



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 10588-16

AGENCY DKT. NO. 2016-24548

J.M. and E.M. ON BEHALF OF C.M.,

Petitioners,

v.

SUMMIT CITY BOARD OF EDUCATION,

Respondent.

Jayne M. Wesler, Esq., for Petitioners (Sussan, Greenwald & Wesler, attorneys)

John B. Comegno II, Esq., for Respondent (Comegno Law Group, attorneys)

Record Closed: October 12, 2018

Decided: October 12, 2018

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a due process petition with the Office of Special Education Programs, New Jersey Department of Education on May 17, 2016, seeking a determination that C.M. be classified as eligible to receive special education services.

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on July 18, 2016 as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Respondent filed its Answer and Affirmative Defenses with the OAL on September 6, 2016.

A prehearing conference was held on November 10, 2016, and a prehearing Order was entered by the undersigned on November 14, 2016.

Petitioner filed a motion requesting an order requiring Respondent to permit its expert, Dr. Carolyn McGuffog, to observe C.M. in his in-district program no later than January 31, 2017; and, to permit its expert, Alana Fichtelberg, to observe C.M. an entire school day, including unstructured time. Said motion was filed January 23, 2017.

A telephone conference on the matter was held on January 25, 2017. Respondent was permitted to file a written response to the motion, which was received on January 25, 2017. Petitioner filed a reply thereto on January 26, 2017. A second conference was held on the motion on January 26, 2017, with Ms. Wesler participating via telephone and Ms. Berman in person. Petitioners' motion was denied by Order of the undersigned dated January 27, 2017.

A telephone conference was held on November 11, 2016, regarding exclusion of certain evidence.

Respondent filed an informal motion, on December 1, 2017, to exclude anything that occurred after February 8, 2016. Petitioners filed a response thereto on December 6, 2017. The motion was denied on the record at the commencement of the continued hearing on December 7, 2017.

The hearing was held on the following dates: July 10, 2017; November 21, 2017; December 7, 2017; March 14, 2018; June 8, 2018; and, June 11, 2018.

Closing briefs were submitted by both parties on August 31, 2018.

The matter was scheduled for closing arguments on October 12, 2018, at which time the record was closed.

SUMMARY OF RELEVANT TESTIMONY

Dr. Angela Pasterⁱ testified, without objection, as an expert in the fields of school psychology, special education, and as a Board Certified Behavior Analyst (BCBA).

She is the Supervisor of Special Education for respondent. She holds certificates from the New Jersey Department of Education as a School Psychologist and Supervisor. She is also a Board Certified Behavior Analyst.

She oversees twelve Child Study Team (CST) members and seven speech therapists. She works with teachers to identify students with disabilities. Students can be referred by parents or teachers. She evaluates students for special education.

She sits on the Intervention and Referral Services Committee. After the committee meets students are referred to the CST for evaluation for special education services. Seventy-five percent of students referred are found eligible for special education services.

Dr. Paster met C.M. in September 2015, when he was in first grade. C.M. was in the school nurse's office at the request of the principal. C.M. was upset and would not talk. She was able to calm him down and they went to her office to talk.

Dr. Paster called petitioners. At this point Dr. Paster learned that C.M. had been kicked out of his kindergarten placement. Petitioners further explained that because C.M. had been kicked out of his kindergarten placement, they had sent him for an evaluation in the summer of 2015 prior to his starting the first grade at Summit.

Dr. Paster informed Petitioners that they should've shared this information with the school district when C.M. started school in Summit, so that the District could have allowed for a smooth transition.

ⁱ Dr. Paster received her doctorate after the commencement of the hearing, but prior to the conclusion of same. Dr. Paster testified on two occasions: on July 10, 2017, as part of Respondent's case in chief; and, again on June 11, 2018, as a rebuttal witness.

On September 30, 2015, Summit held the first Initial Intervention and Referral Services Meeting for C.M. The concerns at this meeting were noted as “Behavioral.”

Behavioral concerns were addressed during the Intervention Meeting, and a goal for C.M. to “learn to regulate his emotions without it disrupting his school day 100% of the time” was set, as well as measurable steps to ensure that that goal was reached. These steps included: C.M. “will participate in a lunch social skills group 1x week with the school psychologist to learn coping strategies and build relationships with same-aged boys,” as well as C.M. “will have a rule card on his desk that reminds him of appropriate school behaviors and it will be reviewed every morning.” C.M. added his own rule: “don’t hurt my friends.” This plan was implemented in October 2015.

