



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

**DECISION**

OAL DKT. NO. EDS 15329-12

AGENCY DKT. NO. 2013-18959

**K.S. AND C.S. ON BEHALF OF J.S.,**

Petitioners,

v.

**HOPEWELL VALLEY REGIONAL**

**BOARD OF EDUCATION,**

Respondent.

---

**Marc D. Youngelson, Esq.**, for petitioners (Cosner Youngelson, attorneys)

**Robin S. Ballard, Esq.**, for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: July 1, 2015

Decided: December 21, 2015

BEFORE **JOHN F. RUSSO, JR.**, ALJ:

**STATEMENT OF THE CASE and PROCEDURAL HISTORY**

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§1400 to -1482. Petitioners, C.S. and K.S., parents of J.S., requested due process against the Hopewell Valley Regional Board of Education (“Board” or “District”)

by petition dated September 27, 2012, alleging that respondent failed to offer or to provide to their son, J.S., a minor child diagnosed with Autism, a free and appropriate public education (FAPE) for the 2012 - 13 school year. Through that request, Petitioners sought reimbursement for their unilateral placement of J.S. at the Princeton Child Development Institute (PCDI) beginning September 2012 and compensatory education.

J.S. attended school in the District for the 2010-11 school year (starting in October 2010), ESY 2011, the 2011-12 school year, and ESY 2012. Petitioners assert that (i) J.S. did not make meaningful progress during that time; (ii) the District did not offer FAPE to J.S. during his time in the District; and (iii) at the end of the 2011-12 school year, the District did not offer J.S. an appropriate program or placement that would provide him with FAPE for the following (2012-13) school year.

The parties participated in mediation on November 16, 2012, and when that did not resolve the outstanding issues, the matter was transmitted to the Office of Administrative Law. A settlement conference conducted by the Honorable John Schuster on December 10, 2012, also did not resolve the outstanding issues in dispute between the parties. The matter then was assigned to me and the matter was heard on April 10, 18 and 24, May 13 and 22, June 17 and 19, July 10, September 11, 27 and 30, October 11 and 30, November 22, December 19, 2013, January 8 and 15, February 20, March 31, May 12 and 30, June 9 and 25, September 10, 18 and 19, November 19, and December 11, 2014, and January 21, 2015. Representatives for the parties also appeared at the Office of Administrative Law on January 29, 2015, to determine the admissibility of certain evidence. The parties submitted post-hearing summations which were received and the record closed July 1, 2015.

### **FACTUAL DISCUSSION**

I **FIND** the following background information, which is not disputed, as **FACT**:

J.S. was born on October 25, 2007 and received services from Early Intervention prior to attaining the age of three. (R-2). J.S. was referred to the Child Study Team (CST) of the Hopewell Valley Regional Board of Education by Early Intervention for

assessment as to whether he was eligible for special education and related services from the Board through the Individuals with Disabilities Education Act (IDEA) at the age of three. Ibid. Petitioner, C.S., completed a questionnaire about J.S. in connection with his referral to the CST. Ibid. On that form, C.S. indicated that J.S. was delayed in speech and social interaction, was more easily frustrated than others, had less interest in interacting with peers his age and continued to work on transitions, speech and social interactions with peers. Ibid. C.S. did not report that J.S. had been diagnosed or was suspected of having autism. Ibid.

An evaluation plan was developed for J.S. by the CST on September 14, 2010, consisting of psychoeducational, social, speech/language and occupational therapy assessments. (R-3). Petitioners consented to the completion of those assessments on the day of the meeting. Ibid.

The speech and language assessment, completed by Tammy Croak, MS, CCC-SLP on September 21, 2010, revealed that J.S. scored at the first percentile for auditory comprehension and expressive communication on the Preschool Language Scale – 4. J.S. also demonstrated play skills from the 9 to 12 month old level, receptive language skills from the 18 to 21 month old level and expressive language skills from the 15 to 18 month old level. (R-4).

The social assessment of J.S., completed by Diane Dempsey, LCSW, on September 23, 2010, included his family history, medical/developmental history, social functioning and behavioral functioning. (R-5). The report noted that Petitioners had taken J.S. to Dr. Laveman for a neurodevelopmental assessment, based upon a recommendation from his pediatrician. Additionally, J.S. was reported to be scheduled to see Dr. Mars for another neurodevelopmental evaluation on September 23, 2010. Petitioners reported to Ms. Dempsey that J.S. was sensitive to noise and could yell, scream or hit one of them if he became overwhelmed. Ibid.

In the report from the neurodevelopmental evaluation of J.S. conducted on September 23, 2010, Dr. Mars diagnosed him with Attention Deficit Hyperactivity Disorder, Apraxia, Dysgraphia and Autism Spectrum Disorder. (R-46). Dr. Mars

recommended that J.S. participate in a full-day program of specialized education services with an extended school year. She further recommended use of applied behavior analysis (ABA) discrete trials and speech/language and occupational therapies. Ibid.

The CST's psychoeducational evaluation report of J.S. was prepared by Beth Hoffman, Ph.D., NCSP and Rebecca Goldstein, M.A., LDTC on September 24, 2010. (R-6). During those assessments, J.S. was noted to have a decreased attention span, not respond to his name, appear distractible and exhibit a low frustration tolerance. The evaluators found J.S. to evidence a relative strength in non-verbal cognitive skills, though they were not able to obtain a valid estimate of J.S.'s cognitive ability. Id. He displayed weaknesses in attention and social interaction. Ibid.

The occupational therapy evaluation of J.S. was completed on September 24, 2010 by Michelle Davis-Korngut, MS, OTR/L. (R-7). The evaluator was not able to complete standardized testing of J.S. due to his non-compliance. She noted J.S. to be self-directed and unable to follow simple directions. Ibid. Petitioner, C.S., completed the Infant Toddler Sensory Profile, the results of which did not indicate concerns with most areas of sensory processing for J.S.; however, the evaluator found J.S. to exhibit many sensory seeking and sensory avoiding behaviors during the assessment. Ibid.

Based upon the evaluations completed, on October 19, 2010, the CST found J.S. eligible for special education and related services under the category of Preschool Disabled due to his diagnosis of an Autism Spectrum Disorder and demonstrated delays in communication, cognition and social skills. (R-8). At that meeting, the parents did not voice any concerns with the evaluations completed or express any disagreement with them. (T-4/10/13, 71).

Also at the meeting held on October 19, 2010, an Individualized Education Program (IEP) was prepared to be implemented on J.S.'s third birthday, October 26, 2010, to which Petitioners consented. (R-9). The IEP provided for J.S. to attend the full-day SKIP+ program, which the Board asserts is a program based upon the principles of ABA throughout the day in-district. (R-1; R-9 at 18). The IEP offered J.S. the support of

a paraprofessional throughout his school day and related services of speech and language therapy 10 times a month and occupational therapy 8 times a month. (R-9 at 6 and 18). The IEP noted that J.S. demonstrated behaviors that would be worked on within the classroom and offered him a home program of up to 8 hours per year. Id. at 10 and 18.

According to the District, the SKIP+ program operated by the District offered preschool students a full day of educational programming that the District claimed was based upon the principles of ABA, using a data-driven approach to assess skill development, targeting specific individualized areas of need. (R-1). Programming for each student was derived based upon individualized skills assessments, with specific goals and objectives being determined by the results of that assessment, the Core Curriculum Content Standards, and input from teachers and parents. Ibid. Supports were built into the SKIP+ program for students to receive individual, small group and large group instruction, and to focus on play skills, pragmatic language, sharing, attending, commenting and involvement in skill building to assist them in meaningful and functional community involvement. Id. The staff working in the SKIP+ program had training in ABA and received ongoing hands-on training as well as didactic training throughout the school year. Ibid. The District also offered a monthly support and education program to all parents of students in the SKIP+ program. Ibid.

In the 2010-2011 school year, the SKIP+ program received consultation from a Board Certified Behavior Analyst (BCBA), Stephanie (Nieves) DeLuise, Ed.M., LDTC, BCBA. Ms. DeLuise explained the supports available within the SKIP+ program in Hopewell Valley, including collaboration days during which parent clinics can be held or workshops conducted to provide general information and assistance to parents in response to questions they write in to staff. (T-4/10/13, 55). Daily communication occurred between the District and parents; parents could call or email and Ms. DeLuise hosted online discussions to answer questions from parents. Id. at 56. Additionally, parents were offered home-based services through Mercer County Special Services School District (MCSSSD). Ibid. The home program services were worked out between the parents and the case manager for each student, and Mercer County communicated and collaborated with the District regarding the services they provided. Id. at 80-81.

According to the District, it had a collaborative relationship with MCSSSD regarding the delivery of home programming services for students attending the SKIP+ program. (R-10). After J.S. began attending the SKIP+ program on or about October 26, 2010, he was referred to Mercer County Special Services School District for home programming, as the family indicated a desire to participate. (R-11; T-6/19/13, 82). The IEP offered 8 hours a year of home programming to J.S. (R-9; T-6/19/13, 76).

J.S. began attending the SKIP+ program on his third birthday, in a classroom with six to eight students, a teacher who according to the District was proficient in ABA and at least three trained paraprofessionals, as well as related service providers at times. (T-4/10/13, 172). According to the District J.S. was instructed using a 1:1 ratio in data-based programming that was guided by assessment. *Id.* at 77, 89. The Assessment of Basic Learning and Language Skills (ABLLS) was administered to J.S. upon entering the SKIP+ program. *Id.* at 82. From that assessment, the staff determined what J.S. needed to learn; of primary importance were communication skills as he was unable to communicate at that time. *Id.* at 96. Additionally, shortly after beginning attendance in the SKIP+ program, J.S. exhibited noncompliant and aggressive behaviors. *Ibid.*

### **The District's Factual Assertions**

On January 5, 2011, as a result of J.S.'s disruptive and aggressive behaviors, an evaluation planning meeting was held during which the District proposed, and Petitioners consented to the completion of a Functional Behavior Assessment (FBA) of J.S. (R-12; T-4/10/13, 69, 101-102). As Ms. DeLuise explained, the need for an FBA arises once a student is in programming and exhibiting behavioral difficulties. (T-4/10/13, 69). According to the District, FBAs are not typically done as part of an initial evaluation to determine eligibility. *Id.*

Additionally, on January 5, 2011, an IEP meeting was held to review the results of the ABLLS assessment completed by J.S.'s teacher and add more specific goals and

objectives for J.S. based upon same. (R-13; T-6/19/13, 90-91). Petitioners consented to implement the new IEP. (R-13 at 27).

Following the meeting on January 5, 2011, the process of completing the FBA began. In connection with the FBA of J.S., Petitioners completed a Functional Assessment Interview Form on January 17, 2011. (R-14). On that form, Petitioners reported J.S. had behavioral issues of hitting, smacking, kicking, crying/tantrums and screeching on a weekly basis, and difficulties with routines, generally in response to being told no or asked to do something undesirable. Ibid. They also noted J.S. was using the Picture Exchange Communication System (PECS) book frequently at home. Ibid.

The PECS program was started with J.S. almost immediately upon starting the SKIP+ program to assist him in developing functional communication skills. (R-22). The data maintained on J.S.'s progress with PECS (R-22) confirmed that he went through all phases of the program. (T-4/10/13, 97). By the end of the 2010-2011 school year, J.S. attempted verbal approximations and was fairly efficient at communicating using PECS to independently express his wants and needs. Id. at 98.

As part of the FBA, Ms. DeLuise observed J.S. and collected data on his behaviors of vocal disruption, physical disruption and aggression in the classroom between January 13, 2011 and February 17, 2011, using descriptive assessment data. (T-4/10/13, 104). Ms. DeLuise prepared a report of her findings on February 25, 2011. (R-15). Based upon her analysis of the data collected, Ms. DeLuise concluded that the primary function of J.S.'s aggressive and disruptive behavior was escape from demands with a secondary function of having his access to preferred items restricted. Ibid. She made recommendations within that report based upon her knowledge of J.S. and best practices in ABA for decreasing escape-maintained behavior. (T-4/10/13, 107). Specifically, Ms. DeLuise recommended use of antecedent strategies with J.S., teaching replacement skills for the behaviors, and providing a reinforcement system for him, and offered consequence strategies for staff to employ. (R-15).

A meeting was held to review the results of the FBA with Petitioners on March 22, 2011. (R-16). At that meeting, the parties discussed that a formal Behavior Intervention Plan (BIP) was not needed for J.S. as his behaviors had decreased with the increase in his ability to communicate using PECS. (T-4/10/13, 108). According to the District, Ms. DeLuise indicated that antecedent strategies were being implemented in school along with a daily schedule, token economy, warnings prior to transitions and constant access to the PECS book for communication. Id. at 108-109.

An IEP meeting was held on June 3, 2011 to plan J.S.'s educational program for the 2011-2012 school year as well as the extended school year. (R-17). At that meeting, J.S.'s teacher reported that, during the 2010-2011 school year, J.S. had learned to follow classroom routines which he could generalize to the lunchroom, and she reported progress for J.S. in all areas of pre-readiness skills including cooperation and reinforce effectiveness, visual performance, imitation, play and leisure, social interactions and group instruction, and tremendous progress in requesting help and expressing his wants and needs through use of PECS. Id. at 2-4. Behaviorally, the IEP noted that no formal BIP was needed for J.S., however, data from the classroom indicated the behavioral strategies put in place following completion of the FBA demonstrated a positive effect on decreasing J.S.'s non-compliant behaviors. Id. at 4. Progress was noted in related service areas of occupational therapy and speech therapy, with J.S.'s speech therapist indicating that he had shown improvement in all areas of communication skill development, including responding to his name, labeling objects and actions, following directions, attending, articulating and playing appropriately. Id. at 4-6. The IEP proposed continued placement for J.S. in the SKIP+ program based on the principles of ABA, with availability of a trained paraprofessional throughout the day, speech and language and occupational therapies each 10 times a month, and extended school year services, four hours a day, four days a week for six weeks, with speech/language and occupational therapies. Id. at 9-11. Petitioners consented to the implementation of this IEP. Id. at 32.

