



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

**FINAL DECISION**

OAL DKT. NO. EDS 02922-18

AGENCY DKT. NO. 2018 27507

**F.R. AND C.R. ON BEHALF OF J.R.,**

Petitioners,

v.

**VERONA BOARD OF EDUCATION,**

Respondent.

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**Denise Lanchantin Dwyer, Esq.** for petitioners (Parles Rekem, attorneys)

**David Rubin, Esq.,** for respondent

Record Closed: February 11, 2019

Decided: March 5, 2019

BEFORE **ELLEN S. BASS, ALJ:**

**STATEMENT OF THE CASE**

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, F.R. and C.R. have requested a due-process hearing on behalf of their son, J.R., who is classified as eligible for special education and related services. They contend that the Verona Board of Education (the Board), through its child study team (CST), failed to timely identify their son as eligible for special-education services, and upon doing so, failed to offer him an individualized education

program (IEP) that delivered a free and appropriate public education (FAPE) for the 2016–2017 and 2017–2018 school years. They have unilaterally placed him at Fusion Academy, a non-approved private school; seek reimbursement for their expenses there; and ask for compensatory education.

### **PROCEDURAL HISTORY**

The request for due-process was received by the Office of Special Education Programs on February 8, 2018. The contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on February 26, 2018.

The parties unsuccessfully sought to resolve their dispute on April 19, 2018. Evidentiary hearings were conducted on September 21, October 1, October 5, October 19, October 29, November 27, and December 4, 2018. Post-hearing written summations were filed on an additional hearing date of February 11, 2019; no further testimony was deemed necessary, and the record closed.

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

#### **The Events Leading Up to the Decision to Classify and the IEPs Offered for the 2016–2017 School Year**

J.R. is a sixteen-year-old eleventh grader, who is classified as eligible for special education under the category “other health impaired.” He entered high school in September 2016; until then, J.R. had received accommodations since third grade under annual Section 504 Plans.<sup>1</sup> The Plans through eighth grade all reflect that accommodations were being offered “to address attention difficulties,” based upon a diagnosis of attention deficit disorder, inattentive type (ADD). There is no mention of any additional diagnoses.

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<sup>1</sup> J.R. was referred to the CST in first grade; found not eligible; and not referred again until high school.

J.R.'s eighth-grade report card revealed that he received all A's and B's and had been present in school each and every day, but for one absence. These grades earned J.R. a spot on the honor roll. And until eighth grade, according to his father, "[h]e had a lot of friends, had a really close friend group . . . [a]nd always did well in school." Mrs. R. also described J.R. as very social, generally happy, conscientious, and a child who perceived himself as a "smart kid," until eighth grade.

Notwithstanding this testimony, Mrs. R. urged that reading issues plagued J.R. since as early as third grade. But this contention was inconsistent with both parents' overall description of their child as academically capable. The examples Mrs. R. offered, such as incomplete third-grade work and poor grades on specific reading assignments, seemed forced. While Mrs. R. urged that she spoke to school personnel repeatedly about her concerns, she never again asked for classification. And Mr. R. confirmed that no challenge was made to any 504 Plans prior to entering high school, because "[J.] was doing fine." By sixth grade, Mrs. R. felt that J.R. needed additional academic help, so she employed tutors privately. J.R. had begun to be treated for depression and anxiety as early as fourth grade, but a diagnosis of unspecified anxiety disorder was only brought to the district's attention at the end of eighth grade, via a Section 504 update letter from Dr. Keri Wasser dated May 26, 2016. Wasser is a psychiatrist who had been treating J.R. continually since 2011.<sup>2</sup> Notwithstanding this additional diagnosis, however, Dr. Wasser's May 2016 letter asks only for a continuation of the Section 504 accommodations then in place.

I **FIND** that overall, J.R. was a successful student until ninth grade. I further **FIND** that any emotional issues that might interfere with J.R.'s educational success were not formally brought to the attention of school personnel until he entered high school.

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<sup>2</sup> In March 2017, harassment, intimidation, and bullying (HIB) coordinator Dana Lustig would be called upon to investigate a bullying allegation against J.R. She spoke to J.R.'s mother as part of her investigation and shared that Mrs. R. asked her not to divulge the investigation to the CST. Lustig testified in a forthright manner; she was a credible witness. I **FIND** that Mrs. R. did so request of Lustig, and that this was consistent with my impression that the family was at times less than candid about the breadth of J.R.'s problems.

Everything began to change in mid-eighth grade; although he still kept his grades up, J.R. began to have troubled peer relationships and began to experience panic attacks. His father related that J.R. would lash out at friends, and that they began to distance themselves. During the summer before ninth grade, J.R. attended a sleep-away camp that had previously offered a successful experience; camp personnel now reported that he was “being a problem.” His father conceded that “he was at times acting inappropriately.”

J.R. started his transition to high school by attending marching-band camp, which he enjoyed. But once classes started, things unraveled. He refused to go to school in the morning; Mr. R. related that getting J.R. out of bed and out the door was “a team effort.” When they arrived at school, Mr. R. would have to coax J.R. out of the car, and it was clear that tension with peer relationships was an issue. J.R. would tell his father that he did not want to walk into the building because a certain classmate was entering at the same time. J.R. would ultimately attend school, but often after “a lot of cajoling, threatening [and] yelling.”

Academically, things fell apart for J.R. as well. His grades began to fall. According to Mr. R., J.R. could not understand why he was doing so poorly in school, or why he was finding the work so extraordinarily difficult. His parents tried every strategy they could think of to motivate and help their son. They explored a medication adjustment and considered whether J.R. just “didn’t feel like being a good student anymore.” They tried bribing him; taking away privileges; riding him; leaving him alone; and tutors. When all these efforts failed, at their psychiatrist’s recommendation, they sought testing privately.

Notably absent from this list of strategies, however, was seeking a CST referral, or any other school-based interventions. Indeed, as early as September 15, 2016, J.R.’s guidance counselor reported via email to his teachers that she had spoken with Mrs. R., who had asked that they be aware that her son’s ADD medication “has not been working so she and [J.R.’s doctor] are working to modify it.” Mrs. R. indicated that J.R. may not be his “best self” and might struggle a bit due to both the ADD and his

general adjustment to high school. These emails continued to be exchanged for several days; none ask for referral to the CST. None ask the school district to complete additional testing, or suggest that anything programmatically was amiss for J.R. His mother simply shares that the transition to high school has been a challenge, and she seeks guidance in how to best assist him, primarily organizationally. When she testified, Mrs. R. clarified that she never thought a medication adjustment would fix all. But the emails do give the impression that medication was the family's primary concern at that time. Indeed, a September 20, 2016, email from the guidance counselor indicates that Mrs. R. had reported that the attempt to adjust the medication was not yet successful, but that the family was continuing to work with J.R.'s doctor.