The committee at this time did not conclude that special education evaluation was warranted.

Petitioners requested an Evaluation Planning Meeting, which was held on November 11, 2015. Petitioners provided their consent for C.M. to be evaluated. Petitioners’ input was considered at the evaluation meeting. Petitioners brought a family member and Dr. McGuffog to the meeting.

On November 18, 2015, a Follow-Up Intervention Meeting was held to assess and review the current interventions in place for C.M.

C.M. was referred to the CST and was being evaluated. Dr. Paster stated C.M. was making progress.

The IEP meeting was held on February 8, 2016. The Pupil Progress Report does not suggest a need for special education services.

Dr. Paster reviewed C.M.’s Pupil Progress Report and stated it was accurate and shows progress.

At the February 8, 2016, eligibility meeting petitioners attended, as did Dr. McGuffog and a parent advocate. Petitioners participated in the meeting. All questions were answered. All data, including private evaluations, were considered.

The CST concluded that C.M. was not eligible for special education services. The accommodations provided C.M. through the Intervention and Referral Services Committee should be continued and were what C.M. needed and was getting.

Dr. Paster noted there are three prongs to determine special education eligibility. Those are: a disability as noted in the fourteen stated criteria in the law; the disability adversely affects educational performance; and, there is a need for special education services. All three must be present to be eligible. If there is a disability, but education is not adversely affected, a student is not eligible.

The data on C.M.'s first- and second-grade progress reports are accurate. No one was advised to provide false data. Seen in the reports are bench marks for the grade and how a student is progressing towards those standards.

Dr. Paster had Dr. McGuffog's first report and considered it in determining that C.M. was not eligible.

Dr. Paster stated it is not atypical for a first-grade student to have difficulty communicating and with behavior. It is all part of the learning process.

Dr. Laruen Banker testified, without objection, as an expert in Elementary Education, as follows:

She is the principal at the Washington Elementary School. She holds three certificates from the New Jersey Department of Education: Teacher - kindergarten through eighth grade; Supervisor - kindergarten through eighth grade; and, Principal.

Dr. Banker serves on the committee for the Intervention and Referral Service at Washington Elementary School.

She also works with the CST and special education teachers at Washington Elementary School to ensure that students receive the appropriate curriculum and instructional experience.

Dr. Banker also serves on the Section 504 Committee at Washington Elementary. She explained what a 504 Accommodation Plan involves. She went on to explain the difference between Intervention and Referral Services and special education.

Dr. Banker described meeting C.M. during the first week of school when he was in first grade. His teacher expressed concerns with his behavior. Dr. Banker went to the nurse's office to help de-escalate the situation. C.M. appeared frustrated and angry. He was "definitely not happy."

Dr. Banker called the school psychologist who was able to calm down C.M. Dr. Banker also then called petitioners, who returned the call after C.M. returned to class.

On September 30, 2015, Summit held the first Initial Intervention and Referral Services Meeting for C.M. The concerns at this meeting were noted as "Behavioral."

At the Intervention Meeting, C.M.'s first-grade teacher noted that C.M. "gets angry quickly when he perceives something is unclear," and "when he feels he's being wronged he gets upset."

Dr. Banker stated that this is behavior that is often seen, "especially [in] the young children, [like] first graders. There is some adjustment period, and fairness is a theme that comes up a lot with very young children.

At the meeting a plan was developed for C.M.

C.M. requiring special education and related services was not even discussed because the District and I&RS Committee felt they "needed to put his intervention[s] into place in the least restrictive environment."

A follow-up meeting to assess the intervention plans being implemented was set for November 18, 2015.

From the date of the September 30, 2015, Intervention Meeting to the November 18, 2015, Follow-Up Intervention and Referral Services Meeting, C.M. only had two incidents where he had to calm down and be removed from the classroom.

At the November 18, 2015, Follow-Up Intervention and Referral Services Meeting the plan for C.M. was working. C.M.'s teacher reported no academic difficulties that needed to be discussed or addressed. No school staff member expressed a need for special education services for C.M.

