



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 03539-2020

AGENCY DKT. NO. 2020-31332

M.H. AND J.H. O/B/O A.H.,

Petitioners,

v.

RIDGEWOOD VILLAGE BOARD

OF EDUCATION,

Respondent.

Beth Callahan, Esq. for petitioners (Callahan and Associates, attorneys)

Alyssa Weinstein, Esq., for respondent (Busch Law Group, attorneys)

Record Closed: July 5, 2023

Decided: July 7, 2023

BEFORE **DANIELLE PASQUALE**, ALJ:

STATEMENT OF THE CASE

This matter arose with the filing of a due process petition in accordance with the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1415, by M.H. and K.H. on behalf of their son, A.H. (“M.H. and K.H.”, or “Petitioner(s)” or “mom”), who is classified as eligible for special education and related services. Petitioners assert that the Ridgewood Village Board of Education (“Ridgewood”, the “Board”, or the “District”) failed

to offer A.H. an Individualized Education Program (IEP) that offered a Free and Appropriate Education (“FAPE”) for the 2020-21 and 2021-22 school years. They have unilaterally placed him at the Craig School (“Craig”), a New Jersey private school; seek reimbursement for the expenses there for the years in question including transportation.

ISSUES PRESENTED

Did the District offer FAPE in the IEP in question? If not, is the Craig School Appropriate and are the parents entitled to reimbursement for that placement?

PROCEDURAL HISTORY

On February 27, 2020, the Petitioners filed a due process petition with the New Jersey Department of Education on behalf of A.H. The matter was then transferred to the Office of Administrative Law.

The petitioner’s request for due process was received by the Office of Special Education Programs on February 28, 2020. The contested case was originally transmitted to the Office of Administrative Law (“OAL”), where it was filed on March 10, 2020 and assigned to me thereafter. The COVID-19 pandemic led to significant delays and on February 15, 2022, with my permission and consent of the adversary the petitioners filed an amended due process petition with the New Jersey Department of Education on behalf of A.H.

On or about March 19, 2020, the parties at the time, Ms. Beth Callahan and Mr. David Rubin, were hopeful that the case had a good chance of settling so the next scheduled hearing dates of July 22, 2020 and October 13, 2020 were adjourned at the request of the parties. This adjournment also allowed for the Amended Petition to be filed as it was during the height of the COVID-19 Pandemic and school shutdowns. At one point, Ms. Weinstein took over the matter wherein the parties again attempted in earnest to engage in settlement discussions. When those were unsuccessful, we resumed, and I held five (5) days of hearing on April 27, May 3, May 5, July 27 and August 9, 2022. The parties and I stipulated as to the issues at bar as listed above. After the August 9, 2022,

hearing date, there was more discussion of potential settlement. For a period, the parties were deciding whether we needed another date. The record remained open by consent of the parties in order to obtain all transcripts and submit written summations. After several adjournments were granted for good cause I scheduled and heard oral argument on May 4, 2023 and the last responsive documentation required regarding exhibits was received and verified on July 5, 2023 at which point the record was closed accordingly.

DISCUSSION AND FINDINGS OF FACT

Summary of Testimony:

Eileen Devaney, LDTC and Case Manager for the District

Development of IEPs and Degree of Parental Cooperation

Ms. Devaney holds a bachelor's degree in elementary education and a master's in reading. She is certified by the New Jersey Department of Education ("NJDOE") as an Elementary School Teacher, Reading Specialist, Teacher of Reading, and Learning Disabilities Teacher Consultant ("LDTC"). She is also certified by Fairleigh Dickinson University as an Orton-Gillingham multisensory reading instructor, and she is trained in the Readers' and Writers' Workshop program and the Wilson multisensory reading program. Ms. Devaney taught various levels of elementary and middle school for approximately twenty (20) years and worked as an LDTC for nine (9) years (six in Ridgewood). At the time of her testimony, she recently returned to the classroom to provide direct instruction to students. As an LDTC in the District from February 2014 through June 2020, Ms. Devaney consulted with staff to provide support for struggling general education students, conducted standardized educational assessments for students to determine eligibility for special education, and served as a case manager for special education eligible students, developing their individualized education programs ("IEPs"), creating individualized goals and objectives, answering parent questions, and supporting school staff. As a result of the qualifications outlined above, I accepted and qualified Ms. Devaney as an expert in learning disabilities teacher consulting (LDTC),

including conducting student educational evaluations, case management, and IEP development, and thus I so **FIND**.

Ms. Devaney conducted A.H.'s initial educational evaluation in 2017 (when A.H. was in Kindergarten) utilizing the Woodcock Johnson IV Tests of Early Cognitive and Academic Development. She testified that A.H.'s scores fell in the average to low average range and demonstrated some variability in his skills. Following the evaluation, A.H. was deemed eligible for special education and related services under the classification SLD (Specific Learning Disability), and he remained eligible throughout the rest of Kindergarten, all of 1st grade, and the portion of 2nd grade that he spent in the District before Petitioners unilaterally placed him at The Craig School in January 2019. As the parties confirmed throughout the hearing and at oral argument, the parents waived stay put which was to be the District after the term of the settlement for that time period and the parents decided to keep him at Craig. As this is largely undisputed and corroborated by documentary evidence, I **FIND** it as FACT.

In January 2020, after A.H. had spent one year at the Craig School, Ms. Devaney conducted A.H.'s educational re-evaluation utilizing, the Woodcock Johnson IV Tests of Achievement and the Woodcock Johnson Reading Mastery Tests, which she testified are the "gold standard" assessment tools for students of A.H.'s age at the time. Again, A.H.'s scores fell in the average to low average range. Ms. Devaney also interviewed A.H. and found it unusual that, at nine years of age, A.H. did not know his own birthday.

Ms. Devaney reviewed the report issued by Petitioners' consultant, Elizabeth Kenny-Foggin, and opined that Ms. Foggin's statement that "Some scores that appear average are not subject to penalty for grammar and punctuation errors" misses the point that the design of most of the Woodcock Johnson subtests is specifically not to look at those skills, but instead to look at students' "ability to construct a sentence when they're given three words, for example." In response to Ms. Foggin's statement that the basic skills standard score was not included in the narrative portion of Ms. Devaney's report, Ms. Devaney explained that the basic skills score is a cluster score comprised of two (2) subtests for which Ms. Devaney's report addressed with a narrative. In response to Ms. Foggin's criticism that Ms. Devaney did not administer any expressive language subtests,

Ms. Devaney explained that, at the same point in time that she was conducting her educational evaluation of A.H., the District's speech language pathologist was conducting his own comprehensive speech language evaluation of A.H. which included an assessment of A.H.'s expressive and oral language skills, so she deemed it best not to burden the student with duplicative testing.

As part of the 2020 re-evaluation process, Ms. Devaney also conducted an observation of A.H. at the Craig School, during which she noted that A.H. often asked questions indicating that he did not understand what had just been stated by the teacher. She also observed that the teacher often intervened and did things for the students rather than explaining to the students how to do things for themselves. Ms. Devaney noted that the class was taught using whole group instruction rather than individualized assignments, and that the pace of instruction was very slow. Finally, Ms. Devaney noted that the students' writing assignment involved writing what they liked about the Craig School, which struck Ms. Devaney as "a little bit of like an indoctrination of ideas about the school ... it seemed like they were trying to highlight how much better it is than where he was"

Following the completion of the 2020 re-evaluations, Ms. Devaney continued that an IEP meeting was held on February 12, 2020, at which time the District proposed an IEP under which A.H. would return to the District in September 2020 in a program comprised of, small group pull-out resource instruction for reading fifty (50) minutes, writing fifty (50), and math fifty (50) minutes each day, plus an extra forty-five (45) minute multisensory reading group each day, plus small group speech language therapy twice per week, small group occupational therapy twice per week, and assistive technology. In response to concerns expressed by Petitioners regarding A.H.'s transition back to the public school, the District also offered to provide notice of extracurricular activities, a summer tour, a meet-and-greet with the case manager and counselor, individual counseling once per week, and the ability to participate in a social skills group or "lunch bunch." Ms. Devaney was A.H.'s District case manager at the time of the 2020 re-evaluations and IEP proposal. As this is largely uncontested and corroborated by testimonial and documentary evidence, I **FIND** it as FACT. (J21)

Ms. Devaney recalled that at the meeting, and it is largely uncontested that Petitioners did not request any revisions to the 2020 proposed IEP. Instead, they asked the District to place A.H. at the Craig School. The District declined the request, stating that the District has an appropriate program available for A.H. in the least restrictive environment, which is his public school district. Ultimately, A.H. did not return to the District, and thus I so **FIND. (J-21)**

Based on her professional experience and personal knowledge regarding A.H., Ms. Devaney opined that the 2020 proposed IEP offered A.H. an opportunity to make meaningful educational and social-emotional progress in the least restrictive environment, whereas the Craig School provided “a separate, small environment with really no opportunities to be with general education peers and no opportunities to participate in larger activities”

On both direct and cross-examination, Ms. Devaney stated that A.H.’s primary area of deficiency is not reading, but rather higher-order thinking and working memory, which she opined impacts all areas of his learning.

On cross-examination, Ms. Devaney stated that A.H. appeared “comfortable and content and happy” both in Ridgewood and at the Craig School. Ms. Devaney did not recall ever telling Petitioners that the District was going to “replicate” the Craig School program. Ms. Devaney explained that the 2020 proposed IEP also included a monthly multisensory reading consultation among school personnel to ensure that all staff are “offering appropriate, efficient instruction to the child across content areas.” **Exhibit J-21 (at page 6-3).**

Ms. Devaney explained in her expert opinion that standardized testing is not the only way to tell whether a student is making meaningful educational progress. She stated that the 2020 proposed IEP would have placed A.H. in general education classes for science and social studies to allow A.H. to have “exposure to his peers and ... the opportunity to just be part of the class and be part of the groups and be part of the experiments and -- and receive that -- that learning in that larger setting.”

When asked if A.H. should have initially been classified under the category “specific learning disability” (“SLD”) rather than “communication impaired,” Ms. Devaney answered in the negative, explaining that an SLD classification is appropriate for a child with “a discrepancy between their cognitive ability, their potential and their current achievement in a specific area. With A.[H.], there wasn’t that discrepancy between his IQ and his achievement. So [SLD] would not have been” his classification. As the classification was stipulated by the parties as not at issue in this matter, I **FIND** his classification is SLD.

Ms Devaney testified professionally and was a highly-qualified witness who I noted was lovely, unrehearsed, and honest indicating to me that she was not biased albeit an employee of the District. In fact, she was a strong witness looking for a good solution for A.H. and as such I **FIND** that she was a very credible witness. In short, I **FIND** as fact that she did the testing as indicated and that she made the observations as outlined above as well as surrounding facts regarding A.H. and the details of his proposed IEP. In terms of her expert opinion and the weight I will give it as to FAPE, I will address that in more detail in the Expert Testimony section below in weighing which expert opinion had more credibility in my ultimate findings of fact and conclusions of law in this matter. However, it bears mentioning that I noted throughout her testimony that she was a very honest witness, very skilled, forthcoming, extremely credible and I as such I gave her overall testimony enormous weight, and thus I so **FIND**.

Additionally, it added to her credibility when she admitted on direct that she was not sure if she went into depth with the parents on goals and objectives at the IEP meeting. Another example of her candor was when pressed on cross examination about whether the parents were given a physical copy of the IEP at the meeting, she was honest that she did not know for sure, but she knew that it was a lengthy meeting and that she was sure that parents were given a hard copy after the meeting. She also impressed me when crossed on whether a diagnosis of Dyslexia as noted by the parents was valid; and she noted that she did not question that. In fact, the classification of SLD noted there was zero discrepancy between IQ and achievement so it would not have been the classification regardless of the Dyslexia diagnosis. In addition, she admitted that at the Craig school he made “slow and steady progress” in line with his learning profile but she

was clear that it was hard to tell how meaningful his progress was at Craig was. She admitted he was learning, and not stalled or regressing. She was also clear that the only concerns listed by the parents at the IEP meeting (as memorialized in the IEP) was to stay at Craig and A.H.'s transition to District. She was extremely honest. Again, I gave her testimony a great deal of weight, and thus I so **FIND**.

Dr. Kate Killby, School Psychologist for the District:

Dr. Killby, school psychologist for the District has her bachelor's, master's, and doctoral degrees in psychology, and is certified by NJDOE as a school psychologist. She has worked directly with children for approximately twenty (20) years, fifteen (15) of those as a member of public-school child study teams. As a school psychologist, Dr. Killby provides direct counseling to students, consults with teachers, parents, and other professionals, conducts psychological evaluations to identify educational disabilities, and serves as a case manager for special educational eligible students, developing and overseeing the implementation of IEPs. **(J-37)**. As a result, I qualified Dr. Killby as an expert in school psychology, including conducting student cognitive evaluations, case management, and IEP development. As this is largely uncontested, I **FIND** it as fact.

It is undisputed that Dr. Killby did not play any role in A.H.'s education before Petitioners removed him from the District, and she did not conduct his initial 2017 psychological evaluation. However, she explained that as an expert school psychologist she was able to interpret A.H.'s 2017 psychological evaluation report. She testified that the results of the 2017 report, which included administration of the Wechsler Preschool and Primary Scale of Intelligence ("WPPSI"), demonstrate that "[w]orking memory was [A.H.'s] lowest area, which was in the borderline range of functioning or at the 8th percentile. His ability to reason with language, his verbal comprehension was assessed to be in the low average range. And then, his visual spatial reasoning, fluid reasoning and processing speed were all within the average range." She opined that A.H.'s working memory deficit "tells us that he had a hard time retaining information upon single presentation of it." A.H.'s full scale IQ at the time was "an 82, which falls in the low average range" and is comprised of "a combination of subtests from each of the five areas

with greater weight being placed on the reasoning skills versus memory and processing speed.” **(J-2)**.

Dr. Killby conducted A.H.’s 2020 psychological re-evaluation, after he had been at the Craig School for one year. Since by that time A.H. had aged out of the scope of the WPPSI, Dr. Killby administered the Wechsler Intelligence Scale for Children (“WISC”), which measures the same five areas of cognitive ability. Once again, A.H.’s working memory “continued to be an area of significant weakness,” and his score fell in the “very low” range as defined by the WISC. She opined that there was “a significant drop” in A.H.’s fluid reasoning score (also known as non-verbal problem solving), “where he had previously been assessed to be in the average range and now, his score came into the borderline range.” A.H.’s processing speed score rose from average to high average, and his verbal comprehension score rose from low average to average. Dr. Killby opined that, although A.H.’s full scale IQ score increased from 82 to 92, and she opined that that 10 point increase is “statistically isn’t all that different.” **(J-18)**.

