



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

**FINAL DECISION**

OAL DKT. NO. EDS 06944-22

AGENCY DKT. NO. 2023-34705

**J.N. AND R.K. ON BEHALF OF H.K.,**

Petitioners,

v.

**MARLBORO TOWNSHIP BOARD OF  
EDUCATION,**

Respondent.

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**Hillary D. Freeman, Esq.**, for petitioners (Freeman Law Offices, LLC, attorneys)

**Alison L. Kenny, Esq.** for respondent (Schenck, Price, Smith & King, LLP,  
attorneys)

Record Closed: May 15, 2023

Decided: June 9, 2023

BEFORE **JOAN M. BURKE, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

The parents of H.K. (petitioners) have requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415. The petition disputes declassification and seeks continued eligibility for special education and related services, stay-put of the current program and placement, development of an appropriate IEP, compensatory education and reimbursement of all costs.

The contested case was transmitted to the Office of Administrative Law (OAL) on August 16, 2022. Hearings were conducted on January 10, January 11, January 12, and March 9, 2023, via Zoom technology. Written summations were submitted in lieu of a final day of hearing, and the record closed on May 15, 2023.

### **STATEMENT OF FACTS**

The parties to this action stipulated to the following **FACTS** identified below as points 1–40 and same were read into the record:

1. H.K. was born on September 3, 2015, is currently seven (7) years old and in the second grade.
2. H.K. initially enrolled in the District in or around September 2018 as a preschool student. He has remained a District student since that time.
3. H.K. has been diagnosed with schizencephaly, left hemiplegic cerebral palsy, mild to moderately severe sensorineural hearing loss in the left ear, gastro-esophageal reflux disease (GERD) and autism.
4. H.K. was initially classified as eligible for special education and related services by respondent's Child Study Team (Team) on or about July 20, 2018, under the classification category preschool child with disability.
5. H.K. attended the District's half-day program from September 2018 through June 2020.
6. On March 3, 2020, a reevaluation planning meeting was held due to H.K. aging out of the preschool classification category at the end of the 2019–2020 school year.
7. At the March 3, 2020, reevaluation meeting it was agreed that: psychological, educational and speech/language assessments; a

classroom observation and physical therapy and occupational therapy status updates would be completed with H.K. to determine whether he continues to have a disability which adversely affects his educational performance. (J-1.)

8. On March 3, 2020, petitioner J.N. signed consent to the reevaluation plan.
9. On March 16, 2020, Governor Philip D. Murphy issued Executive Order 104 which, among other things, closed public schools to in-person learning.
10. In compliance with Executive Order 104, the District transitioned to remote instruction on or about March 18, 2020, and remained in remote status through the remainder of the 2019–2020 school year.
11. Due to the closure of schools, the District determined that the assessments outlined in the reevaluation plan could not be completed prior to the end of the 2019–2020 school year.
12. A report of H.K.'s progress toward the goals and objectives in his IEP dated May 31, 2019, was issued. (J-2.)
13. On May 5, 2020, a reevaluation eligibility determination with annual review meeting was held for H.K. At that meeting, it was agreed that for the 2020–2021 school year, H.K. would be eligible for special education and related services under the classification category Other Health Impaired due to his diagnoses of schizencephaly, left-side hemiparesis, left cerebral palsy and left side mild to moderately severe hearing loss. (J-3.)
14. At the May 5, 2020, meeting, the District advised that once schools reopened, the reevaluation timeline would resume and that the Team would reconvene to review evaluation results and, if necessary, revise the IEP in response.

15. Due to H.K.'s medical status, petitioners opted that H.K. remain fully virtual for the 2020–2021 school year.
16. A report on H.K.'s progress toward the goals and objectives in his IEP, dated May 20, 2020, was issued. (J-4.)
17. An annual Review IEP was held for H.K. on May 12, 2021, at which time it was discussed that the reevaluation for the 2019–2020 school year was still pending and that the evaluations would be completed once H.K. was allowed back in person to school and that the Team would reconvene to review evaluation results and, if necessary, revise the IEP in response.
18. The May 12, 2021, IEP proposed for the remainder of kindergarten as well as first grade that the student, H.K., be placed in an in-class resource program reading/language arts, math, science and social studies. It also proposed continuation of physical therapy, occupational therapy and speech language therapy as well as a 1:1 assistant during the school day. (J-5.)
19. In June 2021, H.K. completed his kindergarten year as a virtual student. (J-6.)
20. In the fall of 2021, petitioners requested that due to his medical conditions, H.K. be exempt from returning to in-person learning.
21. While that request was pending, the Team proceeded with attempting to schedule H.K.'s reevaluation assessments.
22. In October 2021, H.K. was approved for medically based virtual instruction and petitioners requested that the District continue to delay the reevaluation until H.K. returned to in-person school.
23. H.K. was medically cleared by his doctor to return to school on April 1, 2022.

24. The parties agreed that the reevaluation assessments would be completed after the spring break to provide H.K. time to adjust to being back in school.
25. On April 4, 2022, it was proposed that occupational therapy and physical therapy evaluations of H.K. be conducted. (J-7.)
26. On April 14, 2022, petitioner, J.N. signed consent for the additional evaluations to be completed.
27. The psychological evaluation of H.K. was conducted on or about April 29, 2022, by Samantha Defilippo, M.A., CAGS, NCSP, BCBA. (J-8.)
28. The educational evaluation of H.K. was conducted on April 26, 2022, by Kerry Ann Pietrocola, M.A., LDT-C. (J-9.)
29. The speech and language reevaluation of H.K. was conducted by Shara Sisselman, M.S., CCC-SLP, over several dates in April and May 2022. (J-10.)
30. The occupational therapy evaluation of H.K. was conducted by Debra Kurzman, OTR/L, over three dates in April and May 2022. (J-11.)
31. The physical therapy evaluation of H.K. was conducted on April 28, 2022, by Ruchi Gala, PT, DPT. (J-12.)
32. The District did not utilize any formalized measures to assess H.K.'s social/emotional functioning or behaviors as part of this reevaluation.
33. Following completion of the reevaluation assessments, an eligibility meeting was held on or about May 31, 2022, at which time it was determined by the District that H.K. was eligible for Speech/Language, but no longer required special education programming. (J-13.)

34. At the eligibility meeting, the District determined that H.K. would require accommodations and related services through a 504 plan.
35. After the eligibility determination, an IEP meeting was held to develop an IEP reflecting H.K. is “Eligible for Speech/Language” only. (J-14.)
36. The Parents disagreed with the eligibility determination and filed a Petition for Mediation on June 9, 2022.
37. A 504 meeting was held June 15, 2022. (J-15.)
38. H.K. completed his 1<sup>st</sup> grade year. (J-16.)
39. A report of H.K.’s progress towards the goals and objectives in his IEP, dated May 2021, was issued. (J-17.)
40. Second grade, first marking period report card was issued on or about November 29, 2022. (J-18.)

### **TESTIMONY**

#### **For respondent**

**Samantha L. Defilippo** (Dr. Defilippo) is an employee of Georgian Court University and Marlboro Township Public School District (District). She earned her doctoral degree in psychology in May 2022 and active board-certified behavior analyst doctoral designation certification in May 2018. Dr. Defilippo is employed by the District as a school psychologist and board-certified behavior analyst (BCBA). Dr. Defilippo holds a bachelor’s degree, master’s degree and doctoral degree in psychology. She has an active school psychologist credential and is a New Jersey certified school psychologist. Dr. Defilippo has worked as an afterschool aide for children with autism and has overseen children on the autism spectrum. She has been a certified school psychologist since

2016. As a psychologist she supports children that have or may have disabilities which impact their ability to access education. Dr. Defilippo is involved with children with disabilities and are in need of special education services. This is done through collaboration with other specialist to determine if disabilities are present.

Dr. Defilippo is responsible for developing individualized education plans (IEPs) which document individualized services a child requires in order to access the general education curriculum within the school setting. She provides counselling services as needed for children. She has consulted with teachers and parents regarding academic, social, emotional and behavioral concerns or difficulties that children might be experiencing. Dr. Defilippo provides counseling to individuals and groups and is responsible for maintaining and meeting timelines and records when it comes to various components of the special education process; holding annual review meetings, meeting with parents to revise IEPs if necessary; if changes needed to be made, holding reevaluation meetings to determine if children continue to meet eligibility criteria for services.

Dr. Defilippo is trained on various cognitive and social emotional tests that can be used with children. Because she has a doctoral degree in psychology she is allowed to administer a multitude of tests.

Dr. Defilippo has administered the WISC-V, the Stanford-Binet (which are measures of cognitive abilities and additional assessments through the BASC-III), Connors-IV and the Autism Spectrum Rating Scales (ASRS). Dr. Defilippo has conducted approximately between 400 and 500 psychological evaluations. She is also trained to interpret assessments in other disciplines.

As a case manager, Dr. Defilippo is responsible for overseeing a child's IEP to ensure all legal timelines are met by holding annual review meetings and ensuring reevaluation planning meetings are done when children are up for triennial review. Dr. Defilippo also collaborates with teachers and parents to make sure IEPs are followed and meeting the needs of the children for whom they are designed. She is also responsible for ensuring teachers provide updates on the progress for different goals and when

objectives are completed. Dr. Defilippo estimates that she has completed between 300 to 400 case managements. As a member of the Team, Dr. Defilippo has participated in approximately 400 to 500 eligibility determinations.

Dr. Defilippo testified that for a child to be classified as eligible for special education and related services, the child must fall under one of the New Jersey State code category eligibility criteria. In addition, there must be evidence of an adverse educational impact of that disability, as well as a need for special education services. She has participated in IEP meetings where students are found eligible for special education. Over the course of her career she has participated in over 500 IEP meetings.

Dr. Defilippo explained that an IEP is developed after a child is evaluated and found eligible. A team is created which collaboratively identifies the areas in which remediation or the child's weaknesses are determined. Those weaknesses are areas that would make it difficult for the child to access the general education curriculum. After this, a special education program is developed and modifications or accommodations would be necessary to help the child access that curriculum. In addition, goals and objectives must be developed in areas where progress is needed for that child based on the plan that is put in place. Justification is needed if a child is to be removed from a general education setting for a percentage of the school day which exceeds the maximum time put in place by the State. Dr. Defilippo was offered as an expert in psychological evaluations, behavior analysis, special education eligibility determination and special education programming.

Dr. Defilippo became familiar with H.K. in first grade at Frank Dugan Elementary school (Dugan). She was not the case manager for H.K. at Dugan. Dr. DeFilippo is a twelve-month employee in the District, which means she works during the summer. She was involved in the preparation to ensure that the accommodations and supports were put in place before H.K.'s first day back to in-person learning. There was an issue with H.K.'s hearing and Dr. Defilippo collaborated with another school psychologist over the summer to make sure the support was in place for this. She consulted with occupational therapist (OT) to ensure that a special toilet H.K. needed was in place as well as a step stool to access the sink in the classroom was in place. Dr. Defilippo said she shared the information about H.K. with the new case manager who started in September 2021. She



also had a conversation with the parents about the first day of school to make sure everything would be in place for H.K.