At the February 8, 2016, Eligibility Determination Meeting, Dr. Banker, along with the CST and other members of the IEP Team, agreed that C.M. was not eligible for special education and related services because C.M. "was progressing in his academics, and he was learning, and so in order to continue to provide him with the interventions in his general education" setting was more than adequate and appropriate.

Further, at the February 8, 2016, Eligibility Determination Meeting, it was decided that C.M.'s teacher would meet with the I&RS team to create writing goals to further develop C.M.'s writing skills.

It was also decided that the "literacy coach, occupational therapist, speech therapist, and school psychologist and school counselor" would consult with the I&RS Committee whenever they meet about C.M.

C.M. would also "continue to receive basic skills reading four times a week, social skills group once a week, and after-school basic skills programming twice a week."

These services were consistent with the District's goal of ensuring that C.M. remain in the least restrictive environment.

Further, after reviewing C.M.'s report cards and progress reports, C.M. was clearly progressing and achieving academically, and as such, was not eligible for special education and related services.

Dr. Jane Kachmar-Desonne testified, without objection, as an expert in Elementary Education, as follows:

Dr. Jane Kachmar-Desonne was the Board's Director of Special Education. As Director she reports to the Superintendent. She is responsible for all special education, 504 accommodation plans, Intervention and Referral Services, Child Find, supervision and development of program, compliance, and curriculum, among other things.

She stated a diagnosis does not entitle a student to special education services or a 504 Accommodation Plan. The need for special education services arises when a student cannot progress with accommodations, best practice implementation in an instructional environment without the need for modification, alternative curriculum, which would be delivered through an IEP.

Dr. Kachmar-Desonne has met C.M. She did not attend the Intervention and Referral Service meeting of September 30, 2015, or the follow-up meeting November 18, 2015. She was aware the meetings were taking place. She did review the meeting form.

Dr. Kachmar-Desonne, as an expert in special education and the Director of Special Education in the District concluded that the results and behavioral interventions put in place for C.M. as a result of the September 30, 2015, Intervention Meeting were appropriate and adequate for C.M.

Further, nothing Dr. Kachmar-Desonne reviewed from the September 30 Intervention Meeting demonstrated a need for special education and related services.

Dr. Kachmar-Desonne also reviewed and was aware of the November 18 Follow-Up Meeting form and results. C.M. was making clear progress and achieving all goals between the two intervention meetings.

Dr. Kachmar-Desonne was also aware of the February 8, 2016, Eligibility Determination Meeting. She did not attend the meeting. She agreed with the decision that C.M. was not eligible for special education services. She noted that C.M. was progressing and that it was appropriate to continue with the Intervention and Referral accommodations.

She was aware of Dr. McGuffog's report. Dr. Kachmar-Desonne stated that a diagnosis does not mean a student is eligible for special education services.

E.M. testified as follows:

She is the mother of C.M. C.M. is currently in the third grade. He had attended pre-school and did "OK." He was in pre-school from six months to six years of age.

At the end of kindergarten teachers expressed concerns regarding behavioral issues. C.M. would refuse to do his work. He would run out of the room and then run around.

C.M. was enrolled in the Zadies School in Summit in March 2015. She spoke with Dr. McGuffog after C.M. had been asked to leave Zadies. She became concerned. Dr. McGuffog tested C.M. in July 2015. Dr. McGuffog's report was given to the District in October 2015.

On February 8, 2016, E.M. attended the Eligibility Determination for C.M. E.M. was represented by an advocate at the February 8, 2016, Eligibility Determination Meeting.

Prior to the February 8, 2016, Eligibility Determination, E.M. requested to receive weekly progress reports from C.M.'s school regarding C.M.'s behavior and academic progress. The District provided weekly progress reports.

E.M. did not agree with the decision made to not provide C.M. with special education services and hired an attorney. She felt she was not given the opportunity to participate in the meeting. She stated that Dr. McGuffog's report was not considered. She stated she thought her rights were violated. Further, she stated she did not understand the process.

E.M. considered C.M.'s top educational needs were: reading; comprehension; writing; and, social. She does not believe the District did all needed evaluations, such as educational, autism, and ADHD.

Petitioners provided services to C.M. based upon Dr. McGuffog's recommendations.