Based on both the 2017 and 2020 psychological evaluation results, Dr. Killby concluded that “functionally, that working memory piece ... would probably be one of the most defining areas of weakness as far as his functioning in school. As his fluid reasoning score went from 94 to 79, she explained that” non-verbal problem solving, is higher order reasoning skills [so] I would expect that math would be a challenging area for the student as well.” **(J-18)**.

Dr. Killby noted A.H.’s increase of 14 points for processing speed. She opined that cognitive ability begins to normalize at 6 years old and he was very young at the last test which may account for the IQ increase. She continued that to have some change is not unexpected and he was distractable during the testing she conducted and needed redirection which she explained was likely the cause for the lower score on his processing speed last time. In addition, Dr. Killby candidly and professionally noted that in his verbal comprehension there was a “nice jump” in his scores from 88 to 106 but that prior lower score could also be due to his youth. Regardless, she opined he was close to average in this area even in the 2017 evaluation.

Dr. Killby noted that working memory was his biggest area of weakness and had the biggest impact on A.H. across subjects. Again, that fluid reasoning, or non-verbal problem solving tends to be involved with math and thus that accounts for his potential challenges there.

In addition to the testing, she reviewed and conducted above, Dr. Killby also reviewed the report issued by Petitioners' consultant, Elizabeth Kenny-Foggin, and pointed out that in her opinion Ms. Kenny-Foggin inaccurately stated that the processing speed portion of the WISC "artificially inflated" A.H.'s full scale IQ. In contrast, Dr. Killby stated that A.H. had a full scale IQ of 92, which incorporated all areas (including processing speed), but he also scored a 92 on the general ability index ("GAI"), which provides an overall assessment of cognitive ability without including processing speed, and that this demonstrated, in her opinion, that A.H.'s relatively high processing speed score did not by any means "artificially inflate" his full scale IQ score. **(P-32)**.

During her administration of the 2020 psychological testing, Dr. Killby noted that A.H. was a "delightful little boy" and had difficulty staying still, but that he was "really very engaged [and] connected with the material. He didn't require any prompting when it came time to assess something that required him to sit and look at something or write something for me. He went right back to his seat and continued doing the task that was presented." The 2020 psychological re-evaluation also included a BASC rating scale completed by one of A.H.'s teachers at the Craig School. She explained that the BASC measures emotional and behavioral functioning in the classroom, and A.H.'s results were slightly elevated for anxiety. Finally, Dr. Killby found it unusual that, at nine (9) years of age, A.H. did not know his birthday, and did not correct her when she presented him with an incorrect name. Dr. Killby was direct, qualified, and testified very adeptly rarely referring to her notes, as such she was a very credible expert and fact witness, as such I **FIND** that her scores and observations regarding A.H. during the testing she conducted as **FACT** and gave her overall testimony a lot of weight. As with the other experts, I will weigh her ultimate opinion against Petitioner's witnesses in the Expert Testimony portion below. **(J-18)**.

Following the 2020 re-evaluations, Dr. Killby attended the February 2020 IEP meeting with the District's Child Study Team and the Petitioners. At that meeting, the District proposed to bring A.H. back to the District beginning in September 2020, in a resource replacement program for reading, writing, math, and extra multisensory reading, plus small group speech language therapy twice per week and small group occupational therapy twice per week. Morning meeting, science, social studies, lunch, recess, and specials (music, library, physical education, and art) would be provided in the general education setting. In response to concerns expressed by Petitioners at the meeting regarding A.H.'s transition back to the public school, the District offered extracurricular activities, a summer building tour and teacher meet-and-greet, weekly individual counseling, and a social skills group. Again, as Dr. Killby was an extremely credible witness and these facts are corroborated by physical exhibits as well as largely uncontested, I **FIND** them as **FACT**. (J-21).

Dr. Killby continued that, as a matter of practice, Ridgewood's Child Study Teams commonly use the period between IEP proposal and implementation to address parental questions and requests for IEP revisions. At the February 2020 IEP meeting for A.H., Dr. Killby testified, as did Ms. Devaney and the District's other witnesses, that Petitioners did not express any concerns with the District's proposed program and did not request any revisions to the IEP then or at any time thereafter. Petitioners did not make any requests at the meeting other than a request that the District place A.H. at the Craig School as the transition may cause some anxiety. The Child Study Team declined the request to continue the out of district placement but did add transition services and therapy where needed to help with the transition, stating that the District has an appropriate program for A.H. in the least restrictive environment. Ultimately, A.H. did not return to the District. As these facts are largely uncontested and corroborated by the documentation in this matter, added to Dr. Killby's credibility, I **FIND** it as **FACT** in this matter. (J-21).

When questioned about his SLD classification, Dr. Killby explained that it is her opinion that a child's classification category "opens the door to special education services" but does not dictate the programs and services offered to students; instead, each student's program and services are based on that student's individual needs.

Based on her professional experience and personal knowledge regarding A.H., Dr. Killby opined as an expert in school psychology, that the 2020 proposed IEP was based on A.H.'s individualized needs and offered A.H. an opportunity to make meaningful educational and social-emotional progress in the least restrictive environment which would "allow [him] to continue to grow with [his] same age peers, both as role models and social peers too," whereas the Craig School offered "a very limited group of children ... to grow from and role model from." On cross-examination, Dr. Killby candidly confirmed that the 2020 proposed IEP did not contain a specific behavior plan for A.H. As noted above, Dr. Killby was a highly qualified, direct, professional, and thus very credible witness. I **FIND** she was unrehearsed, in fact I noted throughout that she was a great witness who testified at a fast pace just as she had good independent knowledge of her piece of A.H.'s IEP and did not need her recollection refreshed by her attorney. As such, that added to her credibility as she was familiar with the case and did not appear to have an agenda, but rather sought to get me the answers I needed to make a decision regarding the appropriateness of the proposed IEP, as such I **FIND** she was an extremely credible witness.

Kathleen Acosta, LDTC for the District:

Ms. Acosta holds a bachelor's degree in special education and English and a master's degree in special and elementary education with a specialty in reading disabilities. She is certified by NJDOE as an elementary school teacher, teacher of students with disabilities, language arts literacy teacher, and LDTC. She is also trained in the Orton Gillingham multisensory reading program and has completed all requirements for her certification from Fairleigh Dickinson University. She has worked in the field of education for approximately fourteen (14) years, the first seven (7) as an instructor and the most recent seven (7) as an LDTC. As an LDTC, Ms. Acosta conducts evaluations to determine eligibility for special education, consults in classrooms regarding IEP goals and objectives, and serves as a case manager, developing IEPs, drafting goals and objectives, and observing students. As her voir dire including a review of her CV confirmed this, I qualified Ms. Acosta as an expert learning disabilities teacher consultant, and thus I so **FIND**.

Ms. Acosta admitted that she never worked directly with A.H. In fact, she first became aware of A.H. in December 2020 when Petitioners' consultant Elizabeth Kenny-Foggin requested to observe the word study, resource writing and multisensory reading classes that the District had proposed for A.H. in the 2020 proposed IEP. Ms. Acosta observed the classes at the same time as Ms. Kenny-Foggin and later responded to Ms. Kenny-Foggin's request for documents and information following the observations. All of the participants in the observed lessons (students, teachers, and observers) were remote, due to an anticipated rise in Covid numbers following the holiday break. As the attendance of Ms. Acosta and Ms. Kenny-Foggin was via Zoom and the date of that observation are not in dispute, I **FIND** these as facts in this matter.

Ms. Acosta testified that she took handwritten notes during Ms. Kenny-Foggin's observation and later reviewed her observation report, at which time she noted (as was later confirmed and clarified by Ms. Kenny-Foggin) there were several inaccuracies in the portion of the report discussing the multisensory reading lesson taught by Christie DeAraujo. First, Ms. Acosta noted that Ms. Kenny-Foggin's report misidentified the date of the observation and misidentified the teacher as Jaclyn Fanos, despite being advised prior to the observation that the writing class was taught by Jaclyn Fanos and the multisensory reading class was taught by Christie DeAraujo and also seeing that was the case as she notes later in her testimony as outlined below. Second, Ms. Acosta testified that Ms. Kenny-Foggin's report failed to acknowledge multiple instances when Ms. DeAraujo's multisensory reading instructions were delivered both verbally and visually (in fact, Ms. Acosta's contemporaneous notes contain the "actual information that was on the board that was given and bullet pointed for them. They weren't just given multi step -- multi -- oral directions. It was also paired with it being written out visually for them to refer back to"). Third, Ms. Acosta opined that Ms. Kenny-Foggin's report stated that students were not engaged or attentive when other classmates were reading, whereas Ms. Acosta specifically observed the students "following the directions of reviewing -- as she was reading, they were looking through the [word] list as well and they were engaged in the activity;" Fourth, Ms. Acosta highlighted that in her expert opinion Ms. Kenny-Foggin's report failed to mention the differentiated word lists provided for each student's individual levels and failed to include the various multisensory reading strategies and error-correction procedures implemented by Ms. DeAraujo throughout the lesson, including

modeling and prompts to code, highlight, read words silently and aloud, “trace and say,” and associate words with meanings. Finally, Ms. Acosta opined that Ms. Kenny-Foggin’s report incorrectly stated that the teacher did not mention whether the students earned points, whereas Ms. Acosta specifically noted in her contemporaneous notes that, at the beginning of the class Ms. DeAraujo reviewed the goals and expectations and how many points were needed for the end-of-week reward, and when the students earned a point during the lesson Ms. DeAraujo told them they had earned the point. (P-32; J-47).

Ms. Acosta continued that, as part of a multisensory reading (also known as “structured literacy”) program, rather than teachers correcting errors for students, in her expert opinion it is preferable to prompt students to implement their own error-correction strategies. In addition, Ms. Acosta noted that in her opinion, the pacing of the multisensory reading class was appropriate for the learners in the class. Ms. Acosta confirmed that Ms. DeAraujo’s class uses the lesson plans developed by Fairleigh Dickinson University’s Orton Gillingham program. Ms. Acosta also recalled that after Ms. Kenny-Foggin’s remote observation of the multisensory reading class neither she nor anyone else requested an opportunity to come back to District and observe the classes outlined above in person. As this was admitted by Ms. Kenny-Foggin in her testimony, I **FIND** it as FACT that there was no such visit.

Next, Ms. Acosta testified regarding several inaccuracies in the portion of Ms. Kenny-Foggin’s report discussing the writing lesson taught by Jaclyn Fanos. Specifically, she listed that first, Ms. Kenny-Foggin’s report misidentified the class as “English/language arts” when in fact it was a writing class. Second, Ms. Kenny-Foggin’s report failed to acknowledge that the paraphrasing lesson was presented visually as well as verbally (“The expectations were clear and they also had something visual in front of them that was color-coded to help them understand what the expectation was”). Third, she testified that Ms. Kenny-Foggin’s report incorrectly stated that the lesson was fast-paced and confusing to the students, whereas Ms. Acosta recalls that “[a] quick pace was appropriate for those students, especially considering they were remote at that time [so the lesson was] moving along to keep them engaged in the activity;”. Next, Ms. Acosta highlighted Ms. Kenny-Foggin’s conclusion that the students did not understand the term “structure” and thus incorrectly assumed that the concept was new to the students that

day, whereas in actuality the concept of “structure” had been previously taught. Next, Acosta noted that Ms. Kenny-Foggin’s report inaccurately stated that the students were not engaged in the lesson, whereas Ms. Acosta specifically observed the students engaged in the lesson. Lastly, Ms. Acosta disagreed with Ms. Kenny-Foggin’s statement that Ms. Fanos should not have provided a synonym to a student which she opined ignores the fact that modeling is a key component of a structured literacy lesson. She added that Ms. Fanos’ class included a color-coded lesson with differentiated word lists and templates that students filled in during the lesson. **(J-27, P-32; J-47).**

Ms. Acosta further noted that Ms. Fanos’s writing lesson tied in concepts from the multisensory reading lessons presented that week, to give students an opportunity to carry over their skills. At no time after Ms. Kenny-Foggin’s remote observation of the writing class did she request an opportunity to come back and observe the class in person.

Ms. Acosta confirmed as did Dr. Killby above, that a child’s classification category does not dictate the programs and services available to the student; instead, determinations are made based on the student’s evaluations, data, and reports from the teachers “to see where the weaknesses are and making sure we’re addressing them in whatever program is best to meet those needs.” I noted throughout her trial testimony that Ms. Acosta was not just agreeing with the District’s attorney but took the lead in testifying with deep knowledge of her expertise as an LDTC. As a result, I gave her testimony a lot of weight as she was extremely credible, and thus I so **FIND**.

In fact, when pressed on cross, Ms. Acosta opined that in her professional experience, attention and distractibility issues, trouble with eye contact, tactile defensiveness, and perseverative behaviors such as hand flapping are not signs of dyslexia. In addition, Ms. Acosta acknowledged that there are times when she and another observer do not necessarily highlight the same items following an observation. She also added on cross examination that she never met or observed A.H. or CST members or A.H.’s parents. At one point, Ms. Acosta even admitted that she may have made a mistake in her report as her notes were not in report form. Again, these admissions only added to her credibility as it did not change the substance of her opinion

and she remained professional and admitted on cross that Ms. Kenny-Foggin's emails at J2 appear "professional" as well. Thus, she did not attempt to feign first-hand knowledge of the student or family or to malign Petitioner's expert. Rather, she merely testified about her observations of the classes highlighted above in keeping with her proffer. These candid concessions only added to her honesty and credibility and thus, I so **FIND**.

Christie DeAraujo, Multisensory Reading and Dyslexia Expert for the District:

Ms. DeAraujo holds a bachelor's degree in interdisciplinary studies and a master's degree in special education. She is certified by Fairleigh Dickinson University, the International Multisensory Structured Language Education Council, and the International Dyslexia Association as an Orton Gillingham teacher, an Orton Gillingham dyslexia specialist, and an Orton Gillingham teacher trainer. She is also certified by NJDOE as an elementary school teacher, teacher of reading, teacher of students with disabilities, and supervisor. She has received awards as an outstanding multisensory language education professional and educator of the year. She has been teaching elementary school aged children for approximately fourteen (14) years in both private and public-school settings, first as a special education teacher and later as an Orton Gillingham multisensory reading instructor. In addition, Ms. DeAraujo has trained Ridgewood's teachers to implement multisensory reading instruction. She also teaches graduate-level courses in multisensory reading at Fairleigh Dickinson University. **(J-38)**.

