



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 03514-17

AGENCY DKT. NO. 2017-25711

S.S. AND D.S. ON BEHALF OF R.S.,

Petitioners,

v.

MADISON BOARD OF EDUCATION,

Respondent.

Beth A. Callahan, Esq. for petitioners (Callahan & Fusco, attorneys)

Janelle Edwards-Stewart, Esq. for respondent (Porzio Bromberg & Newman, attorneys)

Record Closed: February 27, 2019

Decided: March 22, 2019

BEFORE **KELLY J. KIRK**, ALJ

STATEMENT OF THE CASE

Petitioners, S.S. and D.S. (the parents) on behalf of R.S., filed a Petition for Due Process against the Madison Board of Education (the Board or District), alleging that the District's proposed in-District program for R.S. for the 2016-2017 school year was not

appropriate, and that an out-of-district placement at SEARCH Consulting was appropriate.

PROCEDURAL HISTORY

On or about February 7, 2017, the parents filed a Petition for Due Process against the Board seeking continued unilateral placement at SEARCH Learning Group¹ (SEARCH), up to forty hours of home programming, and reimbursement for all costs for SEARCH Learning Group, including transportation costs and parent training. On or about March 2, 2017, the Board filed an Answer to Petition for Due Process and Affirmative Defenses. The matter was transmitted by the New Jersey Department of Education (the Department) Office of Special Education Policy and Procedure to the Office of Administrative Law (OAL), where it was filed on March 13, 2017.

Hearing dates were scheduled for October 24, 2017, November 18, 2017 and November 20, 2017. The first two hearing dates were adjourned at the request of the parties, and the hearing was scheduled to commence on November 20, 2017. However, on November 20, 2017, petitioners requested an adjournment to file a motion to disqualify opposing counsel. The adjournment request was granted to allow petitioners time to file the motion to disqualify, and the hearing was rescheduled for May 16, 2018, June 8, 2018 and June 15, 2018. On November 28, 2017, petitioners filed a motion to disqualify Ms. Edwards-Stewart and her law firm. On December 8, 2017, respondent filed a motion for partial summary decision. Respondent's opposition to petitioners' motion to disqualify was filed on December 18, 2017, and petitioners' reply was filed on December 22, 2017. Petitioners' opposition to respondent's motion for partial summary decision was filed on January 10, 2018, and respondent's reply was filed on January 27, 2018. The undersigned requested an additional certification from respondent relative to the motion to disqualify, which certification was filed on March 23, 2018. Petitioners' motion to disqualify was denied by order dated March 28, 2018. Respondent's motion for partial summary decision was denied by order dated April 16, 2018. The hearing was held on

¹ Formerly known as SEARCH Consulting.

May 16, 2018, June 8, 2018, June 15, 2018, July 25, 2018², July 30, 2018, and September 12, 2018. Subsequently the parties submitted transcripts and post-hearing briefs. Oral summations were heard on February 27, 2019, on which date the record closed.

FACTUAL DISCUSSION

Findings of Fact

Dawn McNichol (case manager/psychologist), Megan Peterson (occupational therapist), Erica Zuckerman (speech-language pathologist), Alexandra Dougherty (behaviorist), and Katie Lubin (special education teacher) testified on behalf of respondent. Carrie Kahana (SEARCH behaviorist), Nicole Journe (SEARCH behaviorist), Carol Fiorile (doctoral-level behaviorist), and D.S. testified on behalf of petitioners.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

R.S. was born on November 18, 2013. At approximately seventeen months, R.S.'s parents, S.S. (Dad) and D.S. (Mom), became concerned that R.S. would not respond to his name or make eye contact, and he would fixate on spinning objects and repetitive motions. R.S.'s pediatrician suggested the parents contact the New Jersey Early Intervention System (NJ EIS).

The NJ EIS Initial Evaluation/Assessment Summary (NJ EIS Form) reflects that R.S. was evaluated by NJ EIS when he was eighteen months old and found eligible. (P-12). It further reflects that NJ EIS had recommended speech-language and occupational therapy services, and that the parents accepted speech-language therapy for three months, one time per week for half an hour. (P-12.) Speech-language therapy was discontinued by NJ EIS after approximately two months because the therapist advised the parents that R.S. no longer required services.

² The transcript incorrectly reflects the date as July 15, 2018, which was a Sunday.

The parents disagreed that R.S. no longer required services. They switched pediatricians and R.S. was examined by Maureen Baxley, MD for his two-year well visit. Dr. Baxley advised that R.S. needed to be evaluated by a neurodevelopmental pediatrician, and she recommended Kathleen Selvaggi Fadden, MD of the Child Development and Autism Center at Goryeb Children’s Hospital.

On February 1, 2016, R.S., then twenty-six months old, was again evaluated by the NJ EIS due to pediatrician concerns at his two-year-old well visit. (P-12.) The NJ EIS Form reflects that the Battelle Developmental Inventory 2 (BDI-2) was administered to R.S. and that his scores were as follows:

| Developmental Domain | Domain Score (100 is average) | Z Score (0.0 is average) | Raw Score (RS) |
|----------------------|----------------------------------|-----------------------------|----------------|
| Adaptive | 87 | -.87 | 37 |
| Personal/Social | 90 | -.67 | 69 |
| Communication | 69 | -2.07 | 44 |
| Gross Motor | 95 | -.33 | 57 |
| Fine Motor | | <u>.33</u> | <u>31</u> |
| Cognitive | 80 | -1.33 | 49 |

Dr. Fadden evaluated R.S. on February 16, 2016. Dr. Fadden prepared a report, dated March 5, 2016 (Fadden Report). (J-9; P-15.) The Fadden Report reflects that R.S. did not meet the full criteria for an autism spectrum diagnosis, but that an Autism Diagnostic Observation Schedule (ADOS) could be done to further explore autism spectrum symptoms. (J-9; P-15.)

On March 15, 2016, Janet K. Oberman, Ph.D. of Goryeb Children’s Hospital conducted a psychological evaluation of R.S. and prepared a Psychological Evaluation – ADOS Report (Oberman Report). (P-11.) The Oberman Report reflects that “[o]n the current ADOS examination administered, [R.S.] met criteria for an autism spectrum classification.” The Oberman Report also reflects a recommendation that R.S. receive

EIS consistent with a diagnosis of autism spectrum disorder, to include twenty-five hours of Applied Behavior Analysis (ABA) programming, “as well as speech, DI, and OT therapy.” (P-11.)

On March 17, 2016, Dr. Fadden issued an Ambulatory [R]eferral to Behavioral Health, reflecting that R.S. required “[m]edically necessary behavior therapy based on the principles of ABA, 25+ hours per week; has some obsessive behavior”. (P-16.) On March 29, 2016, Dr. Fadden issued an Ambulatory [R]eferral to Behavioral Health/ABA, reflecting the “evaluate and treat” information as: “One on One ABA 35 hours per week with the supervision and programming performed by a Board Certified Behavior Analyst (BCBA).” (P-12.)

After receiving the autism diagnosis, Mom contacted a friend who has a son with autism. Mom’s friend advised that the most important thing to do was to get R.S. intensive ABA services, thirty hours per week, at a reputable place. Mom contacted the providers recommended by her friend, as well as the list of providers she had received from Dr. Fadden. Mom also contacted NJ EIS to determine what type of ABA services NJ EIS offered. NJ EIS recommended ABA five days per week for half an hour per day. The parents did not accept those services, because they were insufficient based on their research and Dr. Fadden’s recommendations.

Carrie Kahana is the founding executive director at SEARCH. (P-19.) SEARCH is a center-based program that provides one-to-one behavior analytic services to children with autism. SEARCH is not a State-approved school. Kahana is a certified special education teacher and a BCBA. She has been a BCBA since 2007. SEARCH does not employ or contract with related service providers, such as speech-language pathologists, occupational therapists or physical therapists.

Kahana was contacted by R.S.’s parents on March 19, 2016 after they were referred to SEARCH by a prior SEARCH family. Kahana met with the parents at SEARCH on March 24, 2016 and explained SEARCH’s program. Kahana wanted to meet R.S., so the parents returned to SEARCH with R.S. on March 29, 2016. R.S. was observed by Kahana and SEARCH’s clinical director/BCBA, ToniAnne Giunta Fede, for approximately

forty-five minutes. After the observation, Kahana and Fede explained to the parents that they had identified key areas that were barriers to learning for R.S. They recommended a full-time behavior analytic program for thirty hours per week with intensive one-to-one instruction and parent training. R.S. was offered a placement at SEARCH.

On March 30, 2016, petitioners signed an Agreement for Service with SEARCH through April 5, 2017. (J-11.) The agreement was for a period of one year, but it could be terminated by the parents on forty-five days' notice. Beginning on April 6, 2016, the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) was administered to R.S. for two hours per day over three days by Journe and an instructional staff member at SEARCH. (P-2.) Journe has been a BCBA since August 2015 and has been employed at SEARCH since April 2016. Journe previously worked at Alpine Learning Group (Alpine) and Institute for Educational Achievement (IEA), which are State-approved private schools for students with autism, providing one-to-one behavior analytic instruction. Journe has never worked in a classroom that was not full-time ABA. R.S. was one of Journe's assigned students.

The results of the April 8, 2016 VB MAPP reflect that R.S.'s skill levels were all within the zero-to-eighteen months age range, but R.S. was twenty-nine months old at the time. (P-2.) The VB MAPP Scoring Form reflects barriers in every assessed area, with the most significant being defective echoic, defective imitation, defective VP-MTS, defective intraverbal, defective social skills, scrolling, defective scanning, defective conditional discrimination, responses requirement weakens MO, reinforcer dependent, and hyperactive behavior. (P-2.)

After the VB-MAPP assessment, SEARCH was closed for spring break, so R.S. formally started at SEARCH on or about April 18, 2016. R.S. was receiving one-to-one intensive ABA therapy for thirty hours per week at SEARCH. Weekly parent training commenced in mid-April, and there would be quarterly clinic meetings and monthly home visits.

On May 2, 2016, SEARCH prepared Goals and Objectives for R.S. (J-12.) R.S.'s cross-content workplace indicators goals and objectives were as follows: The learner will

develop career planning and workplace readiness skills. (Objectives: decreasing elopement, decreasing motor stereotypy, decreasing noncompliance, decreasing non-contextual vocalizations, decreasing visual stereotypy, looking in response to name, building Duplo models, interlocking puzzles, and responding to a timer); The learner will use critical thinking, decision making and problem-solving skills. (Objectives: non-identical object matching, matching-to-sample:picture-picture matching, sorting by category, and wooden knob puzzles); The learner will demonstrate self-management skills. (Objectives: full-day matching photographic activity schedule, following group directions, independent toy play, dressing, and waiting in a specified location); The learner will apply safety principles. (Objective: following community safety procedures).

R.S.'s comprehensive health and physical education goals and objectives were as follows: The learner will learn health promotion and disease prevention concepts and health-enhancing behaviors. (Objectives: brushing teeth, washing hands, and toileting); The learner will learn health-enhancing personal, interpersonal, and life skills. (Objectives: making eye contact, motivational system, and ball skills); The learner will learn and apply movement concepts and skills that foster participation in physical activities throughout life. (Objectives: pointing and gross motor imitation).