During the 2010-2011 school year, progress reports were sent home three times to provide Petitioners with information as to J.S.'s progress toward his goals and objectives. (R-18). The progress reports detailed J.S.'s acquisition of pre-readiness

skills, including following class routines, increasing communication with PECS, matching, completing puzzles, imitating gross motor activities, requesting help, expressing his wants and needs, acting appropriately near peers, washing and drying his hands, and improved compliance skills. Id. In the 2010-2011 school year, J.S. mastered 88 different skills, including increasing his mean length of utterance and remaining dry on a toileting schedule. (R-47).

The progress report for speech therapy indicated that PECS had been successful in providing J.S. a means to spontaneously communicate. (R-18 at 2). Data was maintained regarding J.S.'s progress with the PECS system (R-22) and demonstrated that J.S. went through all steps of the program in the 2010-2011 school year. (T-4/10/13, 97).

In the 2010-2011 school year, probe data was maintained for J.S. to track his progress toward his IEP goals and objectives based upon the ABLLS assessment. (R-19). In that school year, data was also taken on the toileting program implemented with J.S. (R-20) and on his behavior. (R-21).

J.S. attended the ESY program in-district in the summer of 2011. He evidenced progress in using words to communicate, proper bathroom skills and transitioning. (R-24). Through that programming, J.S. worked on naming common objects, puzzles, form box/shapes and rote counting as well. Ibid.

In September of 2011, J.S. returned to the SKIP+ program, with a different teacher, Lori Ayres, having faded the use of PECS and relying primarily on verbal communication to express his wants and needs. (T-4/10/13, 116). During the 2011-2012 school year, the SKIP+ program had 7-8 students, one teacher and two to four paraprofessionals. (T-4/24/13, 115). The program ran as a typical full-day preschool with morning circle, snack, story, leisure time, individual work on IEP goals and objectives, lunch and recess. (R-45; T-4/24/13, 115-116). J.S. participated in all aspects of the program, using a 1:1 instructional ratio. (T-4/24/13, 116). Staff were rotated to work with him to advance generalization, as the District wanted him to respond to anybody in the real world. Id. at 116-117.

J.S. exhibited disruptive behaviors upon return to school in September of 2011. After providing time for J.S. to acclimate to the new teacher and the new school year, when the behaviors did not subside, the District scheduled a meeting with Petitioners for October 13, 2011, to discuss the concerns with J.S.'s behavior. (R-25). As a result of that meeting, it was determined by the BCBA, Ms. DeLuise, that J.S. required an individualized behavior intervention plan (BIP). (T-4/10/13, 118). Ms. DeLuise proposed use of a technique of Differential Reinforcement of Other Behavior (DRO) as she thought it would be most effective with him; however, Petitioners resisted the use of a DRO. Id. at 119-120. Petitioners wanted the District to use a response cost system with J.S. through the BIP, which the District would not agree to do as it is a punishment procedure. Id. at 120.

To compromise with Petitioners, Ms. DeLuise wrote a reinforcement-based BIP for J.S. dated November 14, 2011, which provided, *inter alia*, antecedent strategies, replacement skills, catching J.S. being good, and use of tokens for appropriate behavior. (R-27; T-4/10/13, 121). At a meeting held on November 8, 2011, Ms. DeLuise reviewed this plan with Petitioners and obtained their consent to implement same. (R-26; R-27).

A progress report from November of 2011 from Ms. Ayres indicated that data collected in the classroom showed J.S. could be appropriate near peers for extended periods of time, was increasing his time on task during group lessons and would independently request the bathroom when needed. (R-28). Three additional progress reports were sent to Petitioners during the 2011-2012 school year, which evidenced the gains J.S. had made in speech and language, functional communication, social skills, sorting by function, feature and class, completing 9 step puzzles, imitating actions which he was generalizing in integrated gym and music classes, waiting, following class routines, engagement with peers in leisure skills and attending and participating in group lessons. (R-35).

During the 2011-2012 school year, the VB-MAPP and Early Echoic Skills Assessment were administered to J.S. to determine his foundational skills and strengths and weaknesses, and to identify target areas for instruction to him. (R-32). Probe data

was maintained on J.S.'s acquisition of IEP goals and objectives developed using the ABLLS. (R-36). Additionally, graphs were prepared of J.S.'s progress on each instructional program being implemented with him (R-37) and his behavior (R-39). Weekly behavioral graphs were sent to Petitioners to keep them apprised of his behavioral progress. (T-1/8/14, 208).

On March 5, 2012, Petitioners wrote to the Princeton Child Development Institute (PCDI), seeking placement there for J.S. (P-49).

While the data demonstrated that J.S. was making progress in his target behaviors (R-39), the District wanted to see further reductions in the frequency of those behaviors. (T-10/30/13, 148). A revision to the BIP was prepared by Michelle Newman, BCBA to be implemented on March 12, 2012. (R-30). The revision added use of a token economy and a DRO. Id. With the addition of the DRO and the token economy, the data showed a significant further decrease in J.S.'s target behaviors. (R-39; T-10/30/13, 148). Though his vocal disruptions persisted and the aggressions had not been extinguished, in the expert opinion of the District's BCBA, Ms. Newman, J.S. made significant and meaningful progress with his problem behaviors which effectuated significant social change for him. (T-4/24/13, 148-150). The decrease in duration of problematic behaviors that J.S. evidenced through the year (R-39) also made J.S. more available for learning and being engaged in communication and social skills. (T-4/24/13, 152).

An IEP meeting was held for J.S. on April 27, 2012 to plan for the 2012-2013 school year as well as the extended school year. (R-33). At that meeting, the District reviewed the progress J.S. had shown. J.S. was reported to be able to receptively and expressively identify all letters with 100% accuracy and was noted to have made progress in all areas of pre-readiness skills including requesting, labeling, filling in the blank, imitation of peers, participation in age appropriate motor games, following a lunch routine, transitioning, counting, identifying coins, answering simple comprehension questions, answering "wh" questions, writing, tracing, and selecting pictures by function, feature or class in response to questions. Id. at 2-4. Behaviorally, the IEP noted that J.S. had demonstrated an 82% reduction in his aggressive behavior from the beginning

of the school year and reported a decreased in the duration of problem behavior for J.S. Id. at 4. J.S.'s speech therapist indicated that he had shown improvement in all areas of communication skill development, was able to vocally express his wants and needs using up to a 5 word sentence, asked for assistance, responded to greetings and was motivated to engage in social and group activities. Id. at 4-5. The speech therapist wrote: "Based on his performance during the VB-MAPP assessments, inclusion in group settings with peers is a critical part of his programming." Id. at 5. The occupational therapist also reported progress in motor planning, coordination, visual motor fine motor and sensory processing activities. Id. at 5-6.

At the meeting, the behaviorist, Ms. Newman, BCBA, indicated that J.S. exhibited obsessive behaviors that resulted in difficulty handling changes in the environment such as a cracker breaking or a door being left open. (R-33 at 4). Ms. Newman reported that she planned to implement a "tolerating no" program to teach J.S. how to deal with these environmental variables. Id. She expressed concern that J.S. might exhibit an unsafe increase in behavior as a result of implementing this program that the District might not be able to manage if it persisted, so recommended exploration of public out of district options to be prepared with alternatives in case the need arose for same. Id. The Team prepared a list of priority components for J.S.'s educational placement, if this became necessary. (R-34).

The IEP proposed continued placement for J.S. in the SKIP+ program, instruction using the principles of ABA with availability of a trained paraprofessional to assist him throughout the day, speech and language 10 times a month, occupational therapy 8 times a month, and extended school year services, four hours a day, four days a week for six weeks, with speech/language and occupational therapies. (R-33 at 8-10).

At the IEP meeting held on April 27, 2012, Petitioners requested that the District send J.S.'s records to Princeton Child Development Institute (PCDI) and Somerset Hills Learning Institute, both private schools for the disabled. (R-33 at 25). The Team rejected this option as the schools were more restrictive than continuation in the SKIP+ program as recommended for J.S. and the public out of district options suggested by the District for exploration should the need arise in the future. Ibid.

On June 20, 2012, via counsel, Petitioners forwarded a report from Dr. Anita Breslin, a consultant they hired to observe J.S. in school and make recommendations for his programming, to the District and requested that the District agree to place J.S. at PCDI. (P-2). The District, through counsel, declined this request by letter dated July 6, 2012, as the District's position was that J.S. was being appropriately educated in-district. (R-50).

In the 2011-2012 school year, J.S. mastered an additional 55 skills including initiating greetings, labeling at least 200 nouns or verbs, sitting in a small group for up to 10 minutes and spontaneously following peers. (R-47).

J.S. attended the ESY program in-district in the summer of 2012 and his teacher reported that he made great progress. (R-38). He attended to group instruction, used breaks when needed, requested breaks appropriately and enjoyed playing with his peers. *Id.* Additionally, during the summer, J.S.'s aggressive behavior showed a 92% reduction from the beginning of the 2011-2012 school year. (T-4/24/13, 138).

On August 14, 2012, Petitioners notified the District that they had made arrangements to place J.S. at PCDI for the 2012-2013 school year. (P-66). On September 27, 2012, they filed this Petition for Due Process seeking reimbursement for that placement.

### **The Parents' Factual Assertions**

Petitioner C.S. is the mother of J.S. C.S. has a Master's degree in education from Montclair State University. She was a teacher in public school systems for eight years, first in Virginia and then in New Jersey, until she retired to raise a family in 2007. (1/15/14 Tr. 14:9-16:21, P1.)

On or about October 26, 2010, J.S. started in the District's "SKIP+" program. C.S. and K.S. shared their primary concerns with the District – J.S.'s disruptive behavior

and lack of language – and relied on the District to provide J.S. with the services he needed to address these concerns. (1/15/14 Tr. 45:21-49:20, R3, R8, R9.)

J.S. displayed aggressive and disruptive behaviors in the SKIP+ Program almost immediately. J.S.’s teacher reported concern with “aggressions toward adults.” (P22 at 3.) J.S.’s parents shared similar concerns with the teacher. C.S. explained, “we had no control over J. at this point . . . we were getting very disruptive tantrum behavior for anything and everything . . . we had voiced these concerns to [the teacher].” (1/15/14 Tr. 50:17-53:19.)

In addition, it was undisputed that J.S.’s parents needed help in the home. The District recommended home-based services, but only 8 hours per year, which his parents rejected as insufficient. Nothing other than 8 hours per year was ever offered or even suggested to J.S.’s parents by any representative of the District. (1/15/14 Tr. 54:17-59:2, 59:21-61:1, R9 at 18.)

Knowing that J.S. needed far more than 8 hours per year of home-based services, the parents hired Caroline Dorsey in January of 2011 to provide J.S. with a home program. Ms. Dorsey was extraordinarily helpful to the family. (1/15/14 Tr. 61:2-22, 64:12-66:1.) C.S.: (i) advised both the teacher and the BCBA everything that was being done at home; and (ii) offered to share information and materials regarding the home-based services J.S. was receiving. The District: (i) did not ask to speak with Ms. Dorsey during the first eight months of her working with the family; (ii) never expressed any disapproval with respect to Ms. Dorsey or otherwise advised that they had any concerns regarding the strategies being employed in the home; and (iii) declined C.S.’s offer to share materials. (Id. 66:2-69:6.)

In early 2011, J.S.’s aggressive and disruptive behaviors were not improving, and the District completed a functional behavior assessment (“FBA”). At that time, J.S.’s behaviors included screaming, screeching, flopping to the ground, tantrums, crying, hitting and kicking. (1/15/14 Tr. 69:24-72:5, 73:2-74:5, 74:20-75:3, R12, R14 at 1.)

Although the FBA was completed on February 25, 2011, the District did not meet with J.S.'s parents until March 22nd to share the results. The FBA indicated that the function of J.S.'s disruptive behaviors was task avoidance and/or escape from demand. (1/15/14 Tr. 76:18-77:11, 78:21-79:3, R15, R16.) The District told the parents that "data from the FBA concluded that a formal behavior plan was not warranted at this time," and that various informal intervention strategies outlined in the FBA would be sufficient to reduce J.S.'s problem behaviors. (Id. 79:8-80:5, 84:11-22, R15, R17 at 4.) J.S.'s parents relied upon and accepted the District's recommendation. (Id. 80:1-5.) However, the District's informal strategies were ineffective, as C.S. continued to receive reports through the end of the first year that "no decrease in behavior that was sustained." (Id. 80:6-18, 81:9-20.)

Despite the fact that J.S.'s aggressive and disruptive behaviors were not improving in the District's program, the District recommended that J.S.: (i) attend the in-District extended school year ("ESY") for the summer of 2011; and (ii) continue in the SKIP+ Program for the following school year. Relying upon the District's recommendation, C.S. and K.S. consented. (1/15/14 Tr. 81:22-84:10, R17.) Although J.S. may have acquired some skills during the 2010-2011 school year while he was enrolled in SKIP+, he "certainly didn't meet his potential." (1/15/14 Tr. 84:23-85:5.) Furthermore, the District never told J.S.'s parents that staff were taking probe data or behavior data for J.S. for the 2010-11 school year, and never discussed any data with his parents. The first time C.S. or K.S. saw this "data" regarding their son was after litigation commenced. (1/15/14 Tr. 91:24-92:22, R19, R21.)

### **ESY Summer 2011**

J.S. attended ESY in District during the summer of 2011. J.S.'s ESY program, however, was entirely inconsistent with his SKIP+ Program; ESY was a half day program that took place at a different school, with a different teacher, different bus driver, different aides and different children. (1/15/14 Tr. 86:3-11.) As a result, ESY was very difficult and traumatic for J.S. "Consistency was of utmost importance for J. It was really hard for him . . . the environment was very, very different from what he had during the school year." (Id. 86:12-87:20.)

During ESY 2011, J.S. showed regression both with respect to toilet training and his aggressive and disruptive behaviors. C.S. and K.S. shared their concerns with respect to the foregoing with the ESY teacher and J.S.'s case manager. (1/15/14 Tr. 86:22-89:22, 91:9-23.)

### **2011-12 School Year**

J.S. attended the District's SKIP+ program for the 2011-12 school year. His teacher was Lori Ayres. (1/15/14 Tr. 93:5-11.)

In the fall of 2011, J.S.'s aggressive and disruptive behaviors worsened, both at home and in school. The District reported behaviors that included hair pulling, biting, tearing of clothes, hitting, scratching and kicking. (1/15/14 Tr. 95:1-96:16.)