Ms. DeAraujo explained that Orton Gillingham "is an approach to teaching language, reading, and spelling that's direct, accumulative, systematic that we use in special education but also weave into our general education word study curriculum here in Ridgewood," and that Orton Gillingham is sometimes also referred to as "structured literacy, science of reading, [and] multisensory reading." She further explained that Ridgewood utilizes a packaged program called SPIRE, which uses the Orton Gillingham methodology and follows a developmental scope and sequence similar to that used at Fairleigh Dickinson University. Ms. DeAraujo confirmed that SPIRE is an Orton Gillingham program that "has a lot of great materials. And, students, you know, find success with the program." Given her vast expertise and her presentation during voir

dire, I qualified Ms. DeAraujo as an expert in multisensory reading, structured literacy, and dyslexia instruction, and thus I so **FIND**.

Ms. DeAraujo testified that she is familiar with A.H. but did not work directly with him. However, since 2017 she has provided training and support to Ridgewood's teachers including Jaclyn Fanos, who was A.H.'s multisensory reading teacher before Petitioners removed him from the District. Ms. DeAraujo has observed Ms. Fanos delivering multisensory reading instruction to students and has found Ms. Fanos to be skilled and competent. Ms. DeAraujo testified that the District screens all students in Kindergarten through 2nd grade for signs of being an at-risk reader. **(J-11)**.

As part of A.H.'s 2020 re-evaluation, Ms. DeAraujo visited his reading class at the Craig School and wrote a summary of her observation in the days following her visit. Ms. DeAraujo noted that the students were reading sound cards chorally (as a group), rather than being given "individual opportunities to respond to check for understanding." She also noted that, on several occasions when A.H. read a word incorrectly, the Craig School teacher provided the word for him, rather than prompting him to use his own error correction strategy (such as "trace and say the sounds" or "use your pencil to code the word"), which would have been the proper multisensory reading technique: "[W]e want to teach them strategies so that they can transfer their skills into the rest of their academic areas. And, by teaching them a strategy that they could use independently, you're setting them up for success when they no longer require multi-sensory reading as a remedial set up." Similarly, Ms. DeAraujo noted that the Craig School teacher gave the students a spelling response sheet with pre-planned sound segmentation lines, which is "a scaffold that I've seen used in kindergarten and first grade of general ed classrooms but, generally, by second grade, teachers are -- are not using the pre-planned lines." At the time, A.H. was in 3rd grade. **(J-17)**.

During her observation of A.H.'s class at the Craig School, Ms. DeAraujo also noted that A.H. demonstrated that he knew more sounds and patterns than were presented in the lesson. For example, he knew that both "o" and "oa" make the "o" sound and, in Ms. DeAraujo's experience, "that's what you want, is you want the student to be thinking about all the ways they know how to spell that sound because it gives them

choices for when they go to actually spell a word.” However, the Craig School teacher told A.H. only to practice “o” (not also “oa”), which gave Ms. DeAraujo “the feeling that he knew more than was being asked of him and that the lesson wasn’t really tapping into all the sounds that he knew” The material presented to A.H. in the lesson “was very comfortable ... it just appeared like he could do more and was trying to show more of what he knew throughout the lesson.” Finally, Ms. DeAraujo confirmed that the Craig School teacher stated at the time that she was not certified in Orton Gillingham, and Ms. DeAraujo noted that the Craig School teacher’s “teaching lacked a diagnostic approach that is so essential for multi-sensory instruction. So, that ability to really analyze a student’s performance each day and, you know, each week, and adjust your instruction based on the progress of the student. So, it -- it was not -- that was not part of what I -- I witnessed there.” **(J-17).**

Next, Ms. DeAraujo discussed her impressions of the report issued by Petitioners’ consultant, Elizabeth Kenny-Foggin. In response to the portion of Ms. Foggin’s report that critiqued Ms. DeAraujo’s summary of the Craig School observation, Ms. DeAraujo pointed out that: (1) she did not identify the Craig School teacher by name because she was never provided with the teacher’s name; and (2) Ms. Foggin did not comment on any of Ms. DeAraujo’s criticisms of the lesson that she observed at the Craig School. **(J-17; P-32).**

In response to the portion of Ms. Foggin’s report that critiqued Ms. DeAraujo’s multisensory reading class in Ridgewood, Ms. DeAraujo noted several inaccuracies: (1) Ms. Kenny-Foggin’s included an inaccurate the date of the observation and also misidentified the multisensory reading teacher as Jaclyn Fanos, when in fact the teacher was Ms. DeAraujo; (2) Ms. Kenny-Foggin’s report stated that students were not engaged when other classmates were reading, when in fact Ms. DeAraujo instructs her students to read their classmates’ word lists silently as each classmate is reading his or her own list aloud, which “is a common practice that Fairleigh Dickinson and the State of New Jersey actually have recommended for teaching Orton-Gillingham in a group setting;” (3) Ms. Kenny-Foggin’s report failed to mention the differentiated word lists provided for each student’s individual levels; (4) Ms. Kenny-Foggin’s report failed to acknowledge the various multisensory reading strategies implemented by Ms. DeAraujo throughout the

lesson, including visual instructions, white boards, and prompts to code words; and (5) Ms. Kenny-Foggin's report incorrectly stated that Ms. DeAraujo did not mention whether the students earned points, whereas Ms. DeAraujo recalls giving the students a point in the middle of the lesson to "give that positive reinforcement and tell them when they're on-task and doing what they need to do." **(P-32)**.

In response to the portion of Ms. Kenny-Foggin's report that critiqued Ms. Fanos's writing class (which Ms. DeAraujo observed at the same time), Ms. DeAraujo noted several inaccuracies: First, Ms. Kenny-Foggin's report failed to acknowledge that Ms. Fanos began the class by refreshing the students on a prior lesson so that they could connect it to what they were about to learn, and that Ms. Fanos concluded the class with a closing reminder of the skill and a tie-in to the bigger assignment that the class was working on. Second, Kenny-Foggin's report incorrectly stated that the lesson was fast-paced and that the expectations appeared to be confusing to the students, whereas Ms. DeAraujo "felt that the lesson was appropriately paced for the students in the group," "Ms. Fanos's instruction was adjusted to the speed of the students," and the students "didn't appear to be confused". Third, Kenny-Foggin incorrectly assumed that the concept of "structure" was new to the students that day, whereas in actuality the concept of "structure" had been taught "throughout the school year". Fourth, Ms. Kenny-Foggin incorrectly stated that Ms. Fanos did not use a multisensory approach, when in reality Ms. Fanos utilized color-coded visual cues. Fifth, Ms. Kenny-Foggin's report inaccurately stated that the students were not engaged in the lesson, whereas Ms. DeAraujo noted that "the students seemed engaged in participating and Ms. Fanos understands how to structure her lesson so she has enough opportunity to model and provide guided practice before students are independent". Lastly, Ms. DeAraujo opined that Ms. Kenny-Foggin failed to acknowledge that Ms. Fanos used modeling strategies to "spur the discussion and give some students some examples to go off of before they tried on their own, [after which the students] were able to come up with some synonyms that fit the sentences that were the examples." **(P-32)**. Ms. DeAraujo confirmed, at no time after Ms. Kenny-Foggin's observations of the District's multisensory reading and writing classes did she request an opportunity to come back and observe the classes in person. As this is corroborated by the other credible testimony above and the documentary evidence, and Ms. DeAraujo was a knowledgeable and detailed witness, I **FIND** it as FACT that Ms.

Kenny-Foggin did not observe the District's proposed classes in person even though they were available.

Ms. DeAraujo continued that the District uses a multisensory writing program called "Project Read—Framing Your Thoughts." All of the District's elementary school teachers, both special education and general education, have at least thirty (30) hours of Orton Gillingham training through the Institute for Multi-Sensory Education and then Ms. DeAraujo works with them in the District to implement the strategies in their classrooms. Next, Ms. DeAraujo reviewed A.H.'s Craig School Phonics Evaluations and noted that some skills marked as "needs reinforcement" or "achieved with support" in 2019 were then marked as "not introduced" in 2020, which struck Ms. DeAraujo as odd because skills that had not been fully achieved should continue to be worked on to achieve mastery. As this was largely undisputed and corroborated by testimonial and documentary evidence, I **FIND** it as **FACT** in this matter. **(P-13; P-24)**.

Again, while classification is not at issue in this case, in Ms. DeAraujo's professional experience, attention and distractibility issues, trouble with eye contact, tactile defensiveness, and perseverative behaviors such as hand flapping are not signs of dyslexia.

Next, Ms. DeAraujo also attended the February 2020 meeting at which the District proposed that A.H. return to the District in September 2020 in a program comprised of, pull-out replacement reading (50 minutes), writing (50 minutes), math (50 minutes), and multisensory reading/word study (45 minutes) each day. The proposed IEP also noted that there would be a multisensory reading consultation among school personnel "to support that student's transfer of skills to their other academic areas." **(J-21)**. Based on her professional experience, Ms. DeAraujo testified that the 2020 proposed IEP offered A.H. an opportunity to make meaningful progress in the District's program. The proposed IEP "sets A.H. up to have the supports he needs for multi-sensory reading as far as a pull-out replacement class. And, additionally, even though our staff are trained in how to support a student who requires multi-sensory reading, the consultation really takes it a step further and just really makes sure that we're continuing to support him as he transfers

his skills into his other academic areas. So I -- I do believe that this IEP was designed to meet his needs and help him make growth.” (J-21).

On cross-examination, Ms. DeAraujo confirmed that she shared her Craig School observation with Petitioners at the February 2020 IEP meeting, and that her report admits that A.H. was engaged in the lesson that she observed. Ms. DeAraujo is not aware of whether or not A.H. has a dyslexia diagnosis, but she acknowledged that students with dyslexia can become fatigued due to the taxing nature of reading, which could impact their ability to pay attention.

During the 2020-2021 school year, Ms. DeAraujo was teaching four (4) small groups of students (approximately fifteen (15) students total) and was consulting for about a third of her total time as a full-time employee, for approximately ten (10) students total. On re-direct, Ms. DeAraujo stated that she does not have concerns about her ability to devote enough time to her duties teaching, consulting, or training, because her supervisors and director help her manage and prioritize.

Ms. DeAraujo recalled that, at the February 2020 IEP meeting, Petitioners expressed concerns regarding A.H.’s transition back to the public school, and there was a discussion about supports that the District could provide to help with the transition. (J-21). She testified that it was explained that if Petitioners had returned A.H. to the District in September 2020, he would have been assessed again and the IEP, initially drafted in February 2020, would have been adjusted as necessary: “we had gathered information, through the re-eval, to create this IEP [and] any adjustments that would have needed to be made as far as his reading level or any goals that would need to be adjusted, would have been adjusted with an updated -- with updated assessments when he returned. That’s common practice.” Ms. DeAraujo stated that, at the time the IEP was proposed in February 2020, A.H.’s most significant area of disability was applying strategies independently. He also needed support in oral language and continuing to learn sound patterns to move towards mastery.

Ms. DeAraujo testified that the multisensory reading consultation in the 2020 proposed IEP did not require a statement of frequency or duration (although it does say

that it would be monthly) because it was a support for school personnel and not a direct service to the student. **(J-21)**. Ms. DeAraujo acknowledged candidly that there are times when she and another observer may not necessarily highlight the same items following an observation.

Ms. DeAraujo confirmed that the people listed in the 2020 proposed IEP as having provided information regarding A.H.'s levels of performance (e.g., Mrs. Miller, J. Schilling, Mrs. DellaFave, Mrs. Pompilio, Mr. Furlong, Ms. Kaplan) were Craig School personnel. **(J-21)**.

Finally, Ms. DeAraujo confirmed that part of the multisensory reading consultation among school personnel involves sharing of information with parents via a form on which the parents, case manager, teachers, and other members of the academic team can communicate suggestions, questions, and answers.

Ms. DeAraujo testified directly and is a highly-qualified expert in the field of multisensory learning and Orton-Gillingham instruction and is also fully familiar with the District as she oversees their training and programming. Ms. DeAraujo was very credible as she admitted the good in the programs she reviewed or observed at Craig. In addition, she was able to aptly explain what the goals are and any criticisms she saw in either program. She emphasized that coding and syllabication, which is a critical instruction application, was not being used at the Craig School. She explained this in a straightforward and knowledgeable way. She admitted that when speaking to a teacher at Craig that even though the teacher was not Orton-Gillingham trained, she felt the teacher made an effort to engage the students but it lacked a diagrammatic approach which is so important for multisensory reading. She emphasized that this needs to be adjusted based upon a student's progress. She candidly concluded that the material was not at A.H.'s level at The Craig School. In her expert opinion she felt he could do more and was trying to show his teacher that he could. In short, Ms. DeAraujo was an excellent witness who did not exaggerate, pointed out nuances, was strong, forthright and as such I **FIND** she was entirely credible and thus I gave her testimony a lot of weight and her testimony regarding her observations and corresponding corroborating documentary evidence as **FACT** in this

matter. Again, as her expert opinion is weighed against the petitioners' experts that will be discussed in the Expert Testimony section below.

Petitioner's Testimony:

Elizabeth Kenny-Foggin, LDTC-Petitioner's Expert

Ms. Kenny-Foggin testified she started her training in special education and received her bachelor's degree in 1983. She continued to earn a master's degree in special education and another master's degree in supervision and administration. Eventually she became an Orton-Gillingham trained teacher and trainer through Fairleigh Dickinson University. She testified that the Orton-Gillingham therapist level was the highest level offered by Fairleigh Dickinson University. Ms. Kenny-Foggin testified that she has been a special education teacher since 1983, retiring with thirty (30) years of experience as a special education teacher. She testified that she taught every grade level within those thirty (30) years as a special education teacher. Ms. Kenny-Foggin testified that she currently works as an adjunct faculty member at Fairleigh Dickinson University and trains teachers in Orton-Gillingham, as well as works with students privately and performs evaluations for parents. **(J-32).**

Ms. Kenny-Foggin also earned a master's in administration in 2000 and is currently pursuing an educational doctorate focusing on higher education. During her teaching career, she worked in a variety of roles in public school, including but not limited to a reading/writing teacher, and in-class support teacher in science and social studies. Most of the time she worked in small groups at the high school level and small group mainstream classes at the elementary level. Later in her career, Ms. Kenny-Foggin oversaw a dyslexia committee in the Holmdel district and created an entire method of working with the students and investigated the best standardized testing. She helped create writing samples for students with dyslexia. She testified that she has experience being on a child study team and she has been involved in developing hundreds of IEPs for children with reading issues. **(J-32).**

Ms. Kenny-Foggin was proffered as an expert in multi-sensory reading, Orton-Gillingham and the development of goals and objectives for students with reading issues and specifically dyslexia. Ms. Kenny-Foggin testified that she first used multi-sensory reading when she first started teaching at Seaside Heights and started using Orton-Gillingham at the Tinton Falls Middle School in Teaneck beginning in 1997. Due to her extensive education and work experience I qualified her as an expert in Multi-Sensory Reading, Orton-Gillingham and Development of goals and objectives for students with reading issues in Dyslexia, and thus I so **FIND**.