Dr. Defilippo provided indirect services under H.K.'s first grade IEP. This includes having support for school personnel and checks in with teachers to see if required behavioral consultation is needed. As per Dr. Defilippo, H.K. did not exhibit behavior that needed consultation. She spoke with his teachers and has had direct contact with H.K. She frequently goes into the classroom and interacts with the students and has done so with H.K.

Dr. Defilippo completed a psychological evaluation of H.K. on April 29, 2022. (R-9.) She conducted an evaluation of H.K. across the span of a school day. She found H.K. engaging and receptive to working with her over the day. She administered the Wechsler Intelligence Scale for Children (WISC-V) which is a standardized I.Q. test for children. It gives an indication of cognitive ability. It is a standardized test that is administered the same exact way to each child based upon the instructions that are developed and documented by the publisher of the test. There is comparison norm in terms of performance, when compared to other children nationally of the same age. On this test H.K. performed extraordinarily well. His I.Q. was found to be in the high average range or eighty-sixth percentile range. His verbal abilities were noted to be in the ninety-nine and a half percentile range. H.K.'s highest non-verbal area was fluid reasoning. This is the ability to identify patterns and understand relationships. This also included his visual spatial ability which is the ability to identify how to complete puzzles visually in his mind. H.K.'s working memory or his capacity to retain information verbally was in the fifty percentile average range. H.K.'s processing speed was in the forty-fifth percentile average range in comparison to his peers. According to Dr. Defilippo, overall, the test suggests H.K. has a high potential for success in school. Dr. Defilippo posits that the WISC-V test and the psychological or educational standardized assessments could not be done remotely because the publisher set forth criteria and guidelines for exactly how the test should be administered. The administration of these tests is very precise; for example, how far away a child can be seated from the stimulus.

Dr. Defilippo acknowledged that as a school psychologist she would also administer other assessment tools that measure social, emotional and behavioral functioning. Because there were no indications that social, emotional functioning was an area that needed further investigation, because of how H.K. was performing in class, these assessments were not done. She reviewed all evaluations, medical documents and the input on how H.K. has participated in class. Based on all that she reviewed, no further evaluation was necessary and there was no suspected area for further evaluation.

Dr. Defilippo reviewed the testing conducted by Carrieann Pietrocola which were the Woodcock Johnson Test of Achievement and Test of Oral Language. Both tests Dr. Defilippo has previously administered and was trained in interpreting the results. Both tests are done to gauge where H.K.'s academic skills are in relation to other children and the test norms. Based on both tests, Dr. Defilippo concluded that in a classroom, H.K. would perform average to above average when compared to his peers. Dr. Defilippo participated in the meeting where the Team evaluations were reviewed with the parents of H.K. The parents did not provide any private evaluation reports to consider as part of the eligibility process. Dr. Defilippo recalled that all of H.K.'s teachers said he was performing very well in the classroom academically, behaviorally, socially and emotionally. It was determined by the Team that although H.K. fell under one of the disability categories, there was no evidence that his disability has an adverse educational impact or that he needs special education services. Based on Dr. Defilippo's review of H.K.'s records and conversations with teachers, he did not require any modifications in the classroom. In addition, she further agreed with the Team's May 2022 eligibility determination. Dr. Defilippo testified that she agreed with the other Team members because it was clear that although H.K. could still benefit from some accommodations, which could be provided through other types of documents, he did not require any modifications to the curriculum or special education programming in order to be able to access the general education curriculum similar to his peers.

Defilippo on cross-examination was asked if she observed H.K. in the classroom setting, she responded that she goes into the classroom once a week in order to observe all of the students. She did not observe H.K. when he was on remote instruction but was aware of him through collaboration and communication with his teachers. As part of the

eligibility determination, Dr. Defilippo admitted that she did not ask H.K.'s mother what support she provided to him while he was on remote instruction. Dr. Defilippo was aware that H.K.'s mother was a special education teacher. Defilippo was not aware that H.K. had autism at the time of her evaluation. Dr. Defilippo said if she knew H.K. had autism she would have included a social emotional component in her testing. Dr. Defilippo did not administer any type of emotional component in her evaluation.

Dr. Defilippo admitted that during her evaluation of H.K., she redirected him four to five times. Dr. Defilippo testified that he asked off-topic questions and he started midway through the evaluation with humming, singing and making vocalizations. Dr. Defilippo said that for these hyperactivities she did not step in to stop. When you are looking at H.K.'s ability or his cognitive skills, ability to solve problems, to be able to think and reason, H.K. would perform significantly higher than his peers. H.K.'s processing speed impacts his I.Q. score.

Dr. Defilippo considered the "other health impairment" category and did not specifically consider H.K.'s learning disabilities because H.K. academic areas were at or above where his cognitive ability was. In looking at areas of written expression he scored in the sixty-ninth percentile range. For the test of writing sample he received a score of 113 which is in the eighty-one percentile range. For sentence writing fluency he has a score of ninety-eight which corresponds to the forty-fourth percentile range. (J-9.) Dr. Defilippo testified when looking whether there is a disability, you look at the cluster score and that there was no discrepancy with H.K.'s test for written fluency and written expression. For a discrepancy to be considered in the District, they used a twenty-two-point discrepancy between the I.Q. and the written expression. Here there was a nine-point discrepancy which was not a significant concern to obtain further evaluation. Dr. Defilippo did not evaluate H.K.'s writing skills. Dr. Defilippo was asked about certain behavior that H.K. exhibited during a classroom observation. Dr. Defilippo admitted that if H.K.'s teachers or other adults in the classroom could not calm him down it would be of concern. In the class there would be two adults sometimes three — a general education teacher, a special education teacher and another adult.

Dr. Defilippo did not speak with H.K.'s kindergarten teacher, but reviewed progress reports and report cards. Dr. Defilippo reviewed H.K.'s May 2021 IEP. (J-5.) Dr. Defilippo reviewed the summaries of performance as well as the progress reports based on his IEP goals and objectives. One of his teachers, Ms. Wagner noted that H.K. "demonstrates difficulty transitioning between activities especially from a preferred activity to a less preferred one." (J-5.) It was also noted that H.K. benefits from structured routine and tends to struggle when there is a schedule change. Ibid. Dr. Defilippo said that H.K. had some difficulty in the first week of school. (J-5, at 9.) He needed redirection through his teacher and he has a 1:1 aide. H.K. needs redirection to stay on task. Dr. Defilippo was asked how she would approach a child who has autism and has difficulty transitioning. As per Dr. Defilippo, no one size approach is done, it is individualized based upon the skill set and capabilities of the individual you are working with and on the circumstance. Dr. Defilippo admitted that H.K.'s prompting continued from at least kindergarten through second grade. She noted that H.K.'s behavior of crying, yelling and hitting did not continue into first grade when he was on remote instruction. (J-5.) This was based on reports from H.K.'s teachers.

Dr. Defilippo testified that the goals of an IEP are to lay out exactly where some of the weaknesses are for a child that they need to work with and to bring their skills up in order to make it more attainable for them to access general education. There are no goals in a 504 plan. If one was to declassify a student, there is no more progress reporting formally with an IEP document. However, the goals are still addressed. One of the goals on H.K.'s IEP states "H.K. will maintain his attention on task during class lessons and assignments in order to complete assignments on time on a daily basis across all academic settings." (J-17.) The special education teacher put in a code for how the child is progressing towards a particular goal, and this is done for four different marketing periods and generally within an annual review period the progress is reported for these goals. The goal, that he would maintain his attention on task, was not achieved. Additional goals were not achieved.

Dr. Defilippo testified that H.K. would learn how to focus and concentrate in his classroom without any specialized instruction. She stated that having a 1:1 aide is not special education, it is a support that is provided and could be provided again for

alternative means besides through an IEP. Dr. Defilippo said there are plenty of general education supports that are available in order to provide this type of skill, which doesn't necessitate an IEP or special education services. Dr. Defilippo said they would provide a different level of support to H.K. The support would be individualized, tailored to his specific needs.

Dr. Defilippo said she offered assistance to the teachers if it was necessary during first grade for H.K. However, H.K. did not need any assistance. The teachers did not call Dr. Defilippo for any BCBA support or specialized needs for H.K. She was not notified by the teachers that H.K. was having any significant issues with transitioning back to school for the first time in two years. Dr. Defilippo said that during her testing session she had to redirect H.K. approximately four or five times during her administration of WISC-V, which is comparable to another six-year-old, as to the level of redirection she provided H.K. Dr. Defilippo said that the support in the observation conducted by Pietrocola were accommodations and not specialized instructions. Dr. Defilippo testified that crying and whining behavior is typical of a six-year-old in the classroom and does not require specialized instructions to address depending on the level of significance. There was no report by H.K.'s teachers about his crying or whining in class. Dr. Defilippo testified that to her knowledge, H.K. needed no specialized instruction to assist him in transition and neither did he need specialized instruction to follow a schedule. First graders usually do not stay on task without prompting.

**Lindsey Pandak** (Pandak) is currently employed by the District as a first-grade general education teacher. Pandak has been a teacher for approximately ten years. She has taught both fourth and fifth grade and currently teaches first grade, which she has taught for the past five years. Pandak has the New Jersey Standard Teachers Certificate in elementary education for K–5.

Pandak first met H.K last summer, before class began, when she received an email from his mother to introduce herself. They spoke about things that his mother wanted in place before H.K. began school. H.K.'s mother was concerned with separate places for H.K. to eat lunch and snacks. H.K. did not start school until the end of October that year. When he joined the class, it was through virtual instructions. The instructions are usually

given through Zoom or Google Meet. This virtual format is usually from Monday through Friday. Fridays or Mondays before the start of each week, either Pandak or her co-teacher would put together all the worksheets or any resources that H.K. needed for that week. They would scan them or sometimes they are dropped off at the home. While on Zoom, someone is usually sitting with H.K. There are approximately nineteen students in a class, with three, sometimes four adults. This includes a general education teacher, a special education teacher, a 1:1 assistant to H.K. and possibly another adult for a student that has a 504 plan.

The first week of transition from virtual to in-person learning can be difficult. They had to go over the rules and expectations with H.K., such as staying in his seat and not calling out. However, after two weeks, H.K. transitioned nicely. Pandak recalled on one occasion she was teaching math and H.K. was excited and got out of his seat but he was redirected that he should not do that. In first grade he did well in math; he is a great reader and is above the grade level. According to Pandak, H.K.'s weakness is that he struggles with spelling and does not like to write. He gets upset when he has to write, but he would eventually write. There was no problem with his function in class. In looking at the report card that was completed with his special education teacher, H.K. had outstanding for almost all marking period and had a few "S" pluses. His grades were between ninety and 100 percent. There was no academic modification. The only assistance given was with redirecting and usually this is done to all first graders. He received the accommodation that was in his IEP which was preferential seating, meaning he had to sit close to the speakers because of the microphones. H.K. did not need any adaptations or modifications to the curriculum. Pandak testified that she did not specifically change her delivery of instruction or her teaching method while H.K. was a student in her first-grade class.

