-49.) There was no consideration, despite past success with an RBT, to provide L.S. with an RBT.

The incident that required a clearance letter from Dr. Woldoff for L.S.'s return on September 27, 2021 (R-17), should have prompted the CST to conduct an FBA. It took an additional thirty days for Interactive Kids to start their observation of L.S. in the classroom. (R-20.) Meanwhile, L.S. had been removed from school twelve times in only two months.

After waiting thirty days, to see if L.S. would adjust, the District knew by September 30, 2021, that the placement was inappropriate under the IEP. (R-49.) Other than convening a meeting on October 15, 2021, to authorize evaluations, the District did nothing. They did not increase or add services. Ms. Schwartz mentioned that counselling was being provided by Eileen Conover, the Student Assistance Counselor, but there was nothing in writing to the parents about counselling services or an amendment to the IEP to include such services. There was no consideration to increase the social skills that were only being provided through the speech-language therapist, three times a month for twenty-five minutes.

In desperation the parents wrote to the school on October 31, 2021, specifically requesting counselling for L.S. and a curriculum based social skills group. While such a letter deserved a response and a reaction, the District remained silent.

The CST finally convened an IEP meeting on December 17, 2021, and proposed placement in the autism program at Rosa. (R-26.) The timing of this IEP meeting left no room for the parents to observe the program or for meaningful discussions about the IEP. In accordance with N.J.A.C. 6A:14-4.1(k), “[p]rior to the implementation of the IEP, the district board of education shall provide the parent with the opportunity to observe the proposed educational placement.” After all that had occurred, the only spokesperson about the proposed program was Ms. Schwartz, who had only observed it on two occasions. Ms. Schwartz could not provide the parents with the details and assurances they required.

### **LEGAL ANALYSIS AND CONCLUSIONS OF LAW**

This case arises under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities. Receipt of those funds is contingent upon a state’s compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). As a recipient of Federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities will receive FAPE. 20 U.S.C. §1412. FAPE includes Special

Education and Related Services. 20 U.S.C. §1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d).

Where parents have unilaterally placed their child, it is well established that the appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Rather, the pertinent inquiry is whether the school district offered an IEP reasonably calculated to enable the student to make progress appropriate in light of her circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. \_\_\_\_ (2017); 137 S. Ct. 988; 197 L. Ed. 2d 335

In considering the appropriateness of an IEP, case law instructs that actions of the school district cannot be judged exclusively in hindsight. The appropriateness of an IEP must be determined as of the time it is made, and the reasonableness of the school district's proposed program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564–65 (3d Cir. 2010) citing Susan N. v. Wilson Sch. Dist., 70 F. 3d 751, 762 (3rd Cir. 1995). An IEP is “based on an evaluation done by a team of experts prior to the student’s placement.” Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3rd Cir. 1993) (emphasis in original). Thus, “in striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable [when] the IEP was drafted.” Ibid. Our courts have confirmed that “neither the statute nor reason countenance ‘Monday morning quarterbacking’ in evaluating a child’s placement.” Susan N., 70 F.3d at 762, citing Fuhrmann, 993 F.2d at 1040.

The Third Circuit in Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 247 (3d Cir. 1999) stated that the appropriate standard is whether the IEP offers the opportunity for “significant learning and confers meaningful educational benefit.” The benefit must be meaningful in light of the student’s potential; the student’s capabilities as to both “type and amount of learning” must be analyzed. Id. at 248. When analyzing whether an IEP confers a meaningful benefit, “adequate consideration [must be given] to . . . [the] intellectual potential” of the individual student to determine if that child is receiving

a FAPE. Ibid. The IDEA requires an IEP based on the student's needs and "so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate." Scott P., 62 F. 3d at 534.