She became involved in the case when M.H. and J.H contacted her to perform an observation based on the proposed IEP and recent evaluations from the school, as well as a report from Dr. Fiorile. She testified that she did not make any independent findings on whether Ridgewood Schools provided A.H. an appropriate education prior to February of 2020. Ms. Kenny-Foggin testified that the report in this case took seven (7) months to prepare (from January 2021 to August 2021) because she contracted COVID-19 and was in the hospital. As this is undisputed and I granted adjournments for this reason along the way, I **FIND** the delay in her report was caused due to her illness.

Ms. Kenny-Foggin testified that the important things she looked for in the psychological evaluation were the scores that were collected, such as the processing speed index at 114, the visual spatial index at 89, and working memory at 76. **(R-18)**. Although she has not done any psychological testing, she is familiar with the tests in her role as a case manager as well as a special education teacher and is able to interpret how these scores would impact a student. She opined that Working memory is critical for a student because it helps them hold information if there is no visual support.

Ms. Kenny-Foggin found that A.H.'s reading score of an 85 was below average and it was an area of weakness for A.H. She also believed that the academic skills together, having a score of an 87, showed that A.H. was struggling. She testified that the receptive scores from the speech language evaluation was a 78, which she believed was exceptionally low which she opined meant that A.H. was deficient in those areas. **(R-20)**.

Ms. Kenny-Foggin testified in response to Ms. DeAraujo (who disagreed with her in-class observations) that two (2) people may observe different things, and she bases her observations on the reports. She testified that she takes notes based on the introduction and elements of the lesson, as well as the support systems in place to help A.H. be as independent as possible, knowing he has working memory and fluid reasoning issues.

Ms. Kenny-Foggin confirmed that the word list she received in an email from Ms. Acosta was different from the word list that the students were working on when she observed the classroom. **(J-27)**. She testified that the word list was a component of a structured language literacy lesson, but she believed that it was being used ineffectively. She testified that as one student read the words, the other students were just waiting and were not engaged. This confirmed for her that the class was not individualized and thus not the right environment for multi-sensory learning. Ms. Kenny-Foggin testified that the visual from the writing class with Ms. Fanos (the location of the second observation) was not an appropriate visual because there were too many words and no visual support with the words.

Ms. Kenny-Foggin continued that the statement of what special education services or related services that A.H. would be receiving in District would not address A.H.'s needs because the classes are pull-out classes for multi-sensory reading, writing, and math. **(J-21)**. She opined that collaborating with multiple teachers at different points would disrupt the flow of the class. In short, she recommends a ninety (90) minute reading lesson in a multi-sensory structured language literacy program.

When A.H. was at the Craig School, Ms. Kenny-Foggin testified that they were working on sentences and using the Victoria Green Bare Bones program, which is a writing program. They used hand motions, and the teacher kept them engaged. Ms. Kenny-Foggin observed that A.H. was able to stay engaged even when he came back from the bathroom. The teacher helped the students remain focused even when they were itching to move by getting the students to do hand motions. She testified that A.H. was very motivated and actively engaged, by interacting with his classmates and using his time effectively. She testified that the peer group was acceptable, as it was with kids

of his age and peer level. She noted that the class in the Craig School followed the multi-sensory requirements that she laid out. She testified that the observation at the Craig School was online, but that all the students were in person, while for the Ridgewood school, everyone was online. She testified that it is possible to teach multi-sensory reading online through notebooks and a camera.

Ms. Kenny-Foggin did have an opportunity to review the goals set forth for A.H. in the IEP, but she did not think they were appropriate as she knew him in February of 2020. **(R-21 & J-21)**. She testified that the writing goals were not clear enough, and do not have a specific objective measure. She testified that when she wrote IEP's, it was a requirement of hers to be objective and measurable. She emphasized, in her opinion, that the multisensory reading goals were inappropriate because the goal of 75% - 80% is too low as it was her opinion that typically goals should be set at 92% or higher. With A.H. only hitting a goal of 75% - 80% accuracy he would continue to struggle in reading and not be proficient in the subject. The proficiency goals of 92% or higher is part of the training that she received through Fairleigh Dickinson which she noted is based on extensive research. **(R-21 & J-21)**.

Ms. Kenny-Foggin testified that even if A.H. had mastered the goals as they are written in the IEP, he would not have made meaningful progress because he needs extremely specific measurable goals and objectives, like learning to incorporate the strategies that he is using in the classroom when he must do independent work.

Ms. Kenny-Foggin added that she worked with kids who had nervousness, anxiety, and uncertainty, and she worked on teams where students received counseling. She did not believe A.H. expressed nervousness, anxiety, or uncertainty while at the Craig School.

Ms. Kenny-Foggin testified that after having seen A.H. and observing him in his class at the Craig School, her opinion was that he was incredibly happy and well adjusted. She testified that he was struggling before he went to The Craig School. She posited that since he was getting the appropriate services at the Craig School, he had a higher motivation to participate and engage in the material. She emphasized her opinion that

when a student is making progress out-of-district, it is hard to re-transition them into the district and expect them to keep making progress. She testified the school must be prepared before the child returns, and the child must be emotionally ready to return.

Ms. Kenny-Foggin stated that she never participated in an IEP meeting where the parent did not have a draft of the IEP in front of them as they are supposed to have a draft so they can relay their own input. She also testified that a document that contained information about the observation at The Craig School was clear and accurate. She continued that the lesson, as reported by Ms. DeAraujo, met the requirements she was looking for in a structured language literacy reading class. **(J-17)**

On cross examination, Ms. Kenny-Foggin testified that she was not asked to perform an evaluation of A.H. during the Independent Educational Review period because he had just recently been evaluated and the parents only asked her to perform a review of his records. She candidly admitted that she never instructed or tutored A.H. nor ever met him other than in the context of observing him in a class. She testified that she did not indicate who diagnosed A.H. with dyslexia, however she stated she gathered all the information from reports that were provided to her. **(J-32)**. As this is largely undisputed and Ms. Kenny-Foggin testified professionally and honestly, I **FIND** it as FACT.

Ms. Kenny-Foggin further testified that she wrote on the first page of her report the parents declining the February 2020 IEP and the reasons they did so based on what the parents told her. She admitted did not receive anything in writing from the parents where they communicated to the district the concerns about the 2020 IEP's goals and objectives or modifications. She similarly conceded that she never received in writing any discussion on assistive technology nor an extended school year. As these facts are largely undisputed and Ms. Kenny-Foggin testified candidly, I so **FIND**.

Ms. Kenny-Foggin confirmed that she did not attend the February 2020 IEP meeting with the district. She testified that she was contacted around mid-December of 2020 by the parents. She revealed on cross examination that she was not aware that she was retained ten (10) months after the February 2020 IEP was proposed and that she was also not aware that they had already filed due process against the district. She

testified that she observed the district in January 2021, and observed the Craig school in March 2021. She confirmed the report was finished in August 2021 due to personal issues COVID related. She testified that she sent the finished report to the parents and not the attorney. She testified that it would not concern her if the district did not receive the report until several months after she provided it to the parents because it is the parents' prerogative. Again, as these facts are largely undisputed, corroborated by documentation already in evidence and Ms. Kenny-Foggin testified professionally and credibly, I **FIND** it as FACT in this matter.

Upon further cross examination, Ms. Kenny-Foggin conceded that IEP meetings are supposed to be collaborative, and that parents and members of the district team amend the proposed program together. She testified that previous districts that she has worked with have considered parent requests and suggestions and made modifications to IEPs based on the parent's request and suggestions.

Ms. Kenny-Foggin explained that she decided to exclude Ms. DeAraujo's criticisms of what she saw at the Craig School on page four (4) of her report (J-32) because she believed her comments were contradictory. For example, she testified that Ms. DeAraujo would state that the program at the Craig School was excellent, but then she would also state that the program was inappropriate for A.H.'s skill level and age.

Ms. Kenny-Foggin testified that during her observation she observed multi-sensory correction strategies used at the Craig School with teacher-driven immediate corrective feedback which she feels is acceptable in a group session. **(J-32)**.

Ms. Kenny-Foggin admitted that she is not a psychologist and has never administered the Wechsler Intelligence Scale for Children (The WISC). She identified J-18 as Dr. Killby's psychological evaluation from 2020. **(J-18)**. She testified that the processing speed score was so much higher than A.H.'s other scores on Dr. Killby's psychological evaluation report and agreed, it could contribute to an inflation of his score, even if Dr. Killby did not specifically write that the processing speed score artificially inflated his full-scale IQ. She testified that she was familiar with the general ability index

or GAI portion of the psychological assessment, but she is not aware that the GAI puts less emphasis on processing speed.

Ms. Kenny-Foggin testified earlier that one of her criticisms of Ms. Devaney's educational evaluation was that the expressive language subtests were not given. She was aware at that time that A.H. also had a separate speech language evaluation that included expressive language tests, but that there were times when she worked on a child study team where they would do both evaluations with expressive language subtests. She did admit that there are situations based on the circumstances or child involved where you do not want to overburden a child with testing.

Ms. Kenny-Foggin noted the distinction between low/average and below average on the educational assessments. She testified that she had administered the Woodcock Johnson for Test of Achievement many times, and so she was familiar with the score ranges and what they are classified as, such as average vs. low average. She admitted that Ms. Devaney's classifications of the scores through multiple tests are accurate. **(J-19).**

Ms. Kenny-Foggin testified regarding her observation Ms. Fanos' writing class that even though she was not sure if they were familiar with the concept of "structure" (nor was she given any information that indicated that the students had/had not discussed structure before the lesson), she observed that the children did not seem to have a grasp of "structure" according to what she was visually seeing and their reactions. Next, she testified that one of her criticisms in the IEP for the multi-sensory reading consultation was that it appears in the "supports for school personnel" section rather than in the "related services" section for the student. She testified again that she has worked as a case manager on child study teams dozens of times, and that she has written IEPs before, as such she has an understanding that a consultation service for staff is different from a related service provided directly to a student. **(R-21 & J-21).**

Ms. Kenny-Foggin conceded that she was not familiar with the Scholastic Reading Inventory but had heard of the Slosson Test of Oral Reading, the Test of Written Spellings, and the TOWRE. For all three (3) of these tests, she testified that if a student had either

stagnant or decreasing scores from year to year, then the student is not hitting the mark, and something needs to change.

Ms. Kenny-Foggin continued that homework is important in a multi-sensory reading program, and that repetition and review through homework is critical, and it applies across all subject areas, and that it is appropriate to utilize certain modifications in the context of a structured language literacy program, to include prompting and cueing by teachers, but that it should be individualized. She also added that the goal is to fade and remove those prompts and cues, so the student becomes more independent. She testified that a student who did not require prompting and cueing for a certain period, and then required prompting and cueing could be cause for concern, but that adding modifications is not necessarily a terrible thing.

On cross, Ms. Kenny-Foggin testified and confirmed that earlier, she said it was preferable in a structured language literacy program to have one (1) teacher across all content areas and that she is not sure if the Craig School has that for A.H., but since all the teachers at the Craig School are trained to follow the same strategies and writing developments, they are different, and that preference does not apply to them. She admitted that Ridgewood told her that the teachers in the program offered in the 2020 IEP were all trained in multi-sensory structured language literacy.

After looking through the report card and the goals and objectives progress reports from the Craig School, Ms. Kenny-Foggin admitted that she had a similar concern with the goals and objectives of the Craig School as with the Ridgewood school, because although the goals were at a higher percentage, 80-85% was still not high enough. She agreed that she did not say that one of her criticisms of the district's goals and objectives was that they did not include scope and sequence.

On re-direct, Ms. Kenny-Foggin opined that the multi-sensory reading group in the IEP, a once-a-month consultation, was not enough to address A.H.'s needs because of his phonetic disorder, expressive receptive challenges, and dyslexia. She testified that these factors indicated to her that a child was struggling and that consultations would not be enough. She also testified that standardized tests are not the only way to measure

progress for A.H. Finally, she testified that as an LDTC, she writes every one of her student's psychological reports and educational evaluations and reads the entire reports of speech evaluations, OT, PT, and other evaluations. **(R-21 & J-21)**.

Ms. Kenny-Foggin appeared to struggle to answer questions in a brief manner. It was clear she was doing her best to be truthful, in fact, admitting that she would like to see the percentage raised on the Craig School goals shows this. Ms. Kenny-Foggin was able to articulate A.H.'s needs and to articulate why she believed the lesson at Craig, as documented by Ms. DeAraujo, were in fact appropriate. Lastly, she emphasized that the parents did not rely on Ms. Kenny-Foggin's report to make their decision to keep A.H. at the Craig School rather she confirmed their belief, that what was being offered at the District was inappropriate. As this is largely undisputed and Ms. Kenny-Foggin testified professionally and consistent with the other witness testimony in this matter, I **FIND** the above as FACT.

Overall, I found Ms. Kenny-Foggin to be forthcoming in what she recalled. My notes indicate throughout that she was "all over the place" and confused the issue for me at times. There was no indication of where we took notes for her report. Again, I believe she was being truthful, she was just not a strong witness in this particular case. For example, when describing her observation of the district, she did not give much detail about how the other students were "not engaged" as was noted in her report. At one point, I wondered to myself if she even knew A.H. If she did not take notes contemporaneous with the District's lessons, there is little way she would have been able to author it so late due to her struggle with COVID. This undoubtedly lessened the strength of her testimony. Again, I want to reemphasize that she was VERY HONEST, but it bears mentioning that after her lengthy testimony and detailed report, I could not glean what she opined the IEP is insufficient. Many times, I noted that she was a "weak witness" and found it strange that she found the multisensory reading goals should be higher than 92% as she stated "this is what a skilled Orton Gillingham program would provide." But she said he cannot master higher than 80% which made little sense to me. Please remember that the goals and objectives were both not at 92% in District or at The Craig School. As such, I **FIND** for the reasons stated here that this hurt her credibility.