R.S.'s language arts and literacy goals and objectives were as follows: The learner will speak for a variety of real purposes and audiences. (Objectives: verbal imitation of phonemes, verbal imitation of words, verbal imitation of phrases, intraverbals, mand for desired items, answering social questions, answering questions about animal sounds, initiating a greeting, and requesting help); The learner will listen actively in a variety of situations to information from a variety of sources. (Objectives: circle time skills, discriminating objects by feature/function/class, following basic directions, receptive labeling of body parts, receptive labeling of familiar objects, receptive labeling of familiar people, scanning, and receptive labeling of verbs); The learner will write in clear, concise, organized language that varies in content and form for different audiences and purposes. (Objective: handwriting imitation); The learner will read a variety of material and texts with comprehension and critical analysis. (Objectives: receptive letter identification and letter identification); The learner will view, understand, and use nontextual visual information. (Objectives: matching-to-sample:object-object matching, imitates actions paired with

sounds, motor imitation with objects, labeling body parts, expressive labeling of familiar objects, labeling nouns, labeling verbs, and motor imitation with a peer); The learner will develop number sense and an ability to represent numbers in a variety of forms and use numbers in diverse situations. (Objectives: counting objects, number labeling, receptive number labeling and oral counting). Each objective reflects a specific response definition and a specific measurement procedure. The goals and objectives reflect that R.S. was working primarily on foundational skills at SEARCH.

Per the NJ EIS Part B Notification/Referral to Local School District, the District was notified by NJ EIS on or about July 11, 2016 that R.S. was approaching age three and may be eligible for services. (J-2.)

Dawn McNichol obtained a master's degree in educational psychology in 2000. She is a certified school psychologist and certified supervisor. She has been employed by the District as a school psychologist since November 2004 and she was the Supervisor of Child Study Team Services from November 2004 until June 2010. (R-5, R-6, R-7.) McNichol was assigned to be R.S.'s case manager. McNichol received the NJ EIS referral in August 2016, and she contacted the parents to schedule an initial identification and evaluation planning meeting for September.

On August 11, 2016, SEARCH prepared a Progress Report for R.S., for the period of May 9, 2016 through August 11, 2016. (P-3.) The target responses for "education programs" were making eye contact, looking in response to name, motivational system, pointing, matching-to-sample:object-object matching, following basic directions, gross motor imitation, motor imitation with objects, verbal imitation of words, intraverbals, answering questions about animal sounds, receptive labeling of body parts, receptive labeling of familiar objects, scanning, independent toy play, wooden knob puzzles, responding to a timer, waiting in a specified location, and responding to a greeting. (P-3.) The target responses for "behavior reduction programs" were elopement, motor stereotypy, noncompliance, non-contextual vocalizations, oral stereotypy and visual stereotypy. (P-3.) Specific response definitions, specific measurement procedures and data summaries were included for each target response. (P-3.)

On September 14, 2016, the District held an initial identification and evaluation planning meeting. In attendance at the meeting were Mom, special education teacher Kady Lubin, case manager Dawn McNichol, occupational therapist Megan Petersen, occupational therapist student Christopher Cerami, learning disabilities teacher/consultant Beth Murphy, speech therapist Erica Zuckerman, and social worker Catherine Steege. At the meeting, Mom advised that R.S. had been diagnosed with autism and was attending SEARCH. No request was made that the parents provide the District with written documentation of his autism diagnosis. Mom advised the meeting participants that she was concerned about language, self-help and adaptive skills, and repetitive behaviors.

The District determined that evaluations were warranted, and that the areas of suspected disability were communication, social and emotional, and adaptive. (J-3.) The assessments proposed were a psychological evaluation, a speech/language evaluation, and an occupational therapy evaluation, which would be combined into a preschool collaborative evaluation. (J-3.) Mom signed the consent for initial evaluation on September 14, 2016. (J-3.)

On September 15, 2016, McNichol advised Mom via email that she had contacted SEARCH on September 14, 2016 and left a message for Kahana to call back to schedule an observation and evaluation. (R-9.) On September 15, 2016, Mom emailed a completed Pre-Evaluation Form to McNichol. (R-9.)

On or about September 21, 2016, a second VB-MAPP was administered to R.S. at SEARCH when he was thirty-four months old. (P-2.) These VB MAPP results reflect progress in seventeen of the twenty-four assessed areas, but an increase in self-stimulation. (P-2.) His score increased from a 23 on April 8, 2016 to a 58.5 on September 21, 2016. (P-2.)

On September 23, 2016, McNichol sent Mom an email requesting that she return a completed proof of residency and registration form by the end of October, or very early November, so R.S. could begin school on his third birthday. (P-27.)

In response to the District's request, SEARCH advised the District that its personnel would be allowed to observe R.S. at SEARCH but would not be allowed to evaluate R.S. at SEARCH. Kahana did not allow the evaluations at SEARCH because of space considerations and because she felt it was important to evaluate R.S. in a non-conditioned setting, as R.S. had learned what the expectations were at SEARCH and what he was and was not allowed to do, so the District would not have obtained a pure baseline assessment.

On September 24, 2016, Zuckerman, Petersen and Cerami went to R.S.'s home to perform the speech-language and occupational therapy evaluations. Zuckerman has been employed by the District since November 2011 as a speech-language pathologist. (R-3.) She obtained a master's degree in speech-language pathology in 2007. She has been a Department-certified speech-language specialist since 2008 and a State-licensed speech-language pathologist since 2009. Her caseload has always included some students with autism, but she does not provide "ABA-based speech therapy." Petersen is a certified school occupational therapist and has been employed by the District since June 2009. (R-2.) She works with students ages pre-kindergarten through fifth grade.

Zuckerman evaluated R.S. by administering the Preschool Language Scale-5 (PLS-5) and by informal observation and parent report. (R-10.) Due to interfering behaviors, R.S. was evaluated while seated in a booster seat at the kitchen island. He was not able to escape the booster seat. Petersen evaluated R.S. by administering the Peabody Development Motor Scales Second Edition (PDMS-2), and by observation and parent report. (R-11.) Petersen also used the Educational Assessment of School Youths (EASY) as a developmental checklist. (R-11.)

On September 25, 2016, Zuckerman returned to R.S.'s home to continue her speech-language evaluation. R.S. was again evaluated while seated in the booster seat.

On September 27, 2016, R.S. was observed by McNichol and Zuckerman at SEARCH.

On or about September 27, 2016, McNichol had Mom complete the Behavior Assessment Scale for Children – Third Edition (BASC-3) Parent Report Form. On or about September 27, 2016, McNichol also had Journe complete the BASC-3 – Teacher Report Form. No formal cognitive measure was able to be administered at that time.

Zuckerman, Petersen and McNichol prepared a Collaborative Preschool Evaluation, dated October 1, 2016, with each completing her respective portion of the report. (J-8.)

Zuckerman’s “Communication” portion of the Collaborative Preschool Evaluation included her evaluation results and information she had obtained from SEARCH. In part, Zuckerman’s portion reflects that she observed that R.S. “sat in his booster . . . and attended . . . for a short time;” “[o]nce given a break, it was really difficult to transition him back to the work table”; “he was self-directed with play and had difficulty [responding] to redirection”; and “[h]is compliance decreased over the duration of the assessment.” The PLS results were that R.S.’s overall communication skills were in the low average range, he had average to low average language skills, and his receptive and expressive scores were statistically comparable, meaning that receptive language skills were developing at a similar rate as his expressive language skills. Of note, the PLS-5 accepts “responses from children that are elicited, reported or observed,” and “many . . . tasks do not have to be completed as directed to receive credit for the specific skill.” (J-8.) R.S.’s language skills were “not concurrent with his functional use of language.” (J-8.) The Collaborative Preschool Evaluation notes that SEARCH was targeting the following receptive and expressive language skills: matching identical objects, one-step directions, imitating gross motor movements with and without objects, filling in the blank with a word when a song is sung, answering questions about animal sounds, receptively labeling body parts and familiar objects, and responding to greetings. It further notes that “[R.S.] is making steady gains and progress towards meeting these objectives.” On the PLS-5, R.S.’s receptive communication standard score was 87, which is in the 19th percentile; his expressive communication standard score was 90, which is in the 25th percentile; and his total language score was 88, which fell in the 85-115 average range. Zuckerman recommended thirty minutes of speech therapy twice per week.

Petersen's "Motor" portion of the Collaborative Preschool Evaluation, reflects, in part, the following: After about thirty minutes of sitting in his booster, R.S. began to squirm and was noncompliant. He was allowed a break from the booster, but he was resistant to returning to it. Some tasks were attempted with R.S. out of the booster with little success. He returned to the booster for the occupational therapy portion of the evaluation, but decreased compliance was noted. His noncompliance presented as gently pushing away the material, saying "all done" or "no", or not responding. When asked to complete certain tasks, R.S. said "no" without attempting the skill at all. Working for reward items was attempted with some success, but it was not clear if his noncompliance was the result of not understanding the directions, not complying or not being able to complete the task. R.S. demonstrated decreased attention to tasks, fleeting eye contact, and increased difficulty following directions and imitating demonstrated skills. Petersen altered the testing procedures to determine R.S.'s skill level versus his ability to comply and follow standardized assessments, so the PDMS-2 results were invalid and not reported. If she had not altered the testing procedures, he would not have scored well. R.S. generally had lower muscle tone in his trunk and upper extremities. He had increased difficulty with motor planning fine motor skills. He appeared to have difficulties with visual skills. He demonstrated decreased visual attention to tasks and fleeting eye contact. R.S. struggled with completing the Visual-Motor integration tasks on the PDMS-2, which relies heavily on imitative demonstrated tasks. He was unable to imitate horizontal lines, vertical lines or circles. He demonstrated decreased independence with self-care skills and increased difficulty with sensory processing skills.

McNichol's "Adaptive" Portion of the Preschool Collaborative Report is based upon the BASC-3. The Parent Report results were as follows: Adaptive Skills composite scale T-score of 24 and percentile rank of 1, which falls in the Clinically Significant classification range; Adaptability T-score of 32 and percentile rank of 4, which falls in the At-Risk classification range; Social Skills T-score of 29 and percentile rank of 2, which falls in the Clinically Significant classification range; Activities of Daily Living T-score of 32 and percentile rank of 2, which falls in the At-Risk classification range; and Functional Communication T-Score of 26 and percentile rank of 1, which falls in the Clinically Significant classification range. The Teacher Report results were as follows: Adaptive Skills composite scale T-score of 35 and percentile rank of 4, which falls in the At-Risk

classification range; Adaptability T-score of 38 and percentile rank of 12, which falls in the At-Risk classification range; Social Skills T-score of 35 and percentile rank of 5, which falls in the At-Risk classification range; and Functional Communication T-Score of 37 and percentile rank of 10, which falls in the At-Risk classification range. Scale scores in the “Clinically Significant” classification range suggest a high level of maladjustment, and scores in the “At-Risk” classification range may identify a significant problem that may not be severe enough to require formal treatment or may identify the potential of a developing problem that needs careful monitoring. The Teacher Report Form lists behavioral or emotional concerns as follows: vocal stereotypy (vocalizing sounds without the purpose of communicating); visual stereotypy (tracking objects across his visual field in a repetitive manner); elopement (walking more than 1 ft away from his instructor in the absence of a direction to do so); oral stereotypy (placing hands, finger, or objects near or in the mouth), noncompliance (not following known directions), and motor stereotypy (tensing of the arms and hands).

On October 19, 2016, a telephone conference was held between Petersen and several persons at SEARCH. SEARCH shared the various programs they were working on with R.S.

