



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

**FINAL DECISION**

**(CONSOLIDATED)**

OAL DKT. NOS. EDS 15882-19

and EDS 15886-19

AGENCY DKT. NOS. 2020-30771

and 2020-30814

**M.G. ON BEHALF OF E.K.,**

Petitioner,

v.

**ELIZABETH CITY BOARD OF EDUCATION,**

Respondent.

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**ELIZABETH CITY BOARD OF EDUCATION,**

Petitioner,

v.

**M.G. ON BEHALF OF E.K,**

Respondent.

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**Philip Taylor**, Esq., for M.G. on behalf of E.K. (P. Taylor Legal, attorneys)

**Richard Flaum**, Esq., for Elizabeth City Board of Education (DiFrancesco, Kunzman,  
Davis, Lehrer & Flaum, attorneys)

Record Closed: April 22, 2021

Decided: June 7, 2021

BEFORE **SUSANA E. GUERRERO**, ALJ:

### **STATEMENT OF THE CASE**

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, M.G. requested a due process hearing on behalf of her child, E.K., seeking a determination that E.K. is eligible for special education and related services, and that the Elizabeth City Board of Education (the Board, or the District) failed to offer E.K. FAPE for the 2017–2018, 2018–2019 and 2019–2020 school years. The parent on behalf of E.K. seeks placement in an out-of-district therapeutic program, compensatory education, and other related relief. The District asserts that it has offered E.K. a FAPE in the least restrictive environment, and that M.G.’s requested relief should be denied. The District also seeks a determination that its evaluations of E.K. were appropriate, and that the independent evaluations requested by the parent are unwarranted.

### **PROCEDURAL HISTORY**

The parent, M.G., filed on behalf of E.K. a request for a due process hearing on or around October 10, 2019, which was transmitted to the Office of Administrative Law (OAL), where it was filed on November 8, 2019 under OAL Dkt. No. EDS 15882-19. The Board then filed a due process petition on or around October 22, 2019, seeking an order denying a parental request for independent educational evaluations. The Board’s petition was transmitted to the OAL, where it was filed on November 8, 2019 under OAL Dkt. No. EDS 15886-19. The Board moved to consolidate both petitions. The parent filed an opposition to the motion to consolidate, as well as a cross-motion for an independent evaluation, which the Board then opposed. By order dated January 22, 2020, I ordered the consolidation of OAL Dkt. Nos. EDS 15882-19 and EDS 15886-19; and denied the parent’s cross-motion.

A hearing was initially scheduled for April 3 and 21, 2020 but adjourned due to the closure of OAL offices in mid-March 2020 in response to the COVID-19 emergency. The hearing was rescheduled for July 6, 7 and 28, 2020, but adjourned as the parties did not

want to proceed via Zoom. Ultimately a hearing took place over the course of four days: October 9, 16, 24 and December 7, 2020. The hearing was held via Zoom as in-person hearings were still not being conducted at the OAL. The parties filed post-hearing briefs on April 22, 2021, at which time the record closed.

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

Based upon a review of the documentary evidence and the testimony presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following pertinent **FACTS**:

#### General Background Facts

At the time of the hearing, E.K.<sup>1</sup> was a sixteen-year-old female who has identified as a male since 2018. He is enrolled in the District's Thomas Jefferson Arts Academy (Thomas Jefferson). E.K. has always been a very bright student, and was enrolled in the District's school for gifted and talented students from the second through the eighth grade. E.K. has never received special education and related services.

In or around 2016, the parent started to see a change in E.K.'s behavior. In early 2016, the parents took E.K. for an emergency psychiatric evaluation for depression, and he was discharged that same day, and referred to DCP&P when E.K. reported that his father hits him. M.G. asserted that this was fabricated by E.K., and the matter was not pursued by DCP&P.

E.K. underwent a psychological evaluation in April 2016 that was shared with the District. At the time, E.K. was in the sixth grade and M.G. reported that he was refusing to do homework and, according to the report, had missed school about five times between December 2015 and January 2016 [that school year E.K. was absent a total of approximately six days]. The report indicates that E.K.'s "overall behavioral presentation is most consistent with an Autism Spectrum Disorder, specifically Social (Pragmatic)

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<sup>1</sup> E.K. was also referred to as A.K. at the hearing. E.K. is referred to using the preferred pronoun he/him to the extent possible.

Communication Disorder due to her impaired social pragmatic, limited eye contact, fixed interests, and poor social reciprocity. She also appears to meet diagnostic criteria for a clinically significant comorbid anxiety disorder.” The Diagnostic Impressions were: Social (Pragmatic) Communication Disorder; Other mixed anxiety disorders; Obsessive Compulsive Disorder.” E.K. started therapy in 2016 to address his behaviors and depression. M.G. described E.K.’s behaviors as aggressive, disrespectful and manipulative. At school, however, E.K. performed at least at grade level, and the behaviors described by M.G. were not observed at school.

E.K. had some school absences in late 2016 and early 2017, seventh grade. That school year, E.K. received therapy and counseling through the Care Management Organization (CMO), Families and Communities Together (FACT), which continued through approximately October 2019. M.G. called the New Jersey Department of Children and Families Mobile Response unit in January 2017 at the suggestion of the FACT worker in an attempt to get E.K. to go to school.<sup>2</sup> E.K. was taken to Trinitas Hospital for an observation, and he received home instruction in early 2017 for approximately two weeks. M.G. informed the District in January 2017 that E.K. had been diagnosed with Autism Spectrum Disorder (ASD). In April 2017, E.K. was also diagnosed with Generalized Anxiety Disorder and Obsessive Compulsive Disorder (OCD). While at school, however, E.K. did not exhibit the behaviors his parents reported witnessing while E.K. was at home. Despite having approximately twenty-eight absences that school year, E.K. performed well academically and was promoted to the eighth grade.

#### 2017–2018 School Year

E.K. was in the eighth grade during the 2017–2018 school year.

Nicole Webb (Webb) testified on behalf of the District concerning this school year. She was E.K.’s fourth-grade science teacher and E.K.’s school counselor during that academic year. Webb testified credibly that E.K. performed at a high level, was a well-rounded student, got along with peers, worked well in groups and performed well on

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<sup>2</sup> FACT (Families and Communities Together) was described as a counseling program offered outside of the school setting to assist with students experiencing behavioral or substance issues.

assessments. At some point in eighth grade, E.K. stopped going to school, and Webb initiated an intervention referral process to address his absences. This involved meeting with the parents, obtaining doctors' records, and ultimately creating a 504 Plan.

In approximately December 2017, E.K. started to become chronically absent from school, with a doctor's note. (J-50.) During this time, Webb communicated often with M.G. and drafted a 504 Plan. Webb testified credibly that E.K.'s issue at that time was more his anxiety and his workload, and that this was accommodated through the 504 Plan by providing extra time to complete work, short breaks as needed and preferential seating. These accommodations also address the recommendations of the 2016 Psychological Evaluation provided by the parents to the District.

In February 2018, after E.K. had been absent about twenty days, the parent requested a Child Study Team (CST) evaluation. On February 20, 2018, an Initial Identification and Evaluation Planning meeting took place to decide whether an evaluation was warranted to determine if E.K. has a disability which adversely affects his educational performance, and is in need of special education and related services. E.K. had been hospitalized the week before with what appeared to be a seizure.

At or shortly following the February 20, 2018 meeting, the parent also requested home instruction, and provided the District with a note from a physician requesting home instruction due to E.K.'s anxiety, depression, and inability to attend school. (J-4.) In early March 2018, the parent was informed that despite E.K.'s doctor's request for home instruction, the District's Chief Medical Inspector concluded that E.K.'s diagnosis of Autism-Generalized, Anxiety Disorder and Seasonal Affective Disorder did not justify eligibility for home instruction; and that E.K. should receive outpatient treatment and attend school. In mid-March 2018, E.K.'s physician again requested home instruction due to "the severity of her anxiety."

The parents were also informed that in response to the parent's request for an IEP meeting, CST testing was not advisable at that time. The District concluded that a CST evaluation was not warranted to determine if E.K. had a disability because he was not suspected of having a disability which adversely affected his educational performance.

In reaching this conclusion, the District considered E.K.'s school records, progress, teacher and parent feedback, guidance counselor input and CMO input from FACT. The District recognized at the time that E.K. had a recent diagnosis of ASD and Anxiety Disorder, but that despite these diagnoses, his academic abilities were at or above grade level, which indicated that there was no noted educational impact at the time. It was noted that E.K. displayed school avoidance behaviors at the time because he was reportedly overwhelmed by the volume of work at school. The District advised continuing with the 504 Plan and "possible home instruction, as deemed appropriate by the Home Instruction department." (J-3.)

A second evaluation meeting was held with the parent and District on April 16, 2018. The CST again denied the request to conduct an evaluation, and additional accommodations to the 504 Plan were proposed. The 504 Plan recognizes that E.K. has a diagnosis of ASD and Anxiety Disorder, and that E.K. needs more time to complete tasks. (J-8.) The 504 Plan provides for several accommodations, including: additional time to complete tasks/long-term projects with adjusted due dates; allow extra time for task completion; additional time to complete classroom tests/quizzes; provide short breaks when refocusing is needed; preferential seating; modify the number of assignments; schedule student with breaks in between core academic classes. Testing accommodations were also provided. The parents consented to the 504 Plan.