Further, I **FIND** that her testimony regarding goals and objectives for multi-syllabic words at the District that were 75% and decoding 80% and encoding for 70% were simply not appropriate and that they amounted in her opinion to “zero objective and measurable goals.” I noted that this hurt her credibility. At one point, I even noted that her opinion appeared to be a net opinion, as it was merely about the need not to take him out of Craig based more on the opinions of the parents and her observations of A.H. at Craig, where he was well adjusted with classmates and teachers and was highly motivated. As I believed Ms. Kenny-Foggins observations at Craig to be truthful, I have no doubt that he was happy, and thus I so **FIND** as it is in keeping with J.H.’s opinion and the video of A.H. that I had the benefit of viewing. What I do doubt is why Ms. Kenny-Foggin had a problem with the IEP, other than the fear of any change to switch him out of Craig because he was thriving and feeling good about himself. She did admit that in District all teachers must have the IMSE training but gave a weak excuse about why that would not amount to FAPE of what deficiency was lurking in the IEP. In short, Ms. Kenny-Foggin did her best given the lapse of time between the IEP meeting, when she was retained and then her long battle with COVID, but she had no real recollection of this case. For example, she disagreed with Ms. DeArujo’s critique of Craig, but she did not concede even the smallest of facts even though both the District’s witnesses (DeArujo and Ms. Acosta took contemporaneous notes of Craig’s classes. It also hurt her credibility and caused delay in the case at one point when Ms. Weinstein saw that Ms. Kenny-Foggin was referring to her report which had been highlighted and tabbed in preparation for the hearing. The District accordingly made a request that those notes be produced ASAP for anything that had a notation on it. Again, my thoughts throughout her testimony were “does she even know A.H.”, “did she test A.H.”, and what was she basing these opinions on. As such, I **FIND** I could not give her testimony as much weight as the District’s experts as will be explored below.

On cross, it was confirmed that she did not evaluate A.H., as the parents merely requested a review of his records. She felt her testing would have been redundant. She never even met A.H. She conceded that she does not know offhand who diagnosed him with dyslexia and there is no reference to it in her report. When asked on cross if that notation would be important, she evaded the question. I **FIND** that this hurt her credibility. She also got caught up on cross when noting that in her report, the reasons stated for the

parents' declining the IEP were clearly Kenny-Foggin's not the parents. Kenny-Foggin admitted there was nothing in writing from the parents to the District regarding the goals or objectives or modifications, also nothing regarding assistive technology, also nothing regarding ESY. I noted this was a case crusher for the parents. There was no notation about what was lacking in this IEP other than it was not Craig. Again, she did not attend the 2020 IEP, and she recalls after much questioning that the parents retained her 10 months after the IEP in question. She noted that as many experts are, she was being paid by the parents and when she was able to get the report to the parents in August of 2021 after being retained much earlier, she sent it to parents upon completion. She does not know when the district got the report, but she noted that she was not concerned that the parents did not send her report to the District for about two (2) months after she issued it. (which again was very late due to her personal health issues). Again, I **FIND** Ms. Kenny-Foggin was honest and straightforward and did her very best given the long breaks in this case due to her being retained so far after the IEP meeting and her long illness with COVID that her honesty could not overcome the major weaknesses in her testimony.

Dr. Kara Loftin Ph.D Executive Director of the Craig School and Expert for Peitioner:

Dr. Loftin is currently the chief executive officer (CEO) of the Craig School. **(P-48)**. She has a bachelor's degree in music and a master's degree in business administration and a master's degree in education and special education with a focus on dyslexia, and a PhD in special education. Dr. Loftin has also finished her certificate for Level II of the Wilson Reading system. Dr. Loftin testified that her PhD followed a traditional track for special education where it contained a lot of theory of exceptionalities, ethics in exceptionalities, and special education law. She noted that her dissertation focused on strength-based assessments while looking at the rate or variance for students with exceptionalities. Dr. Loftin received her PhD from the University of Northern Colorado. I noted during her lengthy voir dire and that she was very professional, on point, extremely smart and knowledgeable. After some discussion as to proffer, I qualified her as a learning-disabled teacher, a teacher for students with dyslexia, attention issues and emotional issues related to learning disabilities, and I so **FIND**.

Dr. Loftin testified that she worked at the Wasatch Academy for twenty-one (21) years. She was a parent liaison for the school where she ran the learning support program for students with exceptionalities. She worked with teenagers who were struggling to learn in the classroom and helped make a program to work with students with learning disabilities using the Orton Gillingham approach for all the students in the program. **(P-48)**.

After the Wasatch Academy, Dr. Loftin started at the Craig School on July 1, 2020, where she currently works as the CEO. She deals with budgeting, hiring, firing, retention, teacher training, academic programs, and policies. Dr. Loftin states she also works very closely with a board of trustees because the school is a nonprofit/independent school.

Dr. Loftin is heavily involved in the teacher training that happens during a weeklong in-service training as well as their monthly half-day in-service training. Most of the training deals with application-based approaches, giving the teachers hands-on experience to bring the best practices into the classroom.

Dr. Loftin testified that she has a whole team of directors that review the IEP's and take part in the actual meetings with the students and parents. However, she reviews all the student's IEP's when they start at the Craig School, as well as reading any updated IEP's because she believes that an extra set of eyes are always useful and as a CEO of the school, and that it is important to be part of the conversations to make sure that everything is in place for each student. Dr. Loftin testified that she oversees the directors involved in planning and programming for each student of Craig. Dr. Loftin testified that she does not draft the programs for the students.

Dr. Loftin described the Craig School as an academic program that has been designed for students with language-based learning disabilities, in particular dyslexia. All students have a 90-minute Orton Gillingham block every morning five (5) days a week which is followed by another hour of written expression through the Orton Gillingham approach. Speech, language, occupational therapy, multisensory math, science, and social studies are also a part of the program. Dr. Loftin testified they also have specials

including art, music, and gym. As these facts above are largely uncontested and Dr. Loftin was a knowledgeable and credible witness, I **FIND** these as FACTS in this matter.

Dr. Loftin was introduced to document P-13 and testified that she recognizes the document to be A.H. levels of academic achievement at the time he joined the Craig School in 2019 as a second grader. **(P-13)**. She confirmed that assessment notes indicate that A.H. is struggling with onset rhyme pattern, in particular closed-syllable types. Dr. Loftin opined that it shows that A.H. is really struggling in phonics and phonemic awareness, telling her he is not fluent in his reading and if he is not fluent in his reading, then he does not understand what he is reading. After reading this assessment, Dr. Loftin testified that she would profile A.H. as a student who had learning disabilities. She also noted that the elements of his results are common for students who have dyslexia.

Dr. Loftin testified that her review of reports for A.H. revealed that he was given a fluency test at the beginning of third grade at the Craig School. **(P-49)**. The results showed that comprehension was still a skill that needed to be developed, as well as spelling. Based on these results, Dr. Loftin noted that this tells her that the phonological processing and phonemic awareness is not up to par with his fellow classmates. Dr. Loftin testified A.H. was in the 16th percentile of phonemic decoding on the TOWRE test, which is an exceptionally low average. Dr. Loftin testified that A.H. was tested in many other areas including a group mathematics assessment where he scored in the average range for his grade level, but his concepts and communication was an area of struggle and weakness for A.H.

Dr. Loftin testified that she found in A.H.'s speech and language evaluation **(J-20)** that A.H. struggled with multistep auditory directions, ability to assemble words into multiple sentences, ability to solve word problems presented orally, ability to answer questions about short paragraphs read aloud to him, word retrieval deficits.

During A.H.'s fourth grade year at Craig, she observed him in his reading class which was designed using the Orton-Gillingham approach which is multisensory. Dr. Loftin testified that the reading goes from simple to complex, cumulative, diagnostic and

relies on the five (5) elements of the national reading panel which includes phonics, phonemic awareness, vocabulary, comprehension, and fluency. Dr. Loftin testified that there were four (4) kids in the class, including A.H.

Dr. Loftin opined that for A.H. to succeed and improve in his writing, he needed to be a part of a writing program that gave him explicit instructions and lots of repetition. He needed reference sheets, graphic organizers, checklists, etc. Dr. Loftin continued that on top of his daily 90-minute classes of reading fifty (50) minutes of writing with an Orton Gillingham approach, A.H. also received an additional two half-hour segments per week for phonics and phonemic awareness because “he really needed it”.

Dr. Loftin testified that not only does A.H. receive Orton Gillingham instruction in reading, writing, and math at Craig, but he also receives Orton Gillingham instruction in science and social studies as well because it helps him work out complex problems that are difficult for him to understand by giving him step-by-step instructions. Based upon a review of his records and her 4th grade observation of A.H. at Craig, Dr. Loftin opined that it would be concerning to her if A.H. were in a general education social studies and science class because he needs the repetition of details since he is still working on his phonics and phonemic awareness as well as his fluency.

She emphasized that the Craig School has a point system built into the learning program to help students be more engaged in their studies called the badger point system, which is based on positive reinforcement and a clear expectation that the students act a certain way in the classroom. She noted that every teacher follows the system so that at the end of each class, the teacher will check off each student's point sheet and what they accomplished. The students can then take these points and exchange them for badger cards which eventually become prizes or access to special clubs, for example the gardening club. As Dr. Loftin testified directly on these points and it is largely undisputed as well as corroborated by mom, J.H. later on, I **FIND** that the badger system was an incentive for A.H. as well as the facts outlined about the program itself.

Dr. Loftin testified that A.H. responds beautifully to the badger point system. She states that it keeps him motivated especially when he is dealing with exceedingly difficult subjects. As a result, he is present in his learning because he likes to earn the points to receive the awards, and thus the points system is a huge motivating factor to help him with his reading and writing especially since he struggles so much in this area.

Dr. Loftin testified that A.H. was involved in the Craig School Summer program during the summer of 2021 which really focused on reinforcing skills and competencies met during the school year and to prevent learning loss, which typically occurs during the summer. Dr. Loftin noted that A.H. had Orton-Gillingham language arts and math as well as computer skills on his schedule for that summer. **(P-30)**.

To be a teacher at the Craig School, one must have a bachelor's degree in education, a teacher's license, and they would prefer a person that focused on special education. However, Dr. Loftin testified candidly that it depends on the subject in which they are teaching. She noted that they look for teachers that are certified in Orton-Gillingham. Dr. Loftin admitted that when A.H. was in third grade at the Craig School, his teacher, Ms. Imperatore, who had been at the Craig School since 1986, was not fully certified under Orton Gillingham until halfway through A.H.'s third grade year. However, she noted that Ms. Imperatore knew Orton Gillingham based on the intense training she received at Craig School and has been using the approach since she started working at the Craig School in 1986, she just failed to receive the actual certificate until A.H.'s third grade year. Dr. Loftin testified that Ms. Feldman, A.H.'s fourth grade teacher was a fully certified Orton Gillingham teacher. As Dr. Loftin testified forthrightly and professionally, and these facts are largely undisputed, I **FIND** them as FACT about Craig's programming and requirements and teacher's qualifications as outlined above.

Dr. Loftin was asked about A.H. emotional well-being at the Craig School and Dr. Loftin testified that they were not concerned with his emotional well-being because he had a good relationship with his peers. Dr. Loftin testified he never once presented with nervousness, stress, or uncertainty in any social setting. Dr. Loftin added that she would not recommend A.H. for counseling because in her opinion there is no use for it, and it is a waste of time that could be better suited for more Orton Gillingham programming.

Dr. Loftin opined that the IEP in question would not benefit A.H. **(R-21)**. Dr. Loftin noted that after looking at A.H.'s overall scores and progress at the start of fourth grade it would have been recommended that they ramp up the time of intervention and intensity, not decrease the intervention because the more support the better response A.H. would have.

Dr. Loftin ultimately opined that A.H. has made meaningful educational progress at the Craig School, and she believes it would be in the best interest of A.H. to continue at the Craig School to receive the services that are best fit for him.

On cross examination, Dr. Loftin testified that the Craig School has not been approved by the New Jersey Department of Education as a school for children with disabilities. She explained that the reason they have not applied for approval is because their model is an independent school, which gives them more flexibility in being able to add in support and services without it being approved by the state first. However, Dr. Loftin testified that the Craig School is accredited by the National Association of Independent Schools, the New Jersey Association of Independent Schools and the Middle State College and educational services. As there was nothing to dispute this and Dr. Loftin was a qualified and professional witness, I **FIND** it as FACT.

Dr. Loftin testified that A.H. has a formal diagnosis of dyslexia. Based on her history and studies with the multisensory reading instruction the appropriate error-correction strategy for dyslexia is to use a multisensory instructional approach. For example, if a student decodes a new syllable incorrectly, Dr. Loftin testified she would have the student tap out the syllable as they were saying it aloud. Dr. Loftin noted the goal is get the child to be able to correct themselves in the future and to give them independent reading skills if they indeed made a mistake. Over time the student should be fading out the skills they used to develop independent reading because they will not need them anymore.

It is Craig School's policy to report on progress each marking period in all subject areas. After reviewing P-24, Dr. Loftin testified that this progress report from Craig

focused on A.H.'s reading. The left column shows all elements in which a student needs to be satisfactory in reading. Dr. Loftin testified that the Craig School has a version of a public-school district's "IEP", which she described as a plan that includes all information attained from assessments the student has taken. This plan gives the teachers information on how to instruct each student. This plan also shows the student's benchmark and what their goals and objectives are for that year. Again, as Dr. Loftin testified professionally and expertly in her role as CEO of Craig, I **FIND** the progress report procedure as FACT. **(P13, P14, P 15, P23, P24, P25 P26).**

A.H. scored in the 42nd percentile in February of 2019 on the Scholastic Reading Inventory test, while in the fall of 2021, A.H. scored in the 35th percentile. Dr. Loftin opined that this decrease in percentile did not concern her because A.H.'s actual raw score increased. In the Slosson Test of Oral Reading, A.H. was in the 55th percentile in February of 2019, whereas in Spring of 2019, A.H. was in the 67th percentile. In September 2020, A.H.'s percentile decreased to the 11th percentile. Dr. Loftin stated again that this did not concern her because every year when the students take the assessment it is based on the specific grade, they are in. Here, A.H. was just starting a new grade with new skills and topics, so his percentile was lower than the previous year where his score increased as he learned more.

Dr. Loftin was then given the Test of Written Spelling (TWS). Here, A.H. scored a 77, in September 2019, which is in the sixth percentile for his age. **(P-15)**. In September 2020, A.H. took the same test again where he scored a 77, the same number he scored the previous year. Dr. Loftin admitted that this was concerning to her, and she hoped to have seen more progress from A.H. A.H. also took the TOWRE-2 and TOWRE-4 exam. Here, A.H. scored a scaled score of 99 in September 2019, putting him in the 47th percentile among his peers. In September 2020, A.H. scored a scaled score of 85, landing him in the 16th percentile. Dr. Loftin testified that this drop in scaled score and percentile also concerned her. The TOWRE exam results also concerned Dr. Loftin. A.H. scored a scaled score of 92 and was in the 30th percentile and then a year later he scored an 81 and was in the 10th percentile. The fluency from the fall of 2020 was 91% accuracy, leaving A.H. in the 55th percentile. In the fall of 2021, A.H. scored 100% accuracy, putting

A.H. in the 50th percentile. Dr. Loftin said this was not concerning, because it was more stable.

Dr. Loftin never worked directly with A.H. as a teacher, but she testified she collaborated with him as a supervisor at student events and activities that took place in the classroom. She has previously observed A.H. in the classroom, however there was no official report based on her observations. As this is not in dispute and corroborated by testimonial and documentary evidence, I **FIND** it as Fact.

