



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**MILLSTONE TOWNSHIP BOARD
OF EDUCATION,**

Petitioner,

v.

M.V. AND N.V. ON BEHALF OF O.V.,

Respondents.

FINAL DECISION

OAL DKT. NO. EDS 08551-21

AGENCY DKT. NO. 2022-33478

And

M.V. AND N.V ON BEHALF OF O.V.,

Petitioners,

v.

**MILLSTONE TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 09666-21

AGENCY DKT. NO. 2022-33527

(CONSOLIDATED)

Isabel Machado, Esq., for petitioner/respondent (Machado Law Group, LLC,
attorneys)

Michael I. Inzelbuch, Esq. for respondents/petitioners (Inzelbuch Law, attorney)

Record Closed: August 24, 2023

Decided: September 15, 2023

BEFORE **JACOB S. GERTSMAN**, ALJ t/a:

STATEMENT OF THE CASE

The Millstone Township Board of Education (District) filed a petition, seeking an order that its proposed program and placement constitutes a free and appropriate public education (FAPE) in the least restrictive environment for O.V. N.V. and M.V. (parents) on behalf of O.V., filed a petition seeking O.V.'s continued out-of-District placement at Bridge Academy (Bridge) with transportation, compensatory education, and reimbursement of all fees.

The District argues that the record demonstrates that the District proposed an IEP that was reasonably calculated to provide O.V. with a FAPE in the least restrictive environment, O.V. made meaningful educational progress supported by data while in the District's program, the parent's actions in denying the District program were unreasonable thereby limiting their recovery to tuition reimbursement under the law, and that Bridge is an inappropriate placement for O.V.

The parents argue that the District failed to offer FAPE in its IEPs which is demonstrated by O.V.'s regression, and lack of meaningful progress in the District, O.V. began achieving meaningful progress after she was placed at Bridge, and the parents maintained a collaborative approach throughout the entire process of O.V.'s time in the District.

PROCEDURAL HISTORY

The District's petition was transmitted to the Office of Administrative Law (OAL) on October 14, 2021, as a contested case under OAL Docket No. EDS 08551-21. The parents' petition was transmitted to the OAL on November 24, 2021, as a contested case under OAL Docket No. EDS 09666-21. These matters were consolidated, over the District's objection, by my order dated February 3, 2022. A prehearing order was issued on March 18, 2022.

Hearings were conducted both telephonically and via Zoom Video Communications, Inc. (Zoom) on March 16, July 18, July 25, July 28, September 9, September 16, October 26, November 9, November 29, 2022, and on January 27, April 24, May 30, July 12, and August 24, 2023.¹

The record remained open for the parties to submit both post-hearing and response briefs. The post-hearing briefs were filed by the parents on March 20, 2023, and by the District on March 22, 2023. Reply briefs were filed by the parents on April 3, 2023, and by the District on April 14, 2023. The District requested oral argument for the parties to outline their arguments. The request was granted, and oral argument was held during the May 30, 2023, hearing. The record was closed at the conclusion of the August 24, 2023, hearing.

Testimony

For the District²:

Laurie Hall (Hall)³ is the director of special services for the District and has been in this position for ten years. She became familiar with O.V. during her Kindergarten year when she was referred for speech services.

The parents referred O.V. for special services in April 2020, which was during full virtual instruction due to the COVID-19 pandemic. The first meeting with the parents to

¹ Hearings were adjourned at the request of the parties on March 10 and August 4, 2022, and February 13, 22, and May 17, 2023.

² Hall testified as a fact witness, and was the only witness presented by the District. Following the resting of their case, the District reserved the right to present rebuttal witnesses following the parents' case, to which parents' counsel objected. When the request was made following the completion of the parents' case, I granted their request once again over the objection of parents' counsel. However, as I noted during the January 10, 2023, hearing, while it was the District's prerogative on how to proceed with its case, and I could read the reports entered into the record, the summaries of which were discussed during Hall's testimony, the District was free to call any of the experts who prepared those reports to testify during the rebuttal case. (T. January 10, 2023, 6: 16-17; 10:1-17) Subsequent to that hearing, the District notified me in writing that they would not be presenting a rebuttal case, and rested during the January 27, 2023, hearing.

³ Hall underwent extensive cross-examination and was then called as a witness for the parents. That testimony failed to elicit pertinent facts related to the issues in this consolidated matter and will not be further summarized.

discuss the evaluation was held on April 29, 2020. The following testing was done for O.V.: a social assessment on June 3, 2020; speech and language on July 10, 2020; a psychological evaluation on July 13, 2020; and an education evaluation done July 28, 2020.

The social assessment (R-38) stated that O.V. “is being evaluated by the child study team to determine her eligibility for special education services. A social assessment is being conducted as part of the evaluation process.” Hall noted the following test scores for the speech and language evaluation (R-41): CELF 5: Scores ranged from the 63rd percentile and 91st percentile; the GFTA Goldman-Fristoe Test of Articulation (GFTA) standard score of 112, a percentile rank of a 79 and then she received a raw score, standard score, of 105 and a percentile rank of 63 in sounds and sentences. The articulation section of the report stated that “[s]tandardized testing identifies O.V.’s articulation skills to be solidly within normal limits. Her production during spontaneous conversational speech was intelligible and articulation errors were not evidenced.”

The psychological evaluation (R-42) had the following scores: verbal comprehension 116; visual spatial 100; fluid reasoning working memory 110; processing speed 100; and O.V. had a full-scale IQ of 103. The Behavioral Assessment Scale for Children (BASC) scores, by percentile, were: externalizing problems 22; internalizing problems 39; school problems 92; behavior symptoms index 64; and adaptive skills 54. Hall stated that these were all “within the average range except for school problems which put O at the at-risk category.” (T. July 18, 2022: 86: 21-22.)

Hall also read the following verbatim from the report into the record regarding the Wexler Intelligence Scale for Children (WISC):

The Wexler Intelligence Scale for Children Fifth Edition, WISC 5 was administered to obtain an estimate of O.’s current level of cognitive functioning. O.’s current level of cognitive functioning was measured to be within the average range. Based on this administration of the WISC 5. A minimal amount of variability was noted on her performance across the various sub tests administered which suggest the possibility of uneven

skill development. Overall O.'s verbal comprehension abilities high average range and working memory abilities high average range are somewhat stronger than her visual spatial abilities average range. Fluid reasoning skills average range and her process speed skills average range. This suggests that O. would be expected to do even better on tasks that require her ability to express herself verbally and on tasks that require her short term memory skills than she would be expected to do on tasks that require visual spatial skills. On tasks that require non-verbal reasoning abilities and on wrote paper and pencil tasks requiring her speed and accuracy." (T. July 18, 2022: 87: 10-25; 88: 1-5.)

O.V. had the following scores on the education evaluation (R-46.)