Alana Fichtelberg testified as an expert in Speech Language Pathology and development of IEPs, as follows:

Alana Fichtelberg is a Speech Language Pathologist certified in New Jersey, Pennsylvania, and Florida.

Ms. Fichtelberg first met C.M. when Petitioners hired her to evaluate C.M. She reviewed records, observed C.M., spoke with Petitioners, and briefly had discussions with teachers. She sent questionnaires to teachers and Y.M.C.A. staff. She conducted five hours of one-on-one testing.

She reviewed the speech and language evaluation of C.M. performed by the District and disagreed with the same. Ms. Fichtelberg thought the District needed to do more.

Ms. Fichtelberg reviewed Dr. McGuffog's report. She stated she needs to know as much about a student as possible.

Ms. Fichtelberg sent Petitioners her conclusions and results in her report, dated July 16, 2016. She opined that C.M. should be classified for special education services and have an IEP. She further opined C.M. should get group language services and that social thinking methodology be used.

When asked if C.M. was eligible for special education and related services she replied, "I kind of did. But I wanted to give the district, hopefully based on my report a chance to look into those areas. And that's why I said, you know, child study team should then be convened to review the results of all the testing, because I felt that there needed to be more information gained."

Ms. Fichtelberg's report is dated April 28, 2016.

Ms. Fichtelberg returned to C.M.'s school in January of 2017 to observe him. This was done at the request of Petitioners. She observed "I guess, a language arts, English kind of class." She observed for one hour. Ms. Fichtelberg prepared a second report, which is dated February 27, 2017.

Ms. Fichtelberg reviewed C.M.'s progress reports for marking periods one and two in the creation of her reports.

C.M.'s first-grade teacher stated to Ms. Fichtelberg that C.M. "speaks clearly in class," and that she could "understand him as well as his classmates."

Ms. Fichtelberg received an email from Petitioners in April 2016 that stated Petitioners "referred C.M. to the child study team, because of his diagnosis, not because of any behaviors."

At no point during Ms. Fichtelberg's classroom observation of C.M., prior to her first report, did she witness C.M. express that he was having any difficulty

understanding the events of the classroom. Further, Ms. Fichtelberg never witnessed others stating that they could not understand C.M.

Ms. Fichtelberg also observed C.M. during his recess period prior to her first report. At no point did she see students or school staff expressing that they could not understand C.M. during the recess period.

Ms. Fichtelberg observed that C.M.'s behavior at recess was not atypical for a first grade, seven-year-old student. Ms. Fichtelberg observed no meltdowns or any other inappropriate behavior by C.M. during her observation.

Prior to Ms. Fichtelberg signing the final version of her July 16, 2016, first report, Petitioners gave her forty-nine different notes of changes to be made to Ms. Fichtelberg's report.

Dr. Carolyn McGuffog, testified, without objection, as an expert in School Psychology, Special Services in Public Schools, as a chief school administrator, neuropsychology and the development of IEPs, as follows:

Dr. Carolyn McGuffog is a Neuropsychologist hired by Petitioners to evaluate C.M. Dr. McGuffog performed a neuropsychological evaluation of C.M. at Petitioner's request. Dr. McGuffog did a social history. She spoke with school personnel at the Zadies school. Dr. McGuffog performed sixteen different tests to be comprehensive. C.M. was six years of age at the time of the testing.

Dr. McGuffog first encountered C.M. when Petitioners requested that she evaluate C.M.

Petitioners requested Dr. McGuffog's evaluation because they were very concerned that their son's behavior at school. And at the time, they felt like this was a sudden change in his behavior. This school was not in Summit.

C.M. was asked to leave his kindergarten program prior to Dr. McGuffog's evaluation.

Dr. McGuffog proceeded to review the various testing she performed.

Dr. McGuffog recommended C.M. start in public school, which have special services. Her hope was that the school could provide the appropriate services.

C.M. did not come in with any academic concerns. Dr. McGuffog looked at everything. She determined that C.M. had a significant weakness in reading.

Dr. McGuffog reached the following diagnoses: Language Disorder; Social (Pragmatic) Communication Disorder; Specific Learning Disorder with impairment in reading accuracy; and, Specific Learning Disorder with impairment in written expression. Dr. McGuffog ruled out ADHD and Autism Spectrum Disorder.