While looking at A.H.'s Craig School report card, it was noted that homework assignments were "not applicable" or "NA" in science and social studies. Dr. Loftin testified that she is unsure of what that really means and would need clarification from the teacher. Dr. Loftin testified that there are some modifications that are added to A.H. that she hopes would be faded out over time. For example, number 14, which states "teacher assistance for paraphrasing". Dr. Loftin testified she would prefer to see the student paraphrase independently. Another example, number 15, which states "requiring cognitive cues for decoding automatically" as well as number 16, which states "teacher cueing for to predict outcome and/or answer inferential questions". Both of those Dr. Loftin testified she would prefer them to be eventually not needed by A.H. It was noted that "Needs improvement" or "NI" was noted in auditory processing skills, critical thinking, verbal reasoning, semantics and vocabulary skills, syntax, and morphology.

On redirect, Dr. Loftin testified that A.H. made progress at the Craig School, and the tests that Ms. Weinstein introduced during cross-examination do not give a full picture of A.H.'s progression. She opined that before the Craig School, "A.H. was not open to learning". Once he was at the Craig School, he became more receptive to learning and he started to gain self-esteem. Dr. Loftin testified that A.H. is well liked at the Craig School, he gets along with all his peers, and she has seen improvement in his reading regarding sequencing/order and story recall, his decoding has improved over time as well. Dr. Loftin believes the Craig School addresses A.H.'s needs and continues to address his needs despite the numbers on the standardized tests as highlighted during cross-examination above.

Dr. Loftin was emphatic in noting that the Craig School does not indoctrinate students, nor do they force them to write about how great the Craig School is as part of the curriculum. Dr. Loftin testified that the writing prompt for their books is their choice if it makes sense with their learning objectives. Overall, Dr. Loftin was a professional expert witness who testified dispassionately and professionally and did not veer into areas upon which she did not have independent knowledge of A.H. or his needs. As such, I **FIND** she was a credible witness and will weigh her credibility in the Expert Testimony section below as to my ultimate findings of fact and conclusions of law stemming therefrom.

J.H.- A.H.'s Mom:

J.H. is A.H.'s mother. She has two (2) boys, A.H. and P.H. P.H. is entering his first year of high school at the Ridgewood school district. A.H. is currently eleven (11) years old and is entering sixth grade this upcoming school year at The Craig School. J.H. testified that the first time an educator raised concerns about A.H.'s ability to read was in preschool. She testified that the director of the preschool pulled her aside and told her that they noticed A.H. was having issues recognizing sounds that go along with letters. The director was concerned because A.H. was going to be moving into kindergarten the following year and he was behind his classmates.

After the discussion with the director of the preschool, J.H. decided to get a reading tutor for the summer, hoping that A.H. would catch up. J.H. testified she reached out to the Willard School and contacted Ms. Devaney to let her know that she was notified that her son may have a learning disability. Ms. Devaney indicated that the District would wait until the start of school to evaluate him and advised J.H. to read to A.H. every night, but J.H. testified she had been reading to him since he was an infant.

J.H. testified that A.H.'s kindergarten teacher, Ms. Pisani reached out to her in early that October to let her know that she was noticing that A.H. was having trouble with sounds associated with letters, that he was having trouble reading even the smallest basic words. Ms. Pisani expressed concern and suggested that she get A.H. evaluated. J.H. testified that Ms. Pisano herself did a dyslexia screening on A.H. and he failed. J.H. testified she never received the results from that screening.

J.H. recalled that A.H. had multiple evaluations done by the District including occupational therapy, a psychological evaluation, as well as a speech and language evaluation. J.H. testified they would pull A.H. and other kids to the side in small groups to practice their skills. J.H. testified she never saw any documents from the basic skill sessions nor got any reports discussing his progress in these sessions.

During A.H.'s time in kindergarten, J.H. took A.H. to Dr. Holahan, a neurodevelopmental disabilities pediatrician specialist where A.H. was evaluated for "every learning disability". J.H. also had a private educational evaluation done by an LDT, Nicole Spinelli. J.H. also took A.H. to Jennifer Harris, an Orton Gillingham certified tutor who did private assessments to determine the services A.H. needed. J.H. shared all the documents/results that she received from these specialists with the Ridgewood school district.

J.H. continued that as a result of all the evaluations from the district and the private providers, they all came to the same conclusion, that A.H. was dyslexic. At the time, J.H. admitted she knew nothing about dyslexia, but spent the time researching the learning disability. J.H. testified that the district determined that A.H. was eligible for special education services.

At that time, the school district proposed an IEP, but J.H. testified that she had some concerns over the proposed IEP (not the subject of this case). (R-6). She testified she had never heard of the SPIRE program before and she wanted to observe a class before putting A.H. in the class. J.H. testified she took copious notes and compared it to the SPIRE website where they had model lesson plans in video format for parents like J.H. to know what SPIRE classes should look like. J.H. testified that the class she observed compared to the model lesson plan on the official SPIRE website was not the same.

J.H. started taking A.H. to Jennifer Harris, a tutor specialized in the Orton Gillingham approach and the District was aware of the tutor. The school district offered A.H. an enrichment program during the summer between kindergarten and first grade,

but J.H. made the decision that it would be more appropriate for him to continue with the tutor in the summer instead.

As per J.H.'s testimony, A.H. continued to attend The Willard School (Ridgewood elementary school) for first grade. A.H. had an IEP in place where he was getting pull-out replacement for writing, reading and math, and at the time he was also getting one on one SPIRE with his reading teacher. (R-6). J.H. testified that this was around the time where A.H. started losing interest in school and not wanting to go. J.H. testified that A.H.'s self-confidence drastically dropped because he was not able to learn. He would constantly feel "stupid" because the information was not being presented to him in a way that he could properly process the information. J.H. testified she started sending A.H. to a pediatric psychologist that dealt with learning disabilities on Dr. Holahan's recommendation. J.H. testified she made A.H. child study team aware of his attendance at therapy. J.H. testified that unfortunately the therapy was not helpful.

J.H. had issues with A.H.'s case manager Ms. Zack. According to J.H., she would email Ms. Zack and receive no answer. She tried to set up meetings with Ms. Zack and she would never follow through. J.H. requested through the principal for a new case manager and the principal told J.H. she must tell Ms. Zack directly why she no longer wanted her to be working for their son. J.H. testified that she did exactly that. She told the case manager that she failed to bring to their attention the Franklin Lakes summer program and she failed to upgrade his IEP for first grade as discussed.

J.H. testified it was never her intention to send A.H. to private school, but after her concerns were not addressed in the IEP for A.H.'s second grade year, she knew that she had to do something to address the lack of proper instruction for her son. In the beginning of A.H.'s second grade year, J.H. requested that her son receive a teacher that was enrolled in the Fairleigh Dickinson Orton Gillingham Teacher Training program. The parties agreed in the IEP that A.H. should be evaluated for his reading level within the first two (2) weeks of school. J.H. testified that the school district failed to follow through on J.H.'s request. J.H. had parent-teacher conferences with Ms. Brunner and Mr. Friel in October, and they still did not have the reading evaluations completed as requested in

the IEP. (R-6). J.H. was made aware that the teacher was no longer in the FDU training program.

J.H. testified that after the October parent teacher conferences, she decided to research out-of-district schools that could help A.H. with his learning. J.H. and her husband decided on the Craig School. J.H. testified that she sued the district for money regarding A.H.'s placement in the new school. J.H. testified that they settled outside of court. (R-12). J.H. testified that as a result A.H. started at the Craig school in February 2019. Again, I **FIND** this to be the procedural history of this case prior to the case at bar. To that end, I include J.H.'s entire testimony in for completeness and to enable her to tell her whole story leading up to the IEP in question and thus, the case before me.

Bringing us to the IEP in question, J.H. testified that she and her husband M.H attended the February 2020 IEP meeting for A.H.'s fourth-grade year, between September 2020 to June 2021. J.H. alleged that neither she nor her husband were given the draft IEP or any other documentation to follow along with at the IEP meeting. **(R-21)**.

J.H. testified that she took notes at the IEP meeting, like every other meeting she has attended for A.H. Based on her recollection and her notes from the meeting, the meeting started with all of the evaluators going through their evaluations of what they found to be A.H.'s strengths, weaknesses, and the areas where he could improve. Then as per J.H.'s testimony, Ms. Devaney and Ms. DeAraujo discussed their observations at The Craig School. They gave positive feedback, saying that the program was very structured, and they had no criticism that she could recall.

J.H. testified that even after all the positive feedback about the Craig School, the child study team stated at the meeting that they want to bring him back to the district. As per J.H.'s testimony, her husband then interrupted the conversation and asked why they wanted to bring him back to the district when everyone that had just spoken said that he was happy at his new placement and was excelling. They responded stating they can provide an appropriate program for him in the district. J.H. testified she specifically remembers Ms. Devaney stating that they will "recreate the Craig School" at the Ridgewood School District. J.H. testified that A.H.'s current teacher(s) at the Craig School

were not at the IEP meeting and was unaware if A.H.'s teachers were invited to it. At the meeting her and her husband requested that A.H. stay at the Craig school, and the district said no. As J.H. testified directly and honestly and knows the history of her son's education and development, and the overall facts and conclusion regarding the meeting as noted above are largely undisputed, I **FIND** them as FACT.

Under the "goals and objectives" section of the proposed IEP for A.H., J.H. testified that part the District's goal was to give A.H. counseling to help him transition back to the district. As his mother, J.H. felt counseling was an inappropriate use of time because it was not tackling the core problem of his dyslexia. The counseling focused on ways for A.H. to make friends and initiate play. However, J.H. testified that in all his life, A.H. has never had a problem making friends or initiating play. The counseling also focused on managing his feelings of nervousness, anxiety, stress, and uncertainty. However, J.H. said he never had any of those problems at the Craig School. The fact that the district put in learning and breathing techniques as one of his goals/objectives was disconcerting to her. J.H. testified it was concerning because a fourth grader should not need breathing techniques to make it through the day unless the school district really thought A.H. was going to have that much trouble. **(R-21)**

The other part of the IEP that concerned J.H. was that the reading and writing program was the same as A.H.'s previous Ridgewood IEP before J.H. pulled him out of the district. She testified that it was the same program with just an additional forty-five (45) minutes of multi-sensory reading. J.H. testified this was not an appropriate amount of time for instruction. J.H. testified, based on the research she did, that at least ninety (90) minutes were needed. J.H. also noted that they had taken away the aide he had before leaving the district. **(R-21, J-21)**.

Another part of the IEP that concerned J.H. was that there was no badger cards/point system in A.H.'s IEP. J.H. testified that A.H. thrived on the point system at the Craig School because it made him try hard things for which he was then rewarded. J.H. stated that her son became more confident and more motivated to try new things, especially hard new things in class. J.H. also testified that unlike the district's IEP the

Craig School had a technology class in place for A.H. to learn about all the intricate parts of technology. **(R-21 & J-21)**.

J.H. testified that at the Craig School they had three (3) parent/teacher conferences a year and prior to them they send evaluations, assessments, teacher notes, and anything else that will be discussed at the conferences. These conferences include all of his teachers as well as the director of the school. J.H. testified that there can also be similar meetings in between those parent/teacher conferences if there are any concerns with A.H. or they want to amend his goals and objectives.

J.H. testified that the writing program at the Craig School is extremely structured, multi-sensory based, whereas the writing class that was suggested in the IEP was not structured like the Craig school writing program, nor would have it been for A.H. when he entered sixth grade.

J.H. testified that at the end of second grade, the first year A.H. was at the Craig school, A.H. was a part of a presentation at the school. It was tradition at the Craig School for the second and third graders to do a book reading at the end of the year. Here, the students would present to the parents a book that they worked on for months in class. The book could be on any appropriate topic. J.H. testified that A.H. was the only child that drafted his book about the Craig School. J.H. testified that the book topic was kept a secret and only revealed at the end of the school year. **(P-42, P-43)**.

The tape of A.H. reading his book was played for the court. A.H. talked about how he liked the Craig School because his teacher helps him. He enjoys the classroom chairs because they help him learn. He has a nice reading teacher who gave him a fidget toy to play with while doing work. In the video, A.H. continues to read his book stating that the Craig School is a better school for him because he is learning new things, ending that he is glad he found the Craig School. **(P-42, P-43)**. As myself had an opportunity to view the video, I **FIND** this to be an accurate description of what A.H. credibly relayed about his affinity for the Craig School.

J.H. testified that she never felt part of the IEP team making decisions for her son at the Ridgewood District. She felt like her concerns were never heard and she does not agree with Ms. Devaney's testimony that the Willard School was an excellent place for A.H. J.H. found it to be appalling that Ms. Devaney believed that the Craig School was indoctrinating her son. J.H. states that is not the case, he is happy at the Craig School and enjoys his time being there. In fact, J.H. noted that after going to the book reading at the end of the school year, she asked A.H. what made him decide to write about the Craig school, and A.H. stated he in fact wanted to write about the Willard school and how much he hated it, but the reading teacher said that writing about the Willard school would be inappropriate and guided him in a different way.

J.H. testified that the reason her son could not remember his birthday is because he has working memory issues that include important dates, people's names, phone numbers etc. However, J.H. testified A.H. now knows his birthdate.

J.H. testified that if she signed the proposed IEP, she felt emotionally he was going to go right back to the dark place he was in before, where his self-esteem would have shrunk, his anxiety would go up, and he would be extremely sad. J.H. stated they tried for two and a half years at the district, but it did not work. The district always offered less services than recommended for someone with dyslexia and the services they did offer did not compare to the Craig School.

On cross examination, J.H. testified that she first started noticing A.H. becoming sad, depressed, anxious around the end of kindergarten when he was having trouble learning. When A.H. was moved to the Craig School, he slowly started becoming his old self. J.H. acknowledged it was a gradual process and she started noticing improvements at the end of second grade, five (5) months after he was moved to the Craig School.

J.H. testified that she told Ms. Devaney on the child study team that A.H. was attending therapy from the beginning of first grade to the beginning of second grade. J.H. testified she also used Jen Harris, a private Orton Gillingham tutor from kindergarten to halfway through second grade, when A.H. was in the district. She testified she also notified Ms. Devaney of this tutor and the child study team was made aware. J.H. testified

that stopped using Ms. Harris as a tutor when they switched A.H. to the Craig School because the commute got longer and there was less time in the day.

J.H. testified that the Craig School is open about sending the child back to their appropriate district when the time comes. However, she believes that her son is not there yet. J.H. testified she is not sure whether there will be a time where A.H. is ready to be transitioned back and all she knows is that as of right now it is inappropriate.