In April 2018, the District notes that despite E.K.'s numerous medical conditions and diagnoses of ASD, anxiety disorder and OCD, his academic and cognitive abilities were average and above. The family presented the District with reports indicating that E.K.'s cognitive functioning was in the superior range in her verbal reasoning ability, average range in nonverbal composite standard score, and that his grades are "generally in the above satisfactory, or good range, even with her inconsistent attendance." (J-9.)

Webb testified that E.K. had no behavioral issues in school that year, and that the only issue was attendance. The District conducted a Functional Behavioral Assessment (FBA) of E.K. in April 2018, and E.K. was noted to appear anxious in some of his classes. E.K. consistently attended school in April 2018, but was absent a great deal again in May and June. The FBA report dated April 23, 2018 notes that he missed forty-six days of

school up to that date, and it contains several recommended behavioral interventions, including: student counseling with social worker or school counselor to monitor attendance, grades and stress levels; that the work load be broken down into small parts to help E.K. not become so overwhelmed by the quantity of work after missing several days; one-to-one instruction to reinforce concepts and remediate areas missed; allow E.K. to put her head down or take a quick break during class when E.K. appears stressed; breaks in between core academic classes; and extra time for task completion, projects and tests/quizzes. (R-10.)

Being involved in the theater program at school was a motivator for E.K. to go to school, and once it was closer to the play, his attendance improved. He was very interested in, and involved in, the performing arts and theater in school. When he returned to school, E.K. had some counseling sessions at the school, and Webb met with him about ten times that spring. With the 504 accommodations in place, E.K.'s attendance and performance in school improved in the spring, but then worsened again near the end of the school year.

A third Identification and Evaluation Planning Meeting was held on June 11, 2018, at the parent's request. It was noted that E.K. often refused to go to school, but that his academic skills, cognitive skills and communication abilities were at least average. His teachers reported that he was fully capable of understanding and doing the schoolwork, but that he was anxious and overwhelmed. The teachers also report that E.K. came to school when there were events that he enjoys, such as plays and art shows, and that at those times his attendance was consistent. E.K.'s grades were poor that year in subjects where his assignments were not being done or submitted in a timely manner. The District again denied CST testing, stating that E.K.'s academic abilities are very strong, and that his difficulties are emotional in nature for which he would benefit from a modified workload and some modifications to the April 504 Plan. Several suggested supports were noted in the letter denying CST testing, including: (1) continue 504 Plan to address academic work completion and attendance (modify length and number of assignments; use incentives to motivate E.K. to attend school regularly; in-school counseling with guidance counselor/social worker; use of BIP to support E.K.'s efforts to attend school; have a trusted adult to check in on him daily; use [www.khanacademy.com](http://www.khanacademy.com) for math

assignments; encourage application/attendance to Thomas Jefferson; connect E.K. with YES (Youth Enrichment Services) in high school); (2) use plays, music performances and others to motivate him to attend school regularly and to complete work; (3) suggest consultation with medical professionals and FACT to determine best way to address E.K.'s social-emotional needs. (J-12.)

E.K. had sixty-nine absences that school year, fifty-eight of which were with doctors' notes. He was promoted to the ninth grade.

The District has several high schools, and the students apply to the high schools of their choice. E.K. had express interest in art and theater, and his first choice for high school was Thomas Jefferson Arts Academy (Thomas Jefferson), which is known for its performing arts program.

#### 2018–2019 School Year

During the 2018–2019 school year, E.K. was enrolled as a ninth-grader at Thomas Jefferson. The ninth graders are housed in the building's Annex, separate from the other high school students.

A 504 Plan was in place at the start of the school year. It had been modified to include the following additional accommodations: "ability to meet with school counselor, YES program and/or nurse as needed; ability to leave class up to four minutes prior to bell ringing to avoid crowded hallways; ability to use elevator as needed; physical education self paced with modified exercise; student will receive 2 hours per week of home instruction/mathematics support." (J-8.)

Ashley Rully (Rully), who testified on behalf of respondent, was E.K.'s school counselor for the ninth grade. She was also a member of the school's Guidance Team Attendance Task Force (along with the principal and other counselors) that met about weekly to monitor students attendance and identify and address any attendance issues. E.K. was one of the students they discussed starting in late September 2018 due to his poor attendance early in the school year. He attended Thomas Jefferson for about six



days at the start of the school year, and then essentially did not return until late October, and then was absent again starting in early November for several weeks.

Rully had multiple communications with M.G. concerning E.K. and his attendance. Rully testified credibly concerning the supports that were available to E.K. at the school, such as the YES program, in-house counselors, accommodations set forth in the 504 Plan, and she informed M.G. about utilizing mobile response; however, M.G. stated that she tried that in the past and it did not work. M.G. reported that she and E.K.'s father made many efforts to try to get E.K. to go to school but that she refused. During this time, E.K. also began to exhibit signs of gender dysphoria. She no longer wanted to be referred to as female and wanted to be referred to by a male name, A.K.

Rully explained that the YES program, which is housed at Thomas Jefferson, consists of licensed social workers from Trinitas Hospital who provide students with counselors for both individual and group sessions at the school. Rully testified that the YES program was included in E.K.'s 504 plan in part because he was transitioning from female to male, and that support groups for LGBTQ-type issues are offered through YES.

On or around September 27, 2018, M.G. requested home instruction for E.K. because he refused to go to school, and she provided a note from E.K.'s physician indicating that the medical reason for the request was that E.K. "is unable to attend school due to the severity of her anxiety disorder and heightened by her autism and OCD." (J-13.) The District's physician, however, determined that E.K.'s medical condition does not justify eligibility for home instruction, and the request for home instruction was denied in early October 2018. (J-15.)

On October 24, 2018, when E.K. again refused to go to school and the parent contacted Mobile Response, Mobile Response made a referral for admission to Trinitas, where E.K. spent one week under observation.

While E.K. was still in the hospital, the parent met with the CST for another Identification and Evaluation Planning meeting on October 29, 2018. Anthony Del Polito (Del Polito), case manager serving on the CST, testified that they did not accept the case

because at the time they did not see enough evidence for referral to CST since E.K. had a very thorough 504 Plan at the time and the student just had to be in school to benefit from it. At the time, the parent was requesting a therapeutic placement, but the District considered it premature as there were many services in place at the school that needed to be utilized first, including full implementation of the 504 Plan, the YES program, and in-home FACT services. Del Polito offered to meet regularly and as needed with E.K. when he came to school. At the meeting, M.G. also reported that E.K. did not have a healthy sleep habit, and that she was doing all she could to ensure E.K. went to school but she was unsuccessful. Del Polito testified that when E.K. did present to school and apply himself, he excelled in his classes.

E.K.'s 504 Plan was amended again on October 29, 2019 after the parent again expressed concerns with E.K.'s school attendance. The October 504 Plan provides for several testing accommodations, and provides the following general accommodations and supports:

- Additional time to complete tasks/long-term projects with adjusted due dates;
- Allow extra time for task completion;
- Additional time to complete classroom tests/quizzes;
- Provide short breaks when refocusing is needed;
- Preferential seating;
- Modify the number of assignments;
- Schedule student with breaks in between core academic classes;
- Ability to meet with school counselor, YES program and/or nurse as needed;
- Ability to leave class up to four minutes prior to bell ringing to avoid crowded hallways;
- Ability to use elevator as needed;
- Physical education self-paced with modified exercise;
- Adjust attendance policy, if needed.

On or around November 30, 2018, the District filed truancy charges against M.G. for E.K.'s failure to attend school. Rully had discussed this, and the attendance issues, with M.G. prior to this filing. Rully and M.G. also involved E.K.'s FACT worker in the matter. At that time, E.K. had been absent thirty-four out of forty-four days. Rully testified that truancy is filed when there is a refusal to go to school or when a parent is unable to

get the child to school, and that the school's protocol required filing truancy charges here. Rully agreed that here, M.G. tried to get E.K. to school, and had tried mobile response, but was unsuccessful. She testified that she had hoped that the judge handling the truancy matter would be able to provide additional resources to assist M.G. The truancy filing, however, was unsuccessful in returning E.K. to school.

Later that school year, M.G. again requested home instruction due to E.K.'s refusal to attend school, and she submitted to the District a form from E.K.'s physician indicating that home instruction was warranted due to her severe depression, anxiety and inability to function in a class setting. (J-22.)

On December 19, 2018, the District convened another Identification and Evaluation Planning Meeting. (J-21.) M.G. was accompanied by E.K.'s new FACT worker, and an advocate, Elizabeth Mulholland (Mulholland). The parent and advocate expressed that despite the 504 Plan, E.K. was not attending school and failed the first semester due to absences and no home schooling. Mulholland testified that E.K. only attended school nine days in the first quarter of freshman year and that the 504 Plan was clearly not working.