Dr. McGuffog recommended more testing and some special education services.

Dr. McGuffog again tested C.M. in July and August 2016. She revised her recommendations and stated C.M. needed special education services. She further opined he needed special education services in her first report as C.M. had identified disorders.

Dr. McGuffog did a third evaluation in January 2017. This was done a Petitioners' request. In this report Dr. McGuffog made a diagnosis of Autism Spectrum Disorder.

Dr. McGuffog attended the February 8, 2016, eligibility meeting. This was after she issued her first report.

Dr. McGuffog did not observe C.M. at this kindergarten program. C.M. had been asked to leave the school prior to her being retained. She did not visit the Zadies School. She did not ask what kind of social program was provided at Zadies. Dr.

McGuffog reviewed no reports or behavior incident forms from C.M.'s kindergarten program.

Dr. McGuffog evaluated C.M. four times in the summer of 2015: July 24, July 29, July 31, and August 6, 2015. All were prior to C.M. entering the Summit District.

Dr. McGuffog's evaluations and subsequent report all occurred prior to C.M. attending school in the Board's school district.

Dr. McGuffog reviewed no materials or data from the District in the making of her report.

Upon the completion of Dr. McGuffog's report, Dr. McGuffog recommended to Petitioners that they share her report with the Board, C.M.'s new school.

Prior to the February 8, 2016, Eligibility Determination Meeting, Dr. McGuffog did not observe C.M. in his elementary school setting in the District.

Dr. McGuffog observed C.M. in February 2017. At the February 2017 observation, Dr. McGuffog observed and noted that C.M.'s interactions "appeared appropriate and typical." Dr. McGuffog witnessed no meltdowns or inappropriate behaviors during her observation of C.M. and noted that C.M. "generally interacted appropriately with his peers during lunch and recess."

In reviewing C.M.'s school progress reports Dr. McGuffog stated they are subjective and not based on data. They are not reliable like standardized testing. She stated, referring to the school progress reports, "it feels, quite frankly, disingenuous."

Her report is not intended to tell the District what to do.

Lauren Sachs, testified, without objection, as an expert in Speech and Language, as follows:

Ms. Sachs is the Speech Language Specialist for the District.

Ms. Sachs evaluated C.M. in the 2015-2016 school year.

Ms. Sachs administered a Comprehensive Assessment of Spoken Language (CASL) and the Language Processing Test Elementary (LPT3). The CASL is a comprehensive measure of language abilities that looks at a child's overall language skills, their expressive and receptive language.

C.M. scored in the average range of performance on the CASL, and in the tenth percentile for the pragmatic subtest of the CASL.

In the LPT administered by Ms. Sachs, C.M. scored slightly below average.

In assessing C.M.'s scores in both assessments, C.M. scored within the average range.

The purpose of Ms. Sachs' evaluations of C.M. was to secure appropriate data for the February 8, 2016, Eligibility Determination Meeting, in light of concerns Petitioners shared with the District.

Based on the results of her evaluations of C.M., Ms. Sachs determined that C.M. was not communication impaired.

Ms. Sachs stated that for a student to be communication impaired they have to be in the tenth percentile on two assessments, and it is not just a subtest, it is the entire assessment and C.M. was in the average and slightly below-average range on the two assessments, making him non-eligible.

C.M.'s teacher understood his speech. There were no reports from C.M.'s teacher about any difficulties understanding him.

Ms. Sachs attended the November 11, 2015, planning meeting. She saw Dr. McGuffog's report and noted how low pragmatic language score was. Ms. Sachs stated Dr. McGuffog's report helped her choose which tests to administer.

The scores for C.M. she recorded were comparable with the scores noted by Dr. McGuffog.

Overall scores do not tell the whole story. Ms. Sachs noted she must follow New Jersey law to determine if a student is eligible for special education. There has to be an educational impact.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo, 314 F.2d at 749.

Dr. Paster testified in a professional, direct manner as an expert in school psychology, special education, and as a Board Certified Behavior Analyst. It is clear she is passionate about her work. She was clear, consistent, and direct in her testimony. I deem her very credible.

Dr. Banker testified as an expert in Elementary Education. Her testimony too was professional and direct. Dr. Banker was able to express her opinions without hesitation. She was quite clear and consistent. I deem her very credible.