After several meetings, on or about November 14, 2011, the District finally put a Behavior Intervention Plan (the "November 2011 BIP") in place for J.S. (1/15/14 Tr. 96:20-98:9, R25, R26 and R27.) The November 2011 BIP included: (i) various informal strategies previously identified in the FBA; and (ii) a token economy. Although J.S.'s parents had concerns about the effectiveness of the BIP, they relied upon the District's recommendations and consented to the November 2011 BIP. (Id. 102:3-14, R27.) At the time, the District did not express any concerns regarding its ability to properly implement the token economy. (Id. 101:9-12, 102:1-4; 107:15-18.)<sup>1</sup>

C.S. later learned that the District had concealed significant reservations regarding the proposed token economy. By email dated February 15, 2012, Ms. Newman – the District's BCBA for much of the 2011-12 school year – admitted that the District had "had reservations regarding consistency of implementation" with respect to the token economy in the November 2011 BIP. (1/15/14 Tr. 102:15-103:23, 105:10-107:14, P47.)

---

<sup>1</sup> The District refused to include a response cost with the token economy identified in the November 2011 BIP, even though the parents effectively were using one at home which included this element. (1/15/14 Tr. 98:10-100:15.)

Once the District's November 2011 BIP was implemented, "there was no sustained decrease [in behaviors] . . . the behavior graphs [from the District] were coming home and they were showing very high numbers." (1/15/14 Tr. 109:3-111: 22). As a result, C.S. and K.S.'s concerns were growing. (Id. 112:2-20.)

Because the November 2011 BIP failed, the District revised J.S.'s Behavior Intervention Plan in March 2012. (1/15/14 Tr. 113:5-114:5, R30 (the "March 2012 Revised BIP").) The March 2012 Revised BIP intended to: (i) correct the problems with the token economy previously concealed by the District; and (ii) put in place a DRO for J.S. (Id. 113: 23-114:8.)<sup>2</sup> Under the DRO, J.S. received "J. Time" – 2-3 minutes on an iPad – if he did not display a vocal disruption, physical disruption or aggression for a five minute period. (Id. 114:21-115:11, R30.) At this point, C.S. and K.S. were losing faith in the District's ability to educate their son. They noted that they "consent[ed] to these interventions being implemented. However, we still have concerns that they are not the most appropriate to meet [J.S.'s needs]".) (Id. 116:3-117:6, R30.)

The District's March 2012 Revised BIP also failed effectively to reduce J.S.'s aggressive and disruptive behaviors. (1/15/14 Tr. 117:7-19, 118:5-119:3.) Thus, In late March/early April 2012, Rebecca Goldstein (J.S.'s case manager), Lori Ayres (J.S.'s teacher) and Michelle Newman (the District's BCBA in charge of the March 2012 Revised BIP) contacted C.S. via telephone together and stated that "it was time to look for out of District placement for [J.S.]." (1/15/14 Tr. 119:4-120:25.) C.S. agreed. (Id. 121:1-4.) During this call, Ms. Goldstein suggested that C.S. and K.S. consider Eden Institute, Douglass Developmental Disability Center and Academy Learning Center for J.S. (Id. 121:5-9.) C.S. agreed to explore Douglass and Academy Learning Center as possible options, and also expressed an interest in PCDI and Somerset Hills Learning Institute. (Id. 121:10-19.) Outside of the IEP process, Ms. Goldstein flatly rejected C.S.'s request to explore PCDI as a possible placement. (Id. 121:22-122:3.)<sup>3</sup>

---

<sup>2</sup> At the time, the District did not indicate any plan to: (i) increase demands on J.S. in order to stimulate skill development; or (ii) make it harder or more challenging for J.S. to receive a reward under the DRO. (1/15/14 Tr. 114:11-20.)

<sup>3</sup> In this time frame, the parents explored an out of district placement for J.S. on their own at PCDI. PCDI responded by requesting that the District provide a referral and release J.S.'s student records. The District refused. (1/15/14 Tr. 183:25-186:1, P49.)

By e-mail dated April 12, 2012, C.S. confirmed the District's agreement to place J.S. in an out of District setting. (1/15/14 Tr. 122:7-123:11, P94.) In response, Ms. Goldstein confirmed that the District was willing to "look at all options for J.S.'s school placement." (Id. 124:21-125:9, P95.) By email dated April 20, 2012, C.S. confirmed the parents' interest in visiting Douglass, and repeated their request that PCDI and Somerset Hills Learning Institute be considered as possible placements for their son. (Id. 128:4-25, P96.)

By email dated April 24, 2012, Ms. Goldstein confirmed the District's willingness to place J.S. in an out of district setting. However, she again refused to consider PCDI or Somerset Hills because they were "private" schools and, as such, were "more restrictive" than a public out of district placement. This was the first time J.S.'s parents had ever heard this distinction between public and private out of district placement. (1/15/14 Tr. 129:1-130:10, P54.)

Ms. Goldstein took C.S. to visit Douglass as a possible placement for J.S. (1/15/14 Tr. 130:19-132:15, P71 (C.S. notes regarding visit).) In addition, the District advised J.S.'s parents that Academy Learning Center had an opening for J.S. for the following school year. (Id. 138:23-140:8, P56, P58.) There was never any mention of seeking out of district placement for ESY only. (Id.149:17-151:1.)

Unbeknownst to J.S.'s parents, the District also sought placement for J.S. at two other out of district institutions. By letter dated March 8, 2012, without parental knowledge or consent, the District forwarded J.S.'s confidential student records to Eden Institute, seeking placement for the 2012-13 school year. By letter dated March 30, 2012, without parental knowledge or consent, the District forwarded J.S.'s confidential student records to Douglass, seeking placement for the 2012-13 school year. C.S. and K.S. were not aware of these communications; they did not provide oral or written consent authorizing the District to release J.S.'s confidential student records or to seek placement for J.S. at either institution. In fact, the first time they saw these letters was after litigation commenced. (1/15/14 Tr.145:22-149:15, R29.)

On April 27, 2012, J.S.'s parents attended an IEP meeting, expecting to discuss out of district placement options for their son for the following year. At the IEP meeting, the parties discussed a draft IEP distributed by the District. (1/15/14 Tr.159:18-160:13, P58.) This draft confirmed that the District had agreed to an out of district placement (Id. 163:14-21, P58 at 7 (draft IEP)); see generally 161:3-163:25.) However, without parental knowledge or consent, the District removed that language from the final IEP that was offered to J.S. (Id. 164:3-18, R33 at 7.) The District never explained the change in language, made outside of the IEP process, to the parents. (Id. 164:25-165:17.)

After the April 27 IEP meeting, K.S. and C.S. received only limited communications from the District. At the same time, J.S.'s aggressive and disruptive behaviors did not improve. (1/15/14 Tr. 173:17-174:3, 177:9-18.) J.S. did not make meaningful progress during the 2011-12 school year. His aggressive and disruptive behaviors were not reduced on a significant or consistent basis, and, as such, they interfered with his learning. C.S. also disagreed with the District's list of J.S.'s "Mastered Skills," pointing to the numerous inconsistencies between the District's progress reports and the so-called master list. (Id. 181:5-20, 182:23-183:23.)

J.S. attended ESY in the District for the summer of 2012. Inconsistencies between his regular school program and ESY continued. Behavioral data taken by the District confirmed that J.S. continued to display significant levels of aggressive and disruptive behaviors on a daily basis and he experienced regression during ESY 2012. (1/15/14 Tr. 178:10-24, 180:14-181:4, P108.)

By letter dated August 14, 2012, C.S. and K.S. advised the District of their intent to unilaterally place J.S. at PCDI. Then, on August 28, 2012, they signed a contract with PCDI, and J.S. began attending school there in September. C.S. and K.S. decided to unilaterally place their son at PCDI because, after trying to work within the context of the District's program for two years, it was clear that the District's program simply could not meet J.S.'s needs. (1/15/14 Tr. 186:5-188:4, P66, P87.)

The Parents offered as an expert witness Dr. MacDuff who is the Executive Director of PCDI. He has a Ph.D. in Child Psychology and Development from the University of Kansas. He is a doctoral level Board Certified Behavior Analyst (BCBA-D). (2/20/14 Tr. 7:22-8:14, P75.) Dr. MacDuff has worked at PCDI since 1977. PCDI is a state approved institution for the education of children with autism. As the Executive Director, Dr. MacDuff has ultimate responsibility for all aspects of the program at PCDI. (2/20/14 Tr. 9:1-12, 10:14-16, 12:17-13:10, 44:2-47:24, 48:21-24, P75.) Dr. MacDuff explained that Autism is a pervasive developmental disorder which is characterized by the absence of social skills, social attachment, and severe language deficits. Students with autism learn best through structured behavioral intervention, and do not readily learn through observation. (2/20/14 Tr.15:22-16:9.) Applied Behavior Analysis (“ABA”) – the science which investigates human behavior –is the only empirically driven – i.e., data-based – intervention that is effective with people with autism. Children with autism who receive effective intensive ABA programs at an early age have an increased chance of being able to meaningfully transition back to public schools. (2/20/14 Tr.19:25-17:17, 19:9-11, 26:20-27:2.)

Dr. MacDuff was qualified as an expert in the following areas: Autism; ABA; Educating children with autism; ABA staff training, supervision and program coordination; development of goals and objectives in IEP’s for students with autism; implementation of individualized programs (goals and objectives) for students with autism; development and implementation of behavior plans for students with autism; and assessing the effectiveness of individual programs for students with autism. (2/20/14 Tr. 97:13-21, 108:24-109: 25, 113:13-15, 113:24-114:16, 114:17-18, 116:6-7, 120:12-22, 122:15-20, 136:20-24.)

Dr. MacDuff wrote a report detailing his expert opinions concerning the District’s April 27, 2012 IEP for J.S. In connection therewith, Dr. MacDuff reviewed a number of District documents, including the April 27, 2012 IEP, the February 2011 FBA, the two Behavior Intervention Plans implemented by the District, and the District’s Home Component Brochure. (2/20/14 Tr. 144:12-146:2, P89A, R10, R15, R17, R27, R30, R33.) Dr. MacDuff also reviewed various documents relied upon by the District at the hearing for purposes of offering rebuttal testimony. As explained below, Dr. MacDuff

had several concerns regarding the District's program and documentation relating to J.S. (Id. 148:22-149:5.)

### **2010-2011 School Year**

Dr. MacDuff detailed the District's failures with respect to the February 2011 FBA it completed for J.S. While he agreed that J.S. demonstrated aggressive and disruptive behaviors in order to escape or avoid demands, he found the nine month time lag between the February 2011 FBA and the District's first implementation of a Behavior Intervention Plan for J.S. in November 2011 problematic. A formal BIP should have been put into place much more quickly. (2/20/14 Tr.150:7-151:18, 154:1-17, 155:11-156:2.)

Dr. MacDuff disagreed with the District's conclusion that "data from the FBA concluded that a formal behavior plan was not warranted." (2/20/14 Tr. 156:19-157:1, 158:8-22, 168:24-169:11, R17 (June 2011 IEP) at 4.) The FBA data plainly indicated that, in response to demands being placed on him, J.S. displayed vocal disruptions 100% of the time, physical disruptions 85% of the time, and aggressions 100% of the time. (Id. 169:12-170:9, R15.) Such extremely high levels of aggressive and disruptive behavior confirmed precisely the opposite of the District's conclusion – i.e., that a formal behavior intervention program was required. (Id. 158:18-159:2; see also 173:8-174:6, 3/31/14 Tr. 129:16-130:22, 131:23-132:10, R15.) Indeed, the FBA data plainly demonstrated that J.S. could not be given instruction without eliciting a disruptive behavior. Dr. MacDuff explained that: "Based on the level of these data, I would say that this is a student who was not available for meaningful instruction." (2/20/14 Tr. 172:8-23; 3/31/15 Tr. 133:15-134:13.)

The District's behavioral data for the 2010-11 school year further supported Dr. MacDuff's conclusion that J.S. needed a formal behavior plan. Dr. MacDuff was unable to interpret portions of the District's "data" because it was recorded in an inconsistent fashion or, at times, not recorded at all. (2/20/14 Tr. 175:6-176:15, R21.)<sup>4</sup> However, from what he could interpret, Dr. MacDuff was able to conclude: "These are significant

---

<sup>4</sup> The District's BCBA witnesses also were unable to explain portions of this data.

behavior problems. My experience tells me they interfere with children's ability to acquire new skills. I would have suggested a plan be put into place immediately." (Id. 178:2-25; 179:1-7.)

Dr. MacDuff expressed particular concern over the District's "inability" to return J.S. to a demand after he displayed challenging behaviors. As Dr. MacDuff explained, "an intermittent schedule of negative reinforcement, i.e., J.S. is not required to return to the original task such as this, is likely responsible for the high levels of problem behavior reported by the school district. In fact, J.S.'s target responses can be expected to occur at a high level and will likely become increasingly resistant to change if they are reinforced on an intermittent schedule." (2/20/14 Tr. 183:20-186:18, 187:11-19, R15, P89A at 2.) In other words, it is critical to return a student like J.S. to the same demand after he displays aggressive or disruptive behavior in response to that demand. Failing to do so, or doing so on an inconsistent basis, will cause the aggressive and disruptive behavior to continue to occur and potentially increase.

Dr. MacDuff also found that the District failed to offer or provide a sufficient home program component to J.S. (P89A at 5.) He explained that home programming is a critical part of a program for students with autism and that the District's recommendation of eight hours per year for the home program component for J.S. in the April 27, 2012 IEP was woefully insufficient. Rather, in his professional and expert opinion, an appropriate home program component for J.S. at that time was in the range of ten hours per week. Dr. MacDuff also noted concern over the fact that the District's home program personnel would have been different from the people who were providing instruction to J.S. in school, as such inconsistency would be problematic for J.S. (2/20/14 Tr. 190:14-20, 191:11-193:13, 194:7-14, P89A at 5, R33.)

In addition, Dr. MacDuff was concerned that the District's documents – specifically, the FBA and the June 2011 IEP – failed to identify which intervention strategies were implemented for J.S. In his expert opinion, those strategies needed to be written down in order "to know exactly what was done and when it was done." (3/31/15 Tr. 138:23-144:9, R15, R17.)