The family consulted a private psychologist, Dr. Nancy Ziebert, as early as October 19, 2016; again, without alerting school personnel. Ziebert conducted formal evaluations in November 2016. She met with the parents on December 5, 2016, and that night they formally asked for a referral to the CST. The parents followed up via formal letter the next day and indicated that a privately obtained report would be shared with the district "by the beginning of next week."<sup>3</sup> Mrs. R. emailed Ziebert later in December, asking for the report. Ziebert apologized on December 19, 2016, indicating that she would have the report completed soon. On December 21, 2016, Ziebert wrote, "I understand there is a lot going on, but I want the report to be as thorough and as strong as possible." On December 22, 2016, Ziebert advised Mrs. R. that she was "just about finished." She noted relative to her report that "[i]t's very strong. I think you will be in good shape." Ziebert's report was shared with school personnel the next day, right before the winter holiday break.

Ziebert was admitted at the hearing as an expert in clinical psychology and as an expert in neuropsychological testing. Her report primarily focused on J.R.'s educational deficits and disabilities. He is quite intelligent, with a full-scale intelligence quotient of 130, but J.R.'s educational performance, in Ziebert's view, was not commensurate with

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<sup>3</sup> On December 13, 2016, an emergency Section 504 meeting took place. The family did not yet have a report to share from Ziebert. Mrs. R. shared in an email to Ziebert that she had met that day with a guidance counselor and several teachers, who were sympathetic and wished to be helpful. But petitioners also urge that during that meeting suggestions to assist with J.R.'s organizational deficits went disregarded by school personnel.

his abilities. She diagnosed a learning disability related to reading comprehension, and noted that he lacks focus, and is disorganized. Ziebert does mention that J.R. is depressed, and that “[a]s his depression and anxiety intensify, these issues present additional impediments to his academic functioning and, conversely, his current state of constant academic failure is causing tremendous harm to his mental health and self-esteem; he is feeling hopeless, demoralized, frustrated, and overwhelmed by his current situation.” But the educational programming that she recommends is not therapeutic; it nowhere directly addresses J.R.’s depression and anxiety. Rather, Ziebert emphasizes J.R.’s learning and executive-functioning issues; the thrust of her report is that by better achieving in school, his anxiety and depression will abate.

And Ziebert recommended programming and modifications readily available in the mainstream setting. Her report nowhere suggests that an appropriate educational program cannot be delivered at Verona High School. Ziebert’s recommendations included but were not limited to, extended time; a quiet setting for test taking; use of a calculator; regular communication with his parents; study guides; preferential seating; and breaking down of assignments. She recommended that J.R. receive instruction in an in-class-support setting, but noted that a balance must be struck that would allow J.R. to continue in honors and advanced-placement classes as well. She recommended a study-skills class and suggested that J.R. work with a reading specialist.<sup>4</sup>

At the hearing, and notwithstanding her diagnosis of a reading-comprehension deficit, Ziebert testified that her paramount concern was executive functioning. In fact, she initially recommended that reading help take place after school, so as not to disrupt J.R.’s schedule of classes. Her main reason for wanting an IEP was so J.R. would receive consistent and integrated assistance with organization. Ziebert recommended that one adult monitor J.R., noting that he needed supervision, direction, and instruction so that he could ultimately complete organizational tasks independently.

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<sup>4</sup> His parents in turn privately retained a reading specialist who met for a few sessions with J.R.

The parties first met as an IEP team in early January 2017, immediately after the winter break, and the CST accepted Dr. Ziebert's test results. An eligibility and initial IEP meeting took place on January 30, 2017. Director of Special Services Frank Mauriello conceded that a proposed IEP was drafted quickly, and perhaps without complete knowledge of J.R.'s status.<sup>5</sup> It was the district's attempt to "get him to special education as soon as possible," and an effort to promptly respond to the parents' understandable panic about J.R.'s academic downward spiral. The IEP proposed resource in-class support in English and included modifications akin to those in J.R.'s Section 504 Plans. J.R.'s parents expressed dissatisfaction with the IEP, as they felt that it inadequately addressed his needs for remediation in reading comprehension.

But importantly, by the time that January 30, 2017, meeting took place, all concerned had been blindsided by a dramatic deterioration in J.R.'s mental health. On January 22, 2017, he attempted suicide. That day J.R. was behind on homework; his father shared that "all in all it was a typically unpleasant day in our house." At around 9:30 p.m. J.R. came downstairs with a funny look on his face. Within a minute or two the police called; they had been alerted that someone in the home might be trying to harm himself. J.R. admitted that he had tried to hang himself. The police came to the family home and advised Mr. and Mrs. R. that J.R. had messaged suicidal thoughts to a friend, who had become concerned and had alerted the police. An ambulance escorted J.R. to the hospital, where he remained for five days.

Both parties offered theories on why J.R. was driven to this desperate act. Petitioners urge that his academic frustration drove him to the breaking point, that had the school district earlier intervened this tragedy could have been averted. The school district replies with evidence that peer relationships had run aground. Mrs. R. confirmed a troubling incident during the first month of school. On a dare, J.R. created an Instagram account requesting naked posts from several female classmates. All but one blocked him. But one girl engaged him; he became frightened and physically threatened her if she told anyone what he had done. The police became involved, and

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<sup>5</sup> Pursuant to N.J.A.C. 6A:14-3.4(e), the CST had ninety days to produce an IEP from the date of consent to evaluate. Since the parties first met in January 2017, the district had until in or about April 2017 to offer a finalized IEP.

J.R. was directed to apologize in writing. He was humiliated. Mr. R. related that during a fall band concert J.R. texted frantically to his parents; he was clearly in the throes of a panic attack. They reassured him; he calmed down; and he was able to play. His parents later learned that a child named M. had comforted J.R. during the attack. A friendship between the two children blossomed, and then ultimately floundered. There was something hurtful said during a text exchange with M.; it was during that exchange that J.R. expressed the intent to kill himself. M. alerted the police. The district suggests that these stressors contributed to J.R.'s attempt to take his own life.

All the offered explanations are too facile. No one truly knows why J.R. did what he did that January day, perhaps not even J.R. himself. Suffice it to say, and I **FIND**, that J.R. was feeling many adolescent pressures, to include academic challenges, and family, personal-identity, and interpersonal/social stressors. It is uncontroverted, and I **FIND**, that his mental health was such that J.R. confronted his anxiety in this very frightening way.

After his hospitalization, J.R. attended an outpatient psychiatric placement at GenPsych; as he was not in school, no further revisions were immediately done on the IEP offered in January.<sup>6</sup> As the parties planned for J.R.'s discharge, Dr. Wasser shared in a report dated February 17, 2017, that "[J.R.] is in need of a school placement that can appropriately support his academic needs. Returning to the same, fast-paced public high school places [J.R.] at high risk of further academic and emotional decline." She opined that J.R. needed a "smaller, nurturing, calm environment with fewer students in which he can be provided with more individualized attention." Wasser specifically did not recommend a therapeutic school, rather noting that the "setting should be one which can individualize [his] education to provide appropriate support for his learning disorder and his ADHD." Notwithstanding the belief that he would be inappropriately returned to a comprehensive public high school, Dr. Wasser agreed that

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<sup>6</sup> It is noteworthy that from the time of his referral on December 6, 2016, to March 3, 2017, J.R. was only in school until the holiday break (about thirteen days), and then upon his return from break only until on or about January 20, 2017 (about fourteen days). From the date the Ziebert testing was supplied to the CST on December 23, 2016, until he left school, district personnel had access to J.R. for less than one month. Thereafter, he was unavailable emotionally or physically for testing or observation until his discharge from GenPsych on March 20, 2017.