Dr. Jane Kachmar-Desonne testified as an expert in Elementary Education. Her testimony was clear and precise. She was to the point and had no hesitation in her answers. I deem her very credible.

E.M.'s testimony was somewhat problematic. While I am sure she was truthful in her testimony, she was combative and obstinate when cross-examined. She hesitated sometimes when answering simple questions. She seemed to not want to respond, but rather to say what she wanted to say, as opposed to answering the question posed. At one point on cross-examination she maintained an email from the District was a refusal to email. When it was pointed out that said email did not state this her response was that was how she read it. I deem her only somewhat credible.

Alana Fichtelberg testified as an expert in Speech Language Pathology and development of IEPs. While Ms. Fichtelberg was direct and professional in her testimony, I cannot afford weight to the same as her two reports are dated after the eligibility meeting of February 8, 2016. The reports were not available to the CST at the time of the determination.

Dr. McGuffog testified as an expert in School Psychology, Special Services in Public Schools, as a chief school administrator, neuropsychology and the development of IEPs. I had difficulty with Dr. McGuffog's testimony. She dismissed C.M.'s report cards as "disingenuous" without adequately explaining why they were so. She appeared upset that the CST at the February 8, 2016, did not accept her recommendations set forth in her report. She insisted she was not given the opportunity to participate adequately. Other credible testimony indicates otherwise. Her initial report, she maintained, stated that C.M. should receive special education and related services. On cross she contradicted this testimony. A fair reading of her first report does not reveal an unequivocal recommendation for special education. While Dr. McGuffog testified in a clear and professional manner, and was quite sincere in her beliefs, I am not affording a great deal of weight to the same for the reasons stated above. Further, I cannot afford weight to her testimony based upon her two subsequent reports as the District did not have this information available at the time of the initial determination.

FINDINGS OF FACT

In 2015/2016 C.M. was evaluated for special education and related services on February 8, 2016, and found ineligible. J-8. Prior to entering the District's school system C.M. attended kindergarten at the Zadies School. Zadies School required that C.M. leave the school due to behavioral issues.

C.M. entered the Summit School District for first grade. Petitioners registered C.M. in March 2015. Petitioners did not inform the District about C.M.'s behavioral issues.

After C.M. was expelled from Zadies School, and prior to beginning first-grade classes, Dr. Carolyn McGuffog performed a series of tests and issued a report received the District on October 14, 2015. R-4.

Dr. McGuffog issued two subsequent reports, both dated after the initial eligibility meeting of February 8, 2016. P-11 and P-13. Dr. McGuffog also issued a report based upon her in school observation of C.M., dated February 6, 2017. P-14.

C.M. had incidents of improper behavior while in first grade in the Summit School District. On September 24, 2015, C.M. reported to the School Nurse after such an incident. Dr. Banker contacted Petitioners where the District learned for the first time that C.M. had behavioral issues.

Due to behavioral issues with C.M. the District convened an initial Intervention and Referral Services Meeting. That meeting took place on September 30, 2015. A plan was developed for C.M. to assist him with behavioral issues. The plan was implemented in October 2015.

Petitioners requested an Evaluation Planning Meeting, which was held on November 11, 2015. Petitioners provided their consent for C.M. to be evaluated. Petitioners' input was considered at the evaluation meeting. Petitioners brought a family member and Dr. McGuffog to the meeting. C.M. was referred to the CST. The agreed upon evaluations were performed.

On November 18, 2015, a Follow-Up Intervention Meeting was held to assess and review the current interventions in place for C.M. J-3.

The IEP meeting was held on February 8, 2016. C.M. was found ineligible to receive special education and related services. J-6.

C.M. made consistent progress, both academically, and with behavioral issues, as noted in his progress reports. R-9 and R-17.

The District's initial eligibility determination was made with the information available to it at that time: February 8, 2016.

The District afforded Petitioners and Dr. McGuffog the opportunity to participate at the initial eligibility meeting. All questions posed by the Petitioners and Dr. McGuffog were answered. The District did not refuse to answer any questions posed.

All members of the CST agreed with the decision not to classify C.M. at that time.

LEGAL ANALYSIS AND CONCLUSION

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

New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district “maximize the potential” of the student but requires a school district to provide a “basic floor of opportunity.” Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the child’s education plan provides for “significant learning” and confers “meaningful benefit” to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (internal citations omitted).