Subset scores: (by percentile)

Listening comprehension 68; early reading skills 27; reading comprehension 30; math problem solving 47; alphabet writing fluency 58; sentence composition 42; word reading 25; pseudo word decoding 42; numerical operations 50; oral expression 77. Oral reading fluency 7; spelling 42; math fluency addition 30; and math fluency subtraction 42.

Composite score summary: (by percentile)

Oral language 77; total reading 34; basic reading 32; Written expression 42; mathematics 47; math fluency 37; total achievement 47.

Hall stated that O.V.'s language functioning was in the average range in comparison to her peers and the subset scores was in the upper end of the average range.

After all the evaluations were completed, the reports were sent home to the parents and a meeting set up to review and determine if O.V. was eligible for special education and related services. A letter was sent to the parents on July 29, 2020, and the IEP meeting was held on August 11, 2020, where O.V. was determined to be eligible for special education and related services under the category of specific learning disability due to reading fluency. The proposed IEP (R-48) contained pull-out supplementary instruction for language arts and multi-sensory instruction for the 2021 school year, five times a week for forty minutes. Hall testified that this is an opportunity

to remove a student from a general education setting to get specialized multi-sensory instruction, in addition to O.V.'s regular language arts time in the classroom.

The parents did not consent to the IEP after the August meeting and requested an additional meeting, which was held on September 3, 2020. The same services were presented, and the parents did not consent, due to their concerns about the speech services, and they wanted a different special education program. A supplemental reading program was provided even though the parents did not consent to the IEP. Hall added that “[i]n addition to the multi-sensory Orton-Gillingham or OG instruction that was proposed and being provided, the IEP also proposed that O. would have supplemental support, which is the support of a paraprofessional throughout the entire educational day for her. That it includes some accommodations and modifications.” (T. July 18, 2022, 107 5-11.)

The parents requested an independent speech evaluation from Amy Bernstein (Bernstein) and entered into a cost share agreement with the parents to pay for the evaluation. The child study team reviewed the report and had some concerns. The District proposed another speech evaluation, to which the parents agreed. Another meeting was held on March 22, 2021, and the difference in the proposed IEPs was the inclusion of the extended school year (ESY.) The parents did not consent at that meeting but consented over spring break. An additional speech evaluation was conducted on May 6, 2021, (R-68) and another meeting was held on May 25, 2021, the fourth of the 2020-21 school year. Hall stated that there was no mention of out-of-District placement. ESY was discussed, but the parents did not indicate one way or the other if O.V. would be attending.

The unilateral placement letter informing the District that O.V. was enrolling at the Bridge was sent to the District by the parents on June 7, 2021. O.V. had been accepted sometime in May. The District sent a response to the unilateral placement (R-74) stating that they believed that they could provide O.V. a FAPE.

For the Parents

Amy Bernstein (Bernstein) is a professional speech language pathologist and was qualified as an expert in speech and language services, special education, and the development of IEPs. She prepared a report and an addendum. (P-18 A and B)

Bernstein described the various tests that she administered including: the Comprehensive assessment of Spoken Language (CASL-2); Goldman-Fristoe (GFTA-3); Gray Oral Reading (GORT-5); Oral Passage Understanding Scale (OPUS); Test of Auditory Processing Skills) TAPS-4; and Test of Word Reading Efficiency (TOWR02). Phonological testing was also performed, which she said was important because “that whole basis of her speech and language and phonological issues are based on a phonological deficit, and phoneme issues, so I had to figure out what the ideology was and not just the symptoms.” (T. July 28, 2022, 103:10-14.) She added that “[i]f you are not able to encode, hear the word correctly, produce it correctly, then you’re certainly not going to be able to match it to the correct sound, let alone read and write it.” (T. July 28, 2022, 103: 25; 104:1-3.) The District did not do any phonological testing.

Bernstein was asked to prepare the report by the District and received the records from Hall. She observed O.V. in the general education classroom and the Orton-Gillingham (OG) pull-out instruction and conducted informal testing of O.V. which included a stacked conversation. She reviewed the evaluations including the District evaluation (R-8), the Susan Miller report (Miller Report) (P-13), the speech and language report (R-41), the psychological report (R-42), and the educational evaluation. (R-46) She noted that it is important for a speech and language evaluator to observe the student in the classroom to see if there is generalization and carry over. There was no testing for generalization or carry over in the speech and language report, and she disagreed with its conclusion that O.V. did not need speech because there were a “plethora of articulation issues.” (T. September 9, 2022, 30: 16.) On the progress notes, O.V. never met her goals, but was working towards it. O.V. “went from having all these goals, working on a few to suddenly having nothing wrong.” (T. September 9, 2022, 31: 2-4.) Her testing found that O.V.’s grammar was below average, the articulation

testing was two standard deviations below the mean, and the GORT showed that rate and accuracy in the poor range, fluency, and comprehension below average.

The October 25, 2019, IEP (R-23) used traditional articulation therapy which she believes was not warranted for O.V. Additionally, the August 11, 2020, IEP (R-48) had no speech and language services and the March 8, 2020, progress report (P-8F) showed that her goals were not met, and that she still needed support. Finally, upon reviewing the May 25, 2021, IEP (R-71) Bernstein stated that O.V. needs speech and language services “[b]ecause she has articulation, phonological and language issues in the terms of grammar” (T. September 9, 2022, 52: 18-19.), however this is not recommended in the IEP.

There was no carry over from general education to OG settings, and Bernstein believes that O.V. needed consistency and structure. In her opinion, the District’s program for O.V. was not appropriate. She believes it was a good start, but certified OG instructors were needed, and the aide in the mainstream class was not sufficient.

Christopher Huss (Dr. Huss) is the superintendent of the District. Dr. Huss’ testimony concerned the District’s compliance with the discovery requests of the parents, the District’s receipt of the due process petition, his interaction with the parents and his discussions with Hall regarding this matter. His testimony was of minimal probative value and will not be summarized further.

Kathleen Carne (Carne) was admitted as an expert in Learning Disability Teacher Consultant, special education, and the remediation of dyslexia. She prepared two reports, the first based on based on her testing of O.V. in July and September of 2021, and observance of her in October 2021, (P-16B) and the second based on her observance of O.V. on May 19, 2022, and testing on June 4, 2022. (P-16C.)⁴

She testified that O.V. has all of the characteristics of dyslexia, including reading fluency, encoding, and phonemic awareness issues. While her testing was average

⁴ An addendum (P-43) corrected a date on one of the reports.

except for reading fluency, “the extent of the disability was very apparent in her – the way that she was reading and the fact that she could not automatically read any CVC words or very limited, very, very limited, I shouldn’t say any because there may have been one or two that she could do, but for the most part, the fact that she was at the beginning of second grade and still couldn’t look at the word bat and just say bat, tells me that she really has a disconnect in what we call orthographic mapping. Orthographic mapping is what average readers do.” (T. September 16, 2022, 58: 25; 59: 1-9.)