J.H. testified that no one referred her to the Craig School or to her counsel, Ms. Callahan, and that she found both on her own. She hired Ms. Callahan on January 25, 2019. J.H. testified that after the February 2020 IEP meeting, she did not send a letter or an email to the district stating they are rejecting the proposed IEP and continuing their placement at the Craig School. J.H. agreed that no one was forcing A.H. to come back to the district right away but he would have had to start fourth grade with the district based on the proposed IEP. J.H. testified that Willard Elementary treated A.H. like an outsider and gave the example of how all of the special education kids were photographed in front of different backgrounds in the yearbook because they were not taken out of class to be photographed like the “normal” children.

Overall, I **FIND** J.H. was certainly an advocate for her son who was concerned for his well-being and was well aware of his academic and emotional journey. However, she did not express what her concerns were specifically about the District but for the fact that it was not Craig and she felt the transition would be extremely daunting for him. She also admitted that he dealt with anxiety and previously had counseling to treat it. Now, she is opposed to the District offering any because it will affect his time in class to deal with his reading and processing issues. As noted above, this is the reason the therapy was stopped at Craig as well. Also, no one disputes the dyslexia diagnosis, but it is worth mentioning that both sides cannot find a document that confirms that and thus I so **FIND**.

The Expert Testimony

The expert testimony offers diametrically opposed viewpoints regarding A.H.’s ultimate placement, not his educational disabilities but more specifically what is the

appropriate educational environment for him. An expert's opinion must be weighed based on the cogency of his or her reasoning, the circumstances of his or her involvement in the case, and the relevance of his or her experience. The weight to be given an expert depends on his or her candor, intelligence, and knowledge. County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). And our courts have held 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).

The District's Experts, Devaney, Acosta, Killby and De Araujo and Petitioner's Expert Elizabeth Kenny-Foggin and Dr. Loftin from the Craig School were all well-qualified experts in their fields, all of whom testified in a professional and thoughtful manner. Although, it is crucial to note that Elizabeth Kenny-Foggin and Dr. Loftin based their opinions largely on review of reports administered by the District. As for the District's witnesses, who were all qualified as experts, and the collaborating experts did their own testing, and their own evaluations of A.H. in both the District and the Craig School settings. To that end, the IEP addresses A.H.'s reading issues and addresses his emotional needs. Thus, I have to give the most weight to The District's expert witnesses. As noted above, their test scores were relied upon and uncontested, and note that A.H.'s needs regarding reading, processing, high-order thinking and working memory, classified under Specific Learning Disability (SLD) would be addressed.

I **FIND** Ms. Kenny-Foggin could not concede much at all even in response to common and easy questions, rather she chose to stay steadfast in those positions and that is where she really lost credibility for me. Specifically, when asked on cross about parental involvement in an IEP meeting, she could not admit that parents could push back with their input after a first draft. In this regard, I noted that she was evasive and hedging. Further, my trial notes indicate that she did not know if she included certain information in her report or from where she pulled it. She also had no input as to his General Ability Index (GAI) as noted above and in length on cross. She did earn points with me on honesty when she admitted that sometimes "less is more" and you do not want to burden the child with unnecessary testing". She could not remember where in the educational evaluation (J19) where she noted that it left out basic skills, she could not remember

where, it took her ten (10) minutes and after that it was not listed in her summary but admitted it should have been. On cross she admitted that she was wrong in her report many times, these were not just ministerial mistakes but clearly errors on her part. I noted many times that when the answers brought out on cross seemed unfavorable to her expert opinion, she became extremely evasive and lost almost all her credibility. In fact, she made an allegation on the bottom paragraph of her report that the parents did not want A.H. to be used as practice so teachers could learn Orton Gillingham methods. I felt this was quite an accusation and noted it was a “wow” moment in the hearing.

During hypothetical questions Ms. Kenny-Foggin would make certain admissions. For instance, when asked about whether it would be concerning that a student is not hitting the mark or if program was stagnant or decreasing it would concern her. She said that in response to the Slain test and with the TOWRE. She said a lack of progress in those scores would be a concern and you would want to see what else impacts the student to be focused on and addressed. For example, she stated “like is there a brain injury or an O/T issue, muscle issues etc...” She noted that it would be an indication that something was not working and must change. In addition, she admitted hypothetically that if in a structured literacy program it would be appropriate to utilize certain modifications. In fact, teachers would need to follow those modifications on the level they can read on. She agreed to this with regard to prompting as well, that a goal would be to fade out prompting depending on a student’s ability. In fact, she agreed that overtime if A.H. or a student like A.H. needing more cueing would be a concern and an indication that the child is struggling or something is amiss. I note that these are admissions she made for items included in the IEP or items missing at Craig. Again, these answers could only be elicited from Ms. Kenny-Foggin when they were asked in the hypothetical by District’s counsel, and I so **FIND**.

As to A.H. I **FIND** that her answers were canned and prepared. The IEP was drafted in Feb of 2020, she did not know AH then, she was retained ten (10) months later in December of 2020. She added some credibility to her testimony when she noted some fair criticism of Craig’s program in that she also did not agree with the fact that their goals and objectives were all 80% and not 100% as she testified would be required. She also admitted that with regard to a draft IEP having to be given to the parents as required by

law, she could not note what that law was. She also noted she was never an LDTC in any other public school district other than three (3) years in Holmdel which was mostly grades 4 to 6 and high school.

Kenny-Foggin was honest and eager to do the best job she could given the circumstances upon which she encountered this case. To that end, I cannot give her testimony as much weight as the District's witnesses because she did not do her own testing, had no independent recollection of the case, or A.H., used post-it notes to refresh her memory throughout her trial testimony and then suffered from a long awful case of COVID wherein her illness caused a delay of not only her review of the case but her eventual report which was riddled with clear errors upon which she professionally admits, and I so **FIND**. Furthermore, A.H.'s classification, which is not in dispute here, is SLD and it is based upon all of the District's testing and input from the private testing leading up to the case before me. The IEP finalized by the CST considered and integrated all of their independent testing, their independent observations, a careful review of the parents' experts' reports, reports from the Craig School as well as parental input albeit sparse. I **FIND** that Kenny-Foggin's testimony as well as Dr. Loftin's while strong and professional, could not overcome that of The Districts' experts. In fact, these expert versions are not altogether different. What is different is the conclusion as to where A.H. should be schooled. Their argument is over the brick and mortar; the programming is arguably better in District due to the expertise of the teachers giving the instruction and it is certainly given in the least restrictive environment as the multisensory approach is woven throughout the day while in the both pull-out resource and the general education setting wherever possible. The extra multisensory meeting is additional and not a stand-alone service, and thus I so **FIND**.

All witnesses:

DISCUSSION

It is within an Administrative Law Judge's "province to determine the credibility, weight, and probative value of the expert testimony." State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied. 127 N.J. 321 (1990). The weight to be given to an expert's

testimony depends upon "[sic] candor, intelligence, knowledge, and especially upon the facts and reasoning which are offered as foundation of [their] [sic] opinion." County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). Further, "the 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).

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 it is "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interests, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

Having had an opportunity to hear the testimony in conjunction with a thorough review of the stipulated documentary evidence, **I FIND** that all of the Districts' witnesses were credible, with specialized experience in the area of programming that is germane to this case, who provided reliable testimony that the IEP for the 2020-21 school year was reasonably calculated to provide A.H. with significant learning and meaningful educational benefit in light of A.H.'s individual needs and potential, that is, the IEP was appropriately ambitious in light of those circumstances, and they did so in the least-restrictive environment. As Ms. Devaney and the District's witnesses testified, A.H.'s parents unilaterally placed him by waiving the stay-put which was to be in District at the end of the prior settlement agreement. No subject matter teacher from the Craig School reported his progress. Dr. Loftin did discuss her review of his progress as the CEO of Craig. She was also professional and candid where she agreed there should be more progress in certain areas. That candor with regard to A.H.'s lack of appropriate goals was also echoed by the Petitioner's private witness Elizabeth Kenny-Foggin. Undoubtedly, A.H.'s IEPs contained goals and objectives in all subjects with attendant modifications for success in those classes, and A.H. ultimately would have likely achieved success in those classes had he decided to re-enroll in District as every teacher was trained in multi-sensory reading and it would be weaved into all of his classes in District. In addition, his

IEP included transition services and counseling if needed. It also provided for another IEP meeting in short order after A.H. had some time to settle back into the Ridgewood School District, and thus I so **FIND**.

Likewise, as Devaney, Killby, Acosta, DeAraujo and J.H. testified that at Craig, A.H. attended class regularly, participated fully, and completed tasks timely. In addition, Ms. Devaney, L.D.T.C., reported and The Craig School witnesses testified that A.H. met some of the goals and objectives of those classes even though goals and objectives were a subjective component to their process. Dr. Loftin was clear that there was a plan based upon progress reports and meetings with the parents and teachers, but it was not an IEP with specific goals and objectives as required by public school districts. It is clear that from J.H. and A.H.'s video, that he clearly enjoys going to the Craig School, and thus I so **FIND**. Further, Dr. Loftin, while qualified as an expert, was also a fact witness. As she was the CEO of Craig and not the teacher, as such I **FIND** I cannot give her testimony as much weight as the District's witnesses as while she scored points with me with her candor, she did not have much hands-on direct experience with A.H.

As for Ms. Kenny-Foggin, Petitioner's expert; I **FIND** that I **CANNOT** give the ultimate opinion as memorialized in her report much weight at all. As noted above, she did not test A.H. herself, she was not at the IEP meeting, she was not retained until about ten (10) months after the IEP meeting in question, she did not know A.H. individually, she relied on the testing from the District and then authored her reports many months after and had no independent recollection of A.H. during her trial testimony. In addition, she had many errors in her report, and made honest concessions about those errors which I appreciated in my search for the truth for this child. She never visited the district's program in person and never asked to. She never asked for follow-up materials from the District. Thus, she could not address the alleged inappropriateness of the IEP. It bears mentioning that A.H. was already attending The Craig School prior to her writing her evaluation and she is paid by the hour for her expert services. However, I **FIND** that she was forthright on cross examination when she admitted that A.H.'s goals and objectives as listed by Craig were also inadequate as they did not seek 100% progress in the areas highlighted in her testimony.

As for J.H., **I FIND** that she was a caring and zealous advocate for her son who knows his entire educational and social-emotional history. However, on the whole with regard to her assessment of his educational needs **I FIND** she was less credible than the District's witnesses. She has an obvious self-interest in the outcome of this matter as there is a large financial cost associated with The Craig School placement. However, I also **FIND** that she and her husband were cooperative in attending the IEP meeting, allowing evaluations and observations to take place but were more focused on the alleged lack of a draft IEP at the meeting in question. For a couple who J.H. testified had been a part of multiple IEP meetings, who took copious notes at the meeting in question and at past meetings, who gave input at all of those meetings, **I FIND** that her version of there being no draft IEP to work with alongside the CST did not make much sense. Regardless, **I FIND** that even if the draft were missing, it would not have affected my overall analysis about whether they were given an opportunity to be meaningful collaborators of the CST; they absolutely were given that opportunity. Petitioners' assertion that they were collaborative partners with the District strains credulity. Again, none of this testimony was supported by testimonial or documentary evidence and as such, **I FIND** I cannot give her testimony much weight in this regard.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

This case arises under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities. Receipt of those funds is contingent upon a state's compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). As a recipient of Federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities will receive FAPE. 20 U.S.C. §1412. FAPE includes Special Education and Related Services. 20 U.S.C. §1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d). To meet its obligation to deliver FAPE, the school district must offer G.O. "an educational program reasonably calculated to enable him to make progress appropriate in light of his circumstances." Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017)

The primary issues in this case are whether the District failed to offer A.H. with a FAPE for the 2020-21 and 2021-22 school years. And if not, whether the unilateral placement at The Craig School was appropriate. Lastly, if FAPE was not offered, whether the parents are entitled to any reimbursement.

Did the IEP Offer A.H. a FAPE?

The petitioners argue that the District's proposed IEP did not provide A.H. with a FAPE. **(R-21, J-21)**. The Petitioners claim that A.H.'s significant language-based learning disabilities and his low range of working memory and deficits and fluid reasoning make the IEP inappropriate. Please note that the procedural aspects of this case will not be addressed as counsel, and I discussed and agreed at Oral Argument and before the case was heard. So, with regard to Petitioner's concerns about whether the IEP offered A.H. a FAPE, they claim that since the IEP lacked a reinforcement system, an FM system, no support of any kind in Science and Social students and no multisensory scientifically based writing program, insufficient time for language-based literacy, no binder system and no fidgets or appropriate chairs that allow movement, that those alleged deficiencies amounted to a denial of FAPE. I **FIND** this argument to be wholly unsupported by the credible testimony in this case.

The petitioners previously claimed the District's determination that A.H.'s classification would be changed from Communication Impaired to Specific Learning Disability ("SLD") amounted to the District's predetermination regarding same. However, A.H.'s classification and eligibility are not at issue in this matter as noted above and clarified at oral argument, and thus I so **FIND**. No one disputes that the SLD stems from a language-based learning disability with A.H.'s other factors including low range of working memory, and other deficits as outlined in detail above.

In considering the appropriateness of an IEP, case law instructs that actions of the school district cannot be judged exclusively in hindsight. The appropriateness of an IEP must be determined as of the time it is made, and the reasonableness of the school district's proposed program should be judged only on the basis of the evidence known to

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

The Third Circuit in Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 247 (3d Cir. 1999) stated that the appropriate standard is whether the IEP offers the opportunity for “significant learning and confers meaningful educational benefit.” The benefit must be meaningful in light of the student’s potential; the student’s capabilities as to both “type and amount of learning” must be analyzed. Id. at 248. When analyzing whether an IEP confers a meaningful benefit, “adequate consideration [must be given] to . . . [the] intellectual potential” of the individual student to determine if that child is receiving a FAPE. Ibid. The IDEA requires an IEP based on the student’s needs and “so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate.” Scott P., 62 F. 3d at 534.

First, with respect to the proposed IEP, I do not agree with petitioners that this IEP was not reasonably calculated to address A.H.’s needs. The IEP identifies and address A.H.’s educational, behavioral, social, emotional, and therapeutic needs. It describes a robust program which includes almost everything offered by Craig including professionals qualified in multisensory reading. It explicitly includes small group pull-out resource instruction for reading (50 minutes), writing (50 minutes) and math (50 minutes) each day plus an extra 45-minute multisensory reading group daily, plus small group speech language therapy twice per week, small occupational therapy twice per week and assistive technology. In science and social studies, the teachers all trained in multi-sensory techniques would help in utilizing those techniques as well. It also included in response to the parents’ concerns, extensive transition plan to ensure a smooth transition for A.H. back into the District; myriad and extensive modifications, appropriate goals and

objectives and meetings with a reading specialist to address the petitioners' concerns. Furthermore, the District offered to provide notice of extracurricular activities, a summer tour, a meet-and-greet with the case manager and counselor, individual counseling once per week, and the ability to participate in social skills or a "lunch bunch". The District was also thoughtful in developing A.H.'s schedule for the year so that he could spend a chunk of his time in the mainstream setting while also receiving the necessary educational and support services. As a result, **I CONCLUDE** that the IEP is reasonably calculated to address A.H.'s needs as they were known to the District at the time even given the parents' lack of meaningful collaboration.