At this meeting, the District agreed that a CST evaluation was warranted. The noted suspected areas of disability were: Autistic, and Emotionally Disturbed. The District agreed to conduct the following assessments: Educational Evaluation; Psychological Evaluation; Social History; Speech/Language Evaluation. M.G. consented to these evaluations. (J-25.) The District also agreed to provide E.K. with home instruction pending the results of the CST testing. Specifically, it was decided that E.K. would receive home instruction "while on a modified school schedule pending CST evaluation." (J-26.)

Rully worked with M.G. to create a partial school schedule for E.K. Rully testified that they all tried to think "outside the box and do whatever they could to try to get E.K. back to school successfully." They discussed, for example, having E.K. go to school later in the day since M.G. reported that E.K. was often up all night and had difficulty waking up in the morning. Rully and the parents had multiple conversations in December and

January regarding the partial day schedule, and Rully proposed a modified schedule where E.K. would not attend school for the first two periods. Pursuant to this modified schedule, E.K. was to attend school beginning January 10, 2019, for periods three and four, but she did not appear to school. Rully then contacted the FACT worker for assistance and to discuss the modified schedule, and she also spoke with the home instructor. Rully made many efforts to speak with M.G. to try to get E.K. to school through the end of March. E.K. did not attend school in accordance with any modified schedule.

Despite being provided home instruction, E.K. often refused to leave his room to meet with the home instructor. E.K. attended home instruction for the first several weeks starting in January 2019, but then stopped in late February. On March 13, 2019, the home instructor assigned to E.K. informed Del Polito that E.K. had not participated in home instruction since February 22, 2019. As of about March 15, 2019, E.K. had been absent for over fifty days.

### Assessments

An Educational Assessment was conducted on January 11, 2019. This consisted of the administration of the Woodcock-Johnson IV Test (WJ-IV) of Oral Language; the WJ-IV Test of Achievement Form B and Extended; as well as student interview and behavioral observations. His cluster scores on the WJ-IV were noted to fall within the average to very superior range. His reading, writing and mathematical skills were noted to be standard for his age and academic rank. (J-29.)

A Psychological Evaluation was conducted on January 14, 2019 by a school psychologist. The evaluation consisted of administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), student interview and review of records. She was noted to have a Full-scale IQ (FSIQ) of 109 (Average range when compared to other children). It was noted that E.K.'s WISC-V profile indicates that he is cognitively functioning within the Average range of intelligence. It was noted that E.K. would continue to benefit from his Section 504 Plan being reviewed and/or revised as needed. (J-32.)

A Speech and Language Evaluation was conducted on February 8, 2019, after being rescheduled at least once pursuant to the parent's request. The CELF-5 and ROWPVT-4 were administered as part of this assessment, and the speech and language specialist who conducted the evaluation recommended that speech and language services were not recommended due to E.K.'s overall performance on the CELF-5 and ROWPVT-4. (J-30.)

On February 15, 2019, an Initial Social Assessment was conducted by Anthony Del Polito. (J-31.) This had been scheduled earlier but rescheduled to accommodate E.K. since the parent reported that E.K. did not want to go in to school for the assessment. As part of his assessment, Del Polito interviewed the parent, student and teachers, and reviewed E.K.'s educational history. He noted that E.K. had a history of attendance issues dating back to the sixth grade. He described E.K. as very bright. Del Polito testified that he felt E.K. needed emotional and behavioral health supports, and that these would be provided through services offered at the school, such as the YES program for intensive counseling. He testified that the concerns he observed with E.K. did not necessitate special education.

#### Eligibility Meeting

An eligibility determination meeting took place on March 26, 2019. The CST went through the results of the testing and concluded that E.K. was not eligible for special education and related services. This included Lincoln Pantoja, M.A., L.D.T.C. discussing the Educational Assessment conducted; Tara Knubbert-Miller, discussing her Speech and Language testing and report; Kristy Martinez-Humar, M.S. Ed. Discussing her Initial Psychological Report of E.K.; and Anthony Del Polito, Social Worker, discussing the Social Assessment conducted. The CST determined that E.K.'s specific needs could be addressed and accommodated with a 504 Plan, in-school counseling, Youth Enrichment Services (YES), and a modified class schedule. M.G. and her advocate expressed their dissatisfaction with that determination, and they indicated that E.K. would benefit from an out-of-district or more therapeutic environment to address E.K.'s social emotional needs. Mulholland testified credibly that they were told that E.K. was not eligible for special education because he has the ability to learn. While they were told that E.K. had A's and

B's in his classes, Mulholland questioned how that could be since E.K. only attended school nine days that marking period, and had only roughly three weeks of home instruction at the time of the meeting. The District questioned what the point would be to make E.K. eligible for special education services if he would not attend school, and Mulholland responded that it would help him to go to a residential facility if that is what he needed. While the Director responded that they were far from that point, Mulholland questioned what else needed to happen when E.K. had already been placed in the most restrictive environment (home instruction) and would still not attend.

At the meeting, concerns with the home instruction were also discussed. A home instructor was going every day but E.K. would not come out of his room on many occasions. They also discussed creating a modified schedule for E.K. where he would go to school for one of his electives as a first step towards implementing a partial in-school schedule.

Finally, at the March 26, 2019 meeting, the District agreed to set up a psychiatric evaluation of E.K., and to continue home instruction pending the referral.

On or about March 28, 2019, the District issued a written denial of E.K.'s eligibility for special education.

#### Home Instruction and Modified Schedule

Rully was in contact with M.G. concerning selecting the elective that E.K. would attend as part of his modified schedule, and Rully testified that since E.K. had expressed an interest in drama, the plan was initially to get him to attend school for a drama class and then increase the periods at school over time. Rully scheduled a meeting for April 1, 2019 which was attended by E.K., M.G., the school principal, and Rully. It was agreed at that time that the student was going to report to school for one period starting April 2, 2019, as a first step as part of a transition plan to go back to school. E.K., however, did not report to school. The parent still reported that she was unable to get the child into school and that it was out of her control.

In April, Rully called DCP&P in an attempt to secure additional assistance through an outside provider. The District also filed for truancy against M.G. a second time in or around April 12, 2019, after E.K. had been absent fifty-four days that school year (and only having presented approximately nine days; with only fourteen of those days being excused absences). The truancy charges were dismissed by the court in May 2019.

E.K. rarely accepted home instruction from January 2019 through about May 2019. The home instructor was changed in May, and home instruction participation improved through the end of the school year.

In mid-May, E.K. began attending an LGBTQ support and therapy program in Newark on a daily basis. He traveled to Newark alone by bus, and participated in therapy through that program to assist E.K. with his gender dysphoria.

Mary Beth Berry (Berry) was E.K.'s home instructor from May 28, 2019 through the end of the school year. She provided instruction and administered final exams for Math, English, Science and History. She testified credibly that E.K. completed all of his work and homework assignments, that he was engaged but somewhat lethargic, and that he did very well on his finals. E.K. was capable of completing all of the work and he did not need extra time or modified assignments.

Berry was aware that E.K. would not come out of his room for the previous home instructor, and E.K. told her that he stayed up late at night on his computer. Berry agreed to adjust the home instruction schedule for E.K. to accommodate his daily bus trips to Newark to attend an LGBTQ support group.

E.K. did not progress to the tenth grade because he lacked the required seat time. His third marking period grades show that E.K. received failing grades, which were due in large part to his failure to attend home instruction from February 22, 2019 through the end of May. E.K. was offered the opportunity to attend the District's summer remediation program, but he did not attend.

In April 2019, the parent filed a request for mediation with the Office of Special Education Programs, but withdrew the request in May 2019.

### Psychiatric Evaluation

Dr. Ellen M. Platt conducted a psychiatric evaluation of E.K. in response to the District's request for a psychiatric consultation in late March 2019. Dr. Platt's report indicates that at least part of the reason for the referral was E.K.'s history of school refusal. The report also acknowledges E.K.'s prior treatment at Trinitas and CMO/FACT, and diagnosis of ASD. Dr. Platt's report concludes that E.K.'s history and clinical presentation is consistent with diagnoses of ASD and Generalized Anxiety Disorder; and also "indicates possible sensory sensitivities." (J-40.) Dr. Platt's report contains several recommendations for school staff as well as the parents. With respect to placement, Dr. Platt's report recommended "classroom placement at the discretion of the Child Study Team, in consultation with the parents, bearing in mind that [E.K.] would benefit from a small classroom with decreased stimulation and distractions in a setting that can provide a behavioral program, as well as therapeutic support as part of the academic experience . . . [.] in a setting that can safely manage his potential for physicality . . . [and where E.K. would] be able to take breaks when needed." Dr. Platt did not testify at the hearing. While her report was sent to the District in September 2019, it was not shared with the parent until October 2019, after the parent had already filed for Due Process.

### August 27, 2019 504 Plan

On August 27, 2019, M.G. and the FACT worker met with E.K.'s new guidance counselor, Imani Lewars (Lewars), to plan E.K.'s return to the District in the fall. They discussed and updated the 504 Plan to include a number of additional accommodations to make it "more comfortable" for E.K. to go to school. These additional accommodations include: "Ability to wear noise-cancelling headphones to help him better focus when the noise level is high; Ability to use a fidget cube/pen while in class to increase his ability to focus while at his desk and reduce anxiety; Student will be referred to as . . . [A.K. (preferred male name)] and his preferred pronouns (he/he's/his); Preferential seating—



Closer to front.” (J-39.) Lewars discussed the 504 Plan with E.K. to be sure that everything was in place to make him feel comfortable coming into school. Along with the multiple other accommodations provided for in the 504 Plan, E.K. would be permitted to leave class a few minutes early and arrive late to avoid possible crowding in the hallway, and he was told that he could use the school elevator to avoid crowded stairwells. E.K.’s teachers were also to be instructed not to mark E.K. tardy or absent.