According to Pandak, H.K. is very eager to socialize with the kids in his class. There were no behavioral issues she identified. She found that only when he has to write, he would get upset. In class he was redirected sometimes with a tap on his shoulder. At other times if he was upset, they would get down on his level and talk to him about why he was upset and he would explain and they would inform him what they were working on and he would do the work. At no time during the year did Pandak require or seek

assistance from an educational professional or the Team for H.K. There was group work, H.K. would sometime request that he complete it on his own, independently. He did awesome in school. There was no difficulty with his peers.

Pandak was at the May 2022 eligibility meeting. The Team members went over the reports. Pandak and her co-teacher spoke about H.K.'s performance in that they had no issue academically with H.K. as he was performing well in class. Pandak never had to meet with H.K. to reteach. Pandak had no problem with H.K.'s ability to grasp concepts or learn the material when he was remote. Pandak did not see any substantial difference in H.K.'s work product between remote and in-person class instruction with H.K. However, there was one difference Pandak noted with the word wall quiz he did remotely. When he returned to in-person learning, those were the only quizzes with which he struggled. Although H.K. struggled with word wall quizzes, he was at step seven on the word wall chart.

On cross-examination, Pandak testified that she did not know what efforts were put into helping him with his assignments when he is on remote learning. Pandak said H.K. needed a 1:1 aide for his physical needs and not his academic work. When H.K. needs redirection, it would be the special education teacher, his aide or herself that would do so. If he needs further calming down his 1:1 aide would walk him outside. Pandak testified that she collaborates with the special education teacher to design the lesson plans to meet the needs of the students.

**Meghan Fitzsimmons** (Fitzsimmons) is a social worker on the Team at the District. She has been a social worker since 2004. She is a case manager for special education and conducts evaluations for the Team. Fitzsimmons is a case manager for preschool and kindergarten classes at David C. Abbott Early Learning Center. In 2018 Fitzsimmons became familiar with H.K. when he transitioned from early intervention to the District. On March 3, 2020, a reevaluation planning meeting was done pursuant to the Special Education Code. No concerns were raised by any member of the Team that the proposed evaluations were inappropriate or not comprehensive enough. The parents also had no concerns. This reevaluation was done in person in March 2020. (J-1.) An IEP was done in May 2020. This was conducted remotely for kindergarten. (J-3.)

Subsequent to the in-person evaluation, the State was shut-down because of COVID-19 in March 2020. The District resumed conducting evaluations the last week of July 2020 to the first week of August 2020. Fitzsimmons was H.K.'s case manager for kindergarten. All the meetings at that time were held virtually. They communicated by email with the parents of the students at that time. According to Fitzsimmons, H.K.'s kindergarten teachers did not reach out to her with any concerns and there were no parental concerns about H.K.'s progress, or services that were being provided.

An IEP meeting was conducted in May 2021 virtually. (J-5.) At the meeting they discussed H.K.'s transition from the Early Learning Center to Dugan, what he needs to attend school in person and how they would handle that transition. They were specifically concerned with going from a truncated virtual learning to a six-and-a-half-hour-day. He would need accommodations in the lunchroom for sitting in an unsupported chair. They planned to have H.K. fitted over the summer for a special chair in the classroom. The bathroom needed a fitting because he had grown over the summer. They planned to have him come in over the summer, so he could familiarize himself with the school. In addition, the OT and PT were to be contacted. Basically, the physical needs of H.K. were discussed at the IEP meeting. There were no discussions that the remote services provided to H.K. during his kindergarten year were inappropriate. There were no concerns that H.K. was not making progress towards his IEP goals.

On cross-examination Fitzsimmons said the modifications referenced in the May 2021 IEP were for refocusing and redirection, preferential seating, extra time for task completion and cue him for off-task behavior. (J-5.) In May 2021 he was in kindergarten and was then placed in an in-class support (ICR) class. Fitzsimmons interacted with H.K. only when he was in preschool. She has not had any interaction with H.K. since he transitioned to Dugan.

**Natalie Diaz** (Diaz) testified that she has been employed by the District as a school social worker on the Team for the past ten years. She holds a master's degree in social work and school social work certification. As a case manager she is on the Team where she manages students that have IEPs. She also sits on various committees at Dugan. She conducts annual IEP reviews, reevaluation determination and triannual reviews,



eligibility determination and collaboration with teachers, related service providers, parents, guidance counselors and administrators. Diaz runs groups with the guidance counselor and the school psychologist, such as a social skills group and any counselling mandates that any student has in their IEP for direct service.

As a member of the Team, she has participated in approximately between 300 to 400 eligibility determinations. Diaz testified that in order to be classified as eligible for special education the child would have to meet one or more of the classifications under the New Jersey Code for special education. There would also have to be an adverse educational impact and a need for special education programs.

Diaz became familiar with H.K. when she was told by the case manager at the Early Learning Center that he would be coming to Dugan and would be placed in an ICR classroom. This occurred in the 2020–2021 school year. Diaz does not work during the summer. Once H.K. transitioned, he was assigned to the learning consultant as his ongoing case manager. Diaz became case manager in the spring after H.K. returned to in-person learning. In March and sometime before spring break, Diaz discussed H.K.'s re-entry back due to COVID-19 protocols with the school administration, school nurse and his mother. During the discussion with the mother, the plan to proceed with OT and PT evaluations recommendation was conveyed. Once Diaz became H.K.'s case manager, she did not receive any call from his parents regarding concerns about H.K.'s IEP. There were no concerns from the teachers about H.K.'s academic function as well. She recalled when H.K. had just returned to school, his first week there was some routines they had to get him used to in the classroom, but after a couple days they had no concerns socially or academically at any point in time.

Diaz testified that if there were any significant academic or behavioral issues a student displayed in the classroom, it would be referred to her to handle. There was no related services provider that reached out to her except for OT and PT. They wanted to update the evaluations and wanted her to reach out to the parents to see if they could implement OT and PT evaluations. These were the only concerns that were relayed in the first grade.

Diaz participated in the meeting where the Team evaluations were reviewed with the parents. She did not conduct a social assessment as it was not part of the evaluation to be conducted. There was no private evaluation that was shared by the parents that was considered at the meeting. The evaluators went through the evaluations and a determination was made that H.K. was not eligible. Based on this eligibility determination, H.K.'s mother disagreed. Diaz testified that as a member of the Team responsible for determining eligibility, she was confident that the appropriate determination was made. The Team reviewed all the medical records, and all documents that were part of H.K.'s record and listened to the teachers' input. There were no academic concerns, no social/emotional concerns that were reported. According to Diaz, the teachers agreed with the recommendation.

Diaz testified that the difference between an IEP and a 504 plan, is that the latter is used for students who have medical condition(s) that require accommodations to access the general education in the classroom setting. While an IEP is a legal document that provides a special education program based on the disability that they have which warrants specialized instruction and services and programming to provide modifications to the curriculum. Examples of accommodations are extended time to complete an assignment, frequent breaks, preferential seating, redirection, visual aid and technological assistant. These accommodations could be provided through a 504 plan. An IEP is with modification whether altering content material for academics. For example, modifying tests and quizzes, the pacing in the classroom setting or anything that is changing a curriculum. Here, H.K. did not require any modifications in his classroom. The only thing that the teachers related to Diaz was that they did redirection with H.K. in the classroom.

On cross-examination Diaz admitted that social and emotional functioning is an area of educational performance while behavioral functioning could be—it depends on the impact in the classroom. Diaz testified that she has gone in and out of the classroom but never to observe H.K. because no concerns were brought to her attention that warranted a formal observation. Diaz never met with H.K. during the first-grade school year. She welcomed him into school when he returned in person and welcomed H.K. into her classroom. Diaz testified that she “pops in” frequently in the classrooms, to check-in

on the teachers and students. She usually sits in the classroom for ten or more minutes to observe the students that she case manages. Thus, her knowledge of H.K. to a large extent was based on the records reviewed of the evaluations and what the teachers told her. Diaz said she never asked the parents if they had any concerns regarding H.K.'s educational performance.

Diaz testified that the eligibility determination was based on the entire time H.K. was classified and the updated evaluations and teachers' input from when he was virtual up until the time that eligibility was determined. It was four weeks after H.K. was in school when the eligibility determination was done. Diaz did not know how H.K. did virtually or the support he received. What Diaz admitted was that the teachers indicated that during first grade school year up until the eligibility determination, H.K. was doing well and there were no concerns. No call was made to his mother because H.K. did so well. On redirect, Diaz said that social and emotional skills are addressed in general education in early childhood classes. Behavioral functioning is addressed in general in an early elementary general education classroom. Not all students that exhibit some social or behavioral deficits require an IEP to address those deficits. To have an IEP for those deficits, the behavior would have to be significant where the student is missing a lot of class, work avoidance and not completing classroom tasks or work in the classroom or they fall significantly behind. During H.K.'s first grade year there was no report of such concerns with H.K. Diaz testified that at no time during H.K.'s first grade year did his parent reach out to her with concerns. Diaz testified that a social emotional functional deficit test or evaluation would be done when there was work avoidance, not completing schoolwork, not performing competently in academics or falling behind.

When there is significant adverse impact on education a three-prong analysis is done: first, recognize a classification under the New Jersey Code for a specific disability; second, there must be an adverse impact on educational performance, which warrants a special education program; and third, a special education program is designed for that student. H.K. currently has goals in his IEP that are not adversely impacting his academics in his classroom. He has goals in his IEP that are social, emotional and behavioral. Several of the goals on the IEP did not state they were achieved, but comments were listed. (J-17.) Diaz testified that in her experience as a Team member

in making eligibility determination, it was not necessary for a student to achieve all of their IEP goals and objectives before they are declassified.

**Ali Garbolino** (Garbolino) is employed by the District as a special education teacher in a pull-out resource room setting. She began working at the District as a long-term substitute and in 2022 she began her tenure track as a first grade in-class resource support teacher. Her duties include following the New Jersey State standards and the Marlboro Township Curriculum while helping students with IEPs work toward their goals and also work with their modifications and accommodations based in their IEP. Garbolino became familiar with H.K. when she learned that he would be joining her class. Garbolino reviewed all the documents prior to the start of the school year of all the children for which she was responsible, including H.K. Garbolino testified that H.K. is a very happy child. He did not return to in-person learning until April 2022. She usually spoke with him through the computer prior to in-person learning. H.K. loves science and is very strong in math. Garbolino stated that H.K.'s weakness is writing. At times he struggled with writing assignments but they were never modified for H.K. Garbolino testified that her teaching approach never changed. H.K. was able to follow along with the other kids in the class.

According to Garbolino, H.K. is an average to above average overall student in his class. Garbolino had contact with H.K.'s parents every day all day while he was remote. Garbolino testified that she has also gone to H.K.'s home to drop off schoolwork. She had no concern with H.K.'s work or how he was grasping the material. The concerns from H.K.'s mother were COVID-19 related concerns, where he would eat at lunchtime and whether his desk was located six feet from other students. Garbolino testified that H.K. was a stellar student in first grade. H.K. impressed her daily. He was remote until April, during this time she and Pandak were in charge of his instructions, and he was on a computer for a full day of school. H.K.'s writing skills were average and at times above average. For support H.K. has a slant board which is a slanted clip board. This is easier for some students who struggle to physically write. H.K. also has a hearing aid—that is used with an FM system daily. Garbolino testified that she would check his hearing first thing in the morning to ensure he was able to hear with the FM system. H.K. also wore braces on his legs and she would make sure the classroom is accessible for him.