On October 21, 2016, the District sent the parents an Invitation for Initial Eligibility Determination and IEP Development. (J-7.) On October 26, 2016, Mom emailed McNichol confirming the November 1, 2016 date and asked what the meeting would entail. (P-27.) McNichol responded that it would be the eligibility and IEP meeting, and that they would review the Collaborative Preschool Evaluation and develop an appropriate IEP so that R.S. could begin a program on his third birthday. (P-27.) The parents were provided with a copy of the Collaborative Preschool Evaluation prior to the IEP meeting.

The District held an IEP meeting on November 1, 2016. (J-5.) Prior to the IEP meeting, the District was in possession of the August 11, 2016 Progress Report; the May 2, 2016 Goals and Objectives; and the April 8, 2016 and September 21, 2016 VB MAPP scores from SEARCH. McNichol and Zuckerman had observed R.S. at SEARCH and had interviewed SEARCH staff. Lubin (special education teacher), McNichol (case

manager), Petersen (occupational therapist), Cerami (occupational therapist student), Zuckerman (speech therapist), MacDougall (behaviorist), and Mom attended the IEP meeting. Dad participated by telephone for some of the meeting. Lubin has been a special education teacher in the District since September 2012 and is certified as a teacher of students with disabilities. (R-1.) MacDougall was the District’s behaviorist at that time. She worked four days per week in the District’s elementary schools and middle school. Her office was in the preschool disabled classroom. The District’s current behaviorist is Alexandra Dougherty. Dougherty has been employed by the District since September 2018. She is a certified teacher of the handicapped and has been a BCBA for ten years, specifically focusing on autism and other disabilities.

The District had prepared a draft IEP, dated November 1, 2016, which was provided to Mom at the IEP meeting. (J-4.) The draft IEP proposed the following programs and related services:

| | | |
|---|-----------------------|---------------------|
| Special Class Preschool Disabilities Full-Day | 11/18/2016-06/16/2017 | 4 x Weekly 360 min. |
| Special Class Preschool Disabilities Full-Day | 11/18/2016-06/16/2017 | 1 x Weekly 300 min. |
| Special Class Preschool Disabilities Full-Day | 09/07/2016-10/31/2017 | 4 x Weekly 360 min. |
| Special Class Preschool Disabilities Full-Day | 09/07/2016-10/31/2017 | 1 x Weekly 300 min. |
| Occupational Therapy: Individual | 11/18/2016-06/09/2017 | 2 x Weekly 30 min. |
| Occupational Therapy: Individual | 09/12/2017-10/31/2017 | 2 x Weekly 30 min. |
| Speech-Language Therapy: Individual | 11/18/2016-06/09/2017 | 2 x Weekly 30 min. |
| Speech-Language Therapy: Individual | 09/12/2017-10/31/2017 | 2 x Weekly 30 min. |

The Special Class Preschool Disabilities Full-Day (preschool disabled program) is not a full-time ABA program. The preschool disabled program ran Monday through Friday from 9:00 a.m. until 3:00 p.m.; except for Wednesdays, which ran from 9:00 a.m. until 2:00 p.m. R.S. was classified as “preschool child with a disability” due to the presence of a 33% delay in the areas of communication, fine motor and adaptive skills. The draft IEP reflects that the preschool disabled program and speech-language therapy and occupational therapy will provide R.S. with the individualized support he requires. The draft IEP reflects “no” for extended school year, behavior intervention plan, assistive technology or testing accommodations, and “yes” for modifications, supplementary aids and services, and supports for school personnel. (J-4.) The Initial or Most Recent Evaluations/Reports reflects only the “Multidisciplinary Report” (Collaborative Preschool Evaluation), dated September 24, 2016. (J-4.) However, the draft IEP states:

Based on the formal evaluations completed by the Madison CST, observations at SEARCH, progress reports, results of VB-MAPP, as well as parent input, [R.S.'s] current levels of communication skills, adaptive skill and fine motor skills impact his ability to learn in a general education setting at this time. Therefore [R.S.] requires a special education program at this time.

[J-4.]

The draft IEP reflects “considered but not applicable” in response to “Indicate if the student has communication needs:” and “Indicate if the student’s behavior impedes his or her learning or that of others:” (J-4.) Under the section titled “BEHAVIORAL INTERVENTIONS,” the draft IEP reflects the following:

If behavior impedes the student’s learning or the learning of others, the IEP team must consider, when appropriate, strategies, including positive behavioral interventions and supports to address that behavior. When needed, a behavior intervention plan must be included in the IEP.
Are Behavioral Interventions Appropriate at This Time? No

The draft IEP also contains the following modifications:

| <u>Classroom</u> | <u>Modifications</u> |
|-------------------|--------------------------------------|
| General Education | - Provide individualized instruction |

The draft IEP contains the following supplementary aids and services:

| <u>Classroom</u> | <u>Supplementary Aids and Services</u> |
|-------------------|---|
| Special Education | - Reinforcing of Personal, Social, Behavioral, and Academic Learning Goals - Positive Reinforcement Plan |

The draft IEP contained eleven goals, consisting of speech/language (four goals), motor skills (six goals) and daily living skills (one goal) goals. The only daily living skills goal was that R.S. “will take off 1 clothing items [sic] without buttons or fasteners with 80% success,” with objectives that he will remove his outerwear (80% success) and will remove his socks/shoes (80% success). (J-5.) For every objective the evaluation procedure is “recorded observations,” and the highest criterion for any objective is 80% success, with two objectives requiring only 60% success, and one requiring 70% success.

The objective “[R.S.] will engage in 3 verbal social interactions and cooperative play activities with a peer (e.g., playing house with a peer)” has a criterion of “3 out of 5 trials,” and the objective “[R.S.] will define and use nouns, verbs, adjectives and adverbs correctly” has a criterion of “3 out of 5 trials with moderate assistance.” The objectives “[R.S.] will expand his utterances and responses to questions by using basic sentence patterns (e.g., agent/action/object/adjective/adverb)” and “[R.S.] will comprehend and use yes and no questions (e.g. Are you happy?) and “wh” questions (e.g. who, what, when, why)” both have a criteria of “4 out of 5 trials with moderate assistance”. (J-5.)

The IEP meeting was recorded. (R-13.) During the IEP meeting, Zuckerman, Petersen and McNichol summarized their respective evaluations from the Collaborative Preschool Evaluation. At the meeting, it was explained that initially information is obtained from the District’s evaluations, and parental and SEARCH input, but it was not uncommon after 30-45 days to tweak goals and objectives or programming options after an opportunity to work with the student. District personnel opined that the full-day preschool disabled program was appropriate for R.S. District personnel also stated that the goals are a work in progress; that if there was anything that is a priority to the parents it could be included in the goals; and that the IEP is a fluid document and not set in stone if R.S. masters goals more quickly.

Lubin has been a special education teacher in Madison since 2012 and was the teacher of the preschool disabled program. She holds New Jersey certifications as a P-3 teacher and as a Teacher of Students with Disabilities. Each year the preschool disabled program has had two to three students diagnosed with autism. During the IEP meeting, Lubin stated: the preschool disabled class consisted of Lubin and four aides; mornings were programs and afternoons were centers, but if a student needed programs they would continue in the afternoon; Mondays, Wednesdays and Fridays would be play centers and Tuesdays and Thursdays would be fine motor centers; Lubin and MacDougall work with the aides and provide trainings on programs and behavior plans; they hold meetings on Wednesdays to go over student progress; a “daily sheet” is sent home so that the parents know what therapies and specials a student attended, like adaptive gym and music therapy, and who worked with him; and the District would administer an

Assessment of Basic Language and Learning Skills – Revised (ABLLS-R) and develop an individual program for R.S. based on the ABLLS-R.

During the IEP meeting MacDougall stated: she spends a lot of time doing training on discrete trial generalization of skills, and that they teach and generalize any skills seen in class and work with small group instruction; aides are trained on how to implement skill acquisition programs and behavior management systems; and training is done on professional development days and Wednesdays; and they work closely with the related services therapists. MacDougall stated that SEARCH conducted the VB-MAPP, but the District would conduct the ABLLS-R. However, she also stated that the District could conduct the VB MAPP if the parents prefer. MacDougall acknowledged that R.S. was recently assessed and stated that the District could look at the VB MAPP and progress reports and current programs and work from that because the VB MAPP was very thorough. She also stated that the District would develop a skill acquisition program from the assessment, and look globally at his needs to identify any prerequisites or behavior programs.

During the IEP meeting, Mom asked about the qualifications of the aides, and Lubin responded that the aides have at least a certain amount of college credits. Mom asked how the District measured and tracked progress and was advised that the District would use the ABLLS-R and the VB MAPP from SEARCH. Mom was advised that they do trial by trial data collection; that data is collected daily by MacDougall, Lubin or the aides; that they have worked hard to train the aides on how to collect data and the aides are very good at looking at programs and graphing. McNichol stated that she and Zuckerman were pleased that when they did observation at SEARCH R.S. had a lot of pre-readiness skills for a program, and that they wanted to build on and scaffold R.S.'s skills. Mom had no additional questions at that time and stated that it was a lot of information. Mom was advised that she was welcome to observe the program.

On November 1, 2016, after the meeting, Mom emailed Dawn McNichol, with a copy to Dad, requesting that they be able to observe the in-District program as soon as possible. (P-27.) McNichol responded on November 2, 2016 and provided two dates for

a 45-minute observation. (P-27.) The parents observed the program on Friday, November 4, 2016 at 9:45 a.m.

Mom was provided with the Preschool Schedule for the District's preschool disabled program. (P-23.)

On November 16, 2016, Denise Barrett, of the District, emailed McNichol and asked if R.S. was starting on November 18, 2016. (P-27.) McNichol responded that she was notified late the day before that the family was represented by an attorney and seeking a unilateral placement. (P-27.) Later that day, Mom emailed McNichol and asked if it was possible for SEARCH's director to observe the preschool program and to coordinate a time. (P-27.) McNichol emailed MacDougall and asked her to advise of possible dates and times. (P-27.) On November 18, 2016, McNichol emailed Mom, copying Kahana, and stated that she would touch base with the director of special services regarding her request. (P-27.) On November 21, 2016, McNichol emailed Mom, copying Kahana, stating that she would contact Kahana directly with dates and times for the observation. (P-27.) On November 22, 2016, McNichol emailed Kahana three dates, with forty-five-minute time slots. (P-27.)

Kahana observed the preschool disabled program on December 7, 2016 at 9:45 a.m., during which time she observed morning work. In a November 28, 2016 confirming email McNichol advised Kahana that each student would have his or her individual work schedule based on his or her individual program. (P-27.)

On November 11, 2016, SEARCH prepared a Progress Report for R.S., for the period September 8, 2016 through November 10, 2016. (P-4.) The Progress Report reflects target responses for education programs and for behavior reduction programs. (P-4.)

On November 16, 2016, Mom emailed Dawn McNichol, with a copy to Kahana, requesting that Kahana be allowed to observe the in-District program. Dawn McNichol thereafter contacted Carrie Kahana via email to schedule a 45-minute observation of the in-District full day preschool program. Carrie Kahana observed the in-District program on

December 7, 2016. Per an email from Dawn McNichol, she was scheduled at 9:45 a.m. to observe the full day preschool program morning work (each student has his or her individual work scheduled based on his or her individual program.)