The District argued that the record does not support that the District knew or should have known that the program it offered for L.S. was inappropriate on April 24, 2021. I do not agree. Ms. Phelan and Ms. Anesse were very familiar with L.S.'s history of difficulties with transition. Although it is undisputed that the behaviors had improved in fifth grade, there was reason to suspect that they would return for sixth grade. Ms. Anesse acknowledged that the behaviors returned at the end of fifth grade. Moreover, the parents put the IEP team on notice that L.S.'s anxiety was increasing. Her warning was disregarded or ignored. There was no transition plan in the IEP to ensure a smooth transition to sixth grade in a new building. The District failed to offer a summer tour, a meet-and-greet with the case manager, counselor, and teacher. There was nothing in the IEP that would have alerted the new CST about L.S.'s extreme reactions to transition. There was no behavior, social, or emotional support embedded within the IEP, anticipating L.S.'s emotional needs. Based on what was known at the time the IEP was offered, I **CONCLUDE** that the IEP team did not consider the consistency of the location, changing schools for sixth grade, the concerns of the parents about increased anxiety, or the functional needs of the student with high anxiety and low cognitive abilities. I **CONCLUDE** that the April 26, 2021, IEP for sixth grade did not adequately respond or address all L.S.'s needs and therefore did not deliver a FAPE.

There is no dispute that the programming and placement under the April 26, 2021, IEP proved inappropriate upon implementation. The District staff's failure to immediately address the student's needs and the parents' concerns resulted in loss of learning, worsening behavior, and emotional distress to L.S. At the very least, the District could have engaged an RBT, increased supportive services, and added social skills. The District agreed with petitioner's expert, Ms. Lehrhoff, that the pace of educational instruction in Ms. Fiore Malone's sixth grade classroom was too fast for L.S., which further caused anxiety. While L.S. remained in that classroom, the record does not show whether modifications were made to meet L.S. at her level. Although the evaluations were appropriately done, there was nothing that prevented District staff from responding to the

parents' concerns and addressing L.S.'s needs while gathering the information needed to propose a new program and placement. Therefore, I **CONCLUDE** that the District failed to adequately respond to the inappropriate IEP offered to L.S. at the start of sixth grade.

The District ultimately responded by convening an IEP meeting on December 17, 2021, and offering an autism program that provided a low instructor/student ratio, individualized instruction, structure and behavioral support. (R-26.) The parents required more information about the proposed program that could not be answered during the IEP meeting. They asked for the opportunity to observe the program with their expert. In accordance with N.J.A.C. 6A:14-4.1(k), the District was required to provide the parents with the opportunity to observe the autism program, prior to implementing the IEP. The parents did not have this opportunity. The new program was scheduled to start on January 3, 2022. (R-26.) Holding the IEP so close to the start of the holiday break, increased the pressure to quickly provide the access for the observation. It would have been so easy to email the forms on Friday, December 17, 2021. The District's lack of preparedness denied the parents the opportunity to observe the program.

N.J.A.C. 6A:14-2.7(k) provides that procedural violations deny FAPE only if the violations impeded the child's right to an appropriate education; impeded the parents' opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. G.N. and S.N. on behalf of J.N. v. Livingston Bd. of Educ., 2007 U.S. Dist. LEXIS 57081 at \*21-22 (D.N.J. 2007); see also Coleman v. Pottstown Sch. Dist., 2014 U.S. App. LEXIS 17685 \*16 (3rd Cir. 2014). Here, the failure to allow the parents to observe the program prior to its implementation clearly impeded their opportunity to participate in the decision-making process regarding the proposed autism program. I would also add that the District controlled the timing. The December 17, 2021, IEP meeting provided no time for meaningful collaboration or discussions about the revised IEP. Therefore, I **CONCLUDE** that the District denied a FAPE by impeding the parents' opportunity to participate in the decision making process pertaining to the proposed December 17, 2021 IEP.

Petitioner's expert, Ms. Lehrhoff, observed the proposed autism program on April 7, 2022, after L.S. had been a student at Newgrange for four months. Obviously, the classroom she observed did not include L.S. Her main criticism of the program was that it allowed for little independence for L.S. Mrs. S. also observed the program in June 2022, and she was also concerned that it was too restrictive and did not provide any opportunity for social growth or pragmatic language skills. Dr. Woldoff criticized an autism program in general because L.S. is verbal, social, and has great language skills. Dr. Woldoff believed L.S. needed to be around peers that have a higher linguistic ability so L.S. could scaffold some of those skills. The District's argument was that as L.S.'s needs changed those areas could have been accommodated because of the many options for mainstreaming at Rosa. However, by scheduling the IEP meeting on December 17, 2021, the District did not provide enough time for meaningful discussions about any possible adjustments to the proposed IEP. Given the disastrous experience of the first half of the school year, the parents had lost trust in the District's ability to provide L.S. with a FAPE. Therefore, I **CONCLUDE** that the District had not provided L.S. with a FAPE prior to her enrollment at Newgrange.