H.K. performed well in small groups. At times he would request to do work independently. The small group was doing what H.K. was doing independently. He sometimes was able to complete the work faster than others in the small groups. Spelling was a struggle, but so it is with all first graders. H.K.'s spelling was on level with the other students. His reading level was among the highest group in the class. There was no modification or adaptation to the content. H.K. was a very social student. He always said good morning. He speaks with his friends. On remote learning he was always included with the other students.

The first week of in-person learning he got upset but it subsided, and he became a regular first grade student. There was no special education. In looking at the goals in his IEP (J-5 page 12), the goals and objectives were received by the whole first grade. In class they worked on general education for fifteen minutes. H.K. was able to work for fifteen minutes whether he was at home or in school. The work that was provided to the general education student was not modified in any way. H.K. exceeded many of the general education students. At no time during first grade was there a concern by Garbolino with his social functioning. In addition, he did not exhibit any social or emotional functioning that differed from the rest of students. Garbolino testified as a special education teacher she did not provide any specialized instruction to H.K., because it was not needed.

Garbolino was responsible for H.K.'s goals and objectives in his IEP. The assignments that were dropped off at H.K.'s home while he was on remote learning were never modified in any way compared to the assignments that were being given out to the general education students. His mother then scanned and sent back H.K.'s completed work. When she received the scanned work back, there was no indication that the work had been adapted or modified in any way. While H.K. was in the classroom, Garbolino testified that he had no difficulties with his peers.

Garbolino participated in an eligibility meeting in May 2022. Garbolino testified that she had no concern that H.K. would be a general education student and would not

be supported with an IEP, because H.K. in her opinion exceeded many of the general education students and she thinks he would succeed without an IEP.

On cross-examination Garbolino stated that she reviewed the work that was given to general education for other first grade students that were not in a classroom without a special education teacher. Garbolino stated that the whole first grade works as a team. She also had the opportunity to go into another first-grade classroom other times. Garbolino said H.K.'s struggles with spelling, but she addressed that in reading, and they would practice daily. They would practice different spelling patterns, segmenting and blending. This would be done with small groups in the classroom. H.K. needed prompting to stay on task in class. However, this was no more than with any of the other students. His assistant would redirect him or the general education teacher, they all took turns. According to Garbolino, H.K. did not often need to be redirected, at times he needed to be prompted to begin writing, but once he began writing he would be fine. He does not like to physically pick up a pencil. He would vocalize that he did not want to write; however so did other students. There was no change made to his IEP when H.K. was on remote learning. Garbolino testified that the determination that his disability was not adversely impacting his ability to learn was based on the work samples that she collected from virtual and in-person learning. These work samples she collected matched.

Garbolino was not aware of what support H.K.'s mother gave to him when he was remote. When he returned to in-person learning, H.K. did not need support. He did equally as well as when he was home, and he was in-person all day. H.K. did not need any assistance from other students. In looking at his progress report, Garbolino said she reviews all his goals. (J-17.) The only goal she does not monitor is toileting. His aide would accompany him to the bathroom. Garbolino testified that H.K. had no more academic challenges than any other student. He also had no social challenges. She does not observe him during recess, in the lunchroom or on the playground. However, H.K. has physical challenges. He did not have challenges with demonstrating personal space when sharing with others.

**Shara Sisselman** (Sisselman) is a speech language specialist with Marlboro Township Public Schools (Marlboro). She has a bachelor of science and master's

degrees in communication sciences and disorders. Sisselman is certified in speech language and is licensed by the State of New Jersey. Sisselman's duties included assessing students and providing therapy for students with different speech and language or language disorders or disabilities. Sisselman attends meetings and write goals in IEPs and case manages students who are eligible for speech language services only. Sisselman also collaborates with other professionals to provide the most appropriate therapy for her students.

Sisselman is trained in a myriad of assessments which she can administer. For example, she can administer comprehensive speech tests, any secondary tests and several others. She has completed between 350 and 400 evaluations for speech language needs over her career. Sisselman explained that speech therapy helps to increase speech and language skills to help students better access the curriculum in their least restrictive environment. Sisselman was offered as an expert in speech language assessment, speech language pathology and interventions.

Sisselman first met H.K. in August 2021 at the District's middle school as part of a presentation with Dr. Merchant, the school's contracted audiologist who had come to do training. Sisselman said because H.K. would be attending this presentation and was going to be one of her students at Dugan she attended. Since October 20, 2021, she conducted virtual speech therapy once a week with H.K. In addition, Sisselman consulted with the classroom teachers at least one time per month.

When H.K. returned to in-person learning she provided speech sessions as a direct service in her office. He was pulled out of his classroom once per week and she continued to consult with his teachers. Sisselman worked on asking and answering questions, auditory recall and comprehension, following directions and multiple step directions, conversational skills and increasing his overall intelligibility due to some fluency issues. H.K. had some difficulty with fluency skills and she taught him easy onsets, which is how to breathe and then start his speech in an easier way to make it fluent.

Sisselman said she conducted an evaluation of H.K. and prepared a Speech Language Re-Evaluation Report. (J-10.) She recalled that he transitioned from his

classroom to her office well. He needed some prompting in order to attend and focus the entire time. Sisselman administered three standardized tests. The first was the Clinical Evaluation of Language Fundamentals (CELF); the second is the Phonological Processing, Auditory Memory and Listening Comprehension (phonological) test and third, the Goldman-Fristoe Test of Articulation, 3<sup>rd</sup> Edition. On the CELF exam, H.K. scored average and above average. His language profile was fairly developed; his ability to formulate a grammatically correct sentence when given a picture and a key word, was above average. On the phonological test, he scored between average and above average. This test looks at whether different phonological processing skills such as his ability to manipulate sounds, blend sounds together to formulate words, can he remember strings of words, can he repeat sentences verbatim and can he comprehend what is being told to him.

The Goldman Fristoe test is the articulation test which looks at speech sound. On this test H.K. performed poorly which indicates that he still continues to present with multiple articulation errors which impacts his overall intelligibility. H.K. has a lateral lisp—so instead of the sounds coming out from the front it comes out the side—instead of saying “ch” he would say “ka”. H.K. is a very bright student. His articulation is impacted. Pragmatic language was never addressed because his social skills were not problematic. Sisselman has observed H.K. in the speech room with his peers. Her assessment also includes H.K.’s expressive and receptive language skills. All his receptive and expressive language scores were between average and above average ranges. He had a relative weakness in his receptive language and that was her reason for administering the TAP test to find where the difficulty exists. Sisselman found that H.K. has very pretty good conversation skills at this point.

Sisselman attended the May 2022 eligibility meeting. She recalled reading all the results from the Team members who performed evaluations and said H.K.’s parents were not surprised about the teachers’ evaluation because H.K. is a bright kid. Sisselman believed that declassification was a surprise to the parents. She recommended that H.K. continue speech therapy services one time a week in addition to the consult, under speech only IEP, knowing that his articulation was still impacting him.



On cross-examination Sisselman testified that she was not involved with H.K. in first grade. She never observed him in class or during recess. In her evaluation, she found that he was easily redirected. Her sessions were structured and broken up into twenty-five-minute sessions. During the twenty-five minutes, Sisselman had to redirect two to three times. He was prompted two or three times. Sisselman said she has seen H.K.'s private speech and language evaluation. (P-1.) She skimmed the evaluation. Sisselman said she is qualified to administer the tests that were done in the private evaluation. There were certain tests that were done where the results were similar to what she had done and other tests that she did not perform and could not speak to the results.

Sisselman disagreed with the private evaluation wherein the results stated that "his ability to make inferences is impaired, his interpersonal negotiation is below average, his multiple interpretations is below average . . ." See P-1 at 17. Sisselman said while the scores look significant, that is not how she sees H.K. functioning. Sisselman could not state why H.K. performed differently in the private evaluation. According to Sisselman none of H.K.'s teachers reported challenges in H.K.'s processing. His mother asked how H.K.'s was processing in the classroom in an email sent to Sisselman. However, she directed the mother to H.K.'s classroom teachers as she was unable to answer that question.

Sisselman did not observe H.K. in the classroom, only in her speech language sessions with H.K. The test sessions were split into smaller time blocks to ensure accuracy. These time blocks were approximately forty-five minutes to an hour. During these sessions H.K. needed to be redirected and was provided with reminders. At times, H.K. would start humming and tapping on his desk during the testing sessions. During her regular sessions, he does not hum or tap. Sisselman gave H.K. breaks between each subtest because in her opinion, it helps to provide the most optimal result overall. Because the test was done soon after he returned to in-person learning after being virtual for such a long time, she wanted to build an environment for him that was comfortable. This is standard for what she does with most children when administering this assessment.

According to Sisselman, the redirecting that she did with H.K. she also did with his peers; with some more and others less than what was done with H.K. Sisselman testified that the scores that were listed on page seventeen of the private evaluation report would not have had an impact on her recommendation for the level of educational speech language services that H.K. requires in school. See P-1 at 17. Sisselman said that she did not see it impacting H.K., nor has it been brought to her attention that any of them were impacting him throughout his school day. Sisselman testified that the humming and tapping does not impact his ability to participate in her sessions or his peers who attend the session with him, nor his progress towards his speech language goals and objectives because he is very easily redirected. During her testing, she allows for breaks. The break during testing is what she gave to all children. She usually redirects two to three times an hour. Redirecting the groups were all similar, certain peers were redirected more, while others were similar or less.

### **For petitioners**

**Carriann Pietrocola** (Pietrocola) was H.K.'s case manager when he transferred to Dugan. Pietrocola was a learning consultant on the Team and when H.K. came to the District she conducted a virtual evaluation of H.K. Pietrocola was a learning consultant and case manager at Dugan between 2020 and 2021. Currently she works at Marlboro Memorial Middle school. Pietrocola stated that H.K. was at the end of kindergarten in 2020. He came to Dugan in September of 2021. He was virtual from August to December 2021. As his case manager she made sure he got what he needed. Although he was virtual, she always popped into the classroom and made her appearance and saw how he was doing. In addition, she collaborated with his teachers. There were problems with his attendance virtually.

At the time, Pietrocola testified that H.K. was classified as "other health impaired" which meant he had significant medical needs. He had some issues with hearing and so she let the teacher of the deaf students know that he was there. Once a week she goes to the classroom to make sure he was logged on for class and see if there were any issues that the teachers had with his academics. Pietrocola was not aware of what support H.K. received in virtual learning. On April 26, 2022, she performed a classroom

evaluation. This evaluation was completed after H.K. had only returned to in-person learning twelve to fifteen days. In completing the evaluation, Pietrocola met with H.K.'s teachers, did a classroom evaluation and looked at H.K.'s overall grade and his performance.