On February 7, 2017, petitioners filed a Petition for Due Process seeking the following: (a) the parents should be reimbursed for all costs of R.S.'s SEARCH program; (b) the parents should be reimbursed for all transportation costs of transporting R.S. to and from SEARCH; (c) an IEP should be developed to provide R.S. with "a forty (40) hour a week, 12-month, center-based, ABA program with 1:1 instruction run by SEARCH; (d) R.S. should be transported to and from SEARCH; (e) the parents should be provided with three (3) hours of parent training by the SEARCH staff paid for by the District; (f) R.S. should have up to forty hours a week of direct ABA services including a home program run by SEARCH; and (g) the parents should be reimbursed for home programming services provided to R.S. prior to his start at SEARCH and thereafter. (R-1.)

On February 17, 2017, SEARCH prepared a Progress Report for R.S., for the period of November 11, 2016 through February 16, 2017. (P-5.) The Progress Report reflects target responses for education programs and for behavior reduction programs. (P-5.) On April 7, 2017, a VB-MAPP was conducted on R.S. at SEARCH. (P-2.)

On March 9, 2017, petitioners signed an Agreement for Service with SEARCH through August 30, 2018. (J-13.) On May 19, 2017, SEARCH prepared a Progress Report for R.S., for the period of February 21, 2017 through May 18, 2017. (P-6.) The Progress Report reflects target responses for education programs and for behavior reduction programs. (P-6.) On August 17, 2017, SEARCH prepared a Progress Report for R.S., for the period of May 19, 2017 through August 11, 2017. (P-7.) The Progress Report reflects target responses for education programs and for behavior reduction programs. (P-7.) On October 2, 2017, SEARCH prepared Goals and Objectives for R.S. (P-1.)

On October 26, 2017, Carol Fiorile, Ph.D., BCBA-D, observed R.S. at SEARCH from 1:00 p.m. until 2:00 p.m. Fiorile prepared an Independent Educational Review on October 31, 2017 (Fiorile Report). (J-10.)

On May 30, 2018, Dougherty emailed SEARCH stating that she and the District's special education director were interested in touring SEARCH and asked if SEARCH conducts tours. On May 31, 2018, SEARCH responded via email that it only conducts tours if it is regarding placement for a specific student. (P-26.)

R.S.'s Program Planning List from SEARCH reflects R.S.'s "mastered," "current," and "future" programs for the following skill areas: Language and Communication Skills; Academic; Leisure and Play Skills; Life and Safety Skills; Peer and Social Skills; Self Help; Parent Involvement and Home Skills and Behavior Reduction. (P-8.) SEARCH also prepared a document that identified and defined seven interfering behaviors for R.S. The seven behaviors were elopement, motor stereotypy, noncompliance, oral stereotypy, non-contextual vocalizations, ritualistic behavior, and visual stereotypy. (P-9.) SEARCH generated Data Sheets for R.S.'s education programs. (P-10.)

Testimony

Carrie Kahana

At the intake observation on March 24, 2016, she determined that R.S. was significantly impacted by his autism. R.S. did not respond to his name at any time during the observation, and made eye contact only intermittently and his own accord, not when requested. He exhibited no imitative behavior or actions after they modeled a variety of motor movements and actions. He was able to label certain objects. He did not demonstrate any ability to answer questions or follow any directions, even simple ones. He did not display awareness of other students in the room. He engaged in noncompliant behaviors, such as pushing materials away, not responding to tasks that he knew, and not responding to directions. He engaged in non-contextual vocalizations, jargon (sounds they were unable to understand), a lot of repetitive speech and commenting on things out of context, as well as visual stereotypy.

Kahana testified that ABA is the only evidence-based method for educating children with autism. The earlier, the more intense, higher quality the intervention, the better the outcome. SEARCH aligns its instruction with common core.

R.S.'s improvement on the VB MAPP was meaningful improvement for him because he previously had no imitation or social skills.

SEARCH has ongoing staff evaluation, with all staff evaluated minimally once per quarter. SEARCH conducts an inter-observer agreement to make sure what is being taught and that the data collected is accurate. The staff has different training levels, but all the instructional staff who provide one-to-one direct instruction work alongside a BCBA at least five hours per week while in session with their assigned students. They have monthly lecture-based staff trainings and weekly mini meetings on autism and ABA topics. They have five in-service days thought the year; experts in different areas provide training to staff. The minimum staff educational requirement is a bachelor's degree, but all of SEARCH's instructional staff are registered behavior technicians (RBT), (RBT) Board Certified Assistant Behavior Analysts (BCaBA), BCBAs or are in pursuit thereof. An RBT has minimum of a high school degree. There is a forty-hour training module that must be completed; and a competency assessment completed with oversight by a BCBA and an exam through the Behavior Analyst Certification Board (BACB) to earn this title.

R.S.'s parents have consistently participated in parent training. Parents sign upon review of all skill acquisition and behavior reduction programming to confirm that it has been explained and they understand it.

Kahana observed the preschool disabled program during "morning work". The students were in two-to-one instructional ratios and were moving back and forth between instruction at the table and free play or unrestricted access to toys. She observed no one-to-one instruction; R.S. requires this to learn new information. She observed ineffective implementation of reinforcement – students engaging in correct response with no reinforcement delivered, or reinforcement being delivered while students were engaging in interfering behavior. She did not observe effective instructional strategies or errorless teaching. She did not see effective error correction technique. She did not observe effective use of reinforcement or consistent use of behavior specific praise. She observed tokens delivered while students were engaging in interfering behavior.

The only way to determine if a goal is achieved is if the student is doing it independently. After SEARCH, many students have gone to private schools like Alpine Learning Group, Somerset Hills Learning Institute, and Princeton Child Development Institute, all of which are State-approved schools based on the science and principles of ABA for students with autism. None of those schools have related speech-language or occupational therapy services. Some students go to public schools. Kahana has recommended programs for students with autism that are not fully ABA, including some private and some public schools. She has recommended general education, LLD classroom, and resource room as appropriate. She has observed six public preschool programs on behalf of parents, and has recommended the public-school program at least once, possible twice.

R.S.'s IEP was not appropriate because it contained no reference to ABA or one-to-one instruction; no goals to address the foundational learning deficits he exhibited; no behavior reduction programming; no academic/learning goals; no behavioral goals; and no appropriate social goals. Mastery requires independence. Some goals were not appropriate because R.S. lacked the prerequisites and his rate of acquisition is very slow. Criteria should be at least 90 percent to ensure he is successful and learning the skill. Kahana testified that she did not think there should have been a behavioral intervention plan as part of the IEP, but she did think that the interfering behaviors R.S. presented with should have been highlighted for reduction. The IEP does not include the following interventions: the use of a time or motivational system; discrete trial or incidental testing; audio or video modeling; or following specific teaching procedures.

Kahana opined that only way R.S. can learn is through intensive ABA programming because he is significantly impacted by his autism. He does not have the prerequisite skills to learn through more traditional means. He requires skills to be broken down to very small components and must be taught very systematically, with lots of repetition, reinforcement and support to be able to learn. Kahana further opined that the preschool disabled program would not be effective with a couple hours of discrete trial.

Nicole Journe

R.S. would not repeat a word when directed to say the word, he had no imitative gross motor or fine motor skills, and no vocal imitative skills. He had needs across several domains, including eye contact, ability to follow basic directions, and being able to learn by imitation.

Journe administered the first VB MAPP. Some areas of weakness were defective echoic (would not repeat a word when directed to say the word), and no imitative gross motor or fine motor skills. R.S. had needs across several domains, including eye contact, ability to follow basic directions, and being able to learn by imitation. Those are ways that typical children learn from their environment and are prerequisite skills for several areas of development, including understanding conversation skills. Eye contact is a critical skill in socialization and conversation, and in showing readiness during academic tasks. R.S. had no spontaneous conversational language and instead used language that was not social. He might look around, see a water bottle and say water bottle, but if he were asked what it is, he could not answer or follow up with any comments on the item. He would only label by his own motivation. Non-contextual vocalizations were a problem because they interfered with his ability to use language functionally and to engage in different instructional tasks throughout the day.

Journe utilized reinforcement and praise for appropriate vocalization and prompting to help develop an imitative repertoire of repeating words, and thus expand R.S.'s vocabulary. SEARCH made a list of interfering behaviors, which have been modified while he has been at SEARCH.

SEARCH introduced several systems of support, including a motivational system or token board, to provide reinforcement on. Rather than immediate access to a preferred item, he would be provided with tokens and they systematically increased the length of time he was working. The token board was created for R.S. with his highly preferred items, which was based on observation assessment.

She would not consider any skill where he had to be physically or verbally prompted to be a learned skill. A learned response is one that does not require prompts. If he had free access to items he would largely engage in stereotypic behavior, like repetitive play and non-contextual vocalizations. R.S. would be prompted or redirected for any inappropriate behaviors and they would model different play.

After they began to build up his skill repertoire, they continued to add other items, like teaching him to engage in independent toy play, or to imitate video models of different play actions. R.S. had no group learning, because he requires one-to-one instruction based on data and rate of skill acquisition. Even with one-to-one it would take a few weeks to master different units or tasks. He would not be attentive during group if there was not an instructor driving his instruction. Prior to having the skill set to even respond to his name, group learning would not be possible.

Journe was with R.S. minimally five hours per week, providing direct supervision and training to any staff working with R.S. and monitoring how they were running every single program on his data sheet to ensure the programs were being run accurately and data was being collected accurately. Data sheets are used for weekly data collection for skill acquisition programs. They are designed by the instructor data analysts with oversight from the BCBA team leader. Data from the sheets is scanned into the system and then graphed. All data sheets are summarized in R.S.'s data notebook and progress reports. Journe provided programming suggestions to build up his skill set and sometimes provided direct instruction to R.S. with his instructor present so she could model the exact behavior she wanted them to engage in or the exact expectation in running a program. It is important that every instructor is running a program accurately and the programs are implemented as written, especially because of R.S.'s interfering behaviors so no one ends up inadvertently providing reinforcement for any problem behaviors.

They have had weekly, if not daily contact with the parents since R.S. started at SEARCH. Journe and the data analysts train the parents. Mom needed training and was at SEARCH minimally for thirty minutes to an hour a week. Training is also provided at home and can be provided in the community. It is critical that children with autism practice skills across a variety of different environments to target generalization. The absence of

parent training slows the acquisition of skills or inhibits the student from engaging in the skills outside of school. If his behavior was not also changed outside of school, there would not be meaningful progress. There are parent clinic meetings four times a year during which the BCBA, parents and clinical and executive directors talk about different aspects of R.S.'s program and the results of assessments.

She completed the BASC-3 as requested but indicated that it is not an appropriate way to measure R.S.'s skill set, because it is subjective rather than objective. A majority of his IEP goals were not appropriate in terms of his current skill level (too advanced because he lacked the prerequisite skills or below his current skill level) and the goals and objectives are not specific as to what is being measured. SEARCH goals for R.S. are always from 90-100 percent success at a level of full independence; this is not true of the IEP goals. If the skill can only be performed with prompting, the student does not possess that skill. That R.S. "will use jargon or single words" is problematic, because allowing jargon could inadvertently reinforce interfering behaviors like non-contextual vocalization.