In accordance with N.J.A.C. 6A:14-2.10, parents may receive reimbursement for a unilateral placement as follows:

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

Our regulation mirrors well-established Federal Law. Parents who unilaterally withdraw their child from public school and place him in a private school without consent from the school district "do so at their own financial risk." School Comm. of Burlington v. Mass. Dep't. of Educ., 471 U.S. 359, 374, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397

(1985). See also: N.J.A.C. 6A:14-2.10(b)(1). They may be entitled to reimbursement for the costs of their unilateral private placement only if a court finds that the proposed IEP was inappropriate, and the private placement was appropriate under the IDEA. 20 U.S.C. § 1412(a)(10)(C)(ii). Once a court holds that the public placement violated IDEA, it is authorized to “grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(e)(2).

Parents who are compelled to unilaterally place their child in the face of a denial of FAPE, need not select a school that meets state standards. Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284, 293 (1993); L.M. ex rel H.M. v. Evesham Twp. Bd. of Educ., 256 F.Supp. 2d 290 (D.N.J. 2003). The Third Circuit has held that “parents [are] entitled to reimbursement even [when a] school lack[s] state approval because the [FAPE] state standards requirements . . . [apply] only to placements made by a public entity.” Id. at 297 (citing T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 581 (3rd Cir. 2000)); see also Warren G. v. Cumberland Cty. Schl. Dist., 190 F.3d 80, 83 (3d Cir. 1999). Accordingly, our courts recognize that parents who unilaterally place their child by necessity do so without the expertise and input of school professionals that is contemplated by a truly collaborative IEP process. The courts recognize that under these circumstances, parents essentially do the best they can, holding that, “when a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ (IDEA) if the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” Florence, 510 U.S. at 11, 114 S. Ct. at 365, 126 L. Ed. 2d at 293 (quoting Rowley, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712).

Under this standard, I **CONCLUDE** that the Newgrange placement is appropriate. In so concluding, I note that Newgrange is approved by the New Jersey Department of Education. Newgrange has created a program for L.S. tailored to her needs. The Social Strides program is successfully building her confidence and helping her to appropriately interact with others. Newgrange created a safe place for L.S. as she learns to regulate her emotions. L.S.’s emotions impeded her ability to learn. Her improving behaviors are allowing for educational progress. And per the testimony of Mrs. Morris and Ms. Bruder,

L.S. is improving her reading and math skills, working well with other students, showing independence, and becoming involved in extracurricular activities. This confidence and ability to control her emotions are what L.S. needs to receive educational benefit.

Pursuant to N.J.A.C. 6A:14-2.10(c)(4), reimbursement for a unilateral placement can be reduced or denied upon a finding “of unreasonableness with respect to the actions taken by the parents.” L.S.’s parents made their concerns about L.S.’s lack of support known from as early as September 15, 2021. They cooperated with all evaluations even though the District failed to implement any supportive measures for their daughter during the evaluation process. They pulled out of the district only after they were denied sufficient information about the autism program and an observation of that program.

I **CONCLUDE** that Newgrange is appropriate and that the conduct of the parents was reasonable under the totality of the circumstances; therefore, they are entitled to reimbursement for their expenses at Newgrange.

### **ORDER**

Based on the foregoing, together with the record as whole, the Board is **DIRECTED** to place L.S. at Newgrange, transport her there, and reimburse her parents for their expenses in unilaterally enrolling her at Newgrange, including transportation, retroactive to the date of her enrollment.