### 2019–2020 School Year and Due Process Filings

E.K. was present on the first day of school for the 2019–2020 school year. Lewars met with E.K. that day to see how his classes were going and to be sure he was comfortable and that he knew that she was available to assist him. E.K. also had access to the school’s YES program at the school, and continued to see a FACT worker. M.G. testified that despite the accommodations in the most recent 504 Plan, school security stopped E.K. and told him to remove his headphones, which made him angry because he was told that he was allowed to use them. He also received detention once for arriving to school late, which also had a negative impact on E.K. M.G. testified that it was after the detention that E.K. refused to go to school because he felt that he was being punished.

Lewars called M.G. on October 3, 2019 to discuss E.K.’s attendance and set up a meeting, which M.G. later canceled because she did not want to leave E.K. home alone. M.G. indicated that she reached out to mobile response in Trinitas but they were unable to help get E.K. to school. Lewars also reached out to the FACT worker for assistance, and left messages for M.G. to reschedule the meeting but M.G. never responded.

On or around October 11, 2019, the parent sent a letter to the District stating that she disagreed with the initial evaluation conducted by the CST beginning on or around December 19, 2018, and requesting an independent educational evaluation (IEEs), including the following assessments: neuropsychological assessment, functional behavioral analysis (FBA), speech & language assessment and an occupational therapy (OT) assessment. The parent testified that she did not agree with the CST evaluation because E.K. has an “illness” that does not allow him to go to school, and that the evaluation conducted by the District did not address that.

Also on or around October 11, 2019, M.G. again requested home instruction and provided a request form prepared by E.K.'s doctor. The request form notes that E.K. has severe anxiety compounded by gender identity issues and autism, which makes him unable to return to his public high school.

On or around October 10, 2019, the parent also filed the Petition for Due Process, and on October 17, 2019, the parent filed an Emergent Relief application seeking, in part, interim home instruction pending appropriate placement and an injunction against further truancy proceedings.

On October 22, 2019, the District filed a petition opposing the parent's request for IEEs. With the filing of the District's petition, the District provided the parent with a copy of Dr. Platt's psychiatric evaluation.

Later in October 2019, the District officially approved E.K. for home instruction. The notice from the District's Supervisor of Special Services informing the parent of same notes that the reason for the placement was "court order-modified school schedule and home instruction." (J-45.) In response to an emergent relief application presented by the petitioner, the District was directed to provide E.K. with home instruction and a modified school schedule.<sup>3</sup> (J-45.) Thereafter, a dispute arose between the parties with respect to the terms of a modified school schedule, and the District filed an emergent relief application in January 2020 to address this issue, which resulted in the parties reaching an agreement as to a modified school schedule.<sup>4</sup> (J-48.) The District enrolled E.K. in an

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<sup>3</sup> In October 2019, the parent filed an application for emergent relief to compel the District to grant E.K. home instruction pending the outcome of the pending due process petition, as well as a medical exemption to the District's attendance policy and adjustment to E.K.'s schedule; and injunctive relief against the District from filing truancy proceedings pending the outcome of the due process petition. The application for emergent relief was decided on October 24, 2019 by an ALJ, not the undersigned. That ALJ granted the petitioner's application for emergent relief "requiring the District to provide the Student with home instruction, and a modified school schedule, pending resolution of the due process proceeding;" and that the District "provide a medical exemption to the attendance policy and a modified schedule;" and that the District be enjoined "from pursuing truancy proceedings against Parent and Student pending an appropriate educational placement." The District was ordered to "initiate a home instruction plan for the Student as recommended by Dr. Platt's psychiatric evaluation, and that M.G. and the Student cooperate with the District in the home instruction program." (J-46.)

<sup>4</sup> They agreed that the modified school schedule would be an afternoon art class "not to be held at Thomas Jefferson" and that the student would continue with home instruction from 10AM to 12PM.

art class at the John E. Dwyer Technology Academy, at 12:51PM, located about 0.3 miles from the library where E.K. had been receiving home instruction. E.K., however, would not attend the class. The District then offered E.K. an art class in another school, but E.K. did not accept that option.

Beginning sometime during the latter part of the first marking period of the 2019–2020 school year, E.K. began to receive home instruction at the local public library. Ovies Guadalupe (Guadalupe) provided home instruction for two hours per day. She testified credibly that E.K. was initially very compliant with doing the assigned work, but that E.K. often failed to complete homework. Guadalupe informed M.G. that some homework was not being completed. She testified credibly that E.K. showed no difficulty with the concepts of the curriculum and that E.K. never expressed any concerns about the amount of work to complete. E.K. simply told Guadalupe that she did not have time to complete the homework.

That school year, E.K. continued to attend the LGBTQ program in Newark, that he would travel to nearly every day by bus. From January to March, E.K.'s home instruction attendance was very sporadic, but he continued to attend that Newark program and was even scheduled to travel to China through the Big Brothers Big Sister program. E.K. also volunteered at the public library, and requested working papers from the District to be able to secure a job at the public library. When the District denied the request for working papers (because E.K. had not been attending school through the modified curriculum), E.K. stopped attending home instruction.

In early 2020, the District continued to work with M.G. to have E.K. attend at least one or two in-person classes at one of the District schools. The District proposed classes in two other District schools but M.G. felt that one was too far and the other she did not feel comfortable with due to what she perceived to be gang activity.

The schoolwork that E.K. completed was done well, but he was not completing all the work. E.K. was provided extra time to hand in work. While receiving in-person instruction from Guadalupe, E.K. never indicated that the work was too much for him, or that he was anxious or overwhelmed.

Due to the COVID-19 emergency, the District did not provide any student with in-person instruction, either at school or at home, from mid-March 2019 through the end of the 2019–2020 school year.

From about March 16 (when instruction became virtual) until about April 20, Guadalupe tried to reach out to E.K. every day about the work that had not been submitted. On April 20, she was finally able to reach E.K. and they worked out a schedule/system to complete the missing work. E.K. submitted missing assignments through mid-May, after which E.K. submitted no additional assignments until early June, after Guadalupe emailed E.K. nearly every day about the missing assignments (while receiving no response from E.K.). In early June, E.K. submitted one or two more assignments, and E.K. passed his classes that marking period, and was promoted to the next grade.

#### 2020–2021 School Year

This school year was fully remote due to the COVID-19 pandemic. Home instruction was not offered—only virtual home instruction for those students receiving medical treatment at Trinitas. Virtual instruction was available to all students, including E.K., and the District informed E.K. that he did not have to have his camera or microphone on during instruction. E.K., however, did not attend any classes this year.

#### Expert Testimony

##### For Petitioner

**Debra G. Salzman, Ph.D.** (Salzman) is a Clinical Psychologist who conducted a psychological evaluation of E.K. in early 2000, and issued a report. In her report, Dr. Salzman recommended a “successful school program for [E.K.’s] needs to provide a number of accommodations that address his obsessions and compulsions, Gender Dysphoria, anxiety, rigidity of beliefs and his need for an alternative learning style.” She opines in her report that E.K. should be classified as he meets the criteria for ASD, OCD

and Gender Dysphoria, all of which are interfering with his education. She writes that his school refusal is directly related to these diagnoses and that to provide adequate educational accommodations for E.K., classification is warranted. She opines that appropriate classifications are Autism, Other Health Impaired or Emotionally Disturbed<sup>5</sup>, but stressed that E.K. fits the criteria for Emotional Regulation Impairment, and that he requires special education. She testified that E.K.'s diagnoses have negatively affected school performance because they limit his ability to go to school.

Dr. Salzman was qualified as an expert in Clinical Psychology. She testified concerning her experience treating individuals with ASD, particularly those who are high functioning. She testified concerning "school refusal" and described it as a term used to describe an individual that has persistent avoidance of school based upon emotional or psychological reasons. Some of the underlying psychological reasons for school refusal include anxiety, depression or learning issues. She testified that E.K.'s ASD also plays a role in the school refusal in that it manifests itself through his rigidity of thinking. This, coupled with his OCD led to increased anxiety. She testified that E.K.'s gender dysphoria also affects him educationally in that E.K. feels very unhappy with his body, which made it difficult to get out of bed, get dressed and face the day in a female body. She testified that with E.K., significant psychological issues are maintaining his school refusal.

Dr. Salzman testified that E.K.'s behavior was not truant. Unlike school refusal, Dr. Salzman explained that truancy occurs when the individual does not attend school due to reasons that are not psychological. She explained that those on the autism spectrum who have difficulty communicating, such as E.K., are oftentimes wrongly perceived as oppositional and defiant.