Dawn McNichol

McNichol was unable to complete a formal cognitive measure for several reasons, which is not uncommon at that age. R.S. had some difficulty transitioning from engaging with Mom to engaging with McNichol, and he was out of his routine because he typically would have been at SEARCH at that time. She did an observation and obtained information from the parent. She considers school to be the most appropriate evaluation setting and thought she would have been able to get more responses and been able to conduct the formal measure if she had been allowed to assess R.S. at SEARCH.

When students start the preschool disabled program, the District administers an ABLLS-R assessment to determine baseline skills and abilities and determine functioning across multiple domains. McNichol was aware that SEARCH had completed the VB MAPP when he began, had done an updated assessment, and that he had a recent progress report. The district uses the ABLLS-R to develop very specific goals and objectives to work on in communication, expressive and receptive language skills, motor domains and social domains. She explained that the IEP was lacking in academic goals

because “they are drafted upon completion of an assessment when a student enters our program.” She explained that it is important to collect data in the actual setting, in terms of getting baseline data to determine specific goals and objectives for the year. The parent had no objection or concerns about the lack of academic goals.

The preschool disabled program has components of ABA, including discrete trial, individual positive reinforcement plans, opportunities for skills to be generalized in multiple settings, and prompting and shaping of behaviors. The preschool disabled program has opportunities for socialization with other students in the program, such as snack time, lunch and recess; and offers reverse inclusion, in which the teacher or therapist will have another student (disabled or non-disabled) come in to work with the student in a dyad. There are opportunities for exposure to non-disabled peers.

She observed R.S. at SEARCH and was concerned that he was working with just one adult with no opportunity for socialization with other children, including non-disabled peers. He was not receiving services from a speech-language therapist or occupational therapist. She was concerned that he was earning his rewards very quickly and then had two minutes of free play. If that time was shorter, more trials could be conducted.

The maximum number of students in the PSD program is 12, and in 2016-2017, R.S. would have been the tenth. For discrete trial training instruction, it would certainly be in a one-to-one setting. That is the methodology that is utilized when a student enters the program. The ABLLS-R assessment is given individually and the discrete trials are given individually, unless the BCBA specifically recommends working in a dyad or small group. The preschool disabled program meets the New Jersey Autism Program Quality Indicators (APQI) for length of school day; student-teacher ratio; individualized materials and instruction; developmentally appropriate instruction; and opportunity for data collection. The preschool disabled classroom aides all had college degrees, though a college degree is not required.

R.S. was within the zone of proximal development as there were some students a bit older who may have some more language, and some were functioning lower than R.S. McNichol opined that R.S. would have been able to make meaningful progress in the

program. The lack of related service providers at SEARCH affects the program because it is important to have a multidisciplinary team assess the student's functioning and generalize the skills being taught. It would be appropriate for R.S. to have related services.

At the time she observed R.S. at SEARCH she thought he was being rewarded for too long in comparison to work. She asked why reinforcement was that long and was told it had been increased from previous time intervals.

The frequency and duration of ABA services would be determined after the ABLLS-R assessment and reflected in the student's schedule. McNichol admitted that the child study team (CST) had the 8/11 Progress Report and the VB MAPP from SEARCH prior to the IEP meeting.

The CST had enough information to develop an appropriate IEP. She did not request additional testing. No one was denied access to R.S. or his program at SEARCH, and parents never objected to sharing information or allowing the district to observe him at any location.

There was no pre-established amount of discrete trial in the IEP because they collect baseline data after a student enters the program and that is when they would determine how much discrete trial is required. When a student receives an individualized schedule, it would itemize related services and how frequently the student was working with a teacher or aide. The schedule would also include specials, such as adaptive PE, music therapy and dog therapy. The parent gets a copy after the student begins the program and a schedule is established regarding when the student would receive speech and occupational therapy and the exact time and location. Parents receive communication on a regular basis, either via email or notebook. There are parent-teacher conferences and progress reports twice a year. The teacher also sends home a daily sheet that reflects the related services and specials and what transpired during the day. Data is collected daily. Some parents request weekly copies of the data book. Other parents just review it at parent teacher conference. The program offers home programming. The BCBA has general monthly meetings on general topics. She also

meets with parents on specific topics for specific students, based on individual needs. The home programming would depend on the information they obtain about the student. The BCBA works toward a home-school collaboration, particularly regarding potty training and extinguishing certain behaviors. MacDougall was in the District four days per week and regularly in the PSD program.

Every student in the PSD program has a behavior plan. She would only itemize a specific diagnosis if she had it in writing with the doctor's name and date. However, in determining an IEP, they look at overall functioning and strengths and weakness, not just a specific medical diagnosis. They could have created an appropriate IEP even absent the autism diagnosis information.

Erica Zuckerman

Zuckerman's evaluations of students with autism are not different from her other evaluations, but the services are individualized for each student based on that student's skill set. She works closely with the behaviorist and if the student has a behavior plan or a functional behavior assessment was completed, she would incorporate those methodologies into her sessions and follow the lead of the behaviorist. She does not provide "ABA-based speech therapy."

She and Petersen generally evaluate as a team. R.S. was evaluated at home, but she prefers to test in a school environment to get the best picture of current level of function. The student is used to learning in that environment and knows what is expected in terms of "working." R.S. engaged with her when he first saw her, and she attempted to administer the PLS-5. It took some motivation for him to become interested in her manipulatives and test materials. He had difficulty sitting and was running around the kitchen/family room area. He was placed in his booster chair and the bulk of her testing was conducted while he was in the booster chair. Until he was in his booster, he was noncompliant and running around the house. She heard him repeat things that were out of context and not communicative. R.S. was able to identify basic body parts and clothing by pointing after Zuckerman said, "point to" and stated the body part or article of clothing. He understood a few verbs, such as "eat" and "drink". He was able to follow some

commands without a gestural cue. He had some difficulty understanding pronouns but was able to point to actions and pictures. He understood spatial concepts. Expressively, he was able to use gestures and vocalizations to request objectives. He requested manipulatives that were on the table. He was able to demonstrate "joint attention." He was able to expressively label pictures. He knew "ball," "apple," "baby," "cookie," "spoon," "scissors," "banana," "fridge," but he called an elephant "dog" and a fish "whale." He performed quite well and was in the low average range on that testing. He would not have qualified for speech-language services based upon PLS-5, but his functional communication was also assessed. Based on the BASC-3 he was below average in functional communication and qualified for speech-language services.

She returned a second time because she thought it beneficial to give R.S. another opportunity to complete the testing. He was in the booster seat both times.

She had been provided with a copy of his recent progress report. Her opinion in observing R.S. at SEARCH was that he was making steady gains and progress toward meeting his objectives. However, he would not be exposed to non-disabled peers at SEARCH and positive peer role models and group instruction would give him opportunities to generalize. There was no opportunity at SEARCH to be in a group setting.

She recommended individual speech-language services two times per week for thirty minutes. When she observed R.S. at SEARCH he was receiving individualized instruction and there was no opportunity for generalization of skill sets. He had or has learned some baseline skills that would allow him to access more peer interactions using language, with help. She did not recommend him for group speech therapy because he did not have the prerequisite skills for group speech. It would be more beneficial to teach more novel skills sets in a one-to-one setting and then generalize. It is not uncommon to change the frequency in the middle of the year, with parental permission. Children learn best from their peers in many ways, and she opined that the District preschool disabled program was most appropriate.

A BCBA does not have the same skill set to teach language as a speech-language pathologist. Zuckerman has training in language, language development, speech, speech development, and normal language versus disordered language, while a behaviorist's focus is more on behavior. She opined that R.S. requires speech therapy because during her evaluation and observation he was using mostly single words and should have been speaking and combining words and using more novel language. He was not functionally communicating using novel thoughts.

Speech-language therapy is generally in Zuckerman's therapy room, but sometimes she works with the student in the student's location. Zuckerman developed the speech-language goals in the IEP. Several goals' criteria were success "with moderate assistance." Zuckerman testified that a goal is achieved if it requires moderate assistance.

Megan Petersen

Petersen first observed Zuckerman's evaluation. R.S. began to say "no, we're all done" and was taken out of the booster. They tried to conduct the evaluation with him walking around, but it was difficult, so he was returned to his booster for the occupational therapy assessment. Typically, they test at a kid's size table and chairs or dining room table. Ideally, they prefer to assess students in an educational setting because it is more like school. It is possible the setting impacts the student, because at home children are used to being able to play and often behave differently for parents than in an educational setting, which is typically more structured than home.

Petersen administered the PDMS-2, which is a widely-used standardized assessment tool in occupational therapy and physical therapy. She did two subtests: grasping (holding objects and manipulating them) and visual motor integration (hand-eye coordination). One of the first directions is to make a mark after handing the student a paper and marker. R.S. would not do it and Petersen did not know if it was because R.S. was noncompliant; was not understanding directions; or was unable to perform the task. Petersen made the decision to alter the test and change the directions. This invalidated the test results, so instead she used the assessment as a development checklist to see

where his skills were to determine whether occupational therapy was necessary. R.S. scribbled with the marker. His grasp was immature and inefficient. He was able to use a raking motion to pick up pellets and a pincer grasp. He was able to pick up a cube but did not pick up two cubes at once. Blocks were not a preferred activity for R.S., so he was not attending to that test activity. He had built a three-block tower with Zuckerman, so she altered the directions and accepted that, even though it makes the testing invalid. He was able to do shape puzzles, but she had to hand the pieces to him because he would not pick them up. This altered the test procedures, as the pieces were only supposed to be placed in front of the puzzle. It took some time and encouragement to get him to turn pages of a book because he was not interested. He was not able to imitate a vertical or horizontal line, which are building blocks for writing and would have been expected at his age. He should be able to button, but he pushed this activity away. R.S. stated "No. All done" when he wanted to be done. He had some decreased hand strength, which may have been attributable to not having established hand dominance and frequently switching hands.

R.S. would not have scored well if she had not altered the testing procedures, but she felt such score would not have been an accurate picture of his skill sets. She also used the EASY as a checklist. Mom said he could eat with a fork and spoon, but prefers to use his fingers, which are all developmentally appropriate. He needed assistance to get a jacket and shoes on and off. He could zip a jacket once engaged, which is a strength. He was wearing diapers and twice indicated he was wet. He was eating a variety of food. He handled transitions appropriately, though Mom said transitions were typically poor. Mom noted he tends to run in the house. Petersen noticed some hand flapping when running.

R.S. "w"-sat on the floor at times, which is indicative of weaker core strength and stability. There was some crossing of the midline and hand switching. Therapy cannot change muscle tone but can change strength, so she has students participate in a lot of strengthening play activities. Occupational therapists have training in neuroscience and kinesiology, the study of movement, anatomy and physiology. They strengthen muscles through certain play activities. He had some difficulty with motor planning and some fine motor skills. He had decreased independence with self-care. He had some decreased

body awareness and he bumped into a couple things and lost his balance a couple of times. There was no sensory seeking or avoidance behavior noted. He was unable to pick up scissors when they were presented to him to cut. He was closing his right eye for some of the assessment. Mom was aware of it and advised he had to return to the eye doctor for an astigmatism. He did vocalize when he wanted to be done.

Petersen's testing was not valid, but she scored it for her own knowledge. She recommended individual occupational therapy for thirty minutes twice per week, stating, "It's not uncommon at this age to have individual sessions, to get 3 year olds to sit down and pay attention, you know, is often a struggle for even typical 3 year olds. And then with his difficulties, and the fact that he was having difficulties with compliance, I felt that he would be better served to be individual so that, you know, it could be addressed with him." She does staff trainings particularly during the Wednesday 2:00 p.m. slot.