Pietrocola testified that she observed H.K. in the virtual setting. She admitted seeing his mother helping him. There were no reports of concern by anyone about H.K. As she recalled, H.K.'s mother picked up his class work on Fridays. There was no discussion with his parents of how H.K. did while on remote learning in the home. Pietrocola was asked to review her evaluation which was introduced into evidence as J-9. Nowhere in the evaluation was it noted as part of H.K.'s diagnosis that he was autistic. Pietrocola did not ask H.K.'s mom. Pietrocola testified that it was the first time she had heard that H.K. was autistic. In reviewing the 504 plan documentation, it was noted that H.K. is on the autism spectrum. (J-15.) Pietrocola stated she was surprised it was there but not in H.K.'s IEP.

Pietrocola testified that her conclusion in her evaluation would not have changed had she known his autism diagnosis. According to Pietrocola, her evaluation is based on her observations and all she would have done was to put it as background information. She did not know that H.K.'s mother was a special education teacher and a director of education. Pietrocola stated that a typical writing class is forty minutes. She recalled during her observation the aide stepped in two times to assist H.K. He had expressed to her that he does not like to write. When he was told to flip over his paper he was observed crying and whining and when the assistant prompted him to turn the paper over he did. Although it appeared to be more than two times, Pietrocola noted in her evaluation that H.K. had to be redirected, she testified that it was atypical in comparison to his peers. According to Pietrocola, H.K.'s peers also needed redirection.

Pietrocola testified that an ICR class means "in-class support." The difference between an ICR class and a general education class is that general education has no special education services; the special education teacher would not be in the class. In addition, there would be no accommodations or modifications. H.K.'s accommodation is a slantboard, a "foot-step" for his motor needs and a specific pencil with which he wanted

to write. H.K. was recommended to the current class because, looking at his grades and overall performance, the Team felt that he would be successful in general education with in-class support. Pietrocola testified that a general education class like an ICR allowed for the same processing that is required by H.K. In first grade, teachers repeat themselves all the time. Pietrocola felt that because of H.K.'s medical needs the ICR class would be beneficial to him. In the ICR class, the special education teacher provided prompting, and made sure that the breakdown of assignments were done. Pietrocola was not aware that spelling was difficult for H.K.

On cross-examination Pietrocola was asked if all the support H.K. was receiving could be given in a general classroom. She responded that teachers could provide support in a general education classroom. There was no report from his teachers that H.K. required more support than any other students in his classroom. Pietrocola did not observe H.K. requiring more support than the average student in his class either. During her observation, there was no modification done with the assignment that involved writing colors. Pietrocola testified that accommodations can be provided in a general education classroom. Pietrocola believed that H.K. is right where he is supposed to be. Pietrocola testified that it is her belief that H.K. could be successful in a general education class without a special education teacher. She concludes that H.K. was as bright as all his other peers.

**Carly Fog** (Fog) is a speech language pathologist who is employed by the Princeton Speech-Language & Learning Center. She conducts evaluations and provides direct treatment to clients. Fog conducts evaluations for articulation disorder, speech sound disorders, reading and writing disorder, social communication disorder and evaluates students with cerebral palsy and autism. Her current role is a direct provider of therapy. As such, Fog works closely with families and consults with school districts to provide information about reading programs and language interventions and social communication strategies. She has helped with IEP development and sits in on Team meetings to help with recommendations and goal planning. Fog creates treatment plans containing goals which are similar to the goals written on an IEP. She has provided support to special education services in New York.

According to Fog, the American Speech Language and Hearing Association (ASHA) is the governing body for speech and language. ASHA states that speech and language pathologists are experts in literacy which includes reading and writing. Fog is certified as a speech language pathologist in New York, New Jersey and Pennsylvania. Fog is also a licensed teacher for speech and language in New York and New Jersey. She has participated in approximately ten meetings where eligibility for an IEP was determined. Fog was admitted as an expert in speech pathology, but as a fact witness in special education.

Fog testified that education performance is more than academics. Fog has met H.K. on three occasions. Prior to evaluating H.K. she received background information which included some evaluations and the IEP from H.K.'s mother. Fog learned that H.K. is autistic and has a rare birth defect called schizencephaly which can cause difficulty with language disorders. In reviewing the speech and language evaluation, there was no testing completed for social communication skills. Fog noted that on education testing there was difficulty in the area of writing. Because autism is a spectrum, students present differently depending on the level of severity and the level of autism. H.K. presented as a student with autism and cerebral palsy (CP). H.K. also has physical motor deficits and challenges walking up the stairs.

Fog testified that H.K. did not present as a typical second grader. H.K. had some surface level social communication skills. Children with autism present with splintered skills. They have the ability to do certain things but are lacking in skills in other areas. H.K. has the ability to initiate a conversation and understand turn taking. However, when you have a conversation with him it is completely one sided—it's all about him; he does not pause to ask questions. He only shares information about himself. He lacks perspective talking and does not read social cues. Fog testified that there is a hierarchy which starts with emotional identification. This is understanding how people are feeling. This helps to establish the social reciprocity or the back and forth of a conversation like a ping pong game. However, H.K. is playing ping pong with one paddle and just throwing the ball to the other person. Fog said H.K. is comfortable talking with adults, which is typical of a student with autism.

As per Fog, H.K. appeared internally distracted throughout the testing session. He demonstrated some unusual behavior. For example, during her evaluation he tickled her wrist and then decided to perform surgery on her wrist. According to Fog, it is atypical for a student to want to perform surgery on your wrist and it is also atypical for a student to continue to engage in this behavior when they have been prompted to keep their hands to themselves. During her evaluation, H.K. appeared tired and needed performance feedback in order to move forward. Many of her observations of H.K. are consistent with autism, where he needed a set schedule, a routine; he needed to know what was expected within the social thinking program which is designed for students with communication difficulties, some with ADHD and some with autism. H.K. needed to know what was expected and specific instructions on what was expected in the testing setting.

Fog testified that H.K. had difficulty with perspective taking and social reciprocity. (P-1, at 6.) This is assessed by one of the measures Fog uses in her evaluation called the Social Language Development Test (SLDT). The student has to understand what others are thinking to truly engage in a conversation and to have that back and forth and not to just have a one-sided conversation. The student should be able to understand what the person is saying and respond appropriately.

According to Fog, on the second day of testing, H.K. had significant difficulty with rigidity and flexibility. He had difficulty with transition. He was on the floor kicking, screaming and yelling. He was upset and continued to say, "I need to start from the beginning." He needed everyone to be in their specific locations before he was able to follow through. Fog gave an example that occurred. H.K. had gone to the bathroom, which he wasn't able to ask by himself to go. He was reminded, "hey do you want to go to the bathroom." He responded yes, "I need to go to the bathroom." Fog stated that H.K. had to do a specific routine, that was repeated about four or five times. It took him thirty minutes to get from the bathroom to the room where he was being evaluated.

Fog found H.K. had difficulty transitioning between activities, especially from a preferred activity to a less preferred one. H.K. takes longer to complete activities that require redirection and refocusing on the task at hand. (J-5.) In the social emotional section of the IEP, H.K. has lots of big ideas and struggles to narrow down his thinking to

stay on topic. When this occurs, he sometimes will engage in problem behaviors such as a tantrum, crying with tears, yelling and hitting.

Fog noted in her report that, in reviewing Dr. Freeman's report, H.K.'s aide was supporting him within the classroom in order for him to effectively access the curriculum. It was noted that his aide provided rephrasing, instruction and responding to the teacher. Fog stated that was also consistent with her evaluation as well. In the student behavior section, the testing sections were split into smaller learning blocks ensure an accurate result because H.K. required verbal prompts and reminders to stay on task. H.K. was observed making humming noises, tapping his hands and asking random questions. Fog offered H.K. numerous breaks to limit testing fatigue.

H.K. had a solid foundation for language skills and had some articulation challenges based on the District speech and language evaluation done in April 2022. Fog testified that foundational language skills are early developing language skills. They look at the basis morphology, which is understanding grammatical comments of language, syntax which is the word order of language. How words are related to one another—for example, "cat and whiskers." Use of sentence and disconnect-reading and writing-social skills.

Fog conducted several standardized assessments widely used to assess a variety of disorders. For example, the TILLS assessment looks at some language skills. H.K.'s results showed he is below average skills in the area of written expression at the sentence level. He has the foundation skills to be able to do this, but when he is putting it into application and synthesizing the information, he has difficulty.

Narrative language or oral narration is below average and this needs support. Storytelling, for example, what happens in school. How he is able to recall information and how he is able to structure his foundational concept into sentence and discourse level information. If something happens at school, how is he able to share that information at home. (J-5, at 13.)

H.K. has difficulty with syntactic structure—making sure he is using word order appropriately. He showed some difficulty with pausing. He speaks at an extremely fast rate and often doesn't pause to indicate the punctuation in a sentence. Fog conducted the Great Oral Reading Test. This assesses reading fluency and reading comprehension. H.K. scored within the average range for fluency and superior range for rate. H.K. reads aloud and at a rapid rate. H.K. has a weakness in higher level language skills which is when he is answering comprehension questions. H.K. showed a strong ability to memorize information. When this is done, he is able to think about the sentence and synthesize that one sentence using the context from that one sentence or make a prediction based on the information in the sentence. However, he struggles to answer inferential based questions.

Fog also administered the articulation tests which results are consistent with the results of the District's evaluation. According to Fog, H.K. is able to decode words now but it could impact his ability to spell. If he is not hearing the words when he is saying them appropriately, then when he is sounding them out he may have difficulty spelling the words appropriately. For example, he could write a "th" instead of an "s" or a "w" instead of an "r". This could spill over into writing and social communication.

Fog did the test for problem solving which looks at a variety of different components of problem solving. H.K. has difficulty figuring out how to solve a problem effectively. He was in an interaction with a peer playing soccer. One peer kicked the ball onto a black top—another peer kicked it away instead of giving it to H.K. He was visibly upset—the aide had to debrief him. Fog believed this to be an atypical behavior.

Fog observed H.K. during recess to see how he reacts with a peer and see if there were any difficulties with transition from recess to classroom. During Fog's evaluation she was accompanied by Diaz, H.K.'s case manager. She found that H.K.'s 1:1 aide was with him the entire time. At recess there was difficulty with communication in that he was having a conversation and other students came out and he turned around and stopped the conversation without a greeting or an appropriate way to leave and went to line up with his class. Fog observed him playing a modified game of basketball. The aide stepped in and crouched down and moved her hands back and forth to facilitate some



sort of conversation between the two students. Fog concluded that the aide was not just there for physical support but was providing additional support. Fog said that the support that H.K. received during recess was special education, because it was different from what other students received.

Fog, through her standardized assessment and observation, concluded that H.K. has a deficit in social communication. She recommends that goals should be added to H.K.'s IEP to specifically address his social communication deficits. She would further consult with his aide and classroom teachers. Fog suggested that H.K. get specialized support not only within the speech and language room, but across multiple settings.

Fog stated that H.K. had difficulty transitioning from recess to the classroom. H.K. wanted to catch up with his peers and he was visibly upset because his peers had walked into the building before him and he was rushing through the hallway to try to get to them. Fog stated that she did not observe other students getting visibly upset during the transition from recess to the classroom. The special education teacher and his aide both stepped in to calm him down.

Fog conducted a classroom observation. She believed that the entire lesson incorporated specially designed instruction. The lesson provided had incorporated many specialized supports that she would have recommended. Fog said she was told by Diaz that the teachers planned all the lessons together. As such, Fog believed that the special education teacher is ensuring that her students are getting the appropriate levels of support. Fog, in observing the lesson taught, believed that the accommodation and support given is regularly provided in special education. And it goes above and beyond what most teachers would be doing in their classroom.