In her first testing of O.V., she met the criteria for specific learning disability in the area of reading fluency. However, in the second test, she not only met the criteria for reading fluency, but also for basic reading skills and written expression. Carne noted that in her September 2021 report, after O.V. had spent ESY at Bridge, “the overall composite score which decoding is equal to basic reading skills in the code, so that score had dropped 12 points, so her number went from a 91 in 10-20 to a 79 in ‘21. So after completing the year in District those were the scores that were obtained at this time.” (T. September 16, 2022, 66: 24-25; 67: 1-4.) O.V.’s reading fluency, silent reading fluency, word reading, written language, written expression, all went down.

In the first year that Carne tested O.V., she was receiving an OG program in her regular classroom, consisting of Foundations Level 2, and was not meeting mastery of those skills. (T. September 16, 2022, 70: 1-4.) There were two different levels being instructed simultaneously that were very confusing, which Carne believes is not appropriate for O.V.

The District was proposing in the May 2021 IEP (R-71) what they were doing throughout the second grade year. But O.V.’s scores had gone down and did not make adequate progress. The IEP has no mention of O.V.’s needs in encoding and Carne felt strongly that the goals were not appropriate. She believes that the IEP should have included goals for reading fluency and decoding. “That’s the basis of an OG program is decoding, your ability to read words with certain phonetic patterns.” (T. September 16, 2022, 78: 8-10.) Goals for written expression and encoding were also needed. She added that the ESY program was not a match for O.V. since those students were lower functioning. Her testing of O.V. after she had been at Bridge for a year (P-16C) found

that she made progress in her time there. There was notable progress in her decoding, nonsense word decoding, reading comprehension. Her reading fluency was inching up and she made significant progress in written language. O.V. did not make progress in reading vocabulary which is not unusual for a child with extreme reading difficulty.

Carne is familiar with Bridge and stated that the teachers are all certified in an OG program and OG is immersed throughout the day. She observed O.V. at Bridge in a small class where the teacher used OG very effectively and multi-sensory instruction was used throughout. In Carne's opinion, O.V. needs OG and it needs to be consistent.

Karen Kimberlin (Dr. Kimberlin) was admitted as an expert in speech and language, special education, dyslexia, the diagnosis and the remediation of dyslexia, and the administration of testing in language and writing areas. She prepared two reports, one on December 20, 2021, (P-19A) and June 23, 2022, (P-19B).⁵ The District did not accept her report noting that her recommendations as vague and similar to other evaluators. She believes her recommendations were consistent with the other evaluators, with the exception that she also recommended occupational therapy.

Dr. Kimberlin explained why she administered certain tests and what her focus was regarding O.V. for the first report. She calls her evaluations language and literacy evaluations, especially when there are concerns with reading and writing, and noted that there are very strong connections between oral language and literacy. She looks for underlying oral language skill to determine if there is a weakness contributing to problems with reading and writing and had to rule out if there were any underlying

speaking and listening weaknesses. Based on her testing, she determined that O.V. is stronger in language domain. Additionally, she conducted a record review which showed that O.V. had an articulation disorder identified in preschool and she wanted to know the reason why she was receiving OG instruction.

Her testing was an independent evaluation. O.V. was compared to her peers, and she was not doing well since she was significantly below where she should have been. Dr. Kimberlin believes that it is important that her results were consistent with other evaluators, including Carne and Susan Miller (Miller).

Dr. Kimberlin's impressions of O.V. were that she presented with a language and learning disability in reading fluency, but there were more significant weaknesses in other areas including basic reading. The gap between her and her peers widened over the years which indicated that her program was not working. She stated that the District failed to provide O.V. with an appropriate education program, and that the weaknesses in the program contributed to her lower scores.

When she reviewed the May 25, 2021, IEP (R-71) she determined that her testing showed more significant weaknesses in other areas than her classification, including sound knowledge, which is in the area of basic reading, spelling, and writing. "There were just so many things that were missing in the objectives if you will, in the description of the objectives and then therefore they're not measurable and so how can you really appropriately measure whether or not the student was making progress." (T. October 26, 2022, 68: 14-19.) Other examples of her issues with the District's program were the use of a number of different approaches and that a classroom aide was not

⁵ Dr. Kimberlin additionally prepared an addendum report (P-19C) which noted typographical errors in the prior reports. She stated that none of those corrected errors change her testimony. It changed the scores in terms of numbers, but does not change the score in terms of description and does not change the recommendation. (T. October 26, 2020, 91: 16-24)

appropriate since they were untrained. Further, the goals in the IEP were problematic, with the first goal not being individualized to O.V., and the second “doesn’t tell you which list of words, so how can you measure.” (T. October 26, 2022, 74: 21-22.) She recommended one forty-five-minute pullout session of speech therapy per week. There was no speech and language in the May 2021 IEP.

Dr. Kimberlin believes that the program recommended in the IEP (R-71) was not appropriate “[b]ecause she was receiving Orton Gillingham and two other reading interventions at the same time. That is inappropriate for a student with her needs and one of the most outstanding needs is her issues with retention. So, if you’re teaching her three different ways to “read” it’s very confusing for a student. It’s very confusing for a student like O.” (T. October 26, 2022, 176: 10-16.) She added that “[f]or a child with dyslexia and a reading disability, she requires consistency.” (T. October 26, 2022, 72: 8-9.)

The second report was done at the request of the parents who wanted updated testing after O.V. was at Bridge for eight months. Dr. Kimberlin observed O.V. at Bridge and noted that the difference from the District program is that she needed to be pulled out to get OG in the District and all of the Bridge teachers were trained in OG instruction. Her process testing demonstrated that the program at Bridge was appropriate and the instruction at Bridge is all done within the context of the OG instructional class. She believes that it is necessary for O.V. to have the same method utilized “[b]ecause she requires consistency, so the programs need to be consistent throughout the entire day. She can’t have one program in one period and another program in another period.” (T. October 26, 2022, 82: 10-13.)

O.V. “made quantifiable, so measurable and meaningful gains on testing over an eight-month period while she was in attendance at Bridge Academy” and “is starting to close the gab (sic) between her skills and those of age appropriate and grade appropriate peers.” (T. October 26, 2022, 90: 17-19; 22-24.) However, Dr. Kimberlin noted that O.V. “still continues to present with a mild language disorder with dyslexia

and I describe it a little bit more, deficits in basic reading, reading fluency and comprehension and a disorder of written expression.” (T. October 26, 2022, 91: 1-5.)

Susan Morris (Morris) is the principal of Bridge, which is approved by the New Jersey Department of Education, accredited by the Orton Gillingham Academy, and is the only OG accredited school in New Jersey. The school has approximately sixty students from the third through twelfth grades. Ninety percent are sent from school Districts.