Petitioners further assert that the IEP improperly included therapy/counseling as A.H. would be so affected by the change from Craig to the District that it was proof that FAPE could not be provided as the child would suffer. **I CONCLUDE** that the addition of those services in the IEP did not deny A.H. a FAPE but rather enhanced it if he wanted to take advantage of that as he transitioned back to the District. Especially in light of J.H.'s testimony that he was previously in a dark place about his learning deficiencies and was in therapy that the parents gave up as they felt there was not enough time and that at Craig his time would be better used with further reading instruction. In the context of implementation, the Third Circuit found that even assuming the allegations of a one-day failure of a one-to-one aide, homework deficiencies, and other omission of services were true, "such de minimus failures to implement an IEP do not constitute violations of the IDEA." Melissa S. v. Sch. Dist. Of Pittsburgh, 183 F. App'x 184, 187 (3d Cir. 2006) (citing Houston Indep. Sch. Dist. V. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000)). In A.H.'s case, he never even attended the District's program or placement, and the addition of counseling or other transition to District services are not only not an omission but an addition of services based upon the parents' ultimate concerns of him going to a "dark place". Thus, logic dictates that if an implementation failure is not considered a denial of FAPE, neither should an added optional service in response to the scant parental input, be deemed as such, and thus I so **CONCLUDE**.

In light of my findings of fact and analysis above, **I CONCLUDE** that the IEP offered A.H. a FAPE for 2020-21 and 2021-22 in the least restrictive environment and allowed him an opportunity to make meaningful progress.

Case law recognizes that the IDEA does not require the Board to provide A.H. with the best possible education, S.H. v. State Operated Sch. Dist. of Newark, 336 F. 3d 260, 271 (3d Cir. 2003), or one that provides “everything that might be thought desired by loving parents,” Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (citation omitted). Nor does the IDEA require that the Board maximize A.H.’s potential or provide him the best education possible. Instead, the law requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995). The district must provide personalized instruction with sufficient support services to permit A.H. to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049 (1982). Noting that Rowley involved a student who, though disabled, was fully integrated in a general education classroom, the United States Supreme Court explained that while “a child’s IEP need not aim for grade-level advancement if that is not a reasonable prospect, [the IEP] must be appropriately ambitious in light of his circumstances[.]” Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S.Ct. 988, 992 (2017). The Third Circuit found the directions of the Supreme Court in Endrew to treat “a child’s intellectual abilities and potential as among the most important circumstances to consider” to be consistent with its standard that an “IEP must provide significant learning and confer meaningful benefit” Dunn v. Dowlintown Area Sch. Dist., 904 F.3d 248, 254 (3rd Cir. 2018). “IEPs must be reasonable, not ideal [and] slow progress does not prove” the deficiency of an IEP. Ibid. Here, the IEP in question was more robust than the prior program and placement where A.H. demonstrated reasonable but not meaningful academic progress. In addition, they were in keeping with that progress and the updated evaluations and noted areas of improvement and areas of continued weakness.

The IDEA also requires states to educate disabled children in the LRE to the maximum extent appropriate, with children without disabilities. See 20 U.S.C. §1412(a)(5)(A). Thus, removal of children with disabilities from the general education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Ibid. “This provision evidences a ‘strong congressional

preference' for integrating children with disabilities in regular classrooms.” Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993) (citations omitted).

To determine whether a school follows the Act's mainstreaming requirement, a court must first determine whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. Id. at 1215. If such education cannot be achieved satisfactorily, and placement outside of the regular classroom is necessary, then the court must determine “whether the school has made efforts to include the child in school programs with nondisabled children whenever possible.” Ibid. This two-part test is faithful to the Act's directive that children with disabilities be educated with nondisabled children to the maximum extent appropriate. Ibid.

Is Placement at Craig Appropriate, and are
the Parents Entitled to Reimbursement for their Unilateral Placement?

Having found that the Board offered a FAPE to A.H., it is not necessary for me to analyze whether placement at Craig is appropriate under the IDEA. It is well-established that the appropriateness of an IEP is not determined by a comparison of the private school and the program offered by the District. S.H. v. State Operated Sch. Dist. of Newark, 336 F.3d at 271. Rather, the pertinent inquiry is whether the District's IEP offered FAPE and the opportunity for meaningful educational benefit in the LRE. G.B. and D.B. ex rel J.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., EDS 4075-06, Final Decision (June 13, 2007), <http://njlaw.rutgers.edu/collections/oa/>. Upon a finding that the district provided FAPE, the appropriateness of the private placement is irrelevant. Ibid. (citation omitted); Scott P., 62 F.3d at 533.

Even assuming that the IEP somehow fell short, I **CONCLUDE** that the parents are not entitled to full reimbursement for their expenses at Craig during the period of time highlighted in the petition, specifically the 2020-21 school year. A court may reduce or deny reimbursement costs based on the parents' unreasonable behavior during the IEP process. 20 U.S.C. § 1412(a)(10)(C)(iii). New Jersey regulations specifically require that parents advise the district at the “most recent IEP meeting” that they were rejecting the IEP, and that they give written notice “of their concerns or intent to enroll their child in a nonpublic school” to the district at least ten

business days' prior to removal. N.J.A.C. 6A:14-2.10(c)(1) and (2). The cost of reimbursement may be reduced or denied "[u]pon a judicial finding of unreasonableness with respect to actions taken by the parents." N.J.A.C. 6A:14-2.10(c)(4).

Here, the parents waived the Stay Put at the end of their prior settlement period which was to be the District even before they met with the District to see what special education program the District was proposing for A.H. for the following year, and before they retained their expert, Ms. Kenny-Foggin, who had yet to even observe the District's program. Nor did she observe the unilateral placement at Craig until after the decision for him to stay there was made and her report was written many months after. The District was first made aware that the parents were looking to stay at Craig after the term of the settlement seeking a continued out-of-district, unilateral placement by letter, when the petitioners informed the District that they were waiving the Stay-put and keeping A.H. at Craig. The District requested to discuss the matter at the IEP meeting and reevaluation planning meetings.

I FIND that since the parents had already enrolled him and engaged with Craig and had no proposed changes to the District's IEP, they had no intention at that time of discussing or considering the District's proposed program for school years covered by the IEP in question. This is evidenced by their only concerns at the IEP meeting being that A.H. should return to Craig. **I CONCLUDE** that the parents were not meaningful collaborators during the IEP process, but they did at least allow the observations and testing to occur and thus did not stymie the District's ability to formulate and develop an appropriate IEP.

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

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

education available to the student in a timely manner prior to enrollment and that the private placement is appropriate.

The OAL regulation mirrors well-established Federal Law. Parents who unilaterally withdraw their child from public school and place him in private school without consent from the school district “do so at their own financial risk.” School Comm. Of Burlington v. Mass. Dep’t of Educ., 471 U.S. 359, 374, 105 S.Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985). See also: N.J.A.C. 6A:14-2.10(b)(1). They may be entitled to reimbursement for the costs of their unilateral private placement only if a court finds that the proposed IEP was inappropriate, and the private placement was appropriate under the IDEA. 20 U.S.C.A. Section 1412(a)(10)(C)(ii). Once a court holds that the public placement violated IDEA, it is authorized to “grant such relief as the court determines is appropriate.” 20 U.S.C.A. Section 1415(e)(2).

Parents who are compelled to unilaterally place their child in the face of a denial of FAPE, need not select a school that meets state standards. Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15, 114 S.Ct. 361, 366, 126 L. Ed. 2d 284, 293 (1993); L.M. ex rel H.M. Evesham Twp. Bd. Of Educ., 256 F. Supp. 2d 290 (D.N.J. 2003). The Third Circuit has held that “parents [are] entitled to reimbursement even [when a] school lacks[s] state approval because the [FAPE] state standard requirements... [apply] only to placements made by a public entity.” Id. at 297 (citing T.R. v. Kingwood Twp. Bd. Of Educ., 205 F.3d 572, 581 (3d Cir. 1999)). Accordingly, our courts recognize that parents who unilaterally place their child by necessity do so without the expertise and input of school professionals that is contemplated by a truly collaborative IEP process. The courts recognize that under these circumstances, parents essentially do the best they can, and hold that, “when a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the act.’ (IDEA) if the education provide by the private school is ‘reasonably calculated to enable the child to receive educational benefits.” Florence, 510 U.S. at 11, 114 S. Ct. at 365, 126 L. Ed. 2d at 293 (quoting Rowley, 458 U.S. at 207, 102 S. Ct. at 351, 73 L. Ed. 2d at 712).

Pursuant to N.J.A.C. 6A:14-2.10(c)(4), reimbursement for a unilateral placement can be reduced or denied upon a finding of unreasonableness as outlined above. The Board

admitted that the parents were cooperative but not collaborative in that their only noted concerns at the IEP meeting and thereafter were that leaving the Craig School would be detrimental, as such I **CONCLUDE** in keeping with my findings above, that they were not a meaningful and collaborative part of the IEP process and did not reject the IEP in good faith.

I **FURTHER CONCLUDE** that the petitioners acted somewhat reasonably and allowed the District the opportunity to address their concerns when they participated in the IEP process, provided all of their medical records and allowed the District to re-evaluate and observe him in District and at the Craig School. They also timely responded to the District's requests and observed the in-District school and program.

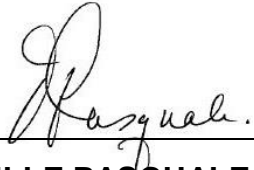
ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the relief requested by petitioners as set forth above and in their due process petition be and hereby is **DENIED**, and that the petition of appeal be **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514. This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2022). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

July 7, 2023

DATE



DANIELLE PASQUALE, ALJ

Date Received at Agency

July 7, 2023

Date E-Mailed to Parties:

July 7, 2023

Ir

WITNESS LISTS

For Petitioner:

Elizabeth Kenny-Foggin, Petitioner's Expert
Dr. Kara Loftin, The Craig School (qualified as expert witness)
Petitioner, J.H. (A.H.'s mother)

For Respondent:

Eileen Devaney, LDTC and Case Manager (qualified as expert witness)
Dr. Kate Killby, School Psychologist (qualified as expert witness)
Kathleen Acosta, LDTC (qualified as expert witness)
Christie DeAraujo, Multisensory reading (qualified as expert witness)

LIST OF EXHIBITS IN EVIDENCE

EXHIBIT LIST

- J-1 Ridgewood Occupational Therapy Evaluation, dated 1/27/2017
- J-2 Ridgewood Psychological Evaluation, dated 2/1/2017
- J-3 Ridgewood Social History, dated 2/1/2017
- J-4 Ridgewood Educational Evaluation, dated 2/2/2017
- J-5 Ridgewood Speech Language Evaluation, dated 2/3/2017
- J-6 Initial IEP, signed 4/3/2017
- J-7 Annual Review IEP, dated 6/13/2017
- J-8 Letter re: Orton Gillingham Summer Clinic, dated June 2017
- J-9 IEP Amendment, dated 3/2/2018
- J-10 Annual Review IEP, dated 6/1/2018
- J-11 Ridgewood assessment scores, dated September 2017 – January 2019
- J-12 Settlement Agreement, dated 11/5/2019, and Decision Approving Settlement, dated 11/14/2019

- P-13 Craig School PLAAFP and testing records, dated Spring 2019
- P-14 Craig School grade 3 objectives, undated
- P-15 Craig School schedule, progress reports, and testing, dated Fall 2019

- J-16 Ridgewood Occupational Therapy Evaluation, dated 1/21/2020
- J-17 Lesson Observation at Craig School by Christie A. DeAraujo, MAT, SLDS, OG-TT, dated 1/30/2020
- J-18 Ridgewood Psychological Evaluation, dated 1/30/2020
- J-19 Ridgewood Educational Evaluation, dated 1/31/2020
- J-20 Ridgewood Speech Language Evaluation, dated 1/31/2020
- J-21 Ridgewood IEP, dated 2/12/2020
- P-22 Petition for Due Process, dated 2/27/2020
- P-23 Craig School report card and progress reports, dated Spring 2020

- P-24 Craig School report card and progress reports, dated June 2020
- P-25 Craig School summer progress reports, dated July 2020
- P-26 Craig School schedule, report card, progress reports, and testing, dated Fall 2020
- J-27 Emails between Elizabeth Kenny-Foggin and Kathleen Acosta, dated December 2020 – January 2021
- P-28 Craig School report card and progress reports, dated Spring 2021

- P-29 Craig School report card and progress reports, dated June 2021
- P-30 Craig School summer progress reports, dated July 2021
- P-31 Craig School schedule, PLAAFP, report card, progress reports, and testing, dated Fall 2021 (pre
- P-32 1/14/2022 email from Beth Callahan, Esq. to Alyssa K. Weinstein, Esq. attaching Independent Educational Review Report of Elizabeth Kenny-Foggin, dated 8/25/2021, with CV (later marked as J-32)
- P-33 Amended Petition for Due Process, dated 2/15/2022
- R-34 Answer and Affirmative Defenses, dated 2/18/2022
- P-35 Craig School report card and progress reports, dated Spring 2022

- P-36 Credentials for Craig School representatives Janet Cozine, Niles Furlong, Lynn Gaffney, Brielle Loughran Miller, Kelly Della Fave, Karen Pompilio,

Harriett Hughes-Rex, Jamie O'Connor

- R-37 Resume and Certifications – Katie Killby (later marked J-37)
- R-38 Resume and Certifications – Christie A. DeAraujo (later marked J-38)
- R-39 Resume and Certifications – Kathleen Acosta (later marked J-39)
- R-40 Resume and Certifications – Jaclyn Fanos (not admitted)
- R-41 Resume and Certifications – Eileen Devaney (later marked J-41)
- P-42 Craig School Book, undated
- P-43 Craig School Video, undated
- P-44 Independent Educational Review Report of Carol A. Fiorile, dated 3/11/2019, with CV (not admitted at hearing)
- P-45 Independent Educational Observation by Carol A. Fiorile, dated 4/30/2019 (not admitted at hearing)
- P-46 Unilateral Placement Letter, dated 1/25/2019
- R-47 K. Acosta Observation Notes, dated 1/5/2021 (later marked J-47)
- P-48 Dr. Loftin's resume
- P-49 More Craig Documents