Fog was asked if the support could be administered through a 504 plan. Fog said no. She believes that H.K. needs more support than a 504 plan because the teachers were providing a robust level of instruction that goes beyond general education support. She further observed the aide redirecting H.K. in the classroom, tapping him on the shoulder to make sure he was paying attention. She observed the aide redirecting him approximately seven to ten times.

Fog used the first-grade common core standards when evaluating H.K. This was used because H.K. was in second grade. Therefore he would or should have mastered all the skills in first grade. In looking at the curricular standard (which are standards that a student should accomplish by a certain grade level, or by the end of a certain grade level), H.K. had not mastered the standards. H.K. is expected to use punctuation and capitalization and he has not met those standards. He struggles with organization, and this should be mastered by grade one. He also struggles to understand emotions and thoughts of others and the intent of their action, thus not meeting this standard. He had difficulty understanding his personal responsibilities.

Fog believes that H.K.'s diagnosis of autism, CP and schizencephaly, adversely impacts his educational performance. Fog recommends that H.K. receive support in the area of written language which can be provided through an IEP. H.K. was able to fill out a graphic organizer and complete tasks with support and with specifically designed instruction in place in the classroom. She would recommend that H.K. continue to receive these services. Fog made the referral for BCBA for designed instruction and that H.K.'s behavior should be addressed further and explored.

On cross-examination, Fog was asked if it was her testimony that all first-grade curriculum should be mastered before second grade, and she said yes. Fog testified that it is a District standard that students are supposed to meet goals by the end of first grade. Students who do not meet those goals do require additional support. They may benefit from special education. In looking at H.K.'s profile she believes he needs special education. Fog was not aware that at Marlboro, the general education and special education teachers collaborate together to plan the lessons.

Fog did not observe any general education classrooms at the school. To her knowledge she did not know if the lesson she observed would be different in a second grade general education classroom. Fog believed that when the special education teacher spoke with H.K. in the classroom she was offering consultation which is under the umbrella of specifically designed instruction. Fog said it depends on the level of support, which can be specialized designed instruction.

Fog on cross-examination said she was not close enough to hear what the aide was saying or doing with H.K. when she characterized the interaction between him and his aide during the modified basketball game as facilitating a conversation. Fog admitted that she inferred the aide was facilitating the conversation. In testifying on Dr. Merchant's review, the question was asked if Fog knew why the observation was conducted. Fog believed it was to observe H.K.'s hearing equipment in the classroom and to help make recommendations for hearing devices. However, Fog did not ask Dr. Merchant or Diaz what the purpose of the observation conducted by Dr. Merchant was to do.

Fog said that her testing sessions with H.K. were scheduled for two hours but they were about three hours because of the additional support that was needed. Fog observed H.K. at recess and within the classroom with peers. In addition, she received information about peer playdates from his mother. Fog requested information from Diaz and the teachers regarding H.K.'s performance, his social communication and his overall functioning within the school. Fog testified that the school said they did not observe social communication difficulties. She also asked the school about emotional and emotional dysregulation and the school reported on two occasions between September to November.

Fog conducted her various testing according to how she felt that the student would be most comfortable. She typically starts with receptive language tasks, because it allows a student to warm up and feel comfortable in a testing session. Once they are more at ease, it is easier to bring on more challenging material. Fog said she reviewed all the records before testing him to include his IEP. Fog was not sure if the work sample she reviewed was to be done alone or in a group setting. Fog was not sure if H.K.'s current IEP required him to receive multisensory instruction. When asked if it was not true that an only child is also comfortable with speaking to adults, she disagreed. Fog admitted that all the information that she was relying on for her report was almost a year and a half old. That was the information she said was available to her.

Fog said that articulation can impact a student's spelling, but did not review his spelling tests, spelling lists or anything specific to his spelling. She did not observe H.K.

at any time prior to the Team determining that he was no longer eligible for special education. She observed him or evaluated him in September 2022. Fog said that H.K.'s behavior listed in the present level section of the IEP was consistent with her observation in September 2022. Thus, the information used in her evaluation as old as they were, was still applicable in her findings in September 2022.

**J.N.** (H.K.'s mother) testified that she is employed by the New Jersey Department of Education, Office of Special Education in Trenton, New Jersey. J.N. is the program development specialist for the Office of Special Education and a Federal 619 coordinator. J.N. helps to monitor and determine if school districts across New Jersey are implementing the IDEA for children with disabilities, IEPs and supporting their families. Prior to this, J.N. worked for North Brunswick Township Public School Board of Education. While there, she has worked as a special education teacher, director of elementary instruction and supervisor of special education. In addition, J.N. worked as a special education teacher and as a speech therapist in New York. J.N. has a bachelor's degree in speech pathology and special education. She has a master's degree in special education and also in educational leadership. With her master's degree in educational leadership J.N. is able to oversee teachers, staff, Teams, evaluate and make program decisions districtwide. J.N. was accepted as an expert in special education.

J.N. testified that she has reviewed all the records for H.K. and based on her expertise in special education, she believes that H.K. is eligible for special education under the categories of autism, or other health impaired. J.N. believes that under autism he would be eligible because his diagnosis of autism is adversely affecting his whole educational performance including social communication skills, functional skills, language skills and making an adverse impact, thus, making it difficult to access the general education curriculum. J.N. testified that H.K. would need clear specifically designed instruction in order to access the general education curriculum. Autism also falls under the other health impaired category. H.K. also has several health issues and impairments that adversely affect his ability to access the general education curriculum and that adversely affect his educational performance and he would again need specifically designed instruction to meet his needs to access the general education curriculum. J.N. testified that based on the testimony she heard and the speech language pathologist Fog,

it is clear that H.K. meets the criteria for eligibility and is a child who needs special education programming and related services.

### **Respondent's Rebuttal Witness**

**Alisyn Morder** (Morder) is a supervisor of special services at the District. She has held this position for the past two years. Prior to this position Morder was a special education teacher for thirteen years. As a special education teacher, she worked out of the District as a multiple disability (MD) teacher. In this position she taught severely disabled students who received specialized education. Morder was responsible for lesson plans, assessment, IEPs and collaboration. In public school she taught students with language learning disabilities (LLD). In this role, she also does collaboration, runs IEP meetings, prepares IEPs, individualize instruction and lesson plans. She then went on to teach in a fourth-grade class which was an in-class resource classroom (ICR). There she supported the general education teacher. Morder has a K–6 general education certification and a supplemental supervisor certification. As a supervisor, she works closely with another supervisor. Her main role is overseeing the self-contained programs such as the MD, autism, LLD, out-of-district disability program, preschool disability program and BCBA's. Morder was offered as an expert in special education.

Morder explained that the elementary general education and the ICR classes follow the same curriculum pacing and guidelines based on the District's recommendations. On the surface level they follow the same materials and the same assessment scheduling. The only difference is that with the ICR classes there is a special education teacher. Based on her observation there is no difference with the general education instructions in each class. Delivery of instruction between classes has similar styles; both have a multimodal approach with a lot of teacher consultations. Their approach is beyond the traditional approach of pen and pencil. They use unique ways to present materials with the student utilizing technology to express their understanding. As a former teacher and supervisor of special education, Morder explained the New Jersey Standard of learning standards, by stating that they are grade specific and encompass all the areas of the content that the student will encounter in the specific grade levels.

Morder testified that if a student has not mastered the learning standards, it does not mean that the student requires special education services. The students should be able to achieve or come close to achieving the goals set forth in order to move on to the next level. However, it is not expected that students should master the student learning standards before moving on to the next grade level. Each year it is assumed that the students move up to the next grade level. The teachers review or have an overall assessment of each student at the beginning of the year. Students are at different learning levels with different needs whether they are in a special education or a general education classroom. The teachers then incorporate those needs either in their instruction as they move into the lessons they are planning for the curriculum or they look at the comparable goals that are in the next grade level to make sure that they are in alignment.

If a student has not mastered the learning standard skills it does not mean that the student needs special education class. Special designed instructions are measures taken that would be beyond steps taken in a general education class. They are unique and individualized. Morder said one to one instruction is not usually special designed instructions; having a one and one consultation is not only given in special education; neither is providing student with extra time on test special education. Individualized behavioral plans are not special education. To be eligible for special education a student referral is usually received by the Team. The child is evaluated to see if he or she meets one of the classification categories in special education. The Team must then determine that the needs of the student and the impairment found have a direct educational impact and the student's learning and specialized education is necessary for the child's success.

Proof or evidence is necessary that there is an impact on the student's education to be able to be in special education. Morder admits that she does not oversee the ICR classes, however the other supervisor she works with does. She frequently visits the ICR classes and works with those teachers. She observed H.K. in his ICR class in September 2022. Morder has not specifically observed H.K. but has gone into his classroom for observation twice during the school year. She is familiar with H.K. through overseeing special education and knows his curriculum as she discussed it with his teachers. In the fall he had a different aide who anticipated H.K.'s needs, such as opening snacks. H.K.

is, not able to navigate the classroom easily. Morder's first observation was with both the general instruction teacher and special education teacher in the classroom. The most recent observation was only with the special education teacher as they were in a transition from gym to the bathroom and back to the classroom.

According to Morder every classroom at the school has classroom management strategies that are utilized and the teachers provide their own behavior plans based on the student need in that classroom. There may be individualized plans for special education or general education classes. All teachers start out with the same generalized plan. Individualized behavior plan is not unique. According to Morder, the District's definition for unique behavior is if the student has extreme or severe behaviors that are occurring frequently or consistently, and they are often in crisis. Then they would be offered an opportunity for behavioral consultants and obtain a more significant behavior plan.

In evaluating the evidence, it is necessary for me to assess and weigh the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's testimony in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). It is further necessary to evaluate and weigh the expert testimony offered at the hearing. It is well settled that "[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted).

I found the petitioners' expert witnesses credible. The record clearly shows that J.N. is a devoted parent who has been actively involved in supporting H.K.'s academic, emotional and social well-being. I do not doubt her testimony describing her concerns

that his diagnosis of autism is adversely affecting his whole educational performance including social communication skills, functional skills, language skills and making an adverse impact, making it difficult to access the general education curriculum. J.N. testified that H.K. would need clear specifically designed instruction in order to access the general education curriculum. These behaviors, however, were not exhibited at school and according to Diaz no concerns were brought to her attention that warranted a formal observation. None of the issues identified by J.N. were set forth as concerns she had about H.K.'s progress. In fact J.N. was more concerned with where H.K. would sit for snacks, lunch and COVID-19 precautions. Moreover, the consistent testimony of H.K.'s teachers is that he was doing well socially at school, he did not exhibit any emotional or social deficiency; functions well in his class and his grades were between ninety and 100 percent. He had issues with writing, because he does not like to write, however he would complete his writing assignments.