Kady Lubin

Prior to administering the ABLLS-R, Lubin relies on the collaborative evaluations. The ABLLS-R assessment helps her develop individual plans to be implemented. The ABLLS-R gives her an opportunity to see the student in the natural classroom environment. It allows to her determine what the student needs to work on, whether individually or in small groups. Depending on a student's skill set, the ABLLS-R can take from one day to three weeks.

The goals in the IEP align with the preschool learning standards developed by the State. Functional and academic goals were not in the draft IEP because she likes to have the student attend the program and complete the ABLLS-R, which is goal-driven, and then she is able to insert goals and objections. She was trained by the BCBA to conduct the ABLLS-R. The preschool disabled program included specials, such as music therapy, adaptive gym, attending assemblies, and pairings with fifth-grade general education buddies who read and do crafts with the students for socialization. The preschool disabled students can interact at assemblies in the gym and on the playground during free time. There are also licensed therapy dogs that come to school, and the students read with the dog and work on student fears of dogs and social skills. Toilet training is

available in the program. Parent training is available. She has conferences twice a year with parents and in the past she and the BCBA have had videotaped sessions, so the parents are able to see exactly how the students are taught in school and mirror it at home to generalize skills.

The BCBA regularly supported her classroom. Lubin saw her daily and was able to talk about different programs and behavior plans with her. The BCBA was able to see the students arrive. Lubin was also able to email and talk on the phone with the BCBA when she was not there. Lubin ate lunch with the BCBA daily and did working sessions through lunch together. On Sunday night or Monday morning the BCBA sent out her schedule to the teachers. The BCBA offered monthly parent training and would talk to parents or have individual meetings with them if requested and talk about programs and behavior plans. On Wednesdays, the BCBA did weekly staff training for Lubin, the aides, and the related services coordinators. There was training prior to the start of the school year, as well as during the school year if needed. Wednesday meetings were an opportunity to meet as a team and discuss individual programs or behavior plans. They were able to collaborate on carrying over the individual therapist goals into the classroom, and the therapists were also able to provide some training. Lubin also received individual training from the BCBA on programs, changes in programs, data collection, and behavior plans.

For a new student there are many ways to determine positive reinforcers. She talks to the parents to see what is reinforcing at home and observes the student to see what is reinforcing at school. Mand training is also done with students, where the student is presented with different toys and the teacher can observe which toy the student repeatedly goes toward. She has had several students with token economy boards to target behavior, developed by Lubin and the BCBA. The BCBA helps determine the plan and Lubin implements it.

The occupational therapists and speech therapists are in her classroom daily, to ensure that therapy goals are carried over into classroom, and that occupational therapists and speech-language therapists are working on classroom goals. The location of therapy services is either in the classroom or the therapist's office.

She had five adults and nine students in her class in 2016. Small group was at the horseshoe table. During morning meeting, snack and lunch all the students are in a group. She and the aides collected data daily; during the student's individual academic programs or on targeted behaviors in small groups. They graph twice daily before students arrive and after students leave. She analyzed the data daily and would look in the students' books and at the data and graphs daily to see if there were trends up or down and make modifications. Several students received group instruction. If a student requires one-to-one, the student receives one-to-one until able to work up to small group.

During Fiorile's observation, she was working with two students who had started two days prior. She worked with one student for fifteen minutes on the ABLLS-R and then that student went to the carpet to take a break. She worked with the next student for fifteen minutes and continued to rotate in that manner for the assessment.

ABA is throughout the day, it is not just discrete trial. It is not an "ABA program." It is a preschool disabled program with ABA components. Some students are ABA all day, and some are not. The IEP does not say that a student will have discrete trial, token economy or behavior interventions because those things are determined when the student arrives. If a student in her class had a one-to-one aide, it was only when specified in the student's IEP. The decision about whether a student receives a one-to-one aide is made after she completes the ABLLS-R assessment.

In November 2016, there were seven students in the classroom. When Fiorile observed there were nine students. There were three aides, plus one aide assigned specifically to a student. Only the one student received one-to-one assistance all day.

Alexandra Dougherty

Dougherty is a certified teacher of the handicapped and has been a BCBA for ten years, specifically focusing on autism and other disabilities. She also has a supervisor certification that allows her to supervise both certificated and non-certificated staff in an educational setting. She has been employed by the District as a behaviorist since

September 2018. She previously worked for twelve years at Douglas Developmental Disabilities Center (DDDC), a school that utilizes ABA to teach individuals with autism. DDDC had speech-language pathologists on staff for each classroom, and as a BCBA, she consulted with occupational therapists and physical therapists who were provided by the school district, and sometimes they were in the classroom working directly with students.

Dougherty briefly explained the VB MAPP and ABLLS-R. Dougherty oversees the preschool disabled program, consults with the staff, conducts functional behavioral assessments, collaborates with related service providers, observes students and staff collecting data, and trains staff on a variety of behavior analytic topics utilizing a behavioral skills training model. The behavioral skills training model involves didactic instruction, role playing, modeling, modeling with students and then providing corrective or other feedback to the individuals implementing the strategies. She employs data collection. She writes behavioral intervention plans and trains staff on the plans. She facilitates parent training.

Dougherty reviewed data from the 2016-2017 preschool disabled program but did not analyze it. She did not do a formal program evaluation. The students had, and still have, skill acquisition program books. She reviewed the skill acquisition programs and the data. There were some programs that students were making progress on and for others where there was stalled skill acquisition. Staff would problem solve as a team.

She believed most of the autism program quality indicators criteria was in place in the 2016-2017 preschool disabled program. She was not aware of the staff credentials in the classroom. It is not problematic if only one aide holds a general education teaching certificate, because there is oversight by the BCBA and the special education teacher who create the programs. Dougherty never saw data on the competency of the staff. She did not know how much time MacDougall spent in the preschool disabled program. Dougherty never saw data on the competency of the staff. Dougherty had not seen any documentation of didactic training and training within the classroom. She never observed the preschool disabled program in 2016-2017, and she did not know who the aides were or their educational backgrounds. She did not review data on the aides' skill sets. To her

knowledge, MacDougall collected data, but it was not shared with Dougherty. She did not see the staff or data on the staff, so she could not opine as to the quality of services. Not all the children received one-to-one instruction, but relying on the student program books she testified that “from my understanding, ABA was done throughout the day.” Most of the program was based on the scientific principles of ABA. During intensive teaching, during different times throughout the day, data was collected, and the teaching procedures were evaluated based on the data. Based on what she was told, the preschool disabled program utilized ABA teaching strategies and ABA procedures, but it was not an ABA program.

Other schools suggested by Dr. Fiorile are run by BCBA's and do not have related services providers, and there are no non-disabled peers. There is not a continuum of least restrictive environment. As a BCBA, she is not an expert in the areas of expertise of the related service providers. She collaborates with speech-language pathologists to employ ABA, and evaluates the procedures recommended by the speech-language pathologist to determine whether those procedures have a relationship to the student's behaviors.

Dougherty has never met or observed R.S. Her knowledge of the District's 2016-2017 preschool disabled program is from discussions with McNichol and MacDougall before she started her employment. Dougherty's testimony as to the program components were largely prefaced by “I was told.” She also testified “I believe” specials were a part of the program and included art, computers, physical education, music and music therapy. In terms of ABA, there were components of ABA present throughout the day, consisting of data collection and analysis of the procedures employed on behavior change, reinforcement, specific teaching procedures, intensive teaching, discrete trial instruction, natural environment teaching, shaping and chaining used to teach self-help skills.

Carol Fiorile

Fiorile observed R.S. at SEARCH and evaluated him at home. R.S. has cognitive potential. He learns well from appropriate instruction. R.S. requires one-to-one

instruction, and sometimes the ratios were not one-to-one. From her observation of the preschool disabled class there was limited evidence of ABA. Autism requires a specialized level of intervention, and the staff lacked the education to ensure a certain degree of expertise in implementing instructional programming for children with autism. A Registered Behavior Technician (RBT) credential requires a minimal competency in implementing instructional programming.

Specials were primarily in a group format and would not have been appropriate for R.S. He was not assigned a one-to-one aide for support in those environments and she was concerned about the level of expertise for the “specials” teachers in managing his problem behaviors. There is no opportunity for generalization because there is no one-to-one aide to see what the related service providers are working on.

The IEP is not appropriate because it does not reflect that there would be one-to-one instruction; despite multiple interfering behaviors, it does not reflect a behavior intervention plan or behavioral interventions, such as token economy, access to reinforcement, or conducting a preference assessment to determine motivators; there is no ESY which would to a degree of certainty lead to regression and an increase in problem behaviors; some goals and objectives were not defined operationally and the criteria was too low. She would have expected behavioral goals, a toilet training goal, goals to work toward generalization, and parent training goals in the IEP, but there were none. There were language and occupational therapy goals, but no academic goals.

The ABLLS-R assessment would not address behavior interventions. Behaviors that limit a student’s ability to access an appropriate education are included in the VB-MAPP, but are not included in the ABLLS-R.

Despite not receiving occupational therapy from an occupational therapist, he has progressed in his fine motor skills at SEARCH. He is now able to draw pictures, and he did not have those skills in his repertoire when he started at SEARCH. R.S. has learned to follow and respond to contingent relationships between compliance and access to reinforcement. His language has expanded. He is learning at a rapid rate and with intensive instruction he might ultimately be able to return to the District in a general

education classroom. However, he presently requires intensity to learn foundational and prerequisite skills and to be able to learn in groups.

Fiorile observed the District program for seventy-five minutes on May 10, 2017, for another student, and summarized her observation. She concluded that the degree of direct supervision for this program was significantly less than what would be necessary to provide adequate supervision for individual ABA programming for [R.S.]. Consistency in program implementation is one of the hallmarks of effective ABA programs.

D.S.

Mom believed that R.S. did not have speech-language therapy or occupational therapy issues, but instead had autism behavioral issues.

She shared information with the district, attended the meetings, and consented to sharing all documentation with the District. SEARCH had all the important documentation and the parents authorized SEARCH to share it with the District. She also consented to evaluations of R.S. by the District.

For the evaluations, Zuckerman and Peterson came together, and Zuckerman returned to complete her evaluation because she could not control R.S. enough to complete the evaluation. McNichol came separately to complete her evaluation. When Zuckerman and Peterson arrived, R.S. was engaging in typical behavior and perseverating over something in the living room. He was not paying attention to them, so Zuckerman suggested he go in his booster chair. Mom complied but was concerned that they would get a false impression of his abilities and deficiencies and asked if that is typically how an evaluation is conducted. When Zuckerman returned, she again instructed Mom to put R.S. in the chair.

The occupation therapy evaluation was on the first day. It did not seem that Petersen was able to get a lot of information from R.S. Mom was concerned that the evaluator was not able to determine if she was getting an accurate representation of R.S. because she did not know if he was noncompliant or unable to understand or unstable to

perform the activities. Mom did not have concerns about McNichol's evaluation, and McNichol had explained to her that it is not uncommon for her to be able to complete her evaluation on a child R.S.'s age.

She thought the Collaborative Preschool Evaluation, which was provided to her prior to the IEP meeting, was a decent representation of RS.'s background and struggles, and contained much of their observations at SEARCH.