J.R. should be allowed to return for participation in marching band, as this is a “great source of pride and self-confidence for [J.R.]”

A February 24, 2017, letter from Ziebert shared similar opinions. Notably, Ziebert had not seen J.R. since her original 2016 evaluation, nor had he completed treatment at GenPsych. She weighed in without the benefit of GenPsych’s clinical discharge recommendations, although she had opined in a January 25, 2017, email that

[a]t this point, it’s hard for me to comment about the best school environment. That will really be up to the treatment team to advise you about next steps. In terms of when he is ready to return to VHS, or if he needs a specialized environment, like a therapeutic school. Financially, you can seek support from the district. It’s not easy, but if VHS is not appropriate, it’s the district’s responsibility to provide the academic environment that he needs.

[Emphasis supplied.]

Nor does her February 24, 2017, letter reference any input or advice from GenPsych.

In late February 2017, the parents met with Mauriello to discuss J.R. and his transition back to school. While Mauriello had reviewed the updated opinions shared by Wasser and Ziebert, J.R. had not yet been discharged from GenPsych. Mr. R. testified that by the time they met with Mauriello he and his wife had “done a lot of homework on places that we maybe could put J.” Not returning to Verona High School thus seemed clear in their minds. Indeed, emails between the parents and Ziebert confirm their ongoing conversations about appropriate next steps for J.R. These emails strategize how best to secure a placement other than in the mainstream. It is curious that only days after his suicide attempt, on January 25, 2017, Ziebert focused on reading comprehension. And although prior to the suicide attempt she opined that this deficit could be remediated after school, she now urged “if [the school district] cannot or will not provide reading remediation (1:1 or small group, NOT just inclusion) then that is

a 'plus' in the column for moving him elsewhere and getting the district to provide financial support for that move.”

At the February meeting, the parents renewed their concerns about the programming offered at Verona High School; their focus was the absence of any remediation for J.R.'s reading-comprehension issue, or for his executive-functioning deficits. They also felt that placing J.R. in a less challenging mathematics class was not appropriate, as proposed by the IEP.<sup>7</sup> Notwithstanding the recommendation that J.R. not return to Verona High School, his parents urged that their goal was an eventual return; continued participation in band thus was important to the family. Fusion was specifically discussed at the meeting. And Mauriello made it clear that he needed input from GenPsych.

Following that meeting, on March 3, 2017, a revised draft IEP was forwarded to Mr. and Mrs. R. In forwarding the March 2017 IEP, the case manager noted that it contained changes addressed during various earlier meetings, and that it now expanded resource support to three academic subjects and added counseling as a related service. Mauriello described the IEP as a baseline program that would have to be adjusted once J.R. was discharged from his psychiatric placement. On March 7, 2017, GenPsych weighed in on its thoughts for J.R.'s educational future via a letter stating, somewhat vaguely, that “[J.R.] is able to return to a school setting that will meet his emotional and academic needs.” The IEP was rejected by the family at a meeting on March 13, 2017. This is unsurprising because ten days earlier, via a letter from counsel, the parents put the district on notice that J.R. had been unilaterally placed at Fusion. This decision was made before J.R.'s discharge from GenPsych. And Mrs. R. confirmed that she had sent the ten-day notice before receiving or reviewing the March IEP.

I **FIND** that most of the recommendations in Ziebert's report were included in the educational plan presented by the district in March 2017. The IEP offers J.R. extended

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<sup>7</sup> A December 8, 2016, email from J.R.'s Honors Algebra 2 teacher outlines his struggles in that class, however. In large part inattentiveness is cited in her email. And interestingly, his parents sought Ziebert's

time on tests and assignments. It allows J.R. to complete tests in a setting that is quiet and is without distractions. While the IEP does not provide for the use of a calculator, these are routinely supplied and used by all students. Ziebert suggests that Scantron sheets not be used when tests are administered; while the IEP does not so state, Mauriello confirmed that they are rarely if ever used in-district. Ziebert recommends regular communication with parents and tutors; the IEP provides that the case manager will coordinate ongoing communication regarding J.R.'s progress.

The IEP provides for study guides. It provides that instruction and assignments will be given to J.R. in writing. The IEP provides for preferential seating, and for the breaking down of lengthy assignments into smaller pieces. Ziebert suggests placement in an in-class-support setting; the IEP so provides. The report suggests a study-skills class; while a formal class is not available at Verona High School, the district would provide intensive organizational support, via the help of the in-class-support teacher and the case manager. Ziebert suggests supplying J.R. with an extra set of books; this is not referenced in the IEP, but Mauriello explained that most reading is done online. Ziebert urges that any support given J.R. be discreet, so that he does not feel different. The IEP specifically states that “[J.] will not be singled out.” While Mauriello urged that he continued to feel that J.R.'s needs centered more on his executive-functioning deficits, he acceded to the parents' request for reading support, in part because it would allow him to learn more about J.R. and his functionality in reading. That support was offered after school, as Ziebert had recommended. And the IEP noted that J.R. would be referred to the Academic Success and Engagement (ASE) program, a service designed to offer academic and emotional support to at-risk students.

On or about March 20, 2017, J.R. was discharged from GenPsych and began to attend Fusion's Englewood campus. He would complete his freshman year at Fusion, entirely at his parents' expense. From there on, attorneys would be involved in the sharing of IEP documents.

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guidance regarding math, and she advised in a January 24, 2017, email, “I feel like you need to do whatever will make J. feel less terrible.”

The IEP Offered for the 2017–2018 School Year

To better understand J.R. and his needs, the parties agreed to additional testing in May 2017. J.R. was evaluated by Debra Couturier-Fagan, who was admitted as an expert in school neuropsychology. She issued her report on June 20, 2017. Overall, Fagan found J.R. to be a strong student, and during the testing she found him to be bright and cooperative. But her impressions differed from those of Ziebert, because Fagan emphasized J.R. and his emotional profile. Indeed, she found that he did not present with any areas of specific learning disabilities, although his strengths were variable in the areas of oral language, reading, and mathematics. She did find that he suffered from an unspecified anxiety disorder.