Fog was a qualified, detailed and persuasive expert and fact witness. While Fog presented as an expert in special education, and a credible witness, I place limited weight on her conclusion that H.K. should continue to be classified. Fog has participated in ten meetings where eligibility for an IEP was determined. Fog observed H.K. for two days and met with him three times. Fog observed him in his classroom but was not aware that the general education and special education teachers work together to plan the lessons at the school. Her observation came sometime in September, some five months after the determination by the Team. Fog concludes that there was a deficit in social communications. She further stated that all children should accomplish the goals set forth in their IEP before they can move on to the other level. However, Fog believed that the lesson provided to H.K. had incorporated many specialized supports that she would have recommended.

I found the testimony by the respondent's experts, specifically Dr. Defilippo and Sisselman, to be credible and consistent with other offered evidence. I also found the District's employees Pandak, Fitzsimmons and Diaz to be credible. I found H.K.'s former teachers to be devoted professionals who knew H.K. well and were attuned to his needs and progress at school. The only area where I noted a discrepancy in the testimony and



the record involved was that both teachers were not aware that H.K. was diagnosed with autism. However both teachers testified that he was a bright child.

Garbolino testified that H.K. impressed them every day. His difficulty was with writing. Not that he could not write, he just did not want to write. When they get down to his level and talk with him he would go ahead and write. Garbolino testified that H.K. was a stellar student and he did not have any behaviors that stood out. When he first returned to in-person learning, the first week he had some issues, but after that he settled in like all of his classmates. The only assistance was with redirecting, which is given to all first graders. Respondent's witnesses, who saw H.K. on a nearly daily basis in first grade, confirmed that at school and online, H.K. is a very social student, works well in a small group, talks with his friends and is a bright student. His reading level was among the highest in the class and there were no modifications or adaptations to the content of the material in first grade. Garbolino did not have to provide any specialized instruction to H.K. "because it was not needed." The work provided to the general education students was not modified. He also performed very well in his class, he completed all his homework assignments in a timely fashion, and the record shows that the accommodations used were for his physical needs. Diaz said H.K. did well in math, he is a great reader and is above the grade level. Pandak said H.K. struggles with spelling and gets upset when he is to write. Again, the only assistance given was with redirecting and there were no behavior issues she identified (i.e., a chair other than those that were already offered to all students in the class). H.K.'s excellent grades and standardized test results support the fact that H.K. does not need special education. Both Garbolino and Diaz, H.K.'s teachers, testified credibly and seemed to be sincerely pleased with H.K.'s progress, and they all appeared to genuinely agree that he is ready to be declassified.

The District conducted a reevaluation meeting in March 2020, just before the COVID-19 pandemic, which resulted in the shutdown of the schools in New Jersey. At that time several evaluations were proposed that would be done for H.K. No one, including J.N., expressed any concerns with the proposed evaluations. (J-1.) Once H.K. was back in school the evaluations were completed. They included a psychological reevaluation (J-8); educational evaluation—triennial (J-9); speech and language

reevaluation (J-10); occupational therapy educational evaluation (J-11) and physical therapy educational evaluation (J-12).

Dr. Defilippo completed a psychological evaluation of H.K. She performed the WISC-V standardized I.Q. test where H.K. “performed extraordinarily well.” (J-8.) She has worked with H.K., spoke with his teachers and had direct contact with H.K. independent of her evaluation as she frequently goes into the classroom and interacts with the students. She said that crying and whining is typical of a six-year-old and did not require specialized education. I **FIND** the evaluations conducted by the District were thorough and reasonably done.

Morder is an expert in special education, and I found her credible. Morder testified that the elementary general education and the ICR classes followed the same curriculum pacing and guidelines based on the District’s recommendation. The only difference is that an ICR class has a special education teacher. She has observed both classes, unlike Fog. Morder testified that the school uses unique ways to present materials to the students. She further stated that if a child does not master the learning standard skills, it does not mean the child requires special education. According to Morder, it is not expected that students should master the student learning standards before moving on to the next grade level. Morder was emphatic that “every classroom” at Marlboro has classroom management strategies that are utilized, and the teachers provide their own behavior plans based on the student’s need.

Pietrocola, H.K.’s case manager, stated that H.K. is classified as “other health impaired,” which meant he has significant medical needs. Pietrocola was credible when she stated that she did not know that H.K. had a diagnosis of autism and that her conclusion in her evaluation would not have changed. Her conclusion based on her evaluation took into account his grades and overall performance. According to Pietrocola, H.K. would do well in a general education class with in-class support. Pietrocola did not observe H.K. requiring more support than the average student. She further testified that accommodations can be provided in a general classroom.

I further give more weight to Sisselman who was offered as an expert in speech language assessment, speech language pathology and interventions over the petitioners' expert, Fog. Since October 2021, Sisselman has conducted virtual and in-person speech sessions with H.K. She conducted the CELF exam on H.K. where he scored above average. He also scored average to above average on the phonological test. The test where he performed poorly was the Goldman Fristoe test which looks at speech sound. H.K. has a lateral lisp, so instead of saying "ch" he says "ka". However, Sisselman said although his articulation is impacted his social skills were not problematic. Sisselman disagreed with Fog's evaluation. As Sisselman explained, none of H.K.'s teachers reported any issues. His redirection was not problematic as she does the same with others of his peers. The results noted in the various subtests<sup>1</sup> given by Fog did not impact him throughout his school day. These results also, would not have impacted her recommendation for the level speech language services he required.

For these reasons I give more weight to the District's expert witnesses' testimony over the petitioners' witnesses' testimony concerning H.K.'s intellectual ability and needs in May 2022.

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

The issues are whether the District met its burden in proving that it substantially complied with all statutory and regulatory requirements when it determined that H.K. was no longer eligible for special education and met its burden of proving that it provided a free and appropriate public education (FAPE) while H.K. was receiving services pursuant to IEPs for the 2021–2022 and 2022–2023 school years.

This case arises under the IDEA, 20 U.S.C. §1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities.

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<sup>1</sup> Subtests

Subtest	Standard Score	Percentile Rank	Performance Level
Making Inferences	6	9	Impaired
Interpersonal Negotiation	7	16	Below Average
Multiple Interpretations	7	16	Below Average
Supporting Peers	7	16	Below Average
Total Test Score	78	7	Impaired

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). To meet its obligation to deliver FAPE, the school district must offer an IEP reasonably calculated to enable H.K. to progress appropriate in light of his circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386 (2017); 137 S.Ct. 988; 197 L. Ed 2d 335.

New Jersey has enacted legislation, N.J.S.A. 18A:46-1 et seq., and has adopted regulations to assure all children with disabilities enjoy the right to FAPE as required by 20 U.S.C. §1401 et seq. The IDEA requires a student's FAPE be designed to meet the unique needs of the child through an IEP which is reviewed annually. Lascari at 30, citation omitted. Moreover, classified students must be reevaluated every three years, or sooner if conditions warrant or if the student's parent or teacher requests the reevaluation. N.J.A.C. 6A:14-3.8(a); See 20 U.S.C. §1414(a)(2)(A).

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). An IEP should be developed with the participation of parents and members of a district board of education's Team who have participated in the evaluation of the child's eligibility for special education and related services. N.J.A.C. 6A:14-3.7(b). The IEP team should consider the strengths of the student and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluations of the student; the student's language and communications needs and the student's need for assistive technology devices and services. The IEP establishes the rationale for the pupil's educational placement, serves as the basis for program implementation and complies with the mandates set forth in N.J.A.C. 6A:14-1.1 to N.J.A.C. 6A:14-10.2.

Here, H.K. went to the District's half-day inclusion preschool program from September 2018 through June 2020. A reevaluating planning meeting (RPM) was held in March 2020 as he was aging out of his preschool category. (Respondent's Brief at 1.) It was determined at the RPM that he would have psychological, educational, speech and language assessment, classroom observation, PT and OT updates. This was agreed to and signed off by petitioner, J.N. The COVID-19 pandemic caused the school immediately thereafter to go to remote instruction. Ibid. It was agreed that once the school reopened that the reevaluation was conducted. Due to H.K.'s medical issues he was not medically released to return to school until April 2022. In the interim, on May 5, 2020, at a reevaluation eligibility determination review meeting it was determined that for the 2020–2021 school year H.K. would be eligible for special education and related services under the classification category of preschool child with disability. (J-3 at 1.) The parents agreed to this. (J-3 at 21.) Petitioners offered no evidence that they disagreed with this approach. The District developed an IEP and H.K. was placed in an ICR classroom for kindergarten. (Respondent's Brief at 2.)

In May 2021, an annual review IEP meeting was held, and an IEP was developed. (J-5 at 1.) H.K. was classified as other health impaired. Ibid. Again, the petitioners signed off on this IEP. (J-5 at 25.) The District also continued with H.K. in an ICR class for first grade. (Respondent's Brief at 2.) At the May 2021 IEP meeting, the Team was concerned about how H.K. would transition from virtual learning with truncated days in kindergarten to in-person learning for a full six-and-a-half-hour school day. The parents were also concerned as stated, "Parents are concerned about how H will do in September 2021 when he transitions back to in-person learning and his stamina for the full school day. They continue to be concerned about safety navigating the school and while eating." (J-5 at 8.) There were no concerns from teachers or parents as to H.K. not progressing, because he had progressed. In dealing with a worldwide pandemic, the District has shown a great level of creativity and concern and based on the situation created an IEP specifically curtailed for H.K. in the 2020–2021 and 2021–2022 school years, which allowed him to progress in light of his circumstances. While the petitioners argue that the "District committed numerous procedural violation [sic] of the IDEA that amount to the Denial of FAPE," they failed to point to a specific violation. H.K. evaluations had to be

done in person. In October 2021 petitioners requested that the District continue to delay H.K.'s reevaluation. H.K. was not medically released until April 1, 2022. The District's witness testified that reevaluation had to be done in person because there were certain tests by the very nature that they were standardized, required that H.K. had to be in person to be evaluated. When H.K. returned to school in April 2022, within a four-week period giving him time to adjust, he was evaluated. The petitioners offered no evidence that this could be done through a virtual evaluation.

To meet its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to progress appropriate in light of the child's circumstances. Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386 (2017); 137 S. Ct. 988; 197 L. Ed 2d 335. I therefore **CONCLUDE** that the District met its burden and obligation to deliver FAPE when it provided H.K. with appropriate IEPs for the 2020–2021 and 2021–2022 school years.

### **Declassification**

The District bears the burden of proving, by a preponderance of the evidence, that its action in declassifying H.K. was appropriate under the circumstances. In this case, the District maintains that “despite H.K.’s numerous diagnoses, he does not meet criteria to be classified as eligible for special education and related services because he is not in need of special education.” (Respondent’s Brief at 13.) Additionally, the District maintains that the testimony of the District’s witnesses demonstrate that he is not in need of special education and related services.

In opposing the decision to declassify H.K., petitioners assert that he is a student with a disability who is eligible for special education and related services under the classification of other health impaired and autism, which adversely affects his educational performance. Petitioners argue that the District did not provide FAPE for the 2021–2022 and 2022–2023 school years.

The District offered competent evidence and testimony that H.K.'s disabilities did not affect his educational performance, that he was making progress akin to his peers, and the general education programming offered by the District was sufficient to address H.K.'s educational needs without offering special education and related services any longer.