For the foregoing reasons Dr. MacDuff concluded that the District: (i) did not provide J.S. an appropriate program for the 2010-11 school year; and (ii) the District's June 2011 IEP did not offer J.S. an appropriate program for the following year. (2/20/14 Tr. 183:1-19, R17).

### **The District's ESY Program**

Dr. MacDuff testified that "an extended school year program that is not entirely consistent with a regular school year program such as the one proposed by the District is not appropriate for J.S." (2/20/14 Tr. 194:19-195:4, P89A at 6.) In his expert opinion, the inconsistencies between the District's ESY program and the SKIP+ program J.S. attended for the regular year were "very problematic." (Id. 195:5-14.) In addition, the District's failure to keep behavior data for J.S. during ESY 2011 meant that there was no way to determine whether any behavior interventions were effective for J.S. (Id. 195:15-196:3.)

### **2011-12 School Year**

Dr. MacDuff testified that the lack of objective criteria for the token economy in the November 2011 BIP made consistent implementation of the token economy difficult to impossible. This inconsistency was highly problematic for J.S., and, therefore, Dr. MacDuff would not have allowed such a token economy to be implemented for him. (2/20/14 Tr. 196:5-17, 197:13-21, 198:17-20, P89A, R27.)

The District's strategy of allowing J.S. to request a break, as set forth in November 2011 BIP, also was problematic. In light of the District's admitted inability to return J.S. to a demand, Dr. MacDuff explained that allowing J.S. to request a break likely would become another form of avoidance, thereby further ingraining problem behavior. (2/20/14 Tr. 198:22-199:13; P89A at 4, R27.)

Dr. MacDuff also had concerns that the District's March 2012 Revised BIP, which was incorporated in the District's proposed April 2012 IEP, was inappropriate. The revised BIP included: (i) a DRO procedure; and (ii) a token economy whereby tokens

were delivered on a variable interval schedule. Under the DRO, if J.S. did not display aggressive or disruptive behavior for a five minute period, he received “J. Time,” which was a two or three minute period whereby J.S. was allowed to choose a preferred item or activity. During “J. Time,” demands – i.e., instructions – were not placed on J.S. (2/20/14 Tr. 199:14-22, 200:2-202:5, P89A, R33.)

In Dr. MacDuff’s expert opinion, the amount of “J. Time” J.S. could receive under the DRO simply was too much time for him not to be available for instruction or learning:

If we just do simple math, that means that there’s a possibility that every eight minutes, three of them could be spent in J. time. . . that could be a significant part of his day that [ ] was spent in J. time.

(2/20/14 Tr. 201:13-19, 202:6-11.)

Dr. MacDuff further was concerned that the District had no plan in place either to: (i) extend the DRO interval to allow more time for learning; or (ii) increase the demands placed on J.S. Especially given the fact that J.S. had been in District for roughly two years by April 2012, as part of an appropriate program for J.S., Dr. MacDuff would have expected to see a long term plan in place that addressed these issues. (2/20/14 Tr. 202:12-205:1, 206:23-207:12.)

Dr. MacDuff reviewed the District’s behavior data for the 2011-12 school year, which demonstrated that the District’s initial November 2011 BIP was not effective at reducing J.S.’s aggressive and disruptive behaviors to acceptable levels. Rather, the data established that, as of mid-April 2012, J.S.’s aggressive and disruptive behaviors still were occurring at significant levels. The District’s behavior data for ESY 2012 revealed the same thing. (2/20/14 Tr. 207:13-212:6, 3/31/15 Tr. 157:16-25, R39, P108.) Thus, with regard to the DRO in the March 2012 Revised BIP, Dr. MacDuff concluded that:

the behaviors continue to occur at what I consider a significant level. So I would have to say that this procedure is in need of revision. It is not, at this point effective.

(2/20/14 Tr. 212:7-14.)

Further, while Dr. MacDuff acknowledged a downward trend in the data, he explained that it appeared due to the fact that J.S. simply was spending less time in a demand situation – i.e., he was getting too much “J. Time.” (Id. 212:18-213:24.)<sup>5</sup>

Dr. MacDuff testified that with a student such as J.S., the District’s practice of having a teacher or para-professional “available,” but not assigned to him, was not sufficient. (2/20/14 Tr. 214:22-216:6.) Rather, J.S. required an instructional program with a one-to-one ratio, particularly given the behaviors to be addressed. Dr. MacDuff found that in such a situation, “someone would need to be assigned directly to the student in order to insure that the procedures were being implemented consistently.” (P89A at 2.) He explained:

Based on my analysis of the data from functional behavioral assessment and other data that I had the opportunity to review, the level of problem behavior and the fact that this was a student whose problem behavior was a function of demands, I would in my professional opinion think that one to one instructional arrangement would be necessary.

(2/20/14 Tr. 216:18-24.)

In view of all of the foregoing, Dr. MacDuff concluded that the April 2012 IEP was not appropriate for J.S. for the 2012-13 school year. As a result, in his professional opinion, J.S. was not likely to make meaningful progress in the program proposed by the District. In fact, the flaws in the District’s proposed program would have been detrimental to J.S. in the long term. (2/20/14 Tr. 216:25-217:18, 218:3-14, 219:25-220:17, R33.)

Finally, Dr. MacDuff concluded that J.S. did not make meaningful progress in the District’s program during the 2011-2012 school year:

---

<sup>5</sup> To be clear, due to the absence of any data regarding demands put on J.S., Dr. MacDuff testified that it would be difficult or impossible to be certain as to the cause of the downward trend. (2/20/14 Tr. 213:25-214:21.)

Q. The district has claimed that J. made meaningful progress in the district's program. Based on what we've talked about, what you've reviewed, how would you respond to that?

A. Although there was some general decline in the behavior, the behaviors, the problem behaviors are continuing to occur at a significant level.

Q. Does that mean you think he did not make meaningful progress with respect to his behavior?

A. Not in terms of his behavior, no. He did not.

(2/20/14 Tr. 219:3-12.)

Furthermore, Dr. Mac Duff explained that even where there is skill acquisition, it is not appropriate to look at that in isolation when determining whether a student made meaningful progress because "it's only half a picture. It's possible for someone to acquire skills and still be having levels of disruptive behavior that could be problematic." (3/31/14 Tr.113:18-25.) If a student's disruptive behaviors properly were addressed and reduced, the student's rate of skill acquisition would increase. (Id. 114:1-17.) Therefore, even if some skills were acquired, the progress could not be meaningful where, as here, the disruptive behaviors were at a level that interfered with skill acquisition.

The Parents retained the services of Dr. Breslin is a BCBA-D (i.e., a doctoral level Board Certified Behavior Analyst). She holds a B.A. in Psychology from Douglass College. She is a certified school psychologist and has a Psy.D. in psychology from the Rutgers Graduate School of Applied and Professional Psychology. (5/12/14 Tr. 19:12-20, 23:5-24, 32:10-34:5, P4.)

Dr. Breslin has worked with students with autism in various capacities since the late 1970s in private practice, at Douglass and in a public school district. Her current practice consists of conducting comprehensive assessments of learners with disabilities, primarily children with autism between the ages of three and eight. Since

1997, Dr. Breslin has completed over 350 such assessments. (5/12/14 Tr. 18:24-22:17, 26:14-27:12, 28:5-20, 29:1-24, 42:20-44:12, 47:18-49:3, P4.)<sup>6</sup>

Dr. Breslin was qualified as an expert in the following categories: Autism; ABA; evaluating children with autism; application of ABA to educational programs for students with autism; psychology and school psychology; development of IEPs for students with autism; implementation of behavior plans for students with autism; and assessing the effectiveness of those programs for students with autism; and assessing the progress of learners with autism in such programs. (5/12/14 Tr. 93:6-94:13, 98:19-20, 99:20-23, 101:10-17, 104:10-20.)

Dr. Breslin explained that autism is a pervasive developmental disorder, which has significant impact on learners in the areas of social interaction, language development and behavioral issues. ABA is the science of understanding and improving behavior, and is the only empirically supported – i.e. data based – intervention system that is beneficial to children with autism. She explained that being data-driven is the cornerstone of an ABA program. (5/12/14 Tr. 35:7-36:4, 37:6-39:1, 40:10-13, 51:11-22.) Consistency in programming and intervention is essential for children with autism. Further, early ABA intervention is critical; studies confirm that, if it is done properly at an early age, gains are seen across all domains. (Id. 40:14-42:19.)

Dr. Breslin issued a report, dated June 18, 2012, detailing her expert opinions regarding: (i) her comprehensive assessment of J.S.; and (ii) whether the District's program appropriately met his needs. In connection therewith, Dr. Breslin: (i) reviewed numerous District documents; (ii) observed J.S. in District on March 30 and April 12, 2012; (iii) attended the April 27, 2012 IEP meeting with J.S.'s parents; and (iv) interviewed J.S.'s parents, which included administering the Survey Interview of the Vineland Adaptive Behavior Scales to C.S. (5/12/14 Tr. 106:20-109:8, P2 at 2-3.)<sup>7</sup>

---

<sup>6</sup> While most of her evaluations have been done on behalf of families, Dr. Breslin has done a number of evaluations for school districts and has also been a court-appointed evaluator. (5/12/14 Tr. 52:5-54:18.)

<sup>7</sup> Dr. Breslin requested the opportunity to interview the District personnel involved in J.S.'s program. The District initially scheduled this interview, but then unilaterally canceled it after the April 27, 2012 IEP meeting. Dr. Breslin nonetheless was able to come to confirm conclusions regarding J.S. and

Based upon this information, Dr. Breslin had multiple concerns regarding the SKIP+ program, which caused her to conclude that it was not appropriate for J.S.

### **The Vineland**

The Vineland is a standardized interview which allows the examiner to reach conclusions regarding a learner's adaptive functioning across several domains. Dr. Breslin administered the Vineland interview to J.S.'s mother. The results indicated that J.S. exhibited significant deficits requiring "extensive intervention, and a one to one, data driven instructional format in order that the gap between J.S. and non-disabled children of similar age be systematically narrowed." (5/12/14 Tr. 132:5-136:20, P2 at 25-26.)

### **Dr. Breslin's Analysis of the District's Documentation Regarding J.S.**

Dr. Breslin reviewed all available District documents in connection with the development of her written report. (5/12/14 Tr. 115:21-116:9, 120:17-121:14, R27, R30, P2 at 2.) Dr. Breslin found that the District's initial evaluations of J.S. described a learner with significant behavioral needs – i.e., they put the District on notice as to J.S.'s problem behaviors. (Id. 122:24-132:3, P2 at 4-7, R4, R5, R6, R7.)

Dr. Breslin testified that the lengthy time period between the FBA conducted in February 2011 and the District's implementation of a formal behavior intervention plan in November 2011 was inappropriate. She concluded that the data in the FBA plainly indicated that a formal behavior intervention plan should have been put in place immediately. (5/30/14 Tr.41:3-44:18, 46:1-13, R15, R27.)

Dr. Breslin also found it inappropriate that, prior to the implementation of the November 2011 BIP, the District's documentation – i.e., the February 2011 FBA and J.S.'s June 2011 IEP – did not identify which intervention strategies were implemented for J.S. In an appropriate program for J.S., "everything would be documented given [J.S.'s] profile of problem behaviors." (5/30/14 Tr. 47:1-9.)

---

his program based upon the information available to her. (5/12/14 Tr. 109:21-111:17, 170:171:19, P2 at 1 (fn.1) and 15.)

Dr. Breslin reviewed the District's behavioral data for the 2011-2012 school year and found that "it is clear that for most of the school year, [J.S.'s] problem behaviors have not been effectively controlled or brought down to near zero levels, and that he continues to exhibit disruptive behavior, which interferes with the daily classroom routine and prevents [J.S.] from being available for learning." (5/30/14 Tr. 50:20-52:8, 53:13-54:13, P2 at 23.) Further, while Dr. Breslin acknowledged a general downward trend in the data, she explained that, based on her observations, she was able to conclude that the trend was due to a combination of: (i) J.S. spending significant time in "J. Time" under the DRO in the March 2012 Revised BIP; and (ii) the District placing low demands on J.S. in the SKIP+ program. (Id. 54:14-55:19.)

Dr. Breslin also found that the District's progress reports for J.S. were not an appropriate means to measure his progress. These documents were not objective, data-based reports but, instead, provided only arbitrary numerical ratings regarding J.S.'s purported performance. As a result, "there is no way to determine what skills J.S. has achieved, if any, by reviewing these ratings." (5/30/14 Tr. 56:22-23, 58:13-60:11, 68:16-21, P2 at 23-25.)

In addition, the District failed to provide Dr. Breslin with any data regarding J.S.'s purported skill acquisition in the SKIP+ Program – including the District's so-called "probe data" for J.S. for the 2011-2012 school year – at her observations, though she certainly requested it. (5/30/14 Tr.55:20-56:18, 62:3-25, 65:5-67:16, R36.) Rather, as noted, supra, the District produced "probe data" for the first time after litigation commenced.

In any event, after reviewing the probe data that was produced for the first time after litigation commenced, Dr. Breslin explained the insufficiencies in this data, and identified the additional information that would have been needed in order properly to assess whether J.S. made any progress. The District's probe data was flawed and simply could not be relied upon to demonstrate J.S.'s progress. (5/30/14 Tr. 68:5-72:3, R36.)

**Dr. Breslin's Observations of J.S. in the SKIP+ Program**<sup>8</sup>

Dr. Breslin found that the District did not appropriately address J.S.'s high levels of disruptive behaviors, which occurred throughout both of her observations (including a severe tantrum during her second observation where J.S. bit a staff member). District staff regularly provided J.S. with reinforcement – e.g., praise, food and/or tokens – following disruptive behavior – e.g., climbing on a cubby, grabbing the speech therapist's arm, shouting and/or grabbing an instructor's face. Reinforcing J.S.'s inappropriate behavior in this fashion was contrary to the principles of ABA, because “providing reinforcement immediately following a display of those problem behaviors can result in either a maintenance of those problem behaviors or an increase over time.” (P2 at 8-28; 5/12/14 Tr. 137:2-138:6, 141:13-149:2, 155:9-157:14, 172:11-175:10, 176:2-178:2, 182:24-183:21; 5/30/14 Tr. 17:16-19:25.)