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

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

In New Jersey, State regulations track the requirement that a local school district provide "a free, appropriate public education" as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey follows the federal standard requiring such entitlement to be "sufficient to confer some educational benefit," although the State is not required "to maximize the maximum potential of handicapped children." Lascari, 116 N.J. 30.

In determining where to deliver that instruction, it is clear that the district must be guided by the strong statutory preference for educating children in the “least restrictive environment.” 20 U.S.C. § 1412(a)(5) 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.

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; N.J.A.C. 6A:14-4.3. 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); see also N.J.A.C. 6A:14-4.2.

Either a parent of a student or a public agency may initiate a request for an initial evaluation to determine if the student is a student with a disability. 34 C.F.R. § 300.301(b). The “child find” requirements of the IDEA (20 U.S.C. § 1412(a); 34 C.F.R. § 300.111) require every state to implement policies and procedures to ensure that all children with disabilities residing in the state, who are in need of special education and related services, are identified, located and evaluated. While local school districts are responsible for conducting child find for children residing in the district, a parent’s failure to request that a school district identify and evaluate a child does not relieve the school district of its child find obligation. Robertson County Sch. Sys. v. King, 24 IDELR 1036 (6th Cir. 1996).

In New Jersey, school districts are required to utilize strategies and interventions in the general education classroom prior to referring the student for an evaluation. N.J.A.C. 6A:14-3.3 provides:

(b) Interventions in the general education setting shall be provided to students exhibiting academic difficulties and shall be utilized, as appropriate, prior to referring a student for an evaluation of eligibility for special education and related services

. . . .
(c)(1) When it is determined through analysis of relevant documentation and data concerning each intervention utilized that interventions in the general education program have not adequately addressed the educational difficulties and it is believed that the student may have a disability, the student shall be referred for evaluation to determine eligibility for special education programs and services under this chapter.

Petitioners requested that C.M. be evaluated for special education and related services. An initial evaluation meeting was held on November 11, 2015. Evaluations of C.M. then commenced. The District convened an eligibility meeting for February 8, 2016. At that meeting the District determined that C.M. was not eligible. The CST was able to consider the evaluations performed by its staff and experts. Additionally, the CST had the report of Dr. McGuffog, which was prepared at the request of the Petitioners. Everyone at the meeting had the opportunity to participate, notwithstanding the testimony from E.M. and Dr. McGuffog to the contrary. The later reports of Dr. McGuffog and Ms. Fichtelberg were not available at the time.

Petitioners argue that the latter reports are indicative of the District's failure to classify C.M. as a failure to comply with 20 U.S.C. § 1400, et seq., and therefore denied him FAPE. Petitioners further argue that the District violated its "child find" obligations. See N.J.A.C. 6A:14-3.3.

In Baquerizo v. Garden Grove Unified School District, 86 F.3d 1179 (9th Cir. 2016) (denying reimbursement to the parents for their private placement when the child's IEP was appropriate and the parents count not affirmatively show any violations of the IDEA) the Court stated:

When reviewing whether a proposed educational setting is appropriate under the Individuals with Disabilities Education Act, a court employs the snapshot rule, which instructs it to judge an Individualized Education Program (IEP) not in hindsight, but instead based on the information that was

reasonably available to the parties at the time of the IEP. To the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 20 U.S.C. §1412 (1)(5)(A).

[Id. at 1186-87; see also Adams v. Or., 195 F. 3d 1141, 1149 (9th Cir. 1999).]

The Third Circuit also uses the snapshot rule, as noted in Furhmann v. East Hanover Board of Education, 993 F.2d 1031 (3rd Cir. 1993) where the majority noted “[e]vents occurring months and years after placement decisions had been promulgated, although arguably relevant to the court’s inquiry, cannot be substituted for Rowley’s threshold determination of a ‘reasonable calculation’ of educational benefit.” Id. at 1040 (interpreting Rowley, 458 U.S. 176. The Court in Furhmann further stated, “Our understanding of Rowley comports with that of the district court: that the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” Id. at 1040.

In the instant matter, it is clear that the District used all information available to it at the time of the eligibility meeting on February 8, 2016.