Mom attended the IEP meeting, and Dad participated for some of the meeting by phone. Mom was two-months postpartum, and very overwhelmed by all the deficiencies noted in the multidisciplinary evaluations. The District recommended its preschool disabled program, but this concerned her because R.S. had been at SEARCH for six months, with intensive one-to-one ABA therapy. He was making slow, steady progress, but he was not in groups, and he always had one or two instructors working with him. Lubin advised during the IEP meeting that the preschool disabled program had a small student-teacher ratio, but she did not advise that it would be one-to-one, or that it was an ABA program. The IEP did not mention that R.S. has autism, and it did not explain how they would teach R.S. Mom did not know her role, as she had never been to an IEP meeting before. She also had not yet seen the District program and did not know if at that point she was supposed to be critiquing the program.

Mom observed the District program, and saw children working in small groups. She saw Lubin working with two children. When she was working with one child, the other child would take a break on the carpet. Mom was disappointed by this because she knew if R.S. was allowed to take a break on the carpet, he would be engaging in non-contextual vocalizations, self-stimulatory behavior, and repetitive behaviors, like opening and closing doors or cabinets.

The parents met with MacDougall for forty minutes and Mom asked a lot of questions. She believed that because MacDougall was a BCBA, she knew a lot about autism. However, Mom observed the aides in the classroom and after having six months of parent training at SEARCH, she could see that the aides did not have instructional control over the students. Students were allowed to not respond, to turn away, to answer

incorrectly and be given another chance, contrary to ABA instruction. After observing, Mom had a very low confidence level in the aide and Lubin. No one advised Mom that R.S. would receive one-to-one services. She was not asked what she thought of the program or if she had any concerns.

Lubin gave her a weekly class schedule. Mom calculated the amount of teaching time R.S. would possibly receive one-to-one. She determined that daily he would have “work” for 120 minutes on Monday, 105 minutes on Tuesday, 95 minutes on Wednesday, 85 minutes on Thursday and 105 minutes on Friday.

Mom knew about ABA from research and training, but she was not an expert in ABA and wanted experts to evaluate the District’s program.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A “child with a disability” means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). R.S. has been diagnosed with autism and classified as a preschool child with a disability.

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a free “appropriate public education.” 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Each district board of education is responsible for providing a system of free, appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A “free appropriate public

education” (FAPE) means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, 458 U.S. 176. 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).

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(14); 20 U.S.C. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student’s educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). Annually, or more often, if necessary, the IEP team shall meet to review and revise the IEP and determine placement. N.J.A.C. 6A:14-3.7(i). FAPE requires that the education offered to the child must be sufficient to “confer some educational benefit upon the handicapped child,” but it does not require that the school district maximize the potential of disabled students commensurate with the opportunity provided to non-disabled students. Rowley, 458 U.S. at 200. Hence, a satisfactory IEP must provide “significant learning” and confer “meaningful benefit.” T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577-78 (3d Cir. 2000).

The Supreme Court discussed Rowley in Endrew F. v. Douglas County School District RE-1, __ U.S. __, 137 S. Ct. 988 (2017), noting that Rowley did not “establish any one test for determining the adequacy of educational benefits” and concluding that the “adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” Id. at 996, 1001. Endrew F. warns against courts substituting their own notions of sound education policy for those of school authorities and notes that deference is based upon application of expertise and the exercise of judgment by those authorities. Id. at 1001. However, the school authorities are expected to offer “a cogent and responsive

explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” Id. at 1002.

In Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 46 (1989), the New Jersey Supreme Court concluded that "in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined." Further, the New Jersey Supreme Court stated:

As previously indicated, the purpose of the IEP is to guide teachers and to insure that the child receives the necessary education. Without an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP. Furthermore, an IEP that is incapable of review denies parents the opportunity to help shape their child's education and hinders their ability to assure that their child will receive the education to which he or she is entitled.

Id. at 48-9. (citations omitted).]

In accordance with the IDEA, children with disabilities are to be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur 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. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to require that a disabled child be placed in the LRE that will provide the child with a “meaningful educational benefit.” T.R., 205 F.3d at 578. Consideration is given to whether the student can be educated in a regular classroom with supplementary aids and services, a comparison of benefits provided in a regular education class versus a special education class, and the potentially beneficial or harmful effects which placement may have on the student with disabilities or other students in the class. N.J.A.C. 6A:14-4.2(a)(8).

The District contends that it provided FAPE to R.S. in the least restrictive environment. Conversely, petitioners contend that the District's proposed program was not appropriate to meet R.S.'s individualized needs and would not provide R.S. with a FAPE. The District bears the burden of proof and the burden of production whenever a due process hearing is held pursuant to the provisions of the IDEA. N.J.S.A. 18A:46-1.1.

Notably, the witnesses from both sides do not significantly disagree on R.S.'s present levels of achievement and functional performance. Yet, there are several overriding concerns with the District's IEP. The IEP places R.S. in the preschool disabled program, without any further specificity. SEARCH identified seven interfering behaviors that were barriers to R.S.'s ability to learn, and these behaviors were confirmed by the testimony of every witness to have observed him. There was no testimony from the District's witnesses to dispute that these interfering behaviors existed or that they were barriers to his ability to learn. In fact, some of the District's multidisciplinary evaluations were conducted while R.S. was confined to a chair, which clearly corroborates elopement and noncompliance behaviors. Moreover, Zuckerman was unable to complete her evaluation in one day due to R.S.'s interfering behaviors. Petersen altered her testing procedures and was unable to determine whether R.S. was noncompliant, unable to understand the directions, or unable to perform the tasks. In the absence of a one-to-one aide, the District had no credible explanation of how it would address elopement and noncompliance or R.S.'s other undisputed problem behaviors, such as motor stereotypy, non-contextual vocalizations, oral stereotypy and visual stereotypy.

The record is replete with evidence that R.S., upon entry into the District's program, would have required a one-to-one aide. However, Lubin testified that any student in the preschool disabled class with a one-to-one aide had an IEP that reflected a one-to-one aide. Thus, it is evident that unless the IEP was later revised, the District was not proposing a one-to-one aide for R.S. Lubin also testified that whether a student is assigned a one-to-one aide is based upon the results of the ABLLS-R, but in this circumstance there is no information to be garnered from the ABLLS-R or other behavioral testing that would have been conducted by the District that would materially change the information already in the District's possession - which clearly evinces the need for a one-to-one aide.

Although there was no dispute that the Collaborative Preschool Evaluation identifies R.S.'s deficits, this report and the IEP fail to mention that R.S. has autism. While not necessarily fatal to the IEP, the testimony and New Jersey Autism Program Quality Indicators establish that there are generally accepted methods, such as ABA, to be implemented in educating a child with autism. Again, the failure of the IEP to reference ABA or some other acceptable method of educating a child with autism is not fatal – if the District demonstrates that the program itself is an autism program implementing an autism-acceptable methodology. While evident that Dougherty and Lubin were knowledgeable about such methodologies, the District failed to present MacDougall, the District's BCBA at the time, to testify, and instead presented Dougherty, whose employment with the District did not commence until September 2018, approximately a year and a half after the Petition for Due Process was filed. Thus, almost the entirety of Dougherty's testimony about the District's preschool disabled program for the 2016-2017 school year was hearsay. Hearsay evidence is admissible in the trial of contested cases, and is accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). However, notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1971). The testimony of the District's witnesses about the preschool disabled program often was at odds with the testimony of the petitioners' witnesses who had observed the program, and there were no preschool disabled program materials, such as skill acquisition program books, data sheets or graphs, provided to corroborate the testimony. Thus, no legally competent evidence exists to fully document the 2016-2017 preschool disabled program.

In a full-time, one-to-one ABA program like SEARCH, the credible evidence, as testified to by Fiorile, Journe and Kahana, supported the view that occupational therapy and speech-language therapy would not have been required as separate services to

provide R.S. with an appropriate education. However, the record reflects that the District's program was not a full-time one-to-one ABA program like SEARCH, thus the District's inclusion of occupational therapy was not unreasonable, especially in view of R.S.'s low muscle tone and decreased hand strength. Although it was clear that the related services were to be thirty minutes twice per week, it was not clear from the IEP what portion of the day those services would occur. Based upon the schedule provided by the District to Mom, the "work" portion of the day ranged between one hour and twenty-five minutes and two hours, depending upon the day. Given R.S.'s undisputed deficits, the credible evidence suggests that one-to-one instruction during only the work portion of the day, which may or may not have been further limited by related services, would have been inadequate to allow for skill acquisition or to address R.S.'s interfering behaviors.

Based upon the testimony and the statements made at the IEP meeting, the District intended to modify the IEP after administering the ABLLS-R. The testimony of the District's witnesses left zero doubt that once R.S. commenced the District's program he would have been assessed, using either the ABLLS-R or the VB MAPP and that modifications may have been made to his IEP. If this were a situation where the child had not been in a program yet and the District did not have such information, it would not be unreasonable to outline goals and objectives based upon the multidisciplinary evaluations and propose a program contingent upon possible revisions after conducting an ABLLS-R or VB MAPP to get an accurate assessment. However, the District already had R.S.'s VB MAPP results for April 8, 2016 and September 21, 2016, which was less than two months prior to the IEP meeting. By all accounts the VB-MAPP is an assessment substantially similar to the ABLLS-R (apart from the behavioral component). Additionally, the District also had a progress report and goals and objectives from SEARCH, which are very detailed and provide a wealth of information about R.S.'s present skill levels and behaviors, as well as his educational programs and behavior reduction programs. Lubin testified that whether R.S. would have discrete trial instruction, a token economy, or behavioral interventions would be determined when he started because the District does not know what he needs until he arrives. However, given the extensive information already in the District's possession, discrete trial instruction, a token economy or behavioral interventions could have been addressed, and there is no reason why creating an appropriate IEP should have been based upon a prospective ABLLS-R.

Certainly, the ABLLS-R could have been used to tweak the IEP, because his performance and behaviors in the District program might not have been identical to those at SEARCH, but the IEP lacks certain basic critical information already known to the District.

Another deficiency is that that IEP reflects “considered but not applicable” in response to whether R.S. has communication needs and in response to whether R.S.’s behavior impedes his learning or that of others. The IEP also reflects that behavioral interventions were not appropriate at the time. While even Kahana testified that it was not necessary to include a behavior intervention plan in the IEP, in the section on behavioral interventions, the IEP should have highlighted interfering behaviors for reduction. The District had observed R.S. and had documentation from SEARCH of R.S.’s behavioral deficits and positive behavioral interventions. The IEP reflects a “positive reinforcement plan” under “supplementary aids and services.” The District had in its possession the requisite information to specify interfering behaviors in the IEP and to identify positive behavioral interventions and supports to address them, but it failed to do so. R.S. had not attended the District’s program, and it was a different environment and different program than SEARCH, so it is not unexpected that these areas may have needed some modifications or revisions; but to have failed to include any information specific to R.S. further supports the argument that the IEP was not calculated to address to R.S.’s specific needs to allow him to make meaningful educational progress.

Several of the goals and objectives in the IEP were not appropriate because R.S. lacked the prerequisites for those goals and the criteria for mastery did not require independent mastery and therefore were not appropriate to establish meaningful progress. Unlike the SEARCH goals and objectives, the IEP goals and objectives failed to properly address his foundational learning deficits or behaviors.