H.K. made good progress through the most recent school year. H.K. was on remote schooling from March 2020 through April 2022. When he returned to in-person learning it was without much difficulty. The first week of class he had some difficulty, however, once it was explained to him what was expected, he was compliant. His grades did not suffer. He performed as well on remote learning, as in-person learning. He met most of his IEP goals and those that were not met, according to Morder, the student should come close to achieving.

H.K. had no significant issues with social/emotional skills, educational achievement or functioning in his classroom. In fact, his teachers believe him to be a bright student. He performed extraordinarily well on the WISC-V test, which is a standardized I.Q. test. His I.Q. was in the high average range or eighty-sixth percentile range. His verbal abilities are in the ninety-nine and a half percentile range. His ability to identify patterns and understand relationships was the highest. Because H.K. did well academically, socially and emotionally in the classroom, there was no need for further evaluation of his behavior. H.K.'s teachers did not observe behavioral issues that would adversely affect his educational performance.

Conversely, petitioners' expert Fog made a referral for BCBA and testified that H.K.'s behavior should be addressed further and explored. Fog is a speech language pathologist and observed H.K. over a two-day period and concluded that there was an issue with H.K.'s behavior. The District expert and the only expert in behavior analysis, Dr. Defilippo, testified that H.K. did not exhibit behavior that needed consultation. The record at no time, whether from the teachers or parent, mentioned any issues with H.K.'s behavior that was of concern. It was only with Fog's evaluation that this was mentioned. I therefore gave more weight to the District behavioral expert and to the District witnesses

that dealt with H.K. on a daily basis. Additionally, H.K.'s mother testified and offered no statement to H.K.'s behavior that adversely impacts his education.

In addition, the District's speech language specialist, Sisselman, provided speech language sessions to H.K. during the 2021–2022 school year. Sisselman started virtual speech therapy once a week with H.K. since October 2021 and when he returned to school she would take him from class and have her speech session in person. Sisselman spoke with his teachers monthly. Based on Sisselman's evaluation, H.K. is a bright student who has multiple articulation errors. Pragmatic language was never addressed because his social skills were not problematic. However, Sisselman conducted three tests in her evaluation and the Goldman Fristoe test is the test in which H.K. performed poorly. H.K. had a relative weakness in his receptive language reasoning. Because of this weakness she administered the TAP test to find where the difficulty exists. She thus recommended that H.K. continue speech therapy services once a week. Certain tests that Sisselman and Fog performed yielded the same results, however, there were certain tests that Fog did that Sisselman was not able to address. Sisselman redirected H.K. a few times, but said it is similar to redirecting H.K.'s peer. Nothing more significant and disagreed with certain findings of Fog. The petitioners argued that redirecting to stay on task has not been mastered by H.K. and thus one of the reasons he needs special education. However, I gave more weight to Sisselman than Fog, because she sees H.K. weekly and stated that any redirection she did with H.K. was similar to all the groups and certain peers were redirected more while others were redirected less. Furthermore, the test results that Fog conducted where H.K. performed poorly did not impact H.K. nor was it brought to her attention or the District.

Testimony from the respondent's witnesses indicated various different tests that were administered in order to evaluate H.K. coupled with a great amount of observation of H.K. both virtually and in the classroom. Petitioners' witness argued that in September 2022 when she conducted her evaluation, H.K. presented as an atypical student. Fog testified that he did not understand his personal responsibilities. "When you're having a conversation with him, it's completely one-sided, it's all about him." (T3 69:24–25). I am not sure if any six- or seven-year-old child's conversation would not mostly be self-directed.



The respondent in contrast, offered testimony that H.K.'s behavior was not atypical for students of his age and that he was behaving similarly to his classroom peers and appropriate reaction with adults. His teachers and aide would redirect him in class, but the redirection did not occur enough times that they needed to track it. Although he was on mute during remote learning if he had an outburst this was not unusual, and the assistance of a parent to maintain focus while trying to learn virtually is common.

In this matter, the District believed not only that it offered an appropriate education pursuant to its IEP, but that H.K. had met the goals set out in his IEP and was doing well, showing progress and performing on a level akin to his classroom peers. The District reviewed and evaluated testing results and took into consideration H.K.'s teachers' opinions in finding that H.K. was making progress. He was an excellent student, excelled in math, reading and was equal to or even at times exceeded his peers. The District's witnesses testified that H.K. did not require any specially designed instructions to access the general education curriculum. Respondent stated that H.K. "achieved excellent grades in his general education class without the need for modification or teacher support within the classroom setting that requires an IEP." (Respondent's Brief at 14.) I agree. Petitioners contend that the District focused mainly on H.K.'s grades. "[S]ome courts have recognized that a student's continued receipt of good grades is not conclusive on whether the student's disability affected their ability to access their education." See C.B. ex rel. Z.G. v. Dep't of Educ. of City of New York, 322 F. App'x 20, 22 (2d Circuit 2009). However, in general "when students' academics do not decline, as is the case here, that consistency is usually found to signal that their disability does not adversely affect their educational performance including their ability to access their education." M.S. v. Randolph Bd. of Educ., 2019 U.S. Dist. LEXIS 169184.

I therefore **CONCLUDE** that the District met its burden of providing by a preponderance of the evidence that it complied with all the statutory and regulatory requirements in determining that H.K. did not have a disability that adversely affected his educational performance and that he did not need special education and related services.

### **Compensatory Education**

Petitioners correctly stated that a student deprived of a FAPE may be entitled to an award of compensatory education to make up for the earlier deprivation. Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 249 (3d Cir. 1999); M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 536 (3d Cir. 1995); Lester H. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990), cert. denied sub nom., Chester Upland Sch. Dist. v. Lester H., 499 U.S. 923 (1991).

The petitioners claimed that there were numerous procedural violations of IDEA which equated to a denial of FAPE. The first example claimed by petitioners was that the District failed to give H.K. an educational program that would provide any meaningful educational benefit or significant progress. They then laid out the legal standard for the granting of compensatory education, that being that the school district knew or should have known that a child was given an inappropriate IEP or was not receiving more than a de minimis educational benefit, and it failed to correct the situation. M.C., 81 F.3d at 397.

Petitioners argued that the IEPs offered to H.K. were inappropriate and his progress report reflected that it failed to assess him and that he “made less than significant progress on many of his IEP goals in the areas of Study Skills, Speech Language, Social/Emotional/Behavioral and daily Living Skills.” (Petitioners’ Brief at 44.) However, the IEP need not “maximize the potential” of the disabled student, it must provide meaningful access to education and “be sufficient to confer some educational benefit” upon the child for whom it is designed. Rowley, 458 U.S. at 200. The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Andrew F. V. Douglas Cnty. Sch. Dist., 580 U.S. 386 (2017); 137 S. Ct. 988; 197 L. Ed 2d 335.

The testimony offered by the District showed that H.K. made significant and meaningful educational progress during the time period when he was previously classified for special education and related services. Petitioners failed to establish that the education provided to H.K. during the COVID-19 pandemic, specifically the remote instruction during 2020–2021 and 2021–2022 school years, resulted in deprivation of an

education. Respondent's witnesses which include the educators, case manager and experts in special education opined based on competent evidence of H.K.'s performance that the educational programs provided to him were appropriate and that H.K. made meaningful educational progress. That meaningful educational progress met the definition of FAPE, as set forth in Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 185 (3d Cir. 1988); L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006); K.D. by and through Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248, 254 (3d Cir. 2018) (a satisfactory IEP is one that confers a meaningful educational benefit.)

I therefore **CONCLUDE** that the District met its burden of demonstrating that it provided H.K. a FAPE and he is therefore not entitled to compensatory education.

### **CONCLUSION**

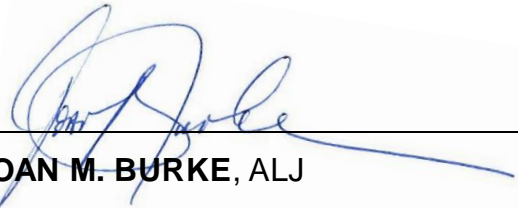
Based on the foregoing facts and the applicable law, I **CONCLUDE** that the District met its burden of proving that it sufficiently complied with all statutory and regulatory requirements when it determined that H.K. was no longer eligible for special education. I **CONCLUDE** that the District met its burden of proving that it provided FAPE during the time frame of 2020–2021 and 2021–2022 school years when H.K. was classified for special education and related services. I also **CONCLUDE** that the petitioners are not entitled to compensatory education. I further **CONCLUDE** that there was no Section 504 violation.

### **ORDER**

I hereby **ORDER** that the respondent's determination that H.K. was no longer eligible for special education and related services is hereby **AFFIRMED**. I **ORDER** that the petitioners are not entitled to compensatory education.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2023) 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 (2023). 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.

June 9, 2023  
DATE



\_\_\_\_\_  
**JOAN M. BURKE, ALJ**

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

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

JMB/jm

**APPENDIX**

**WITNESSES**

**For petitioners**

Carriann Pietrocola

J.N.

Carly Fog

**For respondent**

Samantha L. Defilippo, M.A., CAGS, NCSP, BCBA

Lindsey Pandak

Meghan Fitzsimmons, LCSW

Natalie Diaz

Shara Sisselman, M.S., CCC-SLP

Ali Garbolino

Alisyn Morder

**EXHIBITS**

**Joint**

J-1 Reevaluation Planning, March 3, 2020

J-2 Progress Report, May 31, 2019

J-3 IEP, May 5, 2020

J-4 Progress Report, May 20, 2020

J-5 IEP, May 12, 2021

J-6 Kindergarten Report Card, June 2021

J-7 Request for Additional Assessment, April 4, 2022

J-8 Confidential Psychological Evaluation, April 29, 2022

J-9 Education Evaluation—Triennial, April 26, 2002

J-10 Speech and Language Reevaluation Report,

J-11 Occupational Therapy Educational Evaluation

J-12 Physical Therapy Educational Evaluation, April 28, 2022

J-13 Reevaluation Eligibility Determination, May 31, 2022

- J-14 Draft IEP, May 31, 2022
- J-15 Section 504 Accommodation Plan, June 15, 2022
- J-16 First Grade Report Card
- J-17 Progress Report, May 17, 2022
- J-18 Second Grade Report Card, November 29, 2022

**For petitioner**

- P-1 Princeton Speech-Language & Learning Center's Speech and Language Evaluation, September 2022
- P-2 Carly Fog, M.S., CCC-SLP-Curriculum Vitae
- P-3 ASHA Roles and Responsibilities
- P-4 Not entered into evidence
- P-5 New Jersey Student Learning Standards- Comprehensive Health Curriculum Guide—Grade 1
- P-6 Not entered into evidence
- P-7 Jennifer Nicosia, Curriculum Vitae
- P-8 Dr. Donna M. Goione Merchant Observation, April 11, 2022

**For respondent**

- R-1 Not entered into evidence
- R-2 Not entered into evidence
- R-3 Natalia Diaz, Resume
- R-4 Samantha L. Defilippo, Resume
- R-5 Shara Sisselman, Resume
- R-6 Not entered into evidence
- R-7 Not entered into evidence
- R-8 Not entered into evidence
- R-9 Not entered into evidence
- R-10 Not entered into evidence