Dr. Salzman testified that E.K. should be placed in a setting with a smaller overall student population and smaller classrooms due to his discomfort with sounds, noises and people, and being easily distracted by others. As he is high functioning and very bright, he would need a balance of the therapeutic supports, particularly to address his OCD and anxiety with higher level learning. While Dr. Salzman did not recommend a specific

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<sup>5</sup> "Emotionally Disturbed" is now referred to as "Emotional Regulation Impairment" in the NJ Code.

educational setting in her report, she testified credibly that because of E.K.'s rigidity of thinking (from his ASD) and his distrust of, and disappointment with, the District, she anticipates that E.K. will not be receptive to a District placement. She opined that a return to an in-district school will be more challenging for E.K. given his history with the District and rigidity of thinking, and that progress is likely to be slower due to his history and his ASD diagnosis.

Dr. Salzman testified that while the 504 Plans and the BIP contained some good strategies, they failed to address all the issues that are necessary for E.K. to be successful. For example, they appropriately contain counseling, allow for the breaking down of workload, allow extra time, and break up the core academic classes. However, the 504 Plans in particular do not address E.K.'s OCD; his need to be taught strategies for managing anxiety and his OCD; and they do not provide for a smaller classroom setting and building to address his sensory sensitivities. Dr. Salzman conceded that prior to September 2018, the District worked with the family and the student to ensure E.K.'s attendance and curriculum work. E.K., however, has to be provided with the motivation to be able to show up, and that while she did not testify that the offers or attempts made by the District were not good enough, they failed and the District should find another way to support E.K.

Dr. Salzman testified that she had no reason to disagree with the CST evaluations.

Dr. Salzman testified that she did not know why E.K. was refusing home instruction, and that it could have been his OCD or issues with the home instructor. She agreed that long-term home instruction, including home instruction for over a year, is not appropriate. She was aware that the District offered a re-entry program in the 2018–2019 school year but was not aware when and how often it was offered (about December 2018 and April 2019, and early 2020). She was not aware that the home instruction changed freshman year and that then she turned in assignments and participated towards the end of the year.

**Elizabeth Mulholland** (Mulholland) is an advocate through Save Our Schools New Jersey, and testified as both a fact and expert witness. She was accepted as an

expert in special education. She first became involved with M.G. in November 2018. She attended the December 19, 2018 meeting with M.G. as well as the March 26, 2018 eligibility meeting. She opined that the 504 Plan was clearly not working since E.K. was still refusing to go to school and was now failing. She opined that E.K. should have been made eligible for special education and related services because it would allow E.K. to go to an out-of-district placement if the District was unable to provide what E.K. needed.

She also testified that the District was able to waive the seat time requirement to permit the student to go from ninth to tenth grade because the “504 specifically noted that.”<sup>6</sup>

### For Respondent

**Anthony Del Polito** (Del Polito) provided testimony as a fact witness and as the District’s only expert witness. He was qualified as an expert in school social work. He has been employed by the District for fifteen years, has served as case manager on the CST since 2009, provides individualized counseling, and conducts social evaluations.

Del Polito testified that in October 2018, M.G. reported difficulty getting the child to school and to participate, but that at that time the District did not see enough evidence for referral to the CST. He testified that they had a very thorough 504 Plan that was proposed at the time and that E.K. simply needed to come to school to benefit. He testified that he believed that a therapeutic placement, as requested by M.G., was premature at that time, and that there were many services that were in place through the 504 Plan that needed to be utilized to achieve success. Del Polito also testified that Thomas Jefferson was also a good fit for E.K. because it is a “very welcoming building” that houses several LGBTQ students whom he also works with.

Del Polito testified that he believed that if E.K. was attending Thomas Jefferson and taking advantage of the services offered, the parent would not have requested the Identification meeting. He did not believe that special education was needed if E.K. had

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<sup>6</sup> The language of the 504 Plan, however, does not expressly waive the seat time requirement for this purpose.

utilized the services that were offered to E.K. through his 504 Plan. Del Polito testified that since he has been with the District, he has never seen a more comprehensive 504 Plan as that developed for E.K.

Regarding the Social Assessment that he conducted, Del Polito interviewed the parent with the student, E.K.'s teachers, and he testified concerning the various aspects of his report. Del Polito testified that he felt that E.K. needed emotional and behavioral health supports, and these supports would be provided through services at the school, such as the YES Program; as well as the continuing assistance provided in the home. He felt that E.K. had enough support to be successful within the general education setting. Del Polito stressed that when E.K. participated in school, he performed well above standard. The issue was only that he was not coming to school.

With respect to the March 2019 meeting, Del Polito testified that he did not recall the parent or her advocate having any questions regarding the evaluations conducted, but that they were dissatisfied with the ultimate determination by the District that E.K. was not eligible for special education.

On cross-examination, Del Polito testified that in her report, Dr. Platt does not recommend "a special education setting," but a smaller environment, and that some buildings in the District offer smaller class sizes. Del Polito testified that one such school is the Academy of Finance (AOF), which has between 250-300 students, and under 20 students in every classroom.

### Analysis

Dr. Salzman's testimony was compelling with respect to E.K.'s diagnoses, bases for school refusal, and educational needs. She conducted a comprehensive psychological assessment of E.K., and has significant experience working with individuals with high functioning autism and those experiencing school refusal. Based on her testimony, I **FIND** that E.K.'s poor school attendance, particularly starting early in the 2017–2018 school year, was due to "school refusal" in the sense that E.K. demonstrated a persistent avoidance of school based upon emotional or psychological reasons. I also



**FIND** that the underlying cause of E.K.'s school refusal was his ASD (through his difficulty expressing his emotions, and his rigidity in thinking), OCD and Gender Dysphoria, a combination of which caused significant anxiety. Dr. Platt's report confirms the diagnoses of ASD and Generalized Anxiety Disorder. I also **FIND** that another challenge for E.K. is his sensitivity to loud sound and crowded environments, and that this causes him distress and anxiety, and has also impacted his education.

While the District questioned why E.K. refused to attend school but managed to travel to Newark everyday by bus, planned to travel to China with the Boys and Girls Club (a trip that never materialized), and sought to obtain a job at the local library, Dr. Salzman convincingly explained that it is not uncommon for those with school refusal to be able to participate in other activities because the anxiety is not triggered the same way as with school.

Upon considering Dr. Salzman's recommendations, as well as Dr. Platt's report, I **FIND** that an appropriate program for E.K. requires the following: small class sizes in a school with a smaller overall student population; behavior therapy to treat E.K.'s OCD; therapeutic supports as part of the academic experience; accommodations such as allowing the use of headphones, frequent movement breaks, extra time to complete assignments; and check-ins throughout the school day.

I also **FIND** that E.K.'s placement should offer academic classes that are sufficiently challenging for E.K. but where E.K. is provided with more individualized attention; and where E.K.'s emotional needs as a transgender student are supported. While Dr. Salzman did not make a specific recommendation as to placement, she noted the benefits of a therapeutic out-of-district placement (such as the speed of re-entry, having behavioral supports in the classroom), and she explained that because of E.K.'s rigidity of thinking (from his ASD), it will be very difficult to get him to consider and agree to a District placement since he feels that the District has not met his needs over the past several years. I agree with Dr. Salzman's assessment and **FIND** that an out-of-district placement is appropriate, particularly given the delay in classifying the student. I also agree with Dr. Salzman that long-term home instruction is not appropriate.

Moreover, based upon my review of the extensive record and consideration of the testimony presented, I **FIND** the following additional **FACTS**:

E.K. was clearly a very bright and successful student who had been enrolled in the District's gifted and talented program. Despite having a diagnosis of ASD, he was evidently very high functioning and was never classified based on that diagnosis. I **FIND** that there is insufficient evidence in the record that E.K. should have been classified for special education or related services, either due to his ASD or any other diagnosis or disability prior to the 2018–2019 school year.

It was not until the eighth grade that E.K. started to exhibit anxiety and depression at school. To address E.K.'s anxiety and school absences during the 2017–2018 school year, the District appropriately implemented a 504 Plan which provided him with the accommodation that he needed at the time, and I **FIND** that the 504 Plans that were put in place during the 2017–2018 school year were appropriately tailored to address E.K.'s needs. As in the past, E.K. returned to school when he was motivated to do so through a school activity or event that he enjoyed, and his attendance improved in the spring of eighth grade, but only to worsen again near the end of the school year. Even though two of his grades significantly dropped in the third quarter that year, he ultimately performed relatively well in his classes and was promoted to the ninth grade.

The 504 Plan was appropriately updated for the ninth grade (2018–2019 school year) to incorporate counseling services at the school, and accommodations to address sensory sensitivities and anxiety caused by loud noises and crowds. E.K. was placed in the high school of his choice, which the parties agreed was a good fit for E.K. because it offers the arts curriculum E.K. had expressed interest in, it provides a supportive environment for the LGBTQ community, with a strong counseling program, and the Annex building provided a separate learning environment for the ninth graders apart from the rest of the other high school students. Unfortunately, despite having a very reasonable and seemingly appropriate plan in place for E.K. to start the ninth grade, he stopped attending class after only about six days in September, and did not return again until October (for only about four days).