Fagan recommended study-skills assistance, in view of Mrs. R.'s report that J.R. was disorganized. She stressed J.R.'s need for support in the school setting, so that he could manage stressful situations. She recommended preferential seating; exempting him from being called up to the board; testing in an alternative quiet location; and access to a "safe person." She suggested he have access to a "cool down" pass, so that he could discreetly take a "time out" from class when feeling stress. Fagan urged that if homework is overwhelming, limits could be discussed so that his time on task is modified. Teachers could also estimate the time needed to complete an assignment, so that J.R. could gauge if he was working within those limits. At the hearing, Fagan opined that J.R. could return to Verona High School. She did not feel that one-to-one instruction of the type being offered at Fusion was appropriate for him. While she agreed that J.R. was bright, his test scores during her evaluation were less dramatically high, although still above average.

J.R. was also evaluated by Ellen Platt, M.D., a psychiatrist. Platt was admitted at the hearing as an expert in child and adolescent psychiatry who works extensively with schools. By the time she met J.R. he was already attending Fusion. He was still symptomatic in her view for anxiety, although he reported otherwise, and was entirely unable to discuss the suicide attempt. This was very concerning to Platt, and it was the central consideration in her opinion. She recommended that J.R. receive his

educational programming in an environment that could accommodate his emotional needs; he needed regular in-school monitoring, and coordination between private treatment providers and school staff. Platt stressed that concerns about school pressure were by all accounts one of the factors that precipitated the suicide attempt. She urged that once there has been a suicide attempt, statistically the likelihood of a follow-up attempt is high. The need for monitoring in school is thus critical; properly trained counselors can follow social patterns and conduct, even if the student is unwilling to talk or embrace counseling.

In the months that followed, the district received additional expert input from Ziebert and Wasser, as well. They reported that J.R. continued to need a nurturing educational environment, but neither suggested staying away from school altogether, and neither recommended a therapeutic educational environment. They both pointed out that marching band is something that J.R. is passionate about, and that his renewed participation would be beneficial. Via letter dated June 21, 2017, Ziebert reported that she had met with J.R. and his parents to discuss his status, and to assist in recommending a program for the 2017–2018 school year. She opined that he was thriving at Fusion and should remain there. Ziebert stated that “[r]emoving him from this environment and transitioning him back to a large public high school would cause irrevocable harm to his well-being and mental health, as such environment is completely inappropriate to his needs.” She also opined that J.R. be permitted to return to Verona High School for participation in marching band, as this was “an important source of pride and self-esteem for [J.R.]” and would facilitate his reentry, when ready, to the mainstream high-school environment.

Wasser wrote in a June 22, 2017, letter that “[J.R.’s] new school, Fusion Academy, has been an excellent fit for [J.R.] as the educational component has been tailored to suit his individual needs,” and, “[a]t the current time, this level of support remains appropriate and has allowed [J.R.] to make and maintain gains in his treatment.” The CST also received input from J.R.’s then treating therapist, Mark Demarest, who opined in June 2017 that Fusion was meeting J.R.’s needs, and that his

tension and anxiety were significantly reduced. Demarest recommended J.R.'s continued attendance there.

The parties met in July 2017 to begin planning for the next academic year, with counsel present. They were clearly at loggerheads. The district was comfortable with the recommendations made by its evaluators and presented a program that would bring J.R. back to Verona High School for his sophomore year, with support. His parents felt that a full-time return to the high school was contrary to the advice of their professionals, who opined that J.R. was unready to return, except for participation in marching band. They rejected the notion that J.R. would benefit from any in-school therapeutic interventions. An IEP was not finalized at that meeting, but it appears that conversations between counsel for the parties continued.

On August 1, 2017, Mauriello followed up with Platt, describing the program that the district had proposed for J.R. for the 2017–2018 school year, as well as an alternative program that would address the family's desire for a hybrid arrangement that would allow J.R. to gradually begin reintegrating into Verona High School. Platt replied via letter dated August 22, 2017. She again stressed that "no one close to [J.R.] or involved with him personally or clinically suggested or reported concerns about emotional instability sufficient to have resulted in a serious suicide attempt." She noted that this as an "exceedingly important" factor to consider in planning his educational future, cautioning that his academic placement is where "he will be spending approximately 30% of his weekday time." Platt thus emphasized the need for therapeutic monitoring during the school day. She supported J.R.'s participation in the ASE program, and in a study class that could also serve as a check-in with school personnel.

On August 11, 2017, then counsel for the Board forwarded a proposed IEP to counsel for the family via email. Some time was spent at the hearing discussing whether the district had offered an IEP for 2017–2018, or whether, rather, it had just made a settlement proposal. A review of the email and the IEP document lead me to **FIND** that the August 11, 2017, email included a proposed IEP that would return J.R.

full time to Verona High School. In the alternative, the district expressed willingness to fund two academic classes out-of-district, at a program chosen by the family, for one semester. Since counsel states that this alternative plan is “for purposes of resolution,” I **FIND** that the alternative program was a settlement offer. As to what the global terms of such a settlement would entail, to include whether the parents were being asked to waive all other claims, the record is insufficiently developed to answer that question, and it matters not. The proffered IEP is what is relevant for purposes of my decision-making. I further **FIND**, however, that the district was willing to allow J.R. to return to the high school on a part-time basis regardless of whether the matter could be amicably resolved. Counsel for the family understood this to be the case, because she replied to the August 11, 2017, email with thanks to the district for its “willingness to allow J.R. to start VHS on a modified schedule while we try to settle our differences.” And history bore this out, because J.R. in fact returned to Verona High School on a limited basis for the 2017–2018 school year.<sup>8</sup>

Consistent with opinions rendered by Fagan and Platt, the IEP did not emphasize learning disabilities, but rather J.R.’s emotional and executive-functioning concerns. It continued his classification as “other health impaired.” Consistent with the variable scores that Fagan found when she tested him, J.R.’s program included in-class support in his weaker subjects, English and history. A special chemistry class was offered. The IEP explained that this is a class for students with disabilities taught by a general-education teacher, but where an adapted general-education curriculum is used. The class is considered less restrictive than the in-class-support classroom because it is a smaller classroom, yet one that “supports students with the executive functioning skills needed to be successful in the classroom.”

The IEP included once-weekly counseling sessions, a time during which J.R. could also check in with guidance and his case manager, and coordinate the services

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<sup>8</sup> An earlier version of the IEP was admitted in evidence. It differed slightly in language, as it indicated that the district offered to fund Fusion specifically, via a hybrid program. This version was presented at a July meeting and was rejected by the parents. But I **FIND** that the IEP shared in August was the last IEP offered for the 2017–2018 school year, and the pertinent IEP for determining the appropriateness of the district’s offer of educational programming.

offered via the Academic Success and Engagement (ASE) program. That program is described in the IEP thusly:

ASE counseling program is to support students who are having difficulty attaining and sustaining performance in the school environment. This support allows for identified students to receive individual and group counseling during their academic day from a licensed clinical social worker or psychologist. The goal is to work collaboratively with outside service providers in order to have students achieve a high level of social, emotional, and academic functioning.