The District did not contact the school or observe O.V. at Bridge. Morris prepared O.V.’s program utilizing her records, including evaluations, provided by her mother and through intake testing. She discussed how Bridge monitored O.V.’s progress, including through progress report cards. Progress is monitored every day in reading, writing and math and there are informal assessments, tests, quizzes. Class sizes at Bridge in skills subjects including, reading writing and math, are a three to one ratio. Science and social studies have ten students with two teachers. There is an OG fellow at Bridge who provides training across the board for the teachers. The goal is to help the students become independent learners. Most students do not spend all their academic years at Bridge; however, some stay late into their academic careers, through high school.

OG principles are the underpinning of everything they do at Bridge. They teach OG strategies “across the board so the child reinforces them throughout their day but also can then generalize how do I learn vocabulary, how do I understand the various words in the content specific subjects.” (T. November 9, 2022, 24: 9-13.) The end goal of OG is to have automaticity and application.

O.V. was quiet, reserved, and fidgety at her Bridge intake interview, but Morris could tell she was bright. Now, she is delightful, more engaging, participatory in all of her classes, and follows through with her homework. She received related services including counseling once a week and speech services twice a week. The speech and language specialist sees O.V. individually, and also sees her in a small group

classroom. Speech is forty minutes for each session but would not necessarily show up on her schedule.

M.V. is O.V.'s mother. O.V. was born on July 23, 2013, and was in fourth grade on the date of her testimony. She was a student in the District for kindergarten in the 2018-2019 school year, first grade in the 2019-2020 school year, and second grade in the 2020-2021 school year. Her husband, O.V.'s father, has dyslexia, as does his father and brother.

She had concerns with her daughter's education in the District since even with the intervention O.V. was receiving since kindergarten, she was not making adequate progress. They realized it at home, and her teachers were reporting to them that O.V. was not meeting grade level expectations. O.V. was also behind in reading. Testing was done by Miller on March 12, 2020, which showed that O.V. was potentially dyslexic. O.V. was only meeting fifty percent of her goals which was a red flag for her. It was also concerning to her and Miller that O.V. was performing significantly below grade level even with the amount of intervention she received. O.V. had a 103 IQ, and M.V. and her husband want her to read independently. In second grade, her AIMS web scores were all over the map. In the fall she was in the 22nd percentile and dropped to the 2nd percentile, which was extremely concerning. Her scores went back up to 13th percentile in the spring.

O.V. had a difficult time in second grade. She was not sleeping through the night, had nightmares, and was pulling her hair out. O.V. told her mother that she could not keep up in class. Once she started at Bridge, she started sleeping through the night. Homework was very hard for O.V. in the District, was modified in first grade, but not in second.

The parents chose Bridge since it had OG instruction infused throughout the entire day, and they had kids that were typical for O.V., average to above average intelligence with no behavior problems. She is doing great at Bridge, loves school, has friends and feels successful. She has not pulled her hair out in a long while and has

nice friends. M.V. described O.V. as a work in progress but she is doing better. She has seen improvement in O.V.'s reading and her counseling has moved from once a week to twice monthly due to her progress, and she receives speech twice a week. M.V. stated that the last IEP (R-71) is more of the same, and further detailed her concerns. Finally, in March 2021, the parents informed the District that they would explore alternative placement (P-9E at 3620) ⁶ but clarified in her testimony that they had not started at that point.

Credibility

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

⁶ M.V. hand wrote the following on the consent to implement the IEP on March 29, 2021: "Although I am not in agreement with the proposed program, I agree to try it. I will also be exploring alternate programs."

Further, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep’t of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

For the District:

Hall was the District’s sole witness. While she was offered as a fact witness, she is clearly knowledgeable and experienced. She testified for almost two full hearing days, presenting calm and credible testimony, and remained composed during extensive arduous cross-examination and when she was then called as a witness by parents’ counsel to continue her testimony. I reject the parents’ argument that her testimony is not credible (Parents’ Post Hearing Brief at 72) as it is unpersuasive and unsupported by the record.

For the Parents:

Dr. Huss, the District superintendent, was professional and spoke in a straightforward manner. As noted above, his testimony was of limited probative value to the issue presented in this matter and I found his testimony to be credible.

M.V. was a calm and credible witness and her testimony demonstrated that she is a dedicated and devoted parent to O.V. She provided detailed and compelling testimony regarding how O.V.’s educational issues affected her home life that have improved since her enrollment at Bridge.

Morris spoke in a straightforward manner and is an earnest educator who provided knowledgeable testimony about the program at Bridge. She was also familiar

with O.V. and detailed her progress dating back to her initial intake interview. I found her testimony to be credible.

I found the three expert witnesses, **Bernstein, Carne, and Dr. Kimberlin** to be experienced in their fields who all offered knowledgeable and straightforward testimony that was consistent with their reports. They were all familiar with O.V. and the program offered to her in the District. I especially found Bernstein to not harbor bias toward the District based upon her testimony that while she believed that O.V.'s program in the District was inappropriate, it was a good start. (T. September 9, 2022, 50: 4-5.) Bernstein, Carne, and Dr. Kimberlin were unanimous in their recommendation that O.V. required a consistent program of OG instruction and all three expert witnesses maintained their composure during rigorous cross-examination.

In determining credibility, I am aware that the District employees would want to support the program they developed for O.V. and would believe that the District's program would provide them with FAPE. I am also aware that the parents would want the best program for them. Upon review of the complete record, including the exhibits and expert reports from both parties, and having had the opportunity to personally assess the demeanor and credibility of both the fact and expert witnesses, I **FIND** the opinion of expert witnesses Bernstein, Carne, and Dr. Kimberlin to be persuasive that O.V. requires a program with consistent OG instruction.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. O.V. is currently ten years old and in fifth grade. It is not in dispute that she has dyslexia.
2. She entered the District in kindergarten in the 2018-2019 school year and remained in the District through second grade in the 2020-2021 school year.

Upon entering the District, she was referred by her parents to special services and was found eligible for speech services in 2018 after the child study team (CST) conducted a speech-language Evaluation. (R-8.) The first IEP was dated November 8, 2018.

3. O.V. continued with the speech only IEP through Kindergarten to First Grade, which was the 2019/2020 school year. (R-19.)
4. The IEP dated October 25, 2019, contained thirty minutes of speech-language therapy weekly. (R-23.)
5. On April 7, 2020, the parents requested that O.V. be evaluated by the CST (R-32) The parents included a copy of a Dyslexia Screening Evaluation by Susan Morris from March 2020, with the request. (R-32.)
6. In the summer of 2020, the District conducted the following evaluations of O.V. with the Petitioners' consent: Educational Evaluation; Psychological Evaluation; Speech and Language Evaluation; and Social Assessment. (R-35, R-36.)
7. The District's 2020 evaluations showed that O.V. presented with an average full-scale IQ of 103, which is solidly average (R-42) and found that O.V.'s academic skills are solidly average and high average in some areas, with her only weakness being in the area of reading fluency. (R-38, R-41, R-42, and R-46.)
8. Bernstein's March 10, 2021, report⁷ included the following scores: O.V.'s score in word fluency was 80 which is well below average; in the Grammatically Judgment subtest, O.V. scored below average in the ninth percentile; on the GFTA-3, O.V. scored in the fourth percentile in the sounds-in-words Standard Score, with an age equivalent of four years, six months-old to four years, seven months-old.; On the GORT-5, O.V. scored in the poor or below average range on each score, with an overall result that was "below the level expected for a student

⁷ The report was based on testing of O.V. on October 27, 2020, and December 1, 2020.

of her age”; and in the TAPS-4, O.V. demonstrated a number memory score in the ninth percentile, equivalent to an age range of less than four years old. (P-18A.)