The parent expressed her concerns regarding E.K.'s school avoidance and refusal on multiple occasions since at least the eighth grade, and she kept the District informed of E.K.'s multiple diagnoses. In the 2018–2019 school year, E.K. had been diagnosed with Anxiety Disorder, ASD, OCD, Severe Depression, Seasonal Affective Disorder, and Circadian Dysregulation. He was also struggling with Gender Dysphoria, suffered a “psychiatric pseudoseizure” at school which caused him to be transported to the hospital, and E.K. was hospitalized for a week following four days of attendance in October 2018.

By early 2019, there were several requests for home instruction submitted by the parent which contain notes from E.K.'s physicians requesting home instruction due to E.K.'s anxiety disorder, heightened by her ASD and OCD, and depression which do not allow him to function in a regular class setting. While that may not have qualified E.K. for home instruction per the District Physician's standards, the District was aware of these diagnoses, and it was made aware by the parent that E.K. had been receiving counseling at home through FACT, was being seen by a psychiatrist, and that in late October, when E.K. had again refused to go to school, M.G. called Mobile Response and E.K. spent one week under observation at Trinitas Hospital.

While E.K. was hospitalized, the District agreed to an Initial Identification and Evaluation Planning meeting on December 19, 2018, which M.G. attended with her advocate and FACT worker. The two areas of suspected disability as noted by the CST were Emotionally Disturbed and Autism, and it was agreed that the District would conduct an educational evaluation, psychological evaluation, social assessment and speech/language evaluation, which M.G. consented to and did not request any additional evaluations at the time. Only Del Polito, who conducted the social history, testified on behalf of the District with respect to his evaluation and the meeting of December 19, 2018. Those District employees who completed the psychological, educational and speech/language evaluations did not testify. I **FIND** that the record does not establish that the initial evaluations conducted by the District adequately assessed E.K.'s suspected disabilities, or that they were appropriate. None of these initial evaluations address E.K.'s school refusal, and it is unclear how, if at all, the District assessed whether E.K. met the criteria for Emotionally Disturbed. Rather, the District determined that E.K. was not eligible for special education and related services “based upon testing results,”

which the District determined revealed that E.K. “does not present with difficulties which might have an impact in her educational performance” and because “there is not a significant discrepancy between [E.K.’s] cognitive abilities and her academic performance, according to testing results.” (P-60.) I **FIND** that the District’s basis for denial of eligibility in March 2019 was improper. The District did not demonstrate how it even considered or explored the suspected diagnosis of Emotionally Disturbed, and it based its decision to deny eligibility on the CST’s limited testing that apparently only examined whether a significant discrepancy existed. Dr. Platt’s psychiatric consultation was only requested by the District after the District denied classification. Dr. Platt did not testify concerning her assessment and/or recommendations. However, I accept her diagnoses of E.K., and recommendations concerning program/placement and obtaining additional consultations, and recognize that one of the reasons for the referral for consultation was E.K.’s school refusal.

With respect to the parent’s request for IEEs, I **FIND** that the District did not present sufficient evidence to establish that the initial evaluations it conducted were appropriate; and that the parent did not establish that the IEEs requested are warranted. In fact, the parent’s own expert testified that she had no issues with the District’s initial assessments.

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

This case arises under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities. Receipt of those funds is contingent upon a state’s compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). States who receive federal funding for education are obligated to identify, classify, and provide a “free appropriate public education” (FAPE) to all children with disabilities between the ages of three and twenty-one. 20 U.S.C.A. § 1412; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1. School districts have an affirmative and continuing obligation to identify and evaluate students reasonably suspected of a disability under the IDEA and Section 504 of the Rehabilitation Act (Section 504 or 504). This responsibility is known as a district’s “child find” obligation. See S.W. v. Florham Park Bd. of Educ., EDS 10775-14, final decision

(Sep. 29, 2015), 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111. Each district must develop written procedures to identify students within the location of the district who may have a disability due to “physical, sensory, emotional, communication, cognitive, or social difficulties.” N.J.A.C. 6A:14-3.3(a). These procedures must include evaluation measures to determine a student’s eligibility for special education and related services. N.J.A.C. 6A:14-3.3(a)(3)(iii).

The purpose of the IDEA is to ensure that all children with disabilities have access to FAPE 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). For a school district to provide FAPE to a disabled child under the IDEA they must develop and implement an Individualized Education Plan (“IEP”) — a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). An IEP is to be developed by a district’s child study team in conjunction with the parents of the child. N.J.A.C. 6A:14-2.3; N.J.A.C. 6A:14-3.7(b).

#### Did the District Properly Find that E.K. Is Not Eligible for Special Education?

When a referral for an initial evaluation is made under N.J.A.C. 6A:14-3.3, the district’s CST – along with a parent and general education teacher of the student with knowledge of the student’s performance or with knowledge of the school district’s programs – must review any existing evaluation data pertaining to the student, such as existing classroom-based assessments, observations of staff members, and information from the parents. N.J.A.C. 6A:14-3.4(a)(1). An initial evaluation must consist of at least two assessments from two or more members of the child study team who have the appropriate training, professional licensure, or educational certification to perform such evaluation. N.J.A.C. 6A:14-3.4(f). The evaluations must consist of a “multi-disciplinary assessment” in all areas of the student’s suspected disability and include a “functional assessment of academic performance” and “functional behavioral assessment,” where appropriate. N.J.A.C. 6A:14-3.4(f)(4). A written report of the results of each assessment

must be prepared by the evaluators and include whether the student has a suspected learning disability based on the individual evaluation. N.J.A.C. 6A:14-3.4(h).

In December 2018 the CST agreed to conduct a psychological assessment, an educational assessment, a speech and language assessment and a social assessment to determine whether E.K. qualified for special education and related services. The suspected areas of disability were Autism, and Emotionally Disturbed, however the District failed to demonstrate that the initial evaluations even assessed these areas of suspected disabilities. The fact that E.K. is intelligent and was once successful in the classroom, and his testing did not reveal a significant discrepancy, does not alone disqualify him from special education. Moreover, given E.K.'s history of school refusal, anxiety and other diagnoses known to the District at the time, it is surprising that the District continued to maintain that the student "does not present with difficulties which might have an impact in her educational performance." The fact that E.K. did not attend school for weeks at a time due to his emotional and psychological state demonstrates that he did present with difficulties which had a tremendous impact on his educational performance. E.K.'s emotional and psychological state prevented him from attending school, and this rendered him unavailable to be educated, his grades suffered, and he was ultimately retained in ninth grade.

The IDEA sets up a three-part test to determine eligibility for special education and related services: (1) the student must have one or more of the disabilities defined in N.J.A.C. 6A:14-3.5(c)1-14; (2) the disability must adversely affect the student's educational performance; and (3) the student must be in need of special education and related services. H.M. v. Haddon Heights Bd. of Educ., 822 F. Supp. 2d 439, 450 (D. N.J. 2011). All three criteria must be met in order to be eligible for an IEP.

N.J.A.C. 6A:14-3.5(c) defines specific classifications of disabilities pursuant to the IDEA. The parent asserts that E.K. should be classified under the categories of either Emotional Regulation Impairment or, in the alternative, Other Health Impaired. Dr. Salzman also opined that E.K. should be classified under the category of Emotional Regulation Impairment, Autism or Other Health Impaired.

Emotional Regulation Impairment is defined as:

[A] condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance due to:

- i. An inability to learn that cannot be explained by intellectual, sensory or health factors;
- ii. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- iii. Inappropriate types of behaviors or feelings under normal circumstances;
- iv. A general pervasive mood of unhappiness or depression; or
- v. A tendency to develop physical symptoms or fears associated with personal or school problems.

[N.J.A.C. 6A:14-3.5(c)(5).]

Here, the record demonstrates that E.K. exhibited inappropriate behaviors or feelings, a pervasive mood of unhappiness or depression and fears associated with personal or school problems starting at least in the 2017–2018 school year. Anxiety-related behaviors were observed at school and the anxiety caused E.K. to miss a significant amount of school days. An FBA conducted that school year proposed a BIP to address E.K.'s attendance and tardy concerns and his anxiety-related behaviors. E.K. also reported sensory sensitivities, feeling “overstimulated” at school to the point that it “almost hurt,” and feeling “overwhelmed” by a loud school environment and being among too much movement. He was diagnosed with having suffered a “psychiatric pseudoseizure” at school early in the 2018–2019 school year, and was hospitalized and placed under observation for a week following four days of attendance in October 2018.

E.K. exhibited these behaviors, feelings and fears over a long period of time—since at least the 2017–2018 school year--and these worsened over time to the extent that he was unable to attend school for the vast majority of the 2018–2019 school year, and only through a home instruction program during the 2019–2020 school year. Moreover, E.K. was adversely affected educationally to a marked degree, particularly starting in the 2018–2019 school year when E.K. only attended school a very limited number of days early in the school year and was ultimately placed on home instruction

after missing several weeks of schooling. That year, E.K. barely attended any schooling due to his school refusal behavior, and was subsequently held back.

Ultimately, to be classified for special education and related services and receive an IEP under any of these defined categories, the student's educational performance must show signs of being adversely affected as a result of the classified disability. It was here. Where an IEP is not in place and the school district has denied a student ineligible for special education services, the district bears the burden of demonstrating that it complied with the IDEA in deeming a student ineligible for special education services because the student did not meet a specific learning disability classification under N.J.A.C. 6A:14-3.5(c). M.B. v. South Orange/Maplewood Bd. of Educ., 2010 U.S. Dist. (2010) (citing Anello v. Indian River Sch. Dist., 2009 U.S. Dist. (2009).