While credible that ABA programs are effective for students with autism, the record falls short of establishing that a full-time one-to-one ABA program is the only effective program for students with autism. The Department’s Autism Program Quality Indicators (APQI) reflects that “[h]igh quality programs for students with autism share common characteristics, or indicators, which in practice set standards that, can serve as best practices” and that “[e]ffective interventions for students with autism spectrum disorders emphasize the need for their educational experience to include not only knowledge and

skill acquisition, but also an emphasis on socialization, language and communication, the reduction of problem behaviors, and adaptive skills.” (P-25.) The District’s program is required to consider the seven specific APQI program components, which are: (1) program characteristics; (2) personnel; (3) curriculum; (4) methods; (5) family involvement and support; (6) community collaboration; and (7) program evaluation. The APQI does not require that it be a full-time one-to-one ABA program as preferred by the parents. Further, R.S.’s current program at SEARCH is thirty hours and Fiorile recommended thirty hours. The testimony and evidence falls short of establishing that a “forty (40) hour a week 12-month, center-based ABA program with 1:1 instruction” is required or that R.S. should have “up to forty hours a week of direct ABA services including a home program”. That said, the evidence does support that the District’s proposed program and IEP for the 2016-2017 were not appropriate for R.S.

Based upon the testimony and documentary evidence, I **CONCLUDE** that the District’s IEP was not appropriate to meet R.S.’s educational needs for the 2016-2017 school year, and did not provide him with a FAPE.

The parents unilaterally placed R.S. at SEARCH. SEARCH is a center-based program that provides one-to-one behavior analytic services to children with autism. The credible testimony and the documentation from SEARCH reflect that SEARCH’s ABA program was appropriate for R.S. and allowed him to make meaningful educational progress. The District failed to provide R.S. with a FAPE and I **CONCLUDE** that it was reasonable for petitioners to unilaterally place R.S. at SEARCH for the 2016-2017 school year.

Pursuant to 20 U.S.C. § 1412(a)(10)(C)(i), and subject to 20 U.S.C. § 1412(a)(10)(A), a local education agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in such private school or facility. See also N.J.A.C. 6A:14-2.10(a). However, if the parents enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made FAPE available to the child in a timely

manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii); see also N.J.A.C. 6A:14-2.10(b). When a state fails to provide a free appropriate public education, it must reimburse parents for resulting private school costs. See T.R., 205 F.3d at 577 (citing Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985)). Such reimbursement is subject to limitation as set forth in 20 U.S.C. § 1412(a)(10)(C)(iii).

The District's arguments that petitioners are barred from reimbursement because SEARCH is not accredited or approved by the State of New Jersey are unavailing. With respect to SEARCH not being "approved," a parental placement may be found to be appropriate by a court of competent jurisdiction or an administrative law judge according N.J.A.C. 6A:14-6.5 for placements in unapproved schools, even if it does not meet the standards that apply to the education provided by the district board of education. N.J.A.C. 6A:14-2.10(b). Further, N.J.A.C. 6A:14-6.5(a) provides:

According to N.J.S.A. 18A:46-14, school age students with disabilities may be placed in accredited nonpublic schools **which are not specifically approved** for the education of students with disabilities with the consent of the Commissioner of Education, by an order of a court of competent jurisdiction, or by order of an administrative law judge as a result of a due process hearing. Preschool age students with disabilities may be placed by the district board of education in early childhood programs operated by agencies other than a district board of education according [to] N.J.A.C. 6A:14-4.3(d) or by an administrative law judge as a result of a due process hearing.

[Ibid. (emphasis added).]

Additionally, in Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993), the United States Supreme Court addressed the issue of whether parents were barred from reimbursement for a unilateral placement because the private school did not meet the § 1401(a)(18) definition of a "free appropriate public education." The Supreme Court held that they were not barred because "§ 1401(a)(18)'s requirements cannot be read as applying to parental placements." Id. at 13. The Supreme Court stated, "[n]or do we believe that reimbursement is necessarily barred by a private school's failure to meet state education standards." Id. at 14. The Supreme Court further stated:

Indeed, the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." 950 F.2d at 164. Accordingly, we disagree with the Second Circuit's theory that "a parent may not obtain reimbursement for a unilateral placement if that placement was in a school that was not on [the State's] approved list of private" schools. Tucker, 873 F.2d at 568 (internal quotation marks omitted). Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.

[Ibid.]

Moreover, the Supreme Court noted that "although the absence of an approved list of private schools is not essential to our holding, we note that parents . . . have no way of knowing at the time they select a private school whether the school meets state standards." Ibid.

Thereafter, in Moorestown Twp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 1078 (2011), the school district argued that the judge erred in finding an unapproved school to be an appropriate placement. In this regard, the District Court stated:

The Supreme Court has unanimously rejected this very argument, holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State. See Florence, 510 U.S. at 14 (explaining that it "hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place").

[Ibid.]

With respect to SEARCH also not being "accredited", in T.R. the parents unilaterally placed their child at Rainbow Rascals, an unaccredited private day-care center that the child had attended the previous year. The Third Circuit noted "[a]s a substantive matter, it seems likely that the Rainbow Rascals program, aside from its lack

of accreditation, could have provided N.R. with [a] FAPE. T.R., 205 F.3d at 580. The Third Circuit addressed the parents' request for reimbursement and stated:

Because we have found that the Board did not err in rejecting Rainbow Rascals as a potential placement, we cannot find that the "public placement violated IDEA" on these grounds. Of course, if the District Court on remand finds that the Board improperly failed to consider other potential placements that met New Jersey's substantive standards (see part III(B), *supra*), **the state may have failed to meet its obligations under the IDEA and reimbursement for the Rainbow Rascals placement may be available under Florence.**

[Ibid. at 582. (emphasis added).]

Unlike T.R., the parties are not in a dispute over which out-of-district placement would have been appropriate, and it is not being suggested that the District could have placed R.S. at SEARCH, which is unaccredited and unapproved. However, according to T.R., Florence gives parents the right to reimbursement for a unilateral placement in a non-qualifying school if the school district's placement violated IDEA and the private school placement was proper. Ibid.; see also A.S. v. Harrison Twp. Bd. of Educ., 2016 U.S. Dist. LEXIS 57008 (D.N.J. April 29, 2016), reconsideration granted in part and denied in part, on other grounds, 2016 U.S. Dist. LEXIS 109822 (D.N.J. August 18, 2016) (District Court affirmed ALJ decision ordering tuition reimbursement for unaccredited school).

The New Jersey Supreme Court has also addressed the issue of reimbursement in Lascari as follows:

We are sensitive to the possibility that parents may select a private school that affords their child an education that is more elaborate than is required. Conceivably, parents might select a boarding school even though a day program would furnish their child with an appropriate education. It would be anomalous, however, to recognize the parents' right to reimbursement, but to deny completely that right merely because they selected a school that furnished an education beyond that which the district is obliged to offer. See Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 (5th Cir. 1986). It would also be anomalous to deny parents the right to reimbursement when the district failed to provide their child with an appropriate education and

the only school that the parents could find was a boarding school. Hence, we reject the district's argument that the Lascaris are necessarily precluded from all reimbursement because they did not select the least restrictive environment for the education of their child.

[Lascari, 116 N.J. at 52.]

As set forth above, the District failed to provide R.S. with a FAPE for the 2016-2017 school year. Having reviewed the criteria for reimbursement, I **CONCLUDE** that the District should reimburse petitioners for the cost of R.S.'s placement at SEARCH, including transportation, for the 2016-2017 school year, beginning November 18, 2016, R.S.'s third birthday.

The Petition for Due Process was filed on March 7, 2019 and was not subsequently amended, and during the hearing petitioners stipulated that the petition was limited to the 2016-2017 school year. Accordingly, no determination is made herein as to whether the District's preschool disabled program would be appropriate or provide a FAPE for any other school year or for any other IEP.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioners is **GRANTED** as to the 2016-2017 school year. Specifically, it is **ORDERED** that the District reimburse petitioners for the costs of R.S.'s placement at SEARCH, including tuition and transportation, for the 2016-2017 school year, beginning on November 18, 2016.

It is further **ORDERED** that petitioners and the District should meet within thirty days of this decision to create an IEP for R.S. to reflect his placement at SEARCH for the 2016-2017 school year.

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).

March 22, 2019

DATE
mm



KELLY J. KIRK, ALJ

APPENDIX

Witnesses

For Petitioners:

Carrie Kahana
Carol Fiorile
Nicole Journe
D.S.

For Respondent:

Dawn McNichol
Megan Petersen
Erica Zuckerman
Alexandra Dougherty
Kady Lubin

Exhibits

Joint

- J-1 Petition for Due Process
- J-2 NJEIS, Part B Notification/Referral to Local School District
- J-3 Initial Identification and Evaluation Planning-Proposed Action
- J-4 Draft IEP
- J-5 Meeting Attendance Sign-In Sheet (November 1, 2016)
- J-6 (Not in Evidence)
- J-7 Invitation for Initial Eligibility Determination and IEP Development/Meeting Confirmation Form
- J-8 Collaborative Preschool Evaluation
- J-9 Pediatric Neurodevelopmental Evaluation Report
- J-10 Independent Educational Review
- J-11 SEARCH Agreement for Service, dated March 30, 2016
- J-12 SEARCH Goals and Objectives, dated May 2, 2016

J-13 SEARCH Agreement for Service, dated March 9, 2017

For Petitioners:

- P-1 SEARCH Goals and Objectives, dated October 2, 2017
- P-2 VB-MAPP Scoring Forms
- P-3 SEARCH Progress Report, dated August 11, 2016
- P-4 SEARCH Progress Report, dated November 11, 2016
- P-5 SEARCH Progress Report, dated February 17, 2017
- P-6 SEARCH Progress Report, dated May 19, 2017
- P-7 SEARCH Progress Report, dated August 17, 2017
- P-8 SEARCH Program Planning List
- P-9 SEARCH Interfering Behaviors
- P-10 R.S. Data Sheet
- P-11 Psychological Evaluation-ADOS
- P-12 NJ EIS Initial Evaluation/Assessment Summary & Ambulatory Referral to Behavioral Health, dated March 29, 2016
- P-13 (Not in Evidence)
- P-14 (Not in Evidence)
- P-15 Pediatric Neurodevelopmental Evaluation Report
- P-16 Ambulatory Referral to Behavioral Health, dated March 17, 2016
- P-17 (Not in Evidence)
- P-18 (Not in Evidence)
- P-19 Curriculum Vitae of Carrie Kahana
- P-20 (Not in Evidence)
- P-21 (Not in Evidence)
- P-22 (Not in Evidence)
- P-23 Preschool Schedule
- P-24 (Not in Evidence)
- P-25 NJ Autism Program Quality Indicators
- P-26 Emails between SEARCH and Dougherty
- P-27 Emails between McNichol and Parents
- P-28 Curriculum Vitae of Nicole Journe

For Respondent:

- R-1 Curriculum Vitae of Kady Lubin
- R-2 Curriculum Vitae of Megan Petersen
- R-3 Curriculum Vitae of Erica Zuckerman
- R-4 Curriculum Vitae of Alexandra Dougherty
- R-5 Curriculum Vitae of Dawn McNichol
- R-6 Standard Certificate School Psychologist
- R-7 Standard Certificate Supervisor
- R-8 Academic Transcript
- R-9 Pre-Evaluation Form
- R-10 Preschool Language Scales – Fifth Edition
- R-11 Peabody Developmental Motor Scales – Second Edition
- R-12 (Not in Evidence)
- R-13 USB Audio Recording of November 1, 2016 IEP meeting