9. O.V. was found eligible under the category of Specific Learning Disability (SLD), and a new IEP was proposed on August 11, 2020, but she was discharged from speech services. (R-48.)

10. In between the implementation of the August 11, 2020, IEP (R-48) and the May 25, 2021, IEP (R-71), the parents and the District engaged in correspondence regarding what the parents contended as shortcomings in the August 11, 2020, IEP. (R-51; R-41; R-64; R-66.)

11. The August 11, 2020, IEP, which lacked speech and language services, provided O.V with pull-out supplementary instruction in Language Arts with Multi-sensory Instruction for forty minutes, five times per week, and offered two reading goals:

a. [OV] will read text orally with accuracy, appropriate rate, and expression with 80% success in five consecutive sessions.

b. When presented with a list of high-frequency words, [OV] will immediately recognize and read the words.

(R-48 at 0274.)

12. O.V. was found eligible for special education and related services under the classification of Specific Learning Disability in the area of reading fluency. (R-48.)

13. During the 2020-2021 school year, Millstone provided O.V. with the Orton-Gillingham method of instruction in five forty-minute pull-out sessions a week.

14. O.V.’s IEP supplementary aids and services section also included supplementary support by a teacher aide in the general education classroom.

15. By letter dated September 3, 2020, the parents notified the District that they were rejecting the District's July 8, 2020, speech and language evaluation, (R-41) and therefore rejected the August 11, 2020, IEP. (R-51.)
16. O.V.'s February 25, 2021, AimsWeb report demonstrated that O.V. was at a high-risk level for Reading Composite Score, and that her skills were decreasing, placing her with a reading-skill growth greater than just 5% of students in a national sample and in a well-below average range. (R-58.)
17. An eligibility meeting was held on March 24, 2021, (R-63) where the District proposed pull-out supplementary instruction with an Orton-Gillingham certified teacher, daily for forty minutes, and added an extended school year for O.V. for the summer of 2021. (R-65.) The parents consented to the IEP on March 29, 2021, and M.V. hand-wrote the following on the consent to implement the IEP form, "Although I am not in agreement with the proposed program, I agree to try it. I will also be exploring alternate programs." (P-9E at 3620.)
18. An eligibility meeting was held on May 25, 2021, where the District proposed an IEP with the same related services and goals as the August 11, 2020, IEP. This IEP also lacked speech and language services, with the only difference being the inclusion of ESY. (R-71.)
19. Both the August 11, 2000, and May 25, 2021, IEPs provided pull-out services for specialized reading instruction for forty minutes a day, and then placed O.V. in general education classes, with supplementary support by a teacher aide, where different reading programs were employed.
20. On June 11, 2021, the parents rejected the District's May 25, 2021, proposed IEP and advised the District that they were going to unilaterally place O.V. at Bridge for the 2021-2022 school year and would request full reimbursement from the District. (P-7K at 0003271.)

21. Carne's 2021 report⁸ showed that O.V.'s scores dropped between 2020 and 2021 examples of which include: reading from an 87 to 78, decoding from a 91 to 79, written language from 92 to 77, spelling from 97 to 74. (P-16B.)
22. O.V. was accepted at Bridge on May 11, 2021, for its ESY program and began at Bridge in July 2021. (P-7K at 0003272.) O.V. continued to remain enrolled at Bridge for the 2021-2022, and 2022-2023 school years.
23. OG instruction is utilized throughout the day at Bridge in all classes and subjects. Class sizes at Bridge in skills subjects including, reading writing and math, are a three to one ratio. Science and social studies have ten students with two teachers.
24. Carne's evaluation of O.V. following a full school year at Bridge⁹ demonstrated that O.V.'s scores on the KTEA-3 increased in Reading, Decoding, Letter-Word Recognition, Nonsense Word Decoding, Reading Comprehension, Silent Reading Fluency, Word Reading Fluency, Written Language, Orthographic Process, Letter Naming Facility, Dyslexia Index, and Spelling. (P-16C at 0003908-3910.)
25. Dr. Kimberlin's June 23, 2022, report on her evaluation of O.V. after a year at Bridge¹⁰ demonstrated the following: O.V.'s scores on the TILLS increased in Sound/Word Composite, Sentence/Discourse Composite, Oral Composite (Listening and Speaking), Written composite (Reading and Writing), Vocabulary Awareness, Phonemic Awareness, Story Retelling, Nonword Repetition, Nonword Spelling, Listening Comprehension, Reading Comprehension, Following Directions, Delayed Story Retelling, Nonword Reading, Written Expression-Discourse, Social Communication, and Digit Span Backward. (P-19B at 0004028 and 0004041.); O.V.'s. scores on WIST increased in Word

⁸ The testing of O.V. was conducted on July 7 and September 7, 2021, and O.V. was observed on October 28, 2021.

⁹ The testing of O.V. was conducted on June 4, 2022, and O.V. was observed on May 19, 2022.

¹⁰ O.V. was observed at Bridge on May 20, 2022, and was tested on June 6 and 15, 2022.

Identification, Spelling, and Fundamental Literacy Ability Index. (Id. at 0004031 and 0004042.); O.V.'s scores on GORT-5 increased in Comprehension and Oral Reading Index. (Id. at 0004033-4034 and 0004042.); O.V.'s scores on OWLS-II increased in Reading Comprehension and Written Expression. (Id. at 0004035 and 0004043.)

LEGAL DISCUSSION

Federal funding of state special education programs is contingent upon the states providing a “free and appropriate education” (FAPE) to all disabled children. 20 U.S.C. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C. §§ 1400 et seq. “[T]he IDEA specifies that the education the states provide to these children ‘specially [be] designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.’” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school District. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A), (B). The District bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted).

The IDEA does not require that a school District “maximize the potential” of the student but requires a school District to provide a “basic floor of opportunity”. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 3047, 73 L. Ed. 2d 690, 708 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the child’s education plan provides for “significant learning” and confers “meaningful benefit” to the

child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (internal citations omitted).

As noted in D.S., an individual education plan (IEP) is the primary vehicle for providing students with the required FAPE. D.S., 602 F.3d at 557. An IEP is a written statement developed for each child that explains how FAPE will be provided to the child. 20 U.S.C. § 1414(d)(1)(A)(i). The IEP must contain such information as a specific statement of the student's current performance levels, the student's short-term and long-term goals, the proposed educational services, and criteria for evaluating the student's progress. See 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(VII). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and "be measurable" so both parents and educational personnel can be apprised of "the expected level of achievement attendant to each goal." N.J.A.C. 6A:14-3.7(e)(2). Further, such "measurable annual goals shall include benchmarks or short-term objectives" related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The school District must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C. § 1414(d)(4)(A)(i).