For the reasons stated above, I **CONCLUDE** that the District did not meet its burden of demonstrating that it properly deemed E.K. ineligible for special education services. I also **CONCLUDE** that E.K. should be deemed eligible for special education and related services as he meets the classification criteria for Emotional Regulation Impairment, his disability adversely affects his educational performance, and he is in need of special education and related services.

#### Did the District Deny E.K. a FAPE?

The District asserts that the 504 Plans that were in place since the 2017–2018 school year, and updated regularly to include additional accommodations, offered E.K. a FAPE. The parent, on the other hand, argues that E.K. was denied a FAPE beginning in the 2017–2018 school year through the District's failed programming and procedural violations.

I agree with the District that the 504 Plan that were offered in the 2017–2018 school year were appropriate as they contained reasonable accommodations to address E.K.'s anxiety. The District modified the 504 later in the school year and for the start of the 2018–2019 school year, when E.K. entered high school, to account for E.K.'s additional needs, including his sensory and counseling needs. I **CONCLUDE** that the District



offered E.K. a FAPE during the 2017–2018 school year and the early part of the 2018–2019 school year.

Del Polito described E.K.'s 504 Plan as the most comprehensive he has seen in the District, and he testified that E.K. simply has to come to the school to access the many supports made available through the 504 Plan. Unfortunately, it was E.K.'s disabilities that prevented him from even going to school to access those accommodations and supports provided for in the 504 Plan. Despite the "comprehensiveness" of the 504 Plan, the record demonstrates that by December 2018, it became clear, or should have become clear to the District, that the 504 Plan was not effective in assisting E.K. as he continued to refuse to go to school. At that time, the CST finally agreed to take the case, and E.K. was placed on home instruction pending the results of CST testing. The suspected areas of disability were Autistic, and Emotionally Disturbed. As discussed above, however, the District denied E.K. eligibility for special education and related services in March 2019 without having completed an assessment in all areas of suspected disability. Rather, the District's denial of eligibility was based on the lack of a "significant discrepancy." There is no evidence that the CST even considered the suspected disabilities of Autism or Emotionally Disturbed when it denied eligibility. Only after it denied eligibility in March 2019 did the District request a psychiatric consultation, and Dr. Platt's report was not even shared with the parent until after she filed for due process in October, seven months after the District had denied eligibility. In fact, it appears that the District simply disregarded Dr. Platt's report which made a number of recommendations, including a small classroom in a setting that can provide a behavioral program and therapeutic supports, and additional consultations. Accordingly, and in light of the fact that I have already determined that E.K. does qualify for special education and related services under the classification category of Emotional Regulation Impairment, I **CONCLUDE** that the District denied E.K. a FAPE when it denied him eligibility for special education and related services in March 2019, and that the denial of FAPE continued into the 2019–2020 school year.

Is E.K. Entitled to Independent Educational Evaluations?

Parents of a child with a disability have a right to obtain an IEE of a child under federal and state law. 34 CFR § 300.502(a)(1); N.J.A.C. 6A:14-2.5(c). An IEE is defined as an “evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” 34 CFR § 300.502(a)(3). A parent has a right to an IEE at the public’s expense if the parent disagrees with an evaluation obtained by the public agency unless the agency files a due process complaint and can demonstrate that their evaluation was appropriate. 34 CFR § 300.502(b)(2)(i); N.J.A.C. 6A:14-2.5(c)(1). If the public agency’s evaluation is considered appropriate after a due process hearing, a parent still has the right to an IEE but not at the public’s expense. 34 CFR § 300.502(b)(3).

The undisputed evidence demonstrates that the District timely filed a request for a due process hearing challenging the parent’s request for IEEs. The pivotal issue is whether the District has proven, by a preponderance of the credible evidence, that its evaluation of E.K. was appropriate and whether the parent is entitled to the requested IEEs.

N.J.A.C. 6A:14-3.4(f) provides guidance concerning an initial evaluation and directs in pertinent part:

An initial evaluation shall consist of a multi-disciplinary assessment in all areas of suspected disability. An initial evaluation shall include at least two assessments and shall be conducted by at least two members of the child study team in the areas in which the child study team members have appropriate training or are qualified through their professional licensure or educational certification and other specialists in the area of disability as required or as determined necessary. Each evaluation of the student shall:

1. Be conducted in the language or form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to do so;

2. Apply standards of validity, reliability, and administration for each assessment by trained personnel in accordance with the protocols and instructions of the producer of the assessment;

3. Include, where appropriate or required, the use of a standardized test(s) that shall be:

- i. Individually administered;
- ii. Valid and reliable;
- iii. Normed on a representative population; and
- iv. Scored as either standard score with standard deviation or norm referenced scores with a cutoff score;

4. Include a functional assessment of academic performance and, where appropriate, a functional behavioral assessment, an assessment of the language needs of a child who is an English language learner, assessment of the student's communication needs, and assessment of the need for assistive technology devices and services. Each of the following components shall be completed by at least one evaluator:

i. A minimum of one structured observation by one evaluator in other than a testing session;

(1) In the case of a student who is suspected of having a specific learning disability, one evaluator shall observe the student's academic performance in the general education classroom; . . .

- ii. An interview with the student's parent;
- iii. An interview with the teacher(s) referring the potentially disabled student;
- iv. A review of the student's developmental/educational history, including records and interviews;
- v. A review of interventions documented by the classroom teacher(s) and others who work with the student; and
- vi. One or more informal measures, which may include, but not be limited to: surveys and inventories; analysis of work; trial teaching; self-report; criterion referenced tests; curriculum-

based assessment; and informal rating scales

....

At the December 2018 meeting, the CST directed an educational evaluation, a speech/language evaluation, a psychological evaluation, and a social assessment. The parent, who was accompanied by her advocate, agreed to these assessments and did not request any additional assessments at that time. The results of these assessments were made available to the parent, and discussed with her and her advocate, at the March 26, 2019 eligibility meeting when the CST informed the parent that E.K. was not eligible for special education services. While the burden of proof is on the District to establish that its initial evaluation was appropriate, it only presented Del Polito (who conducted the social assessment) as a witness. While the District asserts that the initial psychological assessment addresses E.K.'s attendance and willingness to go to school, the report itself does not address her emotional/psychological status or school refusal, and only appears to assess her cognitive functioning.

The parent expressed her disapproval of the District's determination that E.K. was not eligible for special education, and the District then agreed to obtain a psychiatric consultation. Seven months later, the parent filed for due process, without having received the report from the District. The parent's letter requesting IEEs, simply states that she disagrees with the initial evaluation conducted by the CST, and that she therefore requests IEEs, including a neuropsychological assessment, FBA, speech and language assessment, and OT therapy assessment. The parent essentially claims that the District did not adequately evaluate the issue at hand, which she described as the student's school refusal. The District asserts that these IEEs are not warranted.

When the CST agreed to take E.K.s case as part of its initial evaluation, it was required to conduct a multi-disciplinary assessment in all areas of suspected disability. It is the school district's burden to demonstrate at a due process hearing that its evaluation was appropriate. N.J.A.C. §6A:14-2.5(c)(1). Here, the District has not demonstrated that it assessed for Autism or Emotional Regulation Impairment prior to denying E.K. eligibility. Moreover, since neither Dr. Platt, the school psychologist, nor the speech and language specialist testified at the hearing, I am unable to determine whether their assessments

were comprehensive and appropriate. I **CONCLUDE** therefore that the District did not establish by a preponderance of the credible evidence that the evaluations it conducted were appropriate.

While I recognize that the District may not have conducted a comprehensive assessment of E.K.'s suspected disabilities I question the necessity of the neuropsychological assessment and the FBA as there is nothing in the record to indicate that these are needed. Dr. Salzman, a psychologist, conducted a very thorough assessment of E.K. and she did not recommend these assessments. Dr. Platt did recommend several consultations in her report, but she did not recommend a neuropsychological or FBA. There is no good cause to order IEEs in these areas.

With respect to the parent's request for an OT IEE, the District did not include an OT assessment as part of the initial evaluation, and the parent never requested one. Since Dr. Platt's report recommends an OT consultation to evaluate sensory sensitivities and their impact on E.K.'s school functioning, I agree with the parent that an OT evaluation is appropriate. However, the District should be provided an opportunity to provide this assessment prior to expending public resources on an independent evaluation.

With respect to the parent's request for a speech and language IEE, the District did not offer any testimony concerning the speech and language assessment, and only provided a copy of the report. The District, therefore, did not establish that the speech and language assessment was comprehensive or appropriate.