The IEP includes study skills and social/emotional goals and objectives. It includes all the modifications and accommodations offered in the earlier versions of the IEP. The IEP indicates that J.R. is to be provided a study hall, daily check-ins with his case manager, and access to a “safe” person for support. The study hall would take place in the Learning Commons, “a quiet environment, and peer tutors and staff are available for questions and support.”

Paul Schottland was admitted at the hearing as an expert in child and adolescent psychology. He is J.R.’s treating psychologist, having started treating J.R. in June 2017 after the suicide attempt and after the conclusion of his ninth-grade year. Schottland opined in a letter dated November 9, 2017, that a full-day program at Verona High School was inappropriate. He urged that J.R. was not yet prepared to return full time to the high school, and that, additionally, the course work proposed for him there was insufficiently challenging and would hurt his self-esteem. But Schottland agreed that J.R. should remain on his then current schedule, attending the high school in the morning for financial literacy, gym, study hall, and band, and spending the afternoons at Fusion for his academic classes.

Notwithstanding this opinion, Schottland conceded that the plan put in place by the CST was a good one. The ASE program theoretically should have been helpful to J.R., Schottland asserted, but J.R. had reported that it was not. Patience Moore, a school counselor, apparently did not make a therapeutic connection with J.R.; he thus did not view Verona High School as a safe place. But, relative to J.R.’s expressed



dissatisfaction with the therapeutic interventions offered at Verona High School, it is noteworthy that J.R. did not easily embrace therapy with Schottland either. Schottland noted that J.R. came to him as well under duress, asserting that he “was fine.”

### Fusion Academy

J.R. transferred to the Montclair Fusion campus for the 2017–2018 school. And he transferred again to the Morristown campus for the current school year.<sup>9</sup> These many transfers raised a question regarding whether Fusion was a successful fit for J.R. But his parents attributed the annual changes to convenience of location or attempts to find a more appropriate cohort of peers. They were unequivocal that J.R. was happy at Fusion.

Mr. and Mrs. R. like Fusion; they pointed to the flexibility in scheduling that Fusion offers; it allows J.R. to continue his involvement in marching band. They urged that J.R. was able to achieve in honors classes but without the stress he experienced at Verona High School. Homework is done at school, easing tensions at home. They were relieved that J.R. was able to complete the work he missed during his illness and stay on target for finishing ninth grade. And they shared that J.R. liked Fusion because he received one-on-one teaching; J.R. described it as “like you came to school and everyone else called in sick.” Mrs. R. shared that J.R. achieves high grades at Fusion. His attendance is excellent. He is happy there socially, and well-adjusted. The parents receive nightly email updates regarding J.R.’s progress. And Mrs. R. pointed out that J.R.’s English teacher at the Englewood campus held certification as a reading specialist. J.R. receives no therapeutic interventions at Fusion, and his parents were adamant that these are unnecessary, and perhaps even inappropriate, since he is receiving extensive therapeutic help privately.

Indisputably, the law mandates that parents have a voice in their child’s education; for this reason, their voice is surely welcome in this due-process proceeding.

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<sup>9</sup> The educational services delivered to J.R. during the 2018–2019 school year are not at issue in this proceeding, as that school year postdates the filing of the petition for due process.

But I needed to hear from a representative of Fusion who could really tell me about the program and how J.R. is progressing there. Helpful too would have been testimony from the parents' experts that reflected that they had observed J.R. at Fusion, and could attest, based upon observation as opposed to parental report, that it was appropriate. The opinion of parents as to placement and educational programming must be viewed with some caution, as they are non-experts. And the soundness of their views can be affected by parental biases arising from subjective judgments of their child. Parental love runs so strong, and so deep, it can be blinding. See M.S. & D.S. ex rel. M.S. v. Mullica Bd. of Educ., EDS 4741-05, Final Decision (November 9, 2005), <http://njlaw.rutgers.edu/collections/oal/>; Johnson v. Ann Arbor Pub. Schs., 569 F. Supp. 1502, 1508–09 (E.D. Mich. 1983); see also Oberti v. Clementon Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993) (where the court noted that judges must rely heavily on the input of educational experts in determining the appropriateness of placements).

No witness with firsthand knowledge of the programs delivered at the Englewood or Montclair Fusion campuses offered testimony. The only Fusion employee to testify was Deborah Russ, a social worker employed for the past five years as the director of admissions and outreach at the Morristown campus. Her role, in part, is to promote its programs. She holds no educational certifications, and was not proffered as an expert who could address the appropriateness of her school program for J.R. Russ did not indicate that she has any responsibilities for the programs delivered at Fusion locations other than her own.<sup>10</sup> Since the suitability of the Englewood and Montclair campuses for this particular young man is the exclusive issue here, her testimony was of little assistance.

The Morristown school is accredited by Middle States and an organization called Advanced Education, Inc. Russ knew nothing about the latter organization, other than that it offers some sort of accreditation. The courses the Fusion model offers follow the New Jersey Common Core requirements. A course is comprised of fifty sessions a year, or sixty sessions a year for honors classes. Instruction is delivered one to one.

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<sup>10</sup> Russ did share some information pulled from the internet regarding the accreditation status of the various Fusion locations.

Missed classes are made up. Russ stated that Executive Functioning is a class offered at Fusion, but she also indicated that there is no formal curriculum for the class. She did not know if a student would get credit for taking this class, or whether it was a graded elective. When pressed regarding whether J.R. took a study-skills class or an executive-functioning class, she did not know. She confirmed that teachers at Fusion are not required to have formal teaching certifications. Homework is completed in a social or quiet homework café; adults are available to supervise and assist. A child needing personal space, or a quiet place to talk through an issue, can go to the Zen Den. But Russ also confirmed that the adults offering such help have no mental-health certifications. While she urged that the school works on social and emotional goals, the example she offered was that a quiet student would be encouraged to attend the social homework café.

Russ offered no testimony regarding J.R. or his progress at Fusion, nor could she. The English teacher certified in reading mentioned by Mrs. R. taught only at the Englewood campus. The only fact in evidence is that she held such certification; this helped little in demonstrating that J.R. received any real instruction in reading comprehension, separate or more intensive than that provided in a typical English class. The instructor's class notes likewise offered little evidence that specialized instruction in reading-comprehension instruction was provided to J.R. To the extent that my impression in that regard was erroneous, no competent witness was offered to clarify the nature of the offered instruction.

As for whether J.R. was thriving at Fusion, the only witness to address his social/emotional progress there was Schottland. Schottland endorsed Fusion as a placement, but based his opinion only on J.R.'s input, and that of his parents. And Schottland confirmed that J.R. experienced difficulties there. The transfer to Morristown came in the aftermath of a troubled experience at the Montclair Fusion. J.R. was twice suspended.<sup>11</sup> One incident involved a thirteen-year-old female classmate whom he touched sexually. Although she had consented, she later regretted

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<sup>11</sup> His mother urged that he was not suspended, but simply asked to Skype into school on the days in question. This was not a credible explanation under the circumstances.

her decision. J.R. had related the incident to Schottland, and was upset by it, noting that he did not want others to consider him a “pervert.”