A due process challenge can allege substantive and/or procedural violations of the IDEA. If a party files a petition on substantive grounds, the Administrative Law Judge (ALJ) must determine whether the student received a FAPE. N.J.A.C. 6A:14-2.7(k). If a party alleges a procedural violation, an ALJ may decide that a student did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) caused a deprivation of educational benefits. Ibid. In the instant matter Petitioners allege substantive violations of the IDEA.

At issue in this matter is whether the May 25, 2021, IEP (R-71), and its predecessors, proposed by the District, afforded FAPE to O.V. in the least restrictive

environment. 20 U.S.C. § 1412(a)(1). J.T. v. Dumont Public Schools, 438 N.J. Super. 241, 257 (App. Div. 2014) (citing Lascari, at 33).

In Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, 1001 (2017), the United States Supreme Court construed the FAPE mandate to require school Districts to provide “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The Court’s holding in Endrew F. largely mirrored the Third Circuit’s long-established FAPE standard, which requires that school Districts provide an educational program that is “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential and individual abilities.” Dunn v. Downingtown Area Sch. Dist. (In re K.D.), 904 F.3d 248, 254 (3rd Cir. 2018) (quoting Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3rd Cir. 2012)). In addressing the quantum of educational benefit, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the IEP provides for “significant learning” and confers “meaningful benefit” to the child. Endrew F., 137 S. Ct. at 1000–01; T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 247 (3d Cir. 1999), superseded by statute on other grounds as recognized by P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988). Hence, an appropriate educational program will likely “produce progress, not regression or trivial educational advancement.” Dunn, 904 F.3d at 254 (quoting Ridley, 680 F.3d at 269).

The IDEA’s FAPE requirement also includes a mainstreaming component, requiring education in the least restrictive environment. S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 265 (3d Cir. 2003); 20 U.S.C. §1412(a)(5)(A). “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” S.H., 336 F.3d at 265 (quoting Carlisle, 62 F.3d at 535). The school District bears the burden to establish that the District offered a FAPE in the least restrictive environment. N.J.S.A. 18A:46-1.1.

The New Jersey Supreme Court stated the following in Liscari v. Board of Education, at 46: “We also conclude that in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined.”

The District argues that “[t]he IEP proposed for O.V. was reasonably calculated to provide her with FAPE. The District IEP provided O.V. with the appropriate services, which included classes taught in the least restrictive environment. Had O.V. remained in the District, O.V. would have without question continued to receive a FAPE.” (District Post Hearing Brief at 49) In support of the argument the District cites to the evaluations which showed that O.V. presented with an average full-scale IQ of 103, which is solidly average (R-42) and found that O.V.’s academic skills are solidly average and high average in some areas, with her only weakness being in the area of reading fluency. (R-38, R-41, R-42, and R-46.)

However, the parents persuasively argue that they have “conclusively demonstrated that the district failed to offer O.V. a Free Appropriate Public Education (FAPE) via its IEPs. This is evident, in part, from her regression, and, lack of meaningful progress at Millstone schools.” (Parents Reply Brief at 22) These arguments are supported by O.V.’s test scores, which demonstrate that she was making *de minimis* progress. The February 25, 2021, AimsWeb report demonstrated that O.V. was at a high-risk level for Reading Composite Score, and that her skills were decreasing, placing her with a reading-skill growth greater than just 5% of students in a national sample and in a well-below average range. (R-58) Additionally, Carne’s 2021 report showed that O.V.’s scores dropped between 2020 and 2021 examples of which include: reading from an 87 to 78, decoding from a 91 to 79, written language from 92 to 77, spelling from 97 to 74. (P-16B.)

The parents also persuasively argue that the “lack of consistency, along with the lack of speech services and an appropriate therapeutic approach all indicate why the IEPs Millstone provided were inappropriate.” (Parents’ Post Hearing Brief at 63) This is

supported by the expert testimony and reports of Bernstein, Carne, and Dr. Kimberlin, who found that the current program, which included pull-out supplementary instruction with an Orton-Gillingham certified teacher, daily for forty minutes, and in-class support from a teacher aide in a general education was not appropriate for O.V. They all recommended that O.V. receive OG instruction throughout the day, not as proposed by the District. Yet the proposed May 25, 2021, IEP (R-71) provided O.V. with the same related services and goals as the August 11, 2020, IEP. (R-48.). This IEP also lacked speech and language services, with the only difference being the inclusion of ESY.

Based on the foregoing, it is evident that that the District has failed to carry its burden. The competent, credible, and relevant evidence in this matter demonstrates that the proposed IEP does not, address O.V.'s needs, and is not reasonably calculated to meet O.V.'s individualized needs and confer upon her a meaningful educational benefit in the least restrictive environment. Therefore, I **CONCLUDE** that the District failed to offer FAPE.

This tribunal now turns to the issue of the appropriate placement for O.V. In accordance with N.J.A.C. 6A:14-2.10, parents may receive reimbursement for a unilateral placement as follows:

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

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

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

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

Under this standard, I **CONCLUDE** that the placement of O.V. at Bridge was appropriate. The parents persuasively argue that placement at Bridge “is appropriate and reasonably calculated to provide educational benefits.” (Parents Post Hearing Brief at 65-66) Morris provided a description of the program, which includes OG instruction throughout the day. She added that OG principles are the underpinning of everything they do at Bridge. They teach OG strategies “across the board so the child reinforces them throughout their day but also can then generalize how do I learn vocabulary, how

do I understand the various words in the content specific subjects.” (T. November 9, 2022, 24: 9-13.) Additionally, the class sizes at Bridge in skills subjects including, reading writing and math, are a three to one ratio. Science and social studies have ten students with two teachers. This program is consistent with the persuasive recommendations of Bernstein, Carne, and Dr. Kimberlin.

O.V.’s test scores reflect her progress at Bridge as evidenced in the evaluations of O.V. following a full year at Bridge by Carne (P-16C at 0003908-3910) and Dr. Kimberlin. (P-19B at 0004028 and 0004041; 0004031 and 0004042; and 0004035 and 0004043.) However, the District argues that O.V. regressed academically after removal from the District. (District Post Hearing Brief at 56-59.) The District’s argument fails as it was persuasively rebutted by Carne during cross-examination and further clarified under my questioning:

THE WITNESS: Okay. A child – this is not unusual for a child to score, especially when they’re like say in first grade, high IQ. They’re able to by memory or other such things, they’re using their intelligence and they can read words better at that time. Now you’re jumping forward so that she needs to learn so much more and she did not make progress in that year. She actually lost, you know, it’s showing even lower, but again, the 2021 to the 2022 shows that thank God she starts to pick up again.