### **ORDER**

Based on the foregoing, I hereby **ORDER** that the parent's request that E.K. be classified as eligible for special education and related services be **GRANTED**, and that the District classify E.K. as eligible for special education and related services under the category of Emotional Regulation Impairment. It is also **ORDERED** that the District convene an IEP meeting within the next thirty (30) days to develop an IEP in collaboration with the parents for the start of the 2021–2022 school year. It is further **ORDERED**: (1) that E.K. be placed in an out-of-district placement that can provide a behavioral program

and therapeutic supports necessary to address E.K.'s school refusal and the underlying causes of his school refusal, including his OCD and anxiety; (2) that E.K. be placed in a school with a smaller overall student population and smaller classroom size (as compared to Thomas Jefferson); (3) that the District identify for the parent at least two out-of-district placements that can provide E.K. with the necessary behavioral and therapeutic supports, as well as any other accommodations or services deemed necessary and appropriate herein; (4) that the IEP incorporate a re-entry plan and those accommodations/modifications determined to be appropriate herein (i.e., use of headphones, extra time to complete assignments, frequent movement breaks and check-ins), as well as any additional accommodations agreed to by the parties; (5) that the District provide an IEE in the area of speech and language to assess E.K.'s expressive, receptive, and pragmatic language skills; (6) that the CST provide an OT assessment and any additional assessments it may deem necessary; and (7) that all other relief requested by the parent is hereby **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). 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 Policy and Dispute Resolution.

June 7, 2021  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
**SUSANA E. GUERRERO, ALJ**

Date Received at Agency

June 8, 2021  
\_\_\_\_\_

Date Mailed to Parties:

June 8, 2021  
\_\_\_\_\_

jb

**APPENDIX**

**LIST OF WITNESSES**

**For Petitioner:**

M.G.

Elizabeth Mulholland

Debra G. Salzman, Ph.D.

**For Respondent:**

Ashley Rully

Anthony Del Polito

Mary Berry

Ovies Guadalupe

Imani Lewars

Nicole Webb

Diana Pinto-Gomez (rebuttal)

**LIST OF EXHIBITS IN EVIDENCE**

**Joint:**

- J-1 Home Instruction Approval dated January 10, 2017
- J-2 Notice Identification Meeting dated February 13, 2018
- J-3 Notice Evaluation Denial dated February 20, 2018
- J-4 Home Instruction Request dated February 27, 2018
- J-5 Letter re Home Instruction Denial dated March 9, 2018
- J-6 Home Instruction Request dated March 12, 2018
- J-7 Meeting Attendance Sheet dated April 16, 2018
- J-8 504 Plan dated April 16, 2018
- J-9 SE Denial Letter dated April 16, 2018
- J-10 Meeting Attendance Sheet dated June 11, 2018
- J-11 Notice Evaluation Denial dated June 11, 2018
- J-12 Notice Evaluation Denial dated July 3, 2018
- J-13 Home Instruction Request dated September 27, 2018

- J-14 Home Instruction Denial dated October 3, 2018
- J-15 Letter re Home Instruction Denial dated October 9, 2018
- J-16 Notice Identification Meeting dated October 17, 2018
- J-17 CST Home Instruction Request dated October 23, 2018
- J-18 Home Instruction Letter dated October 24, 2018
- J-19 504 Plan dated October 29, 2018
- J-20 Truancy Documents dated November 2018
- J-21 Notice Identification Meeting dated December 3, 2018
- J-22 Home Instruction Request dated December 3, 2018
- J-23 Home Instruction Denial dated December 3, 2018
- J-24 Letter re Home Instruction Denial dated December 11, 2018
- J-25 Meeting Attendance & Consents dated December 19, 2018
- J-26 Home Instruction Approval dated December 19, 2018
- J-27 Home Instruction Letter dated January 8, 2019
- J-28 CST Home Instruction Request dated January 8, 2019
- J-29 Educational Assessment dated January 11, 2019
- J-30 Speech & Language Assessment dated February 8, 2019
- J-31 Social Assessment dated February 15, 2019
- J-32 Psychological Assessment dated February 27, 2019
- J-33 Notice Eligibility Meeting dated March 5, 2019
- J-34 Truancy Documents dated April 12, 2019
- J-35 Del. History dated May 1, 2019
- J-36 NJSLA Refusal dated May 13, 2019
- J-37 Letter re Summer School dated June 20, 2019
- J-38 Draft 504 Plan dated August 27, 2019
- J-39 504 Plan dated August 27, 2019
- J-40 Psychiatric Report by Dr. Platt dated September 17, 2019
- J-41 Truancy documents dated October 2019
- J-42 Home Instruction Request dated October 11, 2019
- J-43 Home Instruction Eligible dated October 16, 2019
- J-44 Home Instruction Cover dated October 21, 2019
- J-45 Home Instruction Letter dated October 23, 2019
- J-46 Final Decision dated October 24, 2019



J-47 Home Instruction Letter dated October 31, 2019  
J-48 Agreement dated January 24, 2020  
J-49 District text messages (various dates)  
J-50 Powerschool documents (various dates)  
J-51 Grades, report cards and test scores (various dates)  
J-52 Home Instruction Records (various dates)  
J-53 Letter from District to NJDOE dated September 10, 2020  
J-54 Letter from Parent to NJDOE dated September 11, 2020  
J-55 District emails (various dates)

For Petitioner:

P-1 to P-3 Not in Evidence  
P-4 Trinitas Discharge date January 5, 2016  
P-5 Letter from DCP&P dated January 14, 2016  
P-6 Not in Evidence  
P-7 Psychological Evaluation dated April 12, 2016  
P-8 Not in Evidence  
P-9 Letter re Therapy dated July 12, 2016  
P-10 Lab Tests dated October 30, 2016  
P-11 Not in Evidence  
P-12 Not in Evidence  
P-13 Mobile Response documents (various dates)  
P-14 Vanderbilt Assessments dated April 13, 2017  
P-15 Developmental and Behavioral Initial Evaluation  
P-16 Autism Psychology Interview dated May 2, 2017  
P-17 Not in Evidence  
P-18 Autism Psychology Evaluation dated May 23, 2017  
P-19 CSOC Treatment Plan dated August 15, 2017  
P-20 Developmental and Behavioral Initial Evaluation dated November 28, 2017  
P-21 to 23 Not in Evidence  
P-24 Overlook Admission Record dated February 13, 2018  
P-25 to P-28 Not in Evidence

P-29 Psychological Assessment dated April 6, 2018  
P-30 Developmental follow-up dated April 7, 2018  
P-31 Newark Beth Israel discharge dated April 10, 2018  
P-32 Not in Evidence  
P-33 Letter from Dr. Lavinia Stoicescu dated May 7, 2018  
P-34 to P-38 Not in Evidence  
P-39 Letter from Parent re Evaluation dated September 27, 2018  
P-40 to P-42 Not in Evidence  
P-43 Trinitas Discharge dated October 24, 2018  
P-44 Non-Alcoholic Fatty Liver Disease Diagnosis dated November 30, 2018  
P-45 Not in Evidence  
P-46 Trinitas Admission Recommendation dated December 11, 2018  
P-47 Not in Evidence  
P-48 Meeting Confirmation dated December 14, 2018  
P-49 Letter from Parent re Medical Records dated January 8, 2019  
P-50 Letter from Dr. Bernal dated January 8, 2019  
P-51 Letter from Parent re Home Instruction dated January 8, 2019  
P-52 Letter from Torres dated January 9, 2019  
P-53 After visit summary dated January 28, 2019  
P-54 Court attendance dated January 10, 2019  
P-55 Not in Evidence  
P-56 Letter from CSOC Eligible dated February 22, 2019  
P-57 to P-59 Not in Evidence  
P-60 Notice Eligibility Denial dated March 28, 2019  
P-61 CPAP approval dated April 1, 2019  
P-62 to P-73 Not in Evidence  
P-74 Sleep Study dated May 9, 2019  
P-75 to P-77 Not in Evidence  
P-78 Letter from DCP&P dated June 6, 2019  
P-79 Not in Evidence  
P-80 Neurodevelopmental follow-up evaluation dated July 13, 2019  
P-81 Not in Evidence  
P-82 Not in Evidence

P-83 Letter re Independent Evaluation dated October 11, 2019  
P-84 Not in Evidence  
P-85 Not in Evidence  
P-86 Letter from Ojeda dated October 21, 2019  
P-87 to P-94 Not in Evidence  
P-95 CV of Dr. Debra Salzman  
P-96 Psychological Evaluation dated March 26, 2020  
P-97 Not in Evidence  
P-98 Not in Evidence  
P-99 CSOC Treatment Plan dated January 22, 2020  
P-100 Not in Evidence  
P-101 Not in Evidence  
P-102 Only PE0510 (Progress Report Card) and PE0511 (Grade Report 2018–19)  
P-103 School ranking (undated)  
P-104 Not in Evidence  
P-105 Not in Evidence  
P-106 Policy 5113 (attendance)  
P-107 to P-111 Not in Evidence  
P-112 Truancy disposition documents dated September 2, 2020  
P-113 Dr. Salzman billing dated October 1, 2020  
P-114 Emails and attachments from parent (various dates) (PE-621-625; 633-635; 664-665; 763-764; 782-791; 810-853; 947-951; 980-998; 1047-1048; 960-961; 1071; 1110)  
P-115 Not in Evidence  
P-116 Resume of Elizabeth Mulholland

For Respondent:

R-1 CV of Anthony Del Polito  
R-2 to R-9 Not in Evidence  
R-10 FBA dated March 23, 2018  
R-11 Attendance Sheets, ATF Reports  
R-12 CV of Nicole Webb