And J.R. had been earlier suspended from school after making inappropriate remarks about homosexuals. J.R. apparently was disrespectful when asked to stop doing so. Schottland’s notes are quite concerning. He wrote that the incident caused J.R. to “get down on himself saying he’s a loser and [saying] ‘I hate myself and I hate all of you and I hate me, just kill me, everyone is out to get me.’” And notes reflect that Schottland spoke with the principal of the school, who urged that J.R. “get the help” that he needed to control his misbehavior. When asked if it appeared that things were not going well at Fusion, Schottland declined at first to so state, urging that just as many good things were going on there as well.

But he also stated that an appropriate peer group was lacking for J.R. at the Montclair campus. In quite troubling testimony, Schottland opined that J.R. felt “pretty alienated [there] . . . . He didn’t really have people he could relate to his own age.” This observation came after Schottland also testified that peer relationships were a pivotal aspect of J.R.’s emotional difficulties; that J.R. had informed Schottland that “it’s all about social, my mood goes with being connected.” Notwithstanding all these concerns, Schottland continue to maintain that Fusion was a more appropriate choice than returning him to Verona High School. I came away with the feeling that for Schottland, Fusion simply was the lesser of two evils.

Schottland also described how to assist with the executive-functioning issues that are commonplace for children with ADD. Children need to be taught how to prioritize, plan, and anticipate the time needed for a task, all of which assist the student to maintain focus. But when asked how this need was addressed at Fusion, Schottland readily admitted he did not know. And what is obvious from the Fusion model is disturbing—its program reduces executive-functioning demands, there is little to prioritize. Working one to one with a teacher makes it rather easy for both teacher and student to be on top of classwork. While naturally this would reduce a child’s stress, query how he will practice and learn the critical skill of juggling competing demands?

Nor does a student have to remember to do homework when it is completed, under adult supervision, while still in school. While the parents relied heavily on Ziebert's view that executive functioning was a deficit that necessitated J.R.'s classification and special services, they appear to have sent him to an environment that minimized utilization of executive-functioning skills.

Ziebert visited Fusion, but I can afford her input little weight. She visited only the Morristown location and found it a soothing and calm environment. She observed instruction through a window, and the Zen Den, homework café, and music room. She has not observed the locations that are at issue here, Englewood and Montclair.

### The Expert Testimony

The expert testimony offers diametrically opposed viewpoints regarding both J.R.'s educational disabilities and what is an appropriate educational environment for him. An expert's opinion must be weighed based on the cogency of his or her reasoning, the circumstances of his or her involvement in the case, and the relevance of his or her experience. The weight to be given an expert depends upon his or her candor, intelligence, and knowledge. County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). And our courts have held that "[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted).

### *Ziebert, Fagan, and the Nature of J.R.'s Learning Disabilities*

Ziebert and Fagan were both well-qualified experts, who testified in a professional and thoughtful manner. Although Ziebert's testing revealed that J.R. had extremely depressed scores in reading comprehension, Fagan did not obtain similarly low scores. As a result, Fagan did not agree that reading remediation should be a driver in J.R.'s educational program. She also did not find him to be quite as bright as Ziebert did, thus reducing any discrepancy between ability and achievement.

As to the discrepancy in scores, the higher scores in each expert's report are the more credible ones. J.R. is as cognitively able as Ziebert found him to be, and as capable in reading comprehension as Fagan found him to be. The testing setting is by its very nature limited in its utility, as children are dynamic; their scores on any given day are affected by mood and motivation. And where two sets of scores are disparate, simple common sense dictates that a child be given the benefit of his higher scores. J.R. could have done less well than he was capable of because he was tired, anxious, depressed, or bored, but is quite unlikely he would do more than he is capable of, even when he is fit, motivated, and on task. Consistent with this view, it is noteworthy that Fagan's testing took place after intensive therapeutic interventions, to include a hospitalization, whereas Ziebert's testing took place when J.R. was at an emotional low. Indeed, it is in part for this reason that N.J.A.C. 6A:14-3.4(f)(4)(i)(1) requires that an evaluator observe the student's actual classroom performance if considering a specific-learning-disability classification, rather than rely exclusively on test results.

Ziebert did not observe J.R. in the classroom. And his academic performance makes her scores suspect. I am hard pressed to believe that a child with a disabling reading-comprehension deficit would achieve high grades until ninth grade. Indeed, after the earliest elementary grades students are no longer taught to read, they read to learn. J.R.'s academic achievement would have been an impossibility if, for example, he could not comprehend his science and social-studies textbooks. Mathematics is a strength for J.R., but even this subject matter called upon him to read and comprehend word problems.

But the parents argue that even Fagan's scores reflected a sufficient disparity between ability and achievement to make J.R. eligible for classification due to his learning disability. This argument again ignores that code and case law dictate that a school district must base a determination that a child is eligible for classification on a variety of assessments, and on a careful, documented consideration of classroom observation, parental input, teacher input, test results, and information concerning the child's health and background. M.B. & K.H. ex rel. J.B. v. S. Orange/Maplewood Bd. of

Educ., 2010 U.S. Dist. LEXIS 78163 (D.N.J. 2010); see also N.J.A.C. 6A:14-3.4(f)(4)(i)(1). When Fagan's scores are considered in the context of J.R.'s overall academic performance, I am compelled to **FIND** that it was not a reading-comprehension disability that necessitated classification and the delivery of special services to J.R.

Rather, I **FIND** that inattentiveness due to ADD was, in part, the disability that was interfering with J.R.'s educational success. As J.R. matured, the work and the executive-functioning demands became more difficult. He grew unable to compensate for this disability, which is part and parcel of ADD. Fagan's test scores implied that executive functioning was not an issue for J.R., and this once again highlights the limitations of relying exclusively on test scores. All the other anecdotal evidence, to include parental observation and email reports from staff, highlight this as a deficit that was interfering with J.R.'s educational success. Accordingly, in this respect, Ziebert's report was more persuasive. And most importantly, both experts offer analogous programmatic suggestions to address the executive-functioning concerns, to include study-skills assistance, preferential seating, test taking in a quiet location, and modifications and adjustments to how homework is assigned.

*The Appropriate Program for J.R.*

I moreover **FIND** that emotional issues were interfering with J.R.'s educational success; every expert who testified or offered a written report so found. The disagreement lay in their view of which educational setting could best set J.R. up for success in learning. The family's experts urged that after his discharge from GenPsych, he needed a quiet, nurturing environment, and should not return immediately to Verona High School. The components of that nurturing setting were unspecified, other than that it should be a school that offered no therapeutic interventions whatsoever, but instead focused on J.R.'s deficits in reading comprehension and executive functioning. With the assistance of these experts, J.R.'s parents located the Englewood Fusion campus and chose it for J.R. And at the end of the 2016–2017 school year, having been advised by the family that J.R.'s time at Fusion was

successful, the experts wrote letters endorsing his continued attendance there. Later, in November 2017, Schottland would also write in support of Fusion; he was J.R.'s then treating psychologist, and he clearly opined in anticipation of litigation.