The District also failed to properly implement the DRO aspect of the March 2012 Revised BIP by giving J.S. “J. Time” after he engaged in a disruptive behavior. (5/12/14 Tr. 152:9-11, 157:15-24.) As Dr. Breslin explained, “it's inappropriate to provide the learner with a positive consequence, having time with a preferred activity, following the display of problem behavior.” (Id. 181:3-21, 187:3-13, P2 at 14-18.)<sup>9</sup>

J.S.'s high levels of disruptive behavior led Dr. Breslin to conclude that the District “did not have J.S. under adequate instructional control.” (5/12/14 Tr.185:15-23; 180:3-7.) Given the amount of time J.S. had been in the SKIP+ program, the District should have had better instructional control of him. (Id. 185:25-186:7.) As Dr. Breslin explained:

---

<sup>8</sup> As stated in Dr. Breslin's report, the District confirmed that: (i) “J.S.'s behavior at the time of the current examiner's observation was representative of his behavior on most school days;” and (ii) “the services and supports provided were representative of the program provided to J.S. by the [District].” (5/12/14 Tr. 111:18-113:12, 173:12-19, P2 at 2 and 11.) Also, during her first observation, the District advised Dr. Breslin that C.S. was in possession of all documents pertaining to J.S.'s school performance. (Id. 138:14-20, P2 at 8.) As noted supra, the District in fact did not disclose numerous significant documents relating to J.S.'s performance until after litigation commenced.

<sup>9</sup> Even when J.S. successfully went five minutes without demonstrating disruptive behavior, the District failed to implement the DRO properly by failing to give J.S. a choice of preferred activities (as called for by the DRO). Instead, he was “just basically handed the iPad,” which prevented him from making a choice, allowed him to persevere on that device, and prevented him from developing interests in other activities. (5/12/14 Tr. 159:3-161:7.)

this was the second year that he was in the program and his problem behaviors were not brought down to zero or near zero levels in order for him to actually participate fully in the classroom in which he was involved and benefit from the services in that classroom.

(5/30/14 Tr. 16:25, 17:1-15.)

Dr. Breslin further explained that the manner in which the District addressed J.S.'s disruptive behaviors would not tend to reduce those behaviors but, instead, would make them more resistant to change. (5/12/14 Tr. 163:10-165:3; 5/30/14 Tr.20:15-21:17, 84:3-85:13.) "[J.S.] exhibited problem behaviors, which included excessive verbalizations that were non communicative, grabbing the speech therapist, and respectively attempting to hug the speech therapist. School staff did not effectively manage [J.S.'s] behaviors and the strategies used constituted a poorly developed and executed behavioral intervention plan which appeared to exacerbate [J.S.'s] problem behaviors." (P2 at 28.)

Another reason Dr. Breslin found the program inappropriate for J.S. was the fact that he spent almost 25% of the day in "J. Time," which prevented him from receiving the intensive instruction he needed to improve his deficits for at least one quarter of his instructional day. As she explained, not only was J.S. losing out on 25% of his instructional time, but during the time he was receiving instruction, "he wasn't being provided with some really intensive systematic learning opportunities so they could improve his social interaction skills, his language skills, his direction following skills in a systematic manner." (5/12/14 Tr. 161:24-163:6, 186:22-187:2.) In fact, "other than the time-limited speech therapy session, which did not include an extensive number of demands, J.S. had no identifiable or planned instruction of any sort during the current examiner's observation." (5/12/14 Tr. 166:7-169:4, 5/30/14 Tr. 22:4-9, 23:9-19, 25:1-27:7; 29:17-31:25, 190:9-16, P2 at 13.) There were no written instructional programs for J.S., which was a significant issue. As Dr. Breslin explained, "the District failed to provide J. with identifiable, well-planned, data-driven instruction." (Id. 28:15-29:16, 81:17-83:4, P2 at 27.)

Dr. Breslin contrasted the District's program for J.S. with what he needed in order to be able to achieve meaningful progress:

[h]e needed a combination of a program. He needed a program that effectively reduced and controlled the problem behaviors while also working on improving his language skills, direction following skills, social interaction skills. That was not part of this program.

(5/12/14 Tr. 169:7-17:1; see also 5/30/14 Tr. 31:12-32:8.)

In addition, Dr. Breslin testified that J.S. required a full-day 1:1 instructional program because he lacked the prerequisite skills – e.g., the abilities to sit, attend and follow instructions in a group – to benefit from group instruction. Since the District's primary instructional format for J.S. was large group with some small group instruction, Dr. Breslin concluded that “the program in which J.S. is currently enrolled provides an instructional format that is not matched to [his] current educational needs”. (5/30/14 Tr. 32:9-33:13, 36:2-8; 83:5-84:2, P2 at 27-28.) This was evidenced by the fact that J.S. was not adequately integrated into the SKIP+ class. Rather, he was isolated from his classmates “in a separate, if you want to call it, a ‘Bubble,’ in the context of a classroom setting.” As Dr. Breslin explained, J.S. “had a separate program, inadequate however, in the context of another program which was a self-contained program for students who are identified with disabilities.” (Id. 33:18-34:23, 36:10-37:2).

## **Conclusions**

The IEP offered to J.S. by the District for the 2012-2013 school year proposed that he remain in the SKIP+ program. Dr. Breslin concluded that the April 2012 IEP, proposing J.S.'s continued placement in that program was not appropriate:

the SKIP Plus Program is not an appropriate environment for J. because within this setting his problem behaviors have not been reduced to near zero levels or eliminated and he is not making progress.

(5/30/14 Tr. 76:21-77:8, R33, P2 at 31-32.)

Nor, in Dr. Breslin's opinion, was J.S. likely to make meaningful progress in SKIP+ if he were to remain there for the 2012-13 school year. (Id. 78:3-15, P2.) In fact, if J.S. were to remain in SKIP+, and continue to be denied the intensive ABA program he required, his chances of successfully being transitioned to a mainstream educational environment would be unlikely. (Id. 91:3-19, P2 at 33.)<sup>10</sup>

Ultimately, Dr. Breslin firmly concluded that: (i) the District failed to offer J.S. an appropriate program; (ii) J.S. did not make meaningful progress while in the District's program; and (iii) J.S. was unlikely to make meaningful progress in that program going forward. (5/30/14 Tr. 79:8-81:9, 91:20-93:5.) Dr. Breslin's findings indicated that "the self-contained pre-school disabilities program in which [J.S.] is enrolled is ill matched to [J.S.'s] current educational needs. The program is not appropriately specialized in order for [J.S.] to gain meaningful benefit from his enrollment." (P2 at 26-27.)<sup>11</sup>

Based upon a review of the documentary evidence and testimony of the witnesses I **FIND** the following additional **FACTS**:

1. All of the witnesses that were accepted as experts regarding educating children with Autism testified that J.S. required an ABA based program.
2. The SKIP+ program was not an ABA based program, nevertheless, J.S. did acquire many skills during the time he was enrolled in the District, including communicating, toileting and other basic academic skills.
3. All of the witnesses that were accepted as experts regarding educating children with Autism testified that students such as J.S. that are on the Autistic Spectrum often exhibit "behaviors" that are a direct result the child's disability.
4. All of the witnesses that were accepted as experts regarding educating children with Autism testified that aggressive and disruptive behaviors are common in children that are on the Autism Spectrum.

---

<sup>10</sup> As Dr. Breslin explained, and contrary to representations contained in the IEP and other District documents, the District's SKIP+ program was not an ABA program, as it did not have the necessary components to make it such. (5/30/14 Tr. 93:8-97:12, R1, R22 at 24.)

<sup>11</sup> In her report, Dr. Breslin laid out the components of an appropriate program for J.S., and recommended PCDI as having those components. (5/30/14 Tr. 86:12-91:2, P2 at 28-33.)

5. All of the witnesses that were accepted as experts regarding educating children with Autism testified that it is important to address behaviors in children with Autism because it is these behaviors that do not make a learner available to learn.
6. All of the witnesses that were accepted as experts regarding educating children with Autism testified that “behaviors” take on many different forms not just the obvious type of behaviors, such as hitting, biting, calling out, etc. The behaviors can also be the type that are less disruptive and harder to notice, such as self stimulation and tapping or rocking. The common element is that when such behaviors are occurring the learner is not available to learn.
7. All of the witnesses that were accepted as experts regarding educating children with Autism testified that the aggressive and disruptive type of behaviors are the most problematic because not only is the learner not learning while they are occurring, the rest of the class can experience significant disruption and the other students and staff can become afraid of a student who is exhibiting disruptive and aggressive behaviors, thereby stigmatizing and potentially ostracizing the student exhibiting such behaviors.
8. All of the witnesses that were accepted as experts regarding educating children with Autism testified that J.S. experienced aggressive and disruptive behaviors prior to being enrolled in the District and that these behaviors continued until J.S. left the District.
9. The District should have conducted an FBA on J.S. within two or three months of him beginning
10. Once the FBA was conducted, the District should have implemented a BIP immediately.
11. Once the BIP was implemented the data that was collected was not collected in a consistent and reliable manner so that the progress regarding getting the behaviors under control was not reliable.
12. Specifically, according to Dr. MacDuff, Dr. Breslin and Ms. Newman the aggressive and disruptive behaviors were not reduced to near zero levels by the Spring of 2012.
13. Ms. Newman believed that due to J.S.’s aggressive and disruptive behaviors J.S. should be sent to an out of district program for the 2012-2013 school year.

14. Ms. Goldstein relying on Ms. Newman's assessment began the process to send J.S. out of district, including sending his records to out of district placements and arranging visits with J.S.'s mother to such schools.
15. In the Spring of 2012 the District was committed to sending J.S. out of District because it could not get his aggressive and disruptive behaviors under control.
16. However, once J.S.'s mother began talking about PCDI, the District changed its mind.
17. Ms. Goldstein had a very negative attitude toward PCDI for reasons that had nothing to do with educating a child with Autism and that is when the IEP team decided to adopt the April 2012 IEP that had J.S. attending the District's ESY program for the Summer of 2012 and the Skip + Program at the Bear Tavern School for the 2012-2013 School Year.
18. J.S. attended the District's ESY program, but J.S.'s parents decided to put the District on notice that they were sending J.S. to PCDI for the 2012-2013 school year because they believed that the District could not provide J.S. with a Free and Appropriate education.

### **The Appropriateness of the PCDI Placement**

Dr. MacDuff testified PCDI is a state-approved private, non-profit school for the education of children with autism. It has been serving individuals with autism since 1970. PCDI provides an ABA program to its learners, all of whom have autism. As of the date of Dr. MacDuff's testimony, PCDI had thirty (30) school age students.<sup>12</sup> (11/19/14 Tr. 10:24-11:17, 12:16-23.)

---

<sup>12</sup> When PCDI "graduates" a school age student, this means that the student has progressed to a point where he/she is able to successfully benefit from being educated with few or no supports in his/her public school district or a similar program.

PCDI's regular school year runs from September through mid-June. It offers an ESY program which is identical to the regular year program, "to provide continuity for the students." (11/19/14 Tr. 11:18-12:15.)

PCDI does not provide speech therapy or occupational therapy with therapists who specialize in only those disciplines. Rather, PCDI has employed a generalist model since inception, which incorporates aspects of those disciplines into its programming. This means that PCDI instructors are trained to address deficits in speech/language and motor skills in a way that benefits learners with autism. Any time that PCDI finds circumstances call for one of their learners to work with a therapist from a particular discipline, PCDI consults with and/or brings in such a therapist as needed. (11/19/14 Tr. 25:12-27:2.)

As Executive Director, Dr. MacDuff was responsible for overseeing all aspects of J.S.'s program for the 2012-13 school year. He: (i) consulted frequently with Ms. MacDuff and J.S.'s instructors, particularly with respect to J.S.'s disruptive behaviors; (ii) designed the "Being Friendly" intervention procedure to address these behaviors; (iii) personally spent time with J.S. in his class; and (iv) regularly reviewed J.S.'s data notebook. (11/19/14 Tr. 22:1-23:13.)

PCDI's goal with J.S., as with all of its learners, was to work with him to develop the necessary skills for him to be able to successfully transition back to public school. PCDI "is designed to transition the children when we can and, again, when they meet those prerequisite skills we immediately begin that process." (11/19/14 Tr. 28:15-29:3.)

### **J.S.' Progress at PCDI**

Dr. MacDuff issued a report, dated March 19, 2013, detailing his expert opinions regarding J.S.'s progress at PCDI. (11/19/14 Tr17:15-19:2, P122 (P89B).) Dr. MacDuff concluded that: (i) PCDI was appropriate for J.S.; and (ii) J.S. made meaningful progress at PCDI during the 2012-13 school year.

J.S. started at PCDI in September 2012. He was immediately placed in a 1:1 instructional program because “the level of disruptive behavior that we were seeing really required one to one instruction in order to try to establish instructional control and to make him available for instruction.” (11/19/14 Tr. 20:1-3, 21:12-25, 28:5-14.) As part of that 1:1 instruction, J.S. worked with a certified special education teacher in individual sessions every day. J.S. did not have the prerequisite skills to benefit from being around typically developing peers as of September 2012. (Id. 24:6-25:11, 27:15-28:3.)

PCDI maintained a data notebook for J.S., which contained all of his instructional programs and graphs of all data taken relating to these programs for the 2012-13 school year. (11/19/14 Tr. 29:4-30:3, P116 (data notebook).)

When he started at PCDI, J.S. displayed severe levels of disruptive behaviors. Among other things, he threw tantrums, bit people and destroyed property on frequent occasions. These behaviors interfered with J.S.’s skill acquisition because he was not available for learning while engaged in such behaviors. (11/19/14 Tr. 30:4-31: 6.)

To address J.S.’s “problem” behaviors, PCDI designed and implemented the “Being Friendly” program. Dr. MacDuff designed and approved this program, with Ms. MacDuff’s assistance. Dr. MacDuff was personally involved in implementing the program, which ran throughout J.S.’s entire school day; he frequently discussed the program with Ms. MacDuff, and reviewed data for this program. PCDI modified J.S.’s Being Friendly program on November 1 (teaching procedure added) and on November 27, 2012 (series of rotating consequences added). Dr. MacDuff approved both modifications. (11/19/14 Tr. 32:3-35:3, 36:22-37: 25, 38:6-40:24, P116 at JS463 et seq.)