[T. September 16, 2022, 140: 16-25.]

Q: So in September of 2022 after completing a full year at Bridge, she was actually at a lower percentile rank than she was before she was even classified in October of 2020, correct?

A: That’s what the numbers reveal, but that really --I would need to explain that a bit more.

THE COURT: Please do.

THE WITNESS: Okay. So again I would go back to in first – at the very beginning of second grade when the first dyslexia index score was done O. was able to do certain things because it was such a limited amount that a child of that age are exposed to. So a lot of times these children and if you read any of the literature you’ll see, these children are the ones that can escape you, because they look pretty good, but, you know, when you know this certain profile you recognize that this is a child we really need to keep an eye on.

When a year with the OG instruction two different programming, now she had to grow those skills and here she was with their peers at the beginning of second grade and those particular scores. So she was here and now what the next score shows is that they're here and she's here. The gap just widened tremendously during that year. The third one is showing that okay, there's still a gap and no one would deny that, but from the place that she was after the year of instruction in second grade with the year of instruction in third grade she made progress. She's catching up a tiny bit with her peers, so that's the best way that I can explain that. So looking at numbers doesn't always tell you the full picture. There's a whole lot that goes into that.

[T. September 16, 2022, 145: 18-25; 146: 1-24.]

THE COURT: Just to be clear, Ms. Carne, you're talking about the drop in scores in this instance and the instance we were talking about a couple minutes ago from year one to year two and you're saying that from year two to year three while the numbers are in fact lower than they were in year one, it seems like you just said that the drop from year one to year two was a huge problem.

THE WITNESS: Yes.

THE COURT: And that's she's making progress, is that your testimony?

THE WITNESS: That's exactly what I'm saying, yes, thank you.

[T. September 16, 2022, 147: 11-23.]

Pursuant to N.J.A.C. 6A:14-2.10(c)(4), reimbursement for a unilateral placement can be reduced or denied upon a finding "of unreasonableness with respect to the actions taken by the parents." The District argues that the parents were unreasonable and uncooperative in their actions and therefore the request for reimbursement should be denied. (District Post Hearing Brief at 62-63.) I disagree. O.V.'s parents made their concerns known about her when she was enrolled in kindergarten. They continued to engage with the CST, raising their continued issues with O.V.'s reading and her overall progress in the District. The District's argument that the parents were unreasonable is without merit. Simply put, these are parents who tried to collaborate with their CST.

In light of my conclusion that Bridge is appropriate and that the conduct of the parents here was reasonable under the totality of the circumstances, I **CONCLUDE** that they are entitled to reimbursement for their expenses at Bridge.

Finally, the parents argue that they should be awarded four hours of compensatory education from the first day the District was put on notice, April 7, 2020, though O.V.'s last day of attendance in the District, June 22, 2021, the last day of school for the 2020-2021 school year. Compensatory education is a judicially created remedy that may be awarded to account for the period in which a disabled student was deprived of their right to FAPE. Sch. Comm. Of Burlington v. Dep't of Educ., 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985) (finding that tuition reimbursement was an appropriate remedy under the Education of the Handicapped Act, predecessor to the IDEA); Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 566 (3d. Cir. 2013).

Compensatory education may be awarded if it is determined that a school District failed to provide FAPE to a disabled student and the District knew or should have known that FAPE was not provided. M.C. ex rel. J.C. v. Central Regional Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996). A finding for compensatory education does not require bad faith or egregious circumstances, it only requires a finding that a disabled child was receiving less than a "de minimis" education. Id. at 397.

A finding of compensatory education does not require that there be an IEP first; a disabled child's right to compensatory education "accrues when the school knows or should have known that the child is receiving an inappropriate education." Ridgewood 172 F.3d at 249. The appropriate calculation for compensatory education relief should be the period of deprivation, minus the time reasonably required for the District to correct the problem. Mary Courtney T. v. Sch. Dist., 575 F.3d 235, 249 (3d Cir. 2009). Compensatory education relief is appropriate if it furthers the purposes of the IDEA. Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 719 (3d Cir. 2010) (citing Burlington, 471 U.S. at 369). However, the Supreme Court has declined to limit a court's discretion in granting equitable relief under the IDEA. See Burlington, 471 U.S. at 369; see also Forest Grove School District v. T.A., 557 U.S. 230 (2009).

The parents' argument that compensatory education should be awarded is that "O.V.'s deprivation of FAPE occurred on the first day that Millstone was aware she required the Orton Gillingham method of instruction, or some other Dyslexia remediating method of instruction. On April 7, 2020, Petitioners [M.V. and N.V.] provided Millstone with a letter advising of Susan Miller's Dyslexia screening that concluded O.V. very likely had Dyslexia that required remediation. Millstone never adequately evaluated O.V. after that point, nor did it provide an IEP with programming appropriate to remediate Dyslexia." (Parents' Post Hearing Brief at 68.) I am unpersuaded by this argument, and it must fail. Put simply, the record does not support the parents' position that that the District knew or should have known that FAPE was not provided. Accordingly, I **CONCLUDE** that parents claim for compensatory education is denied.

ORDER

It is hereby **ORDERED** that District's due process petition is **DENIED**, as its program failed to offer a FAPE in the least restrictive environment and is **DISMISSED**.

It is hereby **ORDERED** that the parents' due process petition is **GRANTED** in part as follows: The District is directed to place O.V. at the Bridge Academy and transport her there at the expense of the District. The District shall reimburse the parents for the cost of O.V.'s attendance at the Bridge Academy, including transportation, retroactive to her enrollment.

It is further **ORDERED** that the Parents' due process petition is **DENIED** in part as follows: The request for compensatory education is denied; and the request for reimbursement for private evaluations and other out-of-pocket expenses is denied.

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.

September 15, 2023

DATE



JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency:

September 15, 2023

Date Mailed to Parties:

September 15, 2023

JSG/dw

APPENDIX
WITNESSES

For the District:

Laurie Hall

For the parents:

Laurie Hall

Dr. Christopher Huss

Amy Bernstein

Kimberly Carne

Dr. Karen Kimberlin

Susan Morris

M.V.