To be eligible for special education and related services a student must be classified in one of fourteen disabilities defined in N.J.A.C. 6A:14-3.5(c). Further, the disability must “adversely affects the student's educational performance and the student is in need of special education and related services.” N.J.A.C. 6A:14-3.5(c). That C.M. was ultimately classified does not infer that C.M. was inappropriately not classified at the February 8, 2016, eligibility meeting. C.M. was making consistent, meaningful progress at that time.

Clearly, the CST considered C.M.’s needs, as they had been determined at the earlier Intervention and Referral Services Committee meeting of September 30, 2015, and the follow-up meeting of November 11, 2015. The Committee was able to establish a plan to assist C.M. appropriately. This is borne out by his consistent progress noted in his school progress reports and teacher comments, as well as evaluations, work samples, observations, and behavioral data. See Case Closure Form, J-6. This is

consistent with the District meeting its “child find” obligations pursuant to N.J.A.C. 6A:14.3-3.

Respondent has more than met its burden by a preponderance of the credible evidence that it met its child find obligations, that it considered all information available to it at the time of the initial eligibility meeting, and in its determination that C.M. was not eligible for special education and related services at that time.

Based upon the foregoing, I **CONCLUDE** that Petitioners’ due process petition should be dismissed.

ORDER

It is hereby **ORDERED** that Petitioners’ due process petition is **DISMISSED**, with prejudice.

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 Programs.



October 12, 2018 _____

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

db

APPENDIX

List of Witnesses

For Petitioner:

E.M., petitioner
Alana Fichtelberg
Carolyn McGuffog, Ph.D.

For Respondent:

Angela Paster, Supervisor of Special Education
Lauren Banker, Principal
Jane Kachmar-Desonne, Director of Special Education
Lauren Sachs, Speech and Language Specialist

List of Exhibits

Joint Exhibits:

- J-1 IR&S meeting form dated 9/30/15
- J-2 Evaluation Planning Meeting dated 11/11/15
- J-3 IR&S follow-up meeting dated 11/18/15
- J-4 Contact log dated 12/17/15
- J-5 Speech and language evaluation dated 1/11/16
- J-6 Letter from Dr. McGuffog dated 1/14/16
- J-7 Psychological observation received 2/4/16, dated 12/15/15
- J-8 Initial eligibility determination dated 2/8/16

For Petitioner:

- P-1 Marked – not in evidence
- P-2 Email thread dated 10/26/15
- P-3 Email thread dated 11/18/15
- P-4 Summit Public Schools contact log dated 1/29/16
- P-5 Email thread dated 1/31/16

- P-6 Email thread dated 2/1/16
- P-7 Email thread dated 2/2/16
- P-9 Marked – not in evidence
- P-11 Dr. McGuffog report dated 9/22/16
- P-12 Marked – not in evidence
- P-13 Neuropsychological evaluation update by Dr. McGuffog dated 1/17/17, and 1/22/17
- P-14 Dr. McGuffog school observation report dated 2/6/17
- P-15 Speech/Language Social Learning evaluation by Alana Fichtelberg dated 2/27/17
- P-17 Marked – not in evidence
- P-18 C.V. Alana Fichtelberg
- P-19 C.V. Dr. McGuffog
- P-20 Jayne Wesler, Esq., letter dated 11/14/16
- P-21 Alana Fichtelberg report dated 7/16/16

For Respondent:

- R-1 Due Process Petition dated 5/25/16
- R-2 Answer to Due Process Petition dated 9/1/16
- R-3 Pretrial Order dated 11/14/16
- R-4 Neuropsychological evaluation dated 8/6/15
- R-5 Physical therapy evaluation dated 12/17/15
- R-6 Social assessment dated 1/22/16
- R-7 Psychological evaluation dated 1/27/16
- R-8 Occupational therapy evaluation 2/1/16
- R-9 First-grade progress report
- R-10 C.V. Jane Kachmar-Desonne
- R-11 C.V. Lauren Banker
- R-12 C.V. Angela Paster
- R-13 Email stream starting 9/11/15
- R-14 Email stream starting 11/20/15
- R-15 Contact logs/weekly check-in/emails 2015
- R-16 Subpoena file
- R-17 First- and Second-grade progress reports

R-18 Third-grade progress report

R-19 C.V. Lauren Sachs