The Being Friendly program required J.S.’s compliance with demands or instructions. If J.S. did not comply – i.e., if he displayed disruptive, or “unfriendly,” behavior in response to a demand – he was not allowed to move onto another activity until he complied with the demand preceding the unfriendly behavior. At times, that meant delaying J.S.’s lunch and requiring him to stay after school until compliance was

achieved. Requiring J.S.'s compliance in this manner was important because his disruptive behaviors were a function of escape or avoidance. (11/19/14 Tr. 35:4-36:21.)

Dr. MacDuff explained that the "whole interval" data for the Being Friendly program – which measured the percentage of 10 minute intervals J.S. displayed friendly behavior – confirmed an increase in J.S.'s "friendly behavior," particularly after the November 27 modification to the program. By the end of the year, the data confirmed that J.S. was displaying friendly behavior on "well above 90 percent" of the scored intervals. (11/19/14 Tr. 40:25-44:14, P116 at JS441-444.)<sup>13</sup>

The frequency data for the Being Friendly program – the number of unfriendly behavior episodes per day – confirmed a substantial decrease in the per day number behavior episodes. By the end of the school year, J.S. was engaging in only zero to two unfriendly behaviors per day. (11/19/14 Tr. 45:5-47:4, P116 at JS466-467.) The duration data – the total amount of time J.S. spent engaged in disruptive behaviors – verified a substantial decrease in the: (i) cumulative number of minutes per day J.S. engaged in unfriendly behavior; and (ii) length of each individual unfriendly behavior episode. (Id. 47:5-49:4, P116 at JS468-486; see also P122 at 4-5 (expert report summarizing this data).

J.S.'s progress reports contained tables correlating to the data taken on J.S.'s Being Friendly program. In J.S.'s February 19, 2013 progress report, the table for the whole interval data demonstrated an increasing trend in J.S.'s "friendly" behavior. (11/19/14 Tr. 56:11-59:1, P83 at 20 (table)). The table for the partial interval data confirmed a decreasing trend in J.S.'s "unfriendly" behavior. (Id. 59:2-60:7, P83 at 21-22.) The tables for the frequency of J.S.'s disruptive behaviors, the cumulative number of minutes J.S. spent engaged in such behaviors, and the duration of each episode of such behaviors also evidenced decreasing trends. (Id. 60:8-62:15, P83 at 22-23, P122 at 4-5 and Exhibit A (February 19 progress report tables).

---

<sup>13</sup> PCDI took inter-observer (IOA) data to confirm the validity of the data taken under the Being Friendly program. (11/19/14 Tr. 44:15-45:4, P116 at JS439-450.)

J.S.'s July 3, 2013 progress report confirmed that the trends seen in J.S.'s February 2013 progress report continued through the end of the 2012-13 school year. The table relating to the whole interval data showed an increasing trend in the percentage of time (whole intervals) J.S. spent "being friendly." Conversely, the trend in the partial interval table was descending – i.e., J.S. spent less time being unfriendly. The trend in the table relating to the frequency data was also decreasing. In fact, by the end of June 2013, PCDI virtually had eliminated the occurrence of J.S.'s unfriendly behavior episodes. The trends for the cumulative number of minutes and duration of each episode similarly decreased through the end of the school year. (11/19/14 Tr. 63:7-65:21, P120 (July 2013 progress report) at 21-24.)

Dr. MacDuff concluded that: (i) PCDI's Being Friendly program effectively reduced J.S.'s aggressive and disruptive behaviors, which made him significantly more available for learning; and (ii) J.S. made significant and meaningful progress in terms of reducing his aggressive and disruptive behaviors during his first year at PCDI. (11/19/14 Tr. 49:5-50:2) Dr. MacDuff explained that any purported documentation issues claimed by the District<sup>14</sup> had no impact on his opinions regarding J.S.'s Being Friendly program and its effectiveness. (12/11/14 Tr. 184:9-187:7, 193:17-201:11.)

Dr. MacDuff detailed the manner in which PCDI developed individualized skill acquisition programs for J.S. Based on behaviors J.S. displayed during an initial assessment, PCDI selected approximately sixty instructional programs from a PCDI database containing approximately 700 instructional program templates. (12/11/14 Tr. 116:4-119:3, 144:12-147:10.) PCDI then further individualized the program templates as needed for J.S., again based on the behaviors displayed during assessment. In many cases – e.g., J.S.'s "Being Friendly" program – the final program in J.S.'s data notebook significantly differed from the template for that program. (12/11/14 Tr. 120:20-144:8, P116, P23 ("being friendly" template), P124 ("drawing people and objects" template), P125 ("cutting with scissors" template); see also 11/19/14 Tr. 52:10-54:25.) Furthermore, even if a program template was not modified prior to being placed in J.S.'s data notebook, it nonetheless was appropriate for J.S., as it was selected based on

---

<sup>14</sup> The District attempted to raise concerns regarding dates, signatures and definitions that were not germane to the implementation or effectiveness of the program.

behaviors he displayed during the assessment. (Id. 143:14-144:8.) PCDI's programs for J.S. were not generic; they were individualized to his needs. (11/19/14 Tr. 53:23-54:15.)<sup>15</sup>

As with the Being Friendly program, PCDI maintained data concerning J.S.'s skill acquisition programs in his data notebook. Dr. MacDuff explained that this data verified what J.S. did with a skill in the pre-test condition (before teaching), what he did when a teaching condition was introduced, and when he mastered a given skill. Indeed, having this data is what makes PCDI an ABA program. Based on Dr. MacDuff's review of the data in J.S.'s data notebook, it was clear that J.S. made significant and meaningful progress in terms of his skill acquisition during the 2012-13 school year at PCDI. (11/19/14 Tr. 55:1-56:8, P116.)

Dr. MacDuff explained that home support is an important of an ABA program, as it maintains consistency for the learner. As of March 2013, PCDI provided home support to J.S.'s family that consisted of 14 visits at PCDI and 17 home visits, ranging from 50-180 minutes per visit, and totaling approximately 3,000 minutes in home-based support. Dr. MacDuff testified that this level of home-based support was not only appropriate for J.S.; it was necessary in order for J.S. to make meaningful progress. (11/19/14 Tr. 65:22-68:13, P122 at 5.)<sup>16</sup>

Dr. MacDuff described the significant changes he saw in J.S. both data-based and observationally after his first year at PCDI:

Well, clearly based on the data there were far less disruptive behaviors which meant that J. was more available for instruction. I had personal interactions with J. on a regular basis and he seemed happier, he smiled more. He acquired a number of social skills that allowed him to

---

<sup>15</sup> PCDI has assessed learners in this fashion since at least 1975. PCDI did not assess J.S. via a standardized assessment such as an ABLLS or VB-MAPP, though PCDI uses such tools when appropriate. Dr. MacDuff explained standardized assessment was not necessary with J.S., and that PCDI has been assessing learners using its institute-developed methodology for longer than these standardized assessment tools have existed. (11/19/14 Tr. 52:21-53:22.)

<sup>16</sup> The fact that the Being Friendly Program was not implemented in the home as it was in school did not mean that PCDI's home program was not appropriate. (12/11/14 Tr. 190:25-193:16.)

appropriately approach others, ultimately he was able to begin to participate in small groups with his classmates.

(11/19/14 Tr. 68:14-69:1.)

In Dr. MacDuff's expert opinion, J.S. made meaningful progress at PCDI, all of which was documented and supported by the data in his data notebook, with respect to: (i) his ability to sustain attention; (ii) social interactions; (iii) his aggressive and disruptive behavior; and (iv) skill acquisition. Based on all of the foregoing, Dr. MacDuff concluded that: (i) J.S. made meaningful educational progress overall at PCDI; and (ii) PCDI was an appropriate placement for J.S. for the 2012-13 school year. (11/19/14 Tr. 69:2-78:11, P116, P122.)<sup>17</sup>

I FIND that Dr. MacDuff credibly testified that

PCDI was an appropriate placement for J.S. for the 2012-2013 school year and that he made significant and meaningful educational progress and his aggressive and disruptive behaviors were all but completely eliminated.

## **LEGAL DISCUSSION**

### **THE DISTRICT FAILED TO PROVIDE FAPE.**

In New Jersey, public school boards of education are required by the Individuals with Disabilities Education Act (IDEA) and state law to provide classified students with a free appropriate public education (FAPE), including special education services. Those services are provided in accordance with an Individualized Education Program (IEP) designed for that child. 20 U.S.C.A. § 1412; N.J.S.A. 18A:46-8, -9; N.J.A.C. 6A:14-1 et

---

<sup>17</sup> PCDI charged petitioners \$82,515.60 for the September 2012 through June 2013 time period, or approximately \$458 per day. PCDI charged the same amount to the families of all of its learners, which was less than the rate permitted by the New Jersey Department of Education. (12/11/14 Tr. 207:18-213:20, P126 (Documentation Confirming Amounts Petitioners Paid to PCDI September 2012-June 2013).) The parties stipulated that the reimbursement for transportation that is potentially available to J.S.'s family, should the Court find that the District denied FAPE to J.S., is \$1,073. (Id. 214:12-216:22, P119.)

seq. One purpose of the Act, among others, is to ensure that all children with disabilities have available to them a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C.A. § 1400(d)(1)(A).

Another purpose of the Act is to assist states in the provision of FAPE. See 20 U.S.C.A. § 1400(d)(1)(C). Toward this end, a state is eligible for assistance if the state has in effect policies and procedures to ensure that it will meet the requirements of the Act. 20 U.S.C.A. § 1412(a). In New Jersey, such policies and procedures are set forth in the State statute, Special Schools, Classes and Facilities for Handicapped Children, N.J.S.A. 18A:46-1 to -53, and the implementing regulations, Special Education, N.J.A.C. 6A:14-1.1 to -10.2. See Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 34 (1989).

The inquiry is whether the IEP is “reasonably calculated” to enable the child to receive educational benefits. Bd. of Educ. of the Hendrick Hudson Cent. Sch. I Dist. v. Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690, 712 (1982). Although there is no requirement to maximize the potential of a child with a disability, the Third Circuit has made clear that the educational benefit must be “meaningful,” “achieve significant learning,” and confer “more than merely trivial benefit.” T.R. v. Kingwood Tp. Bd. of Educ., 205 F. 3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F. 3d 238 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F. 2d 171, 183-84 (3d Cir. 1988), cert. den. sub. nom. cent Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The Court has stressed that in the inquiry into whether the proposed placement will provide the student with “meaning educational benefit,” the amount of educational benefit necessary to comply with the IDEA, will vary with the potential of each student. I.H. v. State-Operated Sch. Dist. of Newark, 336 F. 3d 260 (3d Cir. 2003); N.E., supra, 172 F.3d at 247. Relying on the phrase “full educational opportunity” contained in the Act and the emphasis on “self-sufficiency” contained in its legislative history, the Third Circuit inferred that Congress must have envisioned that “significant learning” would occur. See Polk, 853 F.2d at 181-82. The Third Circuit also relied upon the use of the term

“meaningful” contained in Rowley, as well as its own interpretation of the benefit the handicapped child was receiving in that case, to reason that the Court in Rowley expected the benefit to be more than “*de minimis*,” noting that the benefit the child was receiving from her educational program was “substantial” and meant a great deal more than a “negligible amount.” Id. at 182.

Nevertheless, the Third Circuit recognized the difficulty of measuring this benefit and concluded that the question of whether the benefit is *de minimis* must be answered in relation to the child’s potential. Id. at 185. As such, the Third Circuit has written that the standard set forth in Polk requires “significant learning” and “meaningful benefit;” that the provision of “more than a trivial educational benefit” does not meet that standard; and that an analysis of “the type and amount of learning” of which a student is capable is required. Ridgewood, 172 F.3d at 247-48. In short, such an approach requires a student-by-student analysis that carefully considers the student’s individual abilities. Id. at 248. In other words, the IEP must confer a meaningful educational benefit in light of a student’s individual needs and potential. See T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000). As part of this analysis, it is critical that the parents are appropriately involved in the development of the IEP:

Entrusting a child’s education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies and in the formulation of the child’s individual educational program.

Rowley, 458 U.S. at 208, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

Accordingly, there is a two-part inquiry when reviewing alleged violations of the IDEA. First, did a school district comply with the procedural requirements of the IDEA? Second, is the IEP “developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” Rowley, 458 U.S. at 206–07, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. As demonstrated below, the District has failed to satisfy either prong of this inquiry.

**The District's Procedural Failures Denied J.S. FAPE.**

Under 20 U.S.C. § 1415(f)(3)(E)(ii):

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

Here, the District's numerous procedural violations plainly impeded J.S.'s right to FAPE, impeded the parents' opportunity to participate in the decision making process, and ultimately caused a substantive deprivation of educational benefits. First, District personnel admit that they subverted the IEP process by (i) having conversations among themselves germane to the IEP process without parental notice or involvement; and (ii) calling C.S. outside of the IEP process to discuss placement. In fact, outside of the IEP process, District personnel told the parents that it was time to place J.S. out of District. However, when the parents wanted to pursue placements other than the few suggested by the District, they were told that those placements would not be considered (again, outside of the IEP process). Later (at trial), the District claimed that out-of-District placement was not actually being sought. District witnesses admitted that they allowed their alleged prior experiences with out of District placements (PCDI) for other students to influence the District's decision to reject PCDI for J.S., even though those alleged prior experiences were not rooted in fact and had nothing to do with J.S.'s individual

needs. Further, though it later claimed that out-of-District placement was not being sought, the District admitted to releasing J.S.'s confidential student records to multiple third parties at out-of-District placements without the parents' knowledge or consent (only after the District's letters in this regard were produced in discovery).

The District admits that it was seeking out of District placement "for ESY" – in itself a telling admission that the District could not provide an appropriate ESY program to J.S. – then stopped that process because litigation commenced. Once again, the District engaged in all of these decisions and actions outside of the IEP process, without proper notice to the parents, and without the knowledge, involvement or consent of the parents.