But these recommendations did not resonate with me for several reasons. Ziebert's recommendation is centered on her view that J.R. suffered from a long-undiagnosed reading disability. Remediating that disability, in her opinion, and Schottland's as well, was the key to alleviating J.R.'s emotional distress. But once you do not accept the premise that J.R. suffered from reading deficits, as I do not, it is likewise impossible to accept the notion that J.R. should enroll in a school that would in no way address his complex emotional difficulties. Indeed, J.R.'s emotional difficulties are a central impediment to his educational success.

Moreover, Ziebert never spoke to public-school personnel, and based her opinions on test results and parental input. She tried mightily to give J.R.'s parents what they thought they needed to "battle the school district." This is clear from the emails that lead up to the generation of her report. It is clear from her shifting position, which pivoted from an in-district program, but continued to emphasize the skill deficit that only months earlier prompted her to propose a program readily deliverable in the public-school setting. And it is clear from her endorsement of Fusion, a school she knew little about. Indeed, she never even visited the campuses in Englewood and Montclair that are at issue here, much less observe J.R. there or assess his progress.<sup>12</sup> My impressions in this regard are borne out by J.R.'s experience at Fusion. It was less than optimal. He has transferred twice since enrolling there; his year in Montclair was marked by two disciplinary suspensions and unsuccessful peer relationships, an environment in which, by his own therapist's description, he felt "alienated." J.R.'s experience forces the assumption that assistance from a properly trained mental-health professional during the school day would have helped him.

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<sup>12</sup> Likewise, Wasser and Demarest recommended Fusion, but had not observed J.R. there. Their opinions were simply an endorsement of the family's choice of Fusion. Query if they would have opined differently if they had been privy to Schottland's impressions? And they opined that Verona High School was too busy and large without assessing whether the programming ultimately proposed by the district would serve to make the school feel smaller.



Importantly, this is more than an assumption, it is an educational approach validated by a psychiatrist and a neuropsychologist. Platt and Fagan both urged persuasively that J.R. needs an educational environment that includes a therapeutic component. Platt's testimony was particularly compelling, especially when she pointed out that J.R. is at continued risk for a suicide attempt and, like most children, spends most of his time at school. And they both opined that any such setting should include interventions that will support J.R.; they agreed that even if the environment is not literally small, it must be adjusted to cushion J.R. and make him feel safe. Neither opined that J.R.'s needs necessitated one-to-one instruction. And notwithstanding J.R.'s reluctance to embrace therapeutic support, it should be there in school for him. Perhaps in time J.R. would fully avail himself of the available support, and until then it would be a set of trained eyes observing his functionality, a safety net.<sup>13</sup>

Accordingly, based upon weight of the expert testimony, I **FIND** that the appropriate educational setting for J.R. is one that includes services, accommodations, and modifications that address his emotional needs and his ADD, to include his executive-functioning deficits.

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

As a recipient of federal funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education (FAPE). 20 U.S.C. § 1412. FAPE includes special education and related services. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d). The Board will satisfy the requirement that J.R. receive FAPE by providing "an educational program reasonably

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<sup>13</sup> In their post-hearing submission, petitioners assert that Platt agreed that the one-to-one attention available at Fusion would better protect J.R. than a health professional who would attend to many students. This mischaracterizes the testimony and quotes Platt out of context. She went on to stress that none of the staff providing that attention to students at Fusion had the necessary mental-health qualifications to support emotionally fragile children.

calculated to enable [him] to make progress appropriate in light of [his] circumstances.” Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988, 197 L. Ed. 2d 335, 352 (2017).

Case law recognizes that “[w]hat the [IDEA] guarantees is an ‘appropriate’ education, ‘not one that provides everything that might be thought desirable by loving parents.’” Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (citation omitted). Indeed, “meaningful participation does not require deferral to parent choice.” S.K. ex rel. N.K. v. Parsippany-Troy Hills Bd. of Educ., 2008 U.S. Dist. LEXIS 80616, at \*34–35 (D.N.J. October 9, 2008) (citation omitted). Nor does the IDEA require that the Board maximize J.R.’s potential or provide him the best education possible. Instead, the law requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995).

I **CONCLUDE** that the 2016–2017 IEPs offered FAPE to J.R. The IEP presented upon classification in January 2017 was preliminarily responsive to Ziebert’s recommendations, and clearly it was a draft, open to further discussion. Thereafter, the March 2017 IEP expanded the support offered to J.R. to include the therapeutic interventions ultimately recommended by Platt and the reading help recommended by Ziebert. As to the March 2017 IEP, the circumstances under which it was drafted warrant reiteration. After a dramatic and unexpected downturn in J.R.’s mental health, the district had no access to him nor any time to evaluate how best to serve his needs. Notwithstanding the parental view that Verona was inattentive or uncooperative, school personnel were perhaps too anxious to offer a program that would allow J.R. immediately to return to school after his hospitalization. The CST could have, and perhaps should have, placed J.R. on homebound instruction while it sought its own psychiatric evaluation. Having not done so, it could be argued that the district arbitrarily rejected the advice offered by Ziebert and Wasser that a return to Verona High School was contraindicated.

But notwithstanding this shortcoming in the district’s approach, I **CONCLUDE** that the March 2017 IEP nonetheless delivered FAPE. And even if assuming, for argument’s sake, that the IEP somehow fell short, I **CONCLUDE** that the parents are

not entitled to reimbursement for their expenses at Fusion during the 2016–2017 school year. A court may reduce or deny reimbursement costs based on the parents' unreasonable behavior during the IEP process. 20 U.S.C. § 1412(a)(10)(C)(iii). New Jersey regulations specifically require that parents advise the district at the “most recent IEP meeting” that they were rejecting the IEP and give at least ten business days' notice of their concerns or their intent to enroll their child in a nonpublic school. N.J.A.C. 6A:14-2.10(c)(1) and (2). Our regulations confirm that the cost of reimbursement may be reduced or denied “[u]pon a judicial finding of unreasonableness with respect to actions taken by the parents.” N.J.A.C. 6A:14-2.10(c)(4).

Throughout their relationship with the school district, J.R.'s parents were only minimally forthcoming about the breadth of their son's difficulties. Nor were they entirely honest with school personnel once J.R. floundered, and they formally came to the CST only after assessing J.R. using outside professionals and doing their own research with the guidance of those experts. They ultimately sought the school district's assistance only to fund the placement they and their experts had chosen. Indeed, by Mrs. R.'s own admission, she rejected the March IEP sight unseen, having already advised the district that J.R. would be placed at Fusion. Their conduct was at odds with the spirit of N.J.A.C. 6A:14-2.10(c)(1) and (2). Accordingly, I **CONCLUDE** that petitioners have not demonstrated an entitlement to reimbursement for the expenses attached to J.R.'s attendance at Fusion during the 2016–2017 school year.