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



August 2, 2023 \_\_\_\_\_

DATE

\_\_\_\_\_  
**KATHLEEN M. CALEMMO, ALJ**

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

Date E-Mailed to Parties: \_\_\_\_\_

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**WITNESS LISTS**

**For Petitioner:**

Janine Fiore-Malone, L.S.'s sixth grade teacher  
Jaime Lehrhoff, LDTC, petitioner's expert  
Dr. Sarah Woldoff, petitioner's expert  
Mellissa Graham, LDTC, petitioner's expert  
Dana Lynn Morris, Newgrange (qualified as expert witness)  
Monica Ehring Bruder, Newgrange (qualified as expert witness)  
Petitioner, Mrs. S. (L.S.'s mother)

**For Respondent:**

Angelina Phelan, LDTC and case manager (qualified as expert witness)  
Ameetha Annese, teacher (qualified as expert witness)  
Allison Schwartz, psychologist, and case manager (qualified as expert witness)

**LIST OF EXHIBITS IN EVIDENCE**

**For Petitioner:**

P-59 ESY 2022 Schedule for L.S. (p. 3524); Student Schedule for L.S. 2022-2023 (pg. 3526)  
P-60 Monthly Attendance Report from January 1, 2022 – August 31, 2022  
P-66 Reading Scores (pg. 3612)  
P-67 Report Card – grade 6 (pg. 3613)  
P-68 Progress Report (pgs. 3625-3650)  
P-70 Work sample, dated January 21, 2022 (pg. 3665); Benchmark Test 4 (pg. 3673); worksheet (pg. 3693)  
P-71 Newgrange work samples February 2022  
P-72 Sentence worksheet (pg. 3803)  
P-73 Newgrange work samples April 2022

- P-87 Email, dated December 22, 2021, from M.S. and T.S. to Ms. Schwartz (pg. 5105); responsive email dated December 23, 2021, from Ms. Schwartz (pg. 5107)
- P-94 Email, dated October 12, 2021, from Ms. Graham to T.S. (pgs. 5170-5172)
- P-95 Letter, dated December 1, 2021, from Dr. Woldoff (pgs. 5173-5174)
- P-114 Email, dated September 23, 2021, from Dr. Woldoff (pgs. 5671-5674)
- P-119 Curriculum Vitae for Monica Ehring Bruder (pgs. 5684-5686)
- P-120 Curriculum Vitae for Dana Lynn Morris (pgs. 5687-5688)
- P-121 Curriculum Vitae for Jaime Lehrhoff
- P- 144 Curriculum Vitae for Melissa Graham (pgs. 6225-6226)

**For Respondent:**

- R-3 IEP for grade 3
- R-4 Data from Interactive Kids, dated December 2, 2019
- R-5 REM Audiology report, dated December 4, 2019
- R-6 IEP for grade 4
- R-7 Assistive Technology Consultation Service Note, dated January 10, 2020
- R-8 Behavior Summary, dated March 18, 202
- R-9 Grade 4 Student Profile
- R-10 Annual Measurable Goals and Benchmarks – L.S. 2019-2020
- R-11 IEP for grade 5
- R-12 Neuropsychological Evaluation – dated November 12, 2021, December 6, 2021, and January 4, 2021, by Jaime Lehrhoff
- R-13 Compensatory Education Determination Meeting, dated May 28, 2021
- R-14 Grade 5 Student Profile
- R-15 Annual Measurable Goals and Benchmarks – L.S. 2020-2021
- R-16 NJ DLM Participation Criteria 2020-2021
- R-17 Dr. Woldoff's letter, dated September 28, 2021 – safe to return to school
- R-18 Speech and Language Evaluation Report
- R-19 Letter, dated October 31, 2021 – Notice of Potential Litigation

- R-20 Functional Behavior Assessment
- R-21 Psychological Evaluation
- R-22 Educational Evaluation
- R-23 Occupational Therapy Screening
- R-24 Psychiatric Evaluation
- R-25 Speech and Language Evaluation (**same as R-18**)
- R-26 IEP dated December 17, 2021
- R-27 Ten-Day Notice for Unilateral Placement
- R-28 Henry C. Beck Middle School – Report Card
- R-29 Annual Measurable Goals and Benchmarks 2021-2022
- R-30 Letter, dated January 18, 2022, from Robin S. Ballard, Esq. to Andrew Morgan
- R-34 Emails, dated February 24, 2022
- R-37 Autism Classroom Observation, dated April 7, 2022 – Cherry Hill and observation of New Grange School, dated April 11, 2022, by Jaime Lehrhoff
- R-46 Curriculum Vitae for Angelina Phelan
- R-47 Curriculum Vitae for Allison D. Schwartz
- R-49 IEP, dated April 26, 2022 – Case Manager Allison Schwartz