The list of procedural violations goes on. The District admitted to having multiple "versions" of the IEP allegedly offered to J.S., some of which the parents never saw until litigation commenced. The District's IEPs for J.S. failed to document any behavior interventions to use with him to address his aggressive and disruptive behaviors; District witnesses admitted that this made it impossible to know which strategies to use with J.S. (e.g., in ESY 2011, then Fall 2011). The District produced "data" regarding J.S. during the course of litigation that, if it had been kept during J.S.'s time in the District's program, District witnesses admit should have been shared with his parents at the time. The District even went so far as to change the language relating to placement for J.S. from the draft IEP (P97 at 7) to the final IEP (R33 at 7), again outside the IEP process, without explaining or disclosing the change to the parents.

These numerous admitted violations were not *de minimis*, technical or "one off" "inadequacies." Rather, taken together, they evidence a pervasive, orchestrated effort by the District to: make decisions without involving the parents; disregard parental input; breach confidentiality; go behind the parents' back to try to place J.S. out-of-District so they would not have to deal with his behaviors (but only so long as it was to a placement that suited the District, regardless of appropriateness for J.S.); and generally subvert the IEP process. It is immaterial whether these violations occurred due to gross incompetence on the part of the District or because the District was acting in bad faith to deny parental access to appropriate out of District placement options (motivated

at least in part by an irrational and unjustified dislike for PCDI that had nothing to do with J.S.). The plain fact is that these multiple procedural deficiencies violations impeded J.S.'s right to FAPE, took away the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to J.S., and, ultimately, caused a substantive deprivation of educational benefits for J.S.

**The April 2012 IEP Was Not Reasonably Calculated to Enable J.S. to Receive Meaningful Educational Benefit**

In addition to the numerous procedural violations, the April 2012 IEP (R33) was not reasonably calculated to enable J.S. to receive a meaningful educational benefit. The IEP proposed by the District offered J.S. essentially the same SKIP+ program he had been in for the prior two years, and that program had proven inappropriate for him. The experts in Autism and ABA who were not employed by the District delineated multiple reasons why the program proposed for J.S. by the District in the April 2012 IEP was not appropriate for J.S. and was not reasonably calculated to enable him to achieve meaningful educational progress. While the District witnesses may have claimed to have reached other conclusions, their own testimony, along with the District's documentation, ultimately corroborated these reasons as well.

**The April 2012 IEP Failed to Offer J.S. a 1:1 Program**

First, the April 2012 IEP did not offer J.S. a 1:1 program. Dr. Breslin and Dr. MacDuff firmly concluded that J.S. required a full-time, one-on-one, data-driven, ABA-based program, with a strong behavioral component and an intensive home program. As Dr. Breslin explained, J.S. lacked the prerequisite skills necessary to benefit from the group instruction format provided in SKIP+. (P2 at 27-28.) Dr. MacDuff similarly confirmed that, given J.S.'s high levels of problem behavior and the fact that his behaviors were a function of demands, a "one to one instructional arrangement would be necessary." The District's practice of having a paraprofessional "available" to J.S. simply was not sufficient. These conclusions were based upon: extensive observations of J.S.; test data (including the District's FBA data); parent interview and input; direct review and assessment of J.S.; decades of experience educating, evaluating, training and in some cases living with children with autism; and extensive training of teachers,

aides, college students, graduate students, parents, and group home staff.<sup>18</sup>

**The April 2012 IEP Failed to Offer a Program that Effectively Addressed J.S.'s Aggressive and Disruptive Behaviors.**

The April 2012 IEP proposed that the District would continue to implement the March 2012 Revised BIP.<sup>19</sup> The evidence is plain that the March 2012 Revised BIP was fatally flawed in numerous respects. First, the DRO in the March 2012 Revised BIP allowed J.S. potentially to spend 3 out of every 8 minutes on “J. Time,” when demands were not placed on him and he was not available for learning. Indeed, Dr. Breslin’s observations confirmed that J.S. spent almost 25% of what should have been instructional time on “J. Time;” Ms. Newman’s Demand and On Task Analysis similarly confirmed that J.S. spent more than 28% of his time on “J. Time” or “break.” This was simply far too much valuable instructional time for J.S. to be wasted.

Second, all parties agreed that it was critically important to require J.S. to “return to demand” following a behavioral outburst in order to effectively address J.S.’s behavior. While the March 2012 Revised BIP nominally called for District personnel to return J.S. to demand after engaging in aggressive or disruptive behaviors, the District’s own behaviorists and other witnesses admitted the District’s inability to do so. Moreover, the District’s ESY teachers – Ms. Greenwald and Ms. Hallock – admitted that they did not know how properly to implement the DRO with regard to this “return to demand” issue and, instead, described how they responded in what was precisely the wrong way to address J.S.’s aggressive and disruptive behaviors. Both ESY teachers admitted to modifying the demands placed on J.S. until they gained his compliance, which all of the other witnesses, including the District’s own witnesses, testified was likely to continue, and even further ingrain, the aggressive and disruptive behavior.

---

<sup>18</sup> Joyce MacDuff, also an expert in ABA in Autism, confirmed that J.S. needed a 1:1 program at the time he started at PCDI.

<sup>19</sup> Ms. Newman also suggested that the District implement a “tolerating no” program for J.S. in 2012-13. Her own testimony belies any notion that this was appropriate for J.S. In fact, her concerns that J.S.’s aggressive and disruptive behaviors would “spike” in response to this proposed program are what led her to recommend an out of District placement for J.S.

The March 2012 BIP further was flawed in that the District did not have any plan to (i) extend the DRO interval to allow J.S. more time for learning; or (ii) increase the demands on J.S. As Ms. Newman admitted, this was contrary to ABA “best practices.”

Finally, as Dr. Breslin and Dr. MacDuff concluded, based on their review of the District’s behavioral data, the March 2012 Revised BIP did not effectively reduce J.S.’s aggressive and disruptive behaviors. Ms. Ayres confirmed as much in her testimony as well. Continuing to employ the same flawed BIP which demonstrably had failed J.S. already was an entirely inappropriate and inadequate way to plan to address J.S.’s aggressive and disruptive behaviors in the 2012-13 school year.

The District’s repeated failure appropriately to address J.S.’s significant behavioral needs is critically important. J.S. was a student who had been documented to exhibit severe aggressive and disruptive behavior even prior to entering the District’s program. Once he entered the program, the District documented the extremely high levels of these behaviors. Every single District witness acknowledged being aware of, and concerned about, J.S.’s aggressive and disruptive behaviors. Yet, it took months for the District to begin to conduct an FBA; another month even to discuss the results with the parents; another eight months to attempt to put a plan in place to address the behaviors; and another four months formally to recognize the plan’s ineffectiveness and attempt to revise it in a manner that still was insufficient. The testimony and documents clearly establish that the District’s efforts failed, thereby causing J.S.’s aggressive and disruptive behaviors to become further ingrained. The District had no plan to do anything different to address J.S.’s aggressive and disruptive behaviors, despite clear evidence that there was no meaningful progress in the reduction of those behaviors; in fact, continued implementation of the District’s plan was likely to lead to further behavioral regression. By definition, this constituted a failure to provide FAPE to J.S. Lascari, 116 N.J. at 48 (“Without an adequately drafted IEP, it would be difficult, if not impossible, to measure a child’s progress, a measurement that is necessary to determine changes to be made in the next IEP.”)

### **The April 2012 IEP Failed to Offer J.S. an Appropriate Home Program**

Another fatal flaw in the April 2012 IEP is that it offered J.S. a home program of only 8 hours per year. (R33 at 24.) It is undisputed that an effective home program was and is a critical part of an appropriate program for J.S. As Dr. MacDuff explained, 8 hours per year simply was not enough for a learner with J.S.'s significant needs and deficits. The District's BCBA, Ms. Newman, agreed that 8 hours per year was not a sufficient home program for J.S. (though, curiously, she signed off on the April 2012 IEP recommending that amount of time).

### **The District's ESY Program Was Not Appropriate.**

A District's proposed ESY program may not be predetermined and/or lack individualization. E.W. v. Philadelphia School District, 15180 13-14AS (McElligot, July 25, 2014); see also D.B. v. Gloucester Twp. Sch. Dist., 489 Fed. Appx. 564 (3d Cir. July 19, 2012). In the E.W. case, the court found that "the preponderance of the evidence is that the IEP team's consideration of the student's ESY programming was predetermined to fit within the specific context of the District's ESY programming schedule rather than an individualized consideration of the student's needs with ESY programming designed to meet those needs."

Here, the April 2012 IEP proposed that J.S. once again attend a generic in-District ESY program, similar to the one he attended for ESY 2011. There was no consideration of J.S.'s individual needs. Rather, J.S. was offered the "standard issue" in-District ESY program, which was neither designed to, nor able to, meet his individual needs. Petitioners' witnesses and the District BCBA's unanimously agreed that (i) consistency in programming is important for learners with autism like J.S.; and (ii) the ESY program offered by the District was entirely inconsistent with J.S.'s regular school year program (ESY had a different teacher, building, classroom, classmates, bathroom, paraprofessionals and schedule for J.S.). Every witness on behalf of the parents testified that the in-District ESY programs offered to, and provided to, J.S. were not appropriate for him.

Furthermore, not one witness on behalf of the District credibly testified that the in-District ESY programs were appropriate for J.S. In fact, Ms. Goldstein specifically

testified that there was no connection, let alone consistency, between the District's ESY program and J.S.'s regular school year program. As a result, notwithstanding that she was J.S.'s case manager, she had no way to know whether FAPE was provided to J.S. The undisputed evidence of what transpired during ESY conclusively demonstrates that FAPE was not provided: (i) J.S.'s teachers had no clue how to handle his problem behaviors, did not understand how to implement the March 2012 Revised BIP, and responded in what was precisely the wrong way to address J.S.'s aggressive and disruptive behaviors; and (ii) the District's ESY 2012 behavior data showed that even after 2 years in District, J.S.'s behaviors still were not under control. There is no question that the ESY programs provided and offered by the District were inappropriate for J.S. and, as a result, denied him FAPE.

**J.S. Did Not Make Meaningful Progress in the District's Program.**

Throughout the hearing, the District claimed that that J.S. made progress with respect to skill acquisition in the in-District program. However, the District's witnesses admitted that: (i) J.S.'s alleged skill acquisition was not supported by data; and (ii) J.S.'s progress reports were subjective and not based on data. Indeed, the District's list of skills J.S. purportedly mastered was not consistent with his progress reports (which his teacher testified were more "honest" than the list of mastered skills) and not supported by the data. Simply put, the District's claim of progress with regard to skill acquisition is not supported by the evidence.

Even if, contrary to the evidence, J.S. acquired some skills while in District, he could not possibly have acquired sufficient skills to constitute meaningful progress commensurate with his ability, due to his high levels of aggressive and disruptive behavior that the District did not effectively control. The District's failure adequately to reduce J.S.'s aggressive and disruptive behaviors, which adversely impacted his availability for learning and therefore his ability to learn, is a clear indication that the proposed April 2012 IEP, as well as the prior IEPs, did not offer FAPE to J.S. See, e.g., Pennsbury School District v. R.E. and J.E. obo C.E., No. 2041 C.D. 2011 (Pa. Cmwlth. May 10, 2012) (copy submitted herewith) ("An IEP may be found inappropriate, even though it provides specialized academic support, if it fails to adequately address the student's behavior issues that affect his or her ability to learn") (citing Cumberland

Valley School District v. Lynn T., 725 A.2d 215, 218-19 (Pa. Cmwlth. 1999 (en banc)); Stroudsborg Area School District v. Jared M., 712 A.2d 807, 810 (Pa. Cmwlth. 1998); Big Beaver Falls Area School District, 615 A.2d 910, 913-15 (Pa. Cmwlth. 1992)).

Here, the District's expert BCBA witnesses – Ms. De Luise and Ms. Newman – agreed that the meaningful educational progress analysis necessarily includes whether a student, such as J.S., made progress in terms of his aggressive and disruptive behaviors. The District's witnesses also unanimously agreed that (i) J.S.'s behavior issues adversely affected his ability to learn; and (ii) the statement to the contrary in each of his prior IEPs – R9 (at 4), R13 (at 4), R17 (at 7) – was not accurate. Indeed, in the April 2012 IEP – the very IEP at issue herein – the District conceded that “[J.S.] does demonstrate inappropriate behavior, in or out of class, which adversely affects his ability to learn, as well as that of his classroom peers.” (R33 at 6.) J.S. plainly was not offered, and did not receive, FAPE. Pennsbury, No. 2041 C.D. 2011 (affirming holding that FAPE was not provided because “the behavioral provisions of the IEPs were not adequate,” even though, as here, the District claimed that the student was making progress), Cumberland, 725 A.D.2d at 218 (affirming finding that FAPE was not provided because “the District's IEP was vague, failed to address a means of handling Lynn's emotional and behavioral disorders and contained immeasurable standards”); Stroudsborg, 712 A.D.2d at 810 (affirming finding that FAPE was not provided because student's “behavior continued to worsen”).

\*\*\*\*\*

The threshold issue in this case is whether the District offered J.S. FAPE. The District simply has failed to carry its burden of proving by a fair preponderance of the credible evidence that this issue should be decided in its favor. J.S. did not possess the requisite skills to succeed in the SKIP+ program, a generic special education program that (i) was not specifically geared toward students with autism, (ii) consisted of primarily large and small group instruction (instead of one-to-one instruction J.S. needed), (iii) offered an ESY program that was less intensive and essentially unrelated to the regular school year program, (iv) offered no comprehensive home component, (v) failed to implement effective means to address his aggressive and disruptive behavior, and (vi) resulted in no demonstrable, documented progress. An appropriate program for J.S. was one that succeeded in reducing his aggressive and disruptive behaviors,

making him appropriately available for learning, while at the same time instructing him in such a way that he would be able to acquire skills. It is undisputed that none of the program components outlined above as essential for J.S. were offered by the District. At bottom, the District failed to develop a program designed to meet J.S.'s individual needs, as required by law, or even attempt to modify its program in an effort to meet his individual needs. Instead, the District tried to fit J.S. into its generic special education program, rather than tailoring a program to J.S.'s significant individual needs. Accordingly, in view of all of the foregoing, the conclusion that the District did not offer FAPE to J.S. is inescapable.