Relative to the IEP offered in August 2017 for the 2017–2018 school year, I **CONCLUDE** that this IEP likewise offered FAPE. It provided J.R. with academic support via in-class-support classrooms; modifications and accommodations; access to his case manager for help in organization; and a study hall to ease the tension of his day and offer academic support. And the IEP offered counseling and access to the ASE program for further support. This IEP was responsive to the concern expressed by both Ziebert and Schottland that he be exposed to classwork commensurate with his intellect. In a comprehensive public high school, the academic course selections are expansive.

Moreover, by maintaining J.R. in the mainstream, the IEP delivers services to him in the “least restrictive environment.” 20 U.S.C. § 1412(a)(5)(A) mandates that

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3) (2018); see also N.J.A.C. 6A:14-4.2; Oberti v. Board of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993) (citation omitted) (the court confirmed that before placing a child outside the district, “the school ‘must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction,’ speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child’s particular disabilities”).

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115 (2018); N.J.A.C. 6A:14-4.3. One of the most restrictive options in the continuum is a residential school; the next less restrictive option is “[i]ndividual instruction at home or in other appropriate facilities, with the prior written notice to the Department of Education through its county office.” N.J.A.C. 6A:14-4.3(b)(9). This latter code provision aptly describes Fusion.

I am cognizant that several experts opined that a return to Verona High School was contraindicated. But their advice sprung from medical considerations, and not educational ones. Indeed, in so opining, they did not recommend a special-education

setting that would offer interventions designed to address J.R.'s executive-functioning or emotional disabilities. Nor did they opine that such interventions could not be delivered at Verona High School.<sup>14</sup> Rather, they recommended staying away from the high school only because during J.R.'s brief time there he had suffered a mental-health crisis. This recommendation is grounded in medical/mental-health considerations; it is responsive to parents who were fearful of returning their son to a location where he was so unhappy. The parents' fear, while entirely understandable, does not require the public to fund J.R.'s education out-of-district when an educationally appropriate program was available for him at Verona High School. Verona's obligation was to provide J.R. with appropriate special-education supports in the least-restrictive environment, and I **CONCLUDE** that the offered IEP did so.

Parents who unilaterally withdraw their child from public school and place him in a private school without consent from the school district "do so at their own financial risk." School Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359, 374 (1985). They may be entitled to reimbursement for the costs of their unilateral private placement only if a court finds that the proposed IEP was inappropriate and that the private placement was appropriate under the IDEA. 20 U.S.C. § 1412(a)(10)(C)(ii); N.J.A.C. 6A:14-2.10(b). It is well established that the appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the 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 and the opportunity for meaningful educational benefit within the least-restrictive environment. Having concluded that the district offered FAPE to J.R., it is unnecessary that I determine whether Fusion is an appropriate program for him.

Finally, the petition asserts that the district failed to timely identify J.R. as a child with special needs. These claims spring from the requirement in federal law that local public-school districts locate and identify children in need of special-education services. Known as "child find," the requirements of 20 U.S.C. §1412(a)(3)(A) provide for the

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<sup>14</sup> As will be discussed below, having found that the district offered FAPE, it is unnecessary that I reach the issue of the appropriateness of Fusion. But it nonetheless must be emphasized that I heard no competent proof that Fusion offered any special-education interventions whatsoever.

implementation of policies and procedures designed to ensure that “[a]ll children with disabilities residing in the State, . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated.” See also 34 C.F.R. § 300.111 (2018); N.J.A.C. 6A:14-3.3. Verona had a continuing obligation under the IDEA to identify and evaluate students reasonably suspected of having a disability. P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir. 2009).


I **CONCLUDE** that this record offers no evidence of a “child find” violation. J.R. was a good student until ninth grade who received excellent grades with the help of accommodations in a Section 504 Plan. By December of his ninth-grade year he had been referred to the CST; by January he had been classified and offered an IEP. I **CONCLUDE** that this contention by the petitioners is baseless. For this reason, I moreover **CONCLUDE** that the parents are not entitled to reimbursement for tutoring and testing costs incurred prior to referral the CST.

### **ORDER**

Based on the foregoing, the due-process petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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 (2018). 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.

March 5, 2019  
DATE

  
ELLEN S. BASS, ALJ

Date Received at Agency March 5, 2019

Date Mailed to Parties: March 5, 2019

**APPENDIX**

**Witnesses**

**For Petitioners:**

C.R.  
F.R.  
Paul Schottland  
Deborah Russ  
Nancy Ziebert

**For Respondent:**

Frank Mauriello  
Debra Couturier-Fagan  
Matthew Rosa  
Dana Lustig  
Ellen Platt

**Exhibits**

**Joint Exhibits:**

J-1 Section 504 Plans  
J-2 IEP issued after January 30, 2017, meeting  
J-3 Revised IEP  
J-4 Letter dated May 26, 2016  
J-5 Report cards  
J-6 Email and letter exchange, December 6–7, 2016  
J-7 Ziebert report  
J-8 Wasser letter, dated February 17, 2017  
J-9 Ziebert letter, dated February 24, 2017



- J-10 GenPsych letter, dated March 7, 2017
- J-11 Ziebert letter, dated June 21, 2017
- J-12 Wasser letter, dated June 22, 2017
- J-13 Platt report
- J-14 Couturier-Fagan report
- J-15 Demarest report
- J-16 Mauriello letter, dated August 1, 2017
- J-17 Platt letter, dated August 22, 2017
- J-18 Schottland letter, dated November 9, 2017
- J-19 Email exchanges
- J-20 Moore letter, dated January 18, 2018
- J-21 Schottland letter, dated April 17, 2018
- J-22 Rekem letter, dated March 3, 2017
- J-23 Meeting notices
- J-24 Couturier-Fagan curriculum vitae
- J-25 Fusion Academy enrollment contract, progress and grade reports
- J-26 Email exchanges
- J-27 Email exchanges

For Petitioners:

- P-1 Reading specialist's credentials
- P-2 Special services contact sheet
- P-3 Counseling consent form
- P-4 Email
- P-5 Email
- P-6 Schottland curriculum vitae
- P-7 Ziebert curriculum vitae
- P-8 Ziebert notes and email exchanges
- P-9 Ziebert letter, dated August 8, 2017
- P-10 Wasser letter, dated August 2, 2017
- P-11 Ziebert paid invoice
- P-12 Fusion paid invoices

- P-13 Transportation expenses
- P-14 Tutoring expenses
- P-15 Russ curriculum vitae
- P-16 Fusion accreditations

For Respondent:

- R-1 IEP, July 2017
- R-2 IEP, May 31, 2017
- R-3 through R-22 admitted as Joint Exhibits
- R-23 Police Report
- R-24 HIB Incident Report
- R-25 Text messages
- R-26 Text messages
- R-27 through R-31 admitted as Joint Exhibits
- R-32 Email exchanges
- R-33 Email exchange with attached IEP
- R-34 Platt curriculum vitae
- R-35 Schottland notes