EXHIBITS

For the Parents

- P-7K June 7, 2021, Parent Unilateral Placement Notification regarding Bridge Academy, June 7, 2021
- P-8F First Grade Report Card / Progress Report, June 19, 2020
- P-13 Susan Miller's Report (Limited Purpose), March 12, 2020
- P-15A Millstone Speech Evaluation, October 30, 2018
- P-16A Ms. Carne Evaluation, October 24, 2020
- P-16B Ms. Carne Reevaluation, October 28, 2021
- P-16C Ms. Carne Reevaluation, June 4, 2022
- P-16D Ms. Carne Resume, undated

- P-18A Ms. Bernstein Evaluation, December 1, 2020
- P-18B Ms. Bernstein's Evaluation Addendum, March 19, 2021
- P-18C Ms. Bernstein's C.V., undated
- P-19A Dr. Kimberlin Evaluation, December 20, 2021
- P-19B Dr. Kimberlin Reevaluation, June 23, 2022
- P-19C Dr. Kimberlin's Resume, undated
- P-24 Bridge Academy Documents
- P-35 Parent Input Form, undated
- P-37 Emails
- P-41 Ms. Carne's Letter/Evaluation Addendum, July 11, 2022
- P-43 Ms. Carne Evaluation Addendum, undated
- P-70 Ms. Bernstein's Certification, undated

For the District:

- R-1 Registration File, undated
- R-2 Correspondence from Parents to Director of Special Services regarding Speech Services August 19, 2018
- R-3 Correspondence from Parents to Speech Language Specialist regarding Speech Services, September 11, 2018
- R-4 Invitation for Initial Identification and Evaluation Planning, September 17, 2018
- R-5 Initial Identification and Evaluation Planning-Evaluation Warranted, September 28, 2018
- R-6 Audio/Vision Screening, October 18, 2018
- R-7 Speech and Language Case History Form, October 25, 2018
- R-8 Speech Evaluation, October 20, 2018
- R-9 Invitation for Initial Eligibility Determination and IEP Development, October 30, 2018
- R-10 IEP Initial Eligibility, November 6, 2018
- R-11 Release of Information Form-Abilities in Action, November 12, 2018
- R-12 2019 Aims Web Plus Report, Fall 2019

- R-13 2018-2019 Attendance, 2018-2019
- R-14 2018-2019 Progress Report – Third Trimester Grade K Report Card, 2018-2019
- R-15 Progress Report 2018-2019, January 31, 2019
- R-16 Progress Report 2018-2019, April 16, 2019
- R-17 Progress Report 2018-2019, June 21 ,2019
- R-18 Request to Amend an IEP without a Meeting, September 13, 2019
- R-19 IEP Amendment, September 14, 2019
- R-20 Invitation for Annual Review, October 7, 2019
- R-21 Parent Input Form, October 17, 2019
- R-22 Response to Intervention Cover Sheet, October 18, 2019
- R-23 IEP Annual, October 24, 2019
- R-24 Progress Report 2019-2020, November 21, 2019
- R-25 2019-2020 Aims Web Plus Report, 2019-2020
- R-26 2019-2020 Attendance
- R-27 2019-2020 Student History LinkIt, 2019-2020
- R-28 2019-2020 Progress Report,First Grade Report Card, 2019 2020
- R-29 2020 Aims Web Plus Report, Winter 2020
- R-30 2020 Fall Assessment, Fall 2020
- R-31 Progress Report 2019-2020, February 6, 202
- R-32 Letter from Parents to Director of Special Services regarding Request for Evaluation by CST, April 7, 2020
- R-33 Initial Identification and Evaluation Planning Meeting/Invitation , April 8, 2020
- R-34 Progress Report 2019-2020, April 9, 2020
- R-35 Initial Identification and Evaluation Planning - Proposed Action, April 29, 2020
- R-36 Consent for Initial Evaluation , April 30, 2020
- R-37 Parent Input Form-Sent to Parent, May 6, 2020
- R-38 Social Assessment, June 3, 2020
- R-39 Progress Report 2019-2020, June 19, 2020
- R-40 Summer Testing Schedule, June 30, 2020

- R-41 Speech and Language Evaluation, July 10, 2020
- R-42 Psychological Evaluation, July 13, 2020
- R-43 Report Acceptance Form-Dyslexia Screening, July 15, 2020
- R-44 Release of Information Form-Susan Miller, Dyslexia Screening, July 15, 2020
- R-45 WIAT-III, July 22, 2020
- R-46 Educational Evaluation-Parent Report, July 28, 2020
- R-47 Invitation Initial Eligibility Determination with IEP, July 29, 2020
- R-48 IEP Initial Eligibility Determination w IEP, August 11, 2020
- R-49 Invitation at Parent or Student Request, August 19, 2020
- R-50 Record Request from Parent, August 28, 2020
- R-51 Letter from Parents to Director of Special Services regarding Rejection of July 8, 2020 Speech and Language Evaluation, September 3, 2020
- R-52 Consent-Record Release-Dana Carney, September 8, 2020
- R-53 Release of Information Form-Amy Bernstein, September 23, 2020
- R-54 Amy Bernstein's Concerns/Summary, September 30, 2020
- R-55 Response to Intervention, October 18, 2020
- R-56 2020 Progress Monitoring S&P, undated
- R-57 Response to Intervention, October 21, 2020
- R-58 2020-2021 Aims Web Plus Report, Winter 2021
- R-59 2020-2021 Attendance, 2020-2021
- R-60 2020-2021 Progress Report, Second Grade, 2020-2021
- R-61 2021 Assessment Spring, Spring 2021
- R-62 Report Acceptance Form, March 22, 2021
- R-63 Invitation for Initial Eligibility Determination and IEP Development (if feasible), March 22, 2021
- R-64 Initial Identification and Evaluation Planning – Proposed Action, March 24, 2021
- R-65 IEP Initial Determination with IEP, March 24, 2021
- R-66 Consent for Initial Evaluation, March 26, 2021
- R-67 Letter from Parent to Director of Special Services regarding Request for IEEs, April 19, 2021

- R-68 Testing and Classroom Observation, May 6, 2021
- R-69 Invitation for Initial Eligibility Determination and IEP Development (if feasible), May 6, 2021
- R-70 Letter from Parent to Director of Special Services Regarding Rejecting Speech and Language Evaluation, May 6, 2021
- R-71 IEP Assess Progress and Review or Revise, May 25, 2021
- R-72 ESY Program Information to the Parents, June 3, 2021
- R-73 2020-2021 Progress Report, June 18, 2021
- R-74 Letter to Parent from Director of Special Services regarding OOD Placement, June 28, 2021
- R-75 Letter to Judge from Michael Inzelbuch, Esq. regarding withdrawal request for IEEs, July 27, 2021
- R-76 Letter to Judge from Isabel Machado, Esq. withdrawal of D.P., 2021
- R-77 Letter to Parents from Director of Special Services regarding Resolution Meeting, October 28, 2021
- R-78 Letter to D. Rota from Michael Inzelbuch, Esq. regarding withdrawal request for IEEs, December 1, 2021
- R-79 Letter to D. Rota from Michael Inzelbuch, Esq. regarding withdrawal of request for IEEs, December 14, 2021
- R-80 Letter to D. Rota from Isabel Machado, Esq. regarding withdrawals, December 17, 2021
- R-81 Student Testing Records, undated
- R-82 Response to Intervention, undated
- R-83 Emails, undated
- R-84 Letter to Parents regarding Kathleen Carne, June 4, 2022 Educational Evaluation, July 11, 2022
- R-85 Letter to Parents regarding Karen Kimberlin, June 23, 2022 Language and Literacy Reevaluation, July 11, 2022