### **PETITIONERS ARE ENTITLED TO COMPENSATORY EDUCATION**

The law is plain that where, as here, a school district has denied a student FAPE under the terms of the IDEA, compensatory education is an equitable remedy available to the student. The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. See, e.g., Ridgewood; MC v. Central Regional School District, 81 F.3d 389, 21 IDELR 389. The Third Circuit Court of Appeals has held that a student who is denied FAPE "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." M.C., 81 F.3d at 397.

Here, there has been no dispute that J.S. was denied FAPE for ESY programming for the entire time he was enrolled in the District. Multiple witnesses (Dr. Breslin, Dr. MacDuff, C.S.) testified that the inconsistency alone of the District's ESY program rendered it wholly inappropriate for J.S. The only witness who testified on behalf of the District regarding ESY 2011 was Melissa Greenwald, J.S.'s teacher for ESY 2011. Ms. Greenwald was not qualified as an expert. She is not a BCBA and did not evaluate J.S. during ESY 2011. Furthermore, her testimony confirmed that there was no continuity between the ESY program and J.S.'s regular school year program the year before or the year after it; J.S. exhibited aggressive and disruptive behaviors throughout ESY, yet there were no strategies in place to address these and there was

no data taken regarding them; there was no BCBA involvement in ESY. Similarly, the only witness who testified on behalf of the District regarding ESY 2012 was Sarah Hallock, J.S.'s teacher for ESY 2012. She was not qualified to administer the March 2012 Revised BIP and she admittedly responded in precisely the wrong way to J.S.'s aggressive and disruptive behaviors.

Based upon the evidence in the case, it is clear that J.S. was not provided with appropriate ESY programs for 2011 or 2012. Nevertheless, the claim for compensatory education for the 2012 ESY program must be denied as J.S. made significant and meaningful educational progress while attending PCDI, which negates the need for compensatory education for the 2012 ESY.

While the parents argued that J.S. was not provided with an appropriate program during the 2011-11 and 2011-12 regular school years and that the District did not provide an appropriate home component to J.S.'s program, I cannot find that he was denied FAPE for those school years. I found that the District failed to effectively address and reduce J.S.'s aggressive and disruptive behaviors, as confirmed, again, by their BCBA, as well as by multiple witnesses for Petitioners. And, as confirmed by the documents and testimony, J.S. did not make meaningful progress in the District's SKIP+ program either in terms of his aggressive and disruptive behaviors. Nevertheless, Petitioners are not entitled to compensatory education due to the fact that J.S. has done so well at PCDI there is no need for compensatory education.

### **PCDI WAS AN APPROPRIATE PLACEMENT FOR J.S.**

It is well established that the appropriateness of an IEP is not determined by a comparison of the private placement and the program proposed by a district. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Rather, the pertinent inquiry is whether the District's IEP offered FAPE – i.e., the opportunity for meaningful educational benefit within the least-restrictive environment. Parents who withdraw their child from public school and unilaterally put him in a private placement while challenging the IEP are entitled to reimbursement if the Administrative Law Judge finds that the school district's proposed IEP was inappropriate and that the parents'

unilateral placement was appropriate. Florence City Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 365, 126 L. Ed. 2d 284, 292 (1993).

Thus, because the District in this case did not fulfill its obligation to offer J.S. FAPE, the next consideration is the appropriateness of the program provided to J.S. at PCDI. PCDI is a New Jersey State-approved non-profit school for the education of children with autism. All of Petitioners' witnesses, including two Doctoral level Board Certified Behavior Analysts, testified that PCDI's program was (and is) appropriate for J.S. and that he is made meaningful educational progress in that program. This testimony was grounded in explanations of extensive scientific data supporting that conclusion. The only "evidence" offered by the District regarding this issue was (i) the testimony of a teacher who admitted she would have to defer to BCBAs to interpret J.S.'s progress in PCDI's program, and (ii) a "report" signed by four different people, but for which the teacher in fact primarily was responsible, claiming some purported criticisms of the PCDI program. This "report" was based on virtually no analysis, fails to qualify as an expert report, and should be given little or no weight at all. Significantly, in both Ms. Ayres's testimony and in its so-called "report" criticizing PCDI, the District failed to dispute PCDI's extensive scientific data confirming J.S.'s progress at PCDI. Put differently, the District provided no evidence whatsoever that its "criticisms" of PCDI, even if accepted as accurate, would be tantamount to a conclusion that the program provided to J.S. by PCDI was inappropriate. Accordingly, the undisputed evidence supports the fact that PCDI's program was appropriate for J.S., and the parents are entitled to reimbursement for their unilateral placement of J.S. at PCDI.

### **CONCLUSION AND ORDER**

Based upon all of the foregoing, I **CONCLUDE** that the District failed to meet its burden of proof by a preponderance of the credible evidence that it offered J.S. a free appropriate public education. The IEP at issue was not reasonably calculated to confer significant learning and meaningful benefit in light of J.S.'s needs and potential. J.S.'s parents, on proper notice to The District, provided J.S. with an appropriate unilateral placement at PCDI, where he has achieved, and continues to achieve, meaningful educational progress. As a result, Petitioners are granted reimbursement for their

unilateral placement of J.S. at PCDI for the 2012-13 school year, including the Extended School Years, plus transportation costs.

Furthermore, I **CONCLUDE** that while the District's 2012-2013 School Year IEP failed to provide J.S. with a free and appropriate public I cannot **CONCLUDE** that the District failed to provide FAPE for the educational programming prior to 2012-2013 School Year combined with the fact that J.S. has done so well at PCDI there is no need for compensatory education.

As a result, Petitioners claim for compensatory education is hereby denied.

It is **ORDERED** that Petitioners are granted reimbursement for the all of the tuition and associated costs for PCDI for the unilateral placement of J.S. at PCDI for the 2012-13 school year plus transportation costs.

It is also **ORDERED** that Petitioners' claim for compensatory education is hereby denied.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2015). 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.



December 21, 2015

DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency:

December 22, 2015 (emailed)

Date Sent to Parties:

December 22, 2015 (emailed)

/mel

**LIST OF WITNESSES:**

**For petitioner:**

C.S. (mother of J.S.)  
Gregory MacDuff  
Anita Breslin  
Joyce MacDuff

**For respondent:**

Stephanie DeLuise  
Michele Newman  
Rebecca Goldstein,  
Melissa Greenwald  
Lori Ayres  
Sarah Hallock

**LIST OF EXHIBITS:**

**For petitioner:**

- P-1 Photograph of J.S.
- P-2 June 18, 2012 Assessment Report regarding J.S., Anita Breslin, Psy.D., BCBA-D
- P-3 Supplemental Report regarding J.S., Anita Breslin, Psy.D. BCBA-D
- P-4 Curriculum Vita, Anita Breslin, Psy.D., BCBA-D
- P-6 June 22, 2010 Preschool Questionnaire
- P-7 May 25, 2010 Children's Specialized Hospital Department Evaluation of J.S. (Drs. Skurka and Bronaugh)
- P-8 August 31, 2010 District Notice of Meeting with CST

- P-21 November 19, 2010 Occupational Therapy Progress Report from M. Friedman
- P-29 Letter from the District Forwarding 2<sup>nd</sup> marking Period Progress Report for 2010-2011 School Year dated February 2011
- P-31 Letter from C. Curley Forwarding 3<sup>rd</sup> Marking Period Progress Report for 2010-2011 School Year dated April 2011
- P-46 Letter from C. Curley Forwarding 2<sup>nd</sup> Marking Period Progress Report for 2011-2012 School Year dated February 2012
- P-47 String of February 2012 E-mails between C.S. and Child Study Team members
- P-49 March 5, 2012 letter from parents to PCDI
- P-53 Letter from C. Curley Forwarding Third Marking Progress Report for 2011-2012 School Year dated April 2012
- P-54 April 24, 2012 Letter from R. Goldstein to C.S.
- P-55 April 30, 2012 Letter from Academy Learning Center to R. Goldstein
- P-56 May 1, 2012 E-mail from R. Goldstein to C.S.
- P-57 May 1, 2012 E-Mail from R. Goldstein to C.S. enclosing letter from Academy Learning Center
- P-58 Draft IEP and Related Materials Distributed to parents in Advance of April 27, 2012 IEP Meeting
- P-66 August 14, 2012 Letter from C.s. to District regarding unilateral placement for J.S.
- P-67 November 9, 2012 PCDI Progress Report for J.S.
- P-70 District Data regarding J.S.
- P-71 C.S. Notes regarding visit to Douglass
- P-75 CV of Gregory S. MacDuff
- P-76 CV of Joyce MacDuff
- P-80 PCDI Notebook/Data regarding J.S.
- P-82 Audio recording and transcript of April 27, 2012 IEP meeting
- P-83 February 19, 2013 Progress Report for J.S. from PCDI
- P-84 October 2, 2012 PCDI incident Report
- P-85 Communication Logs
- P-86 Cancelled Checks and Proof of Payment from petitioner to PCDI

- P-87 PCDI contract
- P-88 Notes from R. Goldstein
- P-89 March 19, 2013 Expert Report Form for J.S.
- P-90 Caregiver-Teacher Report Form for J.S.
- P-98 Behavioral Specialist Job Description
- P-100 April 27, 2012 IEP from District's Student Record
- P-106 PCDI Daily Schedules for J.S.
- P-107 Greenwald Probe Data ESY 2011
- P-108 Hallack Behavioral Dates ESY 2012
- P-115 April 19, 2012 Doctor Mars updated Evaluation of J.S.
- P-116 PCDI Data Notebook for J.S.
- P-118 J.S. PCDI Attendance Record 2012-2013
- P-119 Google Maps printout showing driving distance from J.S. residence to PCDI
- P-120 PCDI July 3, 2013 Progress Report for J.S.
- P-121 PCDI Home Programming Log for 2012-2013 School year for J.S.

**For respondent:**

- R-1 Hopewell Valley Regional School District Programs for Preschool Children with Special Needs
- R-2 Preschool Questionnaire for J.S. completed by C.S.
- R-3 Structured Observation Report – Evaluation Plan for J.S. dated September 14, 2010
- R-4 Speech and Language Evaluation dated September 21, 2010 prepared by Tammy Croak, MS, CCC-SLP
- R-5 Confidential Social History dated September 23, 2010 prepared by Diane Dempsey, LCSW
- R-6 Psycho-Educational Evaluation dated September 24, 2010 prepared by Beth Hoffman, Ph.D., NCSP and Rebecca Goldstein, M.A., LDTC
- R-7 Occupational Therapy Evaluation dated September 24, 2010 prepared by Michelle Davis-Korngut, MS, OTR/L

- R-8 Parental Notice of Eligibility dated October 19, 2010
- R-9 Individualized Education Program (IEP) dated October 19, 2010 for 2010-2011 school year
- R-10 Home Component Program brochure from Mercer County Special Services School District
- R-11 Home Component: Team Referral Form
- R-12 Evaluation Plan dated January 5, 2011
- R-13 IEP dated January 5, 2011
- R-14 Functional Assessment Interview Form dated January 17, 2011 completed by C.S.
- R-15 Functional Behavior Assessment dated February 25, 2011 prepared by Stephanie Nieves, Ed.M., LDT-C, BCBA
- R-16 Meeting Attendance Record dated March 22, 2011/3/22/11
- R-17 IEP dated June 3, 2011 for 2011-2012 school year
- R-18 Progress Report for 2010-2011 school year
- R-19 SKIP+ Probe Data for J.S. for the 2010-2011 school year
- R-20 SKIP+ Bathroom Data for J.S. - 2010-2011 school year
- R-21 SKIP+ Behavioral Data for J.S. - 2010-2011 school year
- R-22 SKIP+ PECS Data Sheets for J.S. – 2010-21011 school year
- R-23 Note from C.S., K.S. and J.S. to Mrs. V. (end of 2010-2011 school year)
- R-24 ESY Progress Reports 2011
- R-25 Meeting Attendance Record dated October 13, 2011
- R-26 Meeting Attendance Record dated November 8, 2011
- R-27 Behavior Intervention Plan dated November 14, 2011
- R-28 Progress Report for J.S. – November 2011
- R-29 Unsigned Letters from Case Manager to Eden (March 8, 2012) and Douglass Developmental Disabilities Center (March 30, 2012)
- R-30 Revision to Behavior Intervention Plan for J.S. dated March 12, 2012 with Treatment Analysis Protocol
- R-31 Demand and On-Task Analysis: Frequency and Rate of Demands during SKIP+ Group Activities dated May 9, 2012 prepared by Michele Newman
- R-32 Early Echoic Skills Assessment completed of J.S. in the 2011-2012 school year

- R-33 IEP dated April 27, 2012 for 2012-2013 school year
- R-34 Priority Components for J.S.'s placement
- R-35 Progress Report for J.S. from 2011-2012 school year
- R-36 SKIP+ Probe Data for J.S. – 2011-2012 school year
- R-37 Instructional Programs for J.S. and graphs
- R-38 ESY Progress Reports 2012
- R-39 Behavioral Graphs for J.S.
- R-41 Resume of Michele L. Newman
- R-42 Resume of Stephanie M. Nieves, Ed.M., LDT-C, BCBA
- R-43 Resume of Rebecca Goldstein, M.Ed., LDT-C
- R-44 Resume of Lori Ayres
- R-45 Weekly schedule of SKIP+ program for 2011-2012 and 2012-2013 school years
- R-46 Neurodevelopmental Evaluation dated September 23, 2010 prepared by Audrey Mars, M.D.
- R-47 District's response to Dr. Breslin's evaluation
- R-48 Handwritten notes of Ms. Goldstein
- R-49 Letter to Petitioners' counsel dated July 6, 2012
- R-50 Video of J.S. at recess while attending school in-district
- R-51 Speech Probe Data January – May 2012
- R-52 Resume of Sarah Hallock
- R-53 Resume of Melissa Greenwald
- R-54 Report from Hopewell Valley regarding PCDI placement for J.S.
- R-56 Notes from visit to PCDI prepared by Lori Ayres
- R-59 Documentation from file of Anita Breslin, BCBA-D