



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 9664-18

AGENCY DKT. NO. 2018-28214

V.P. AND R.P. ON BEHALF OF H.P.,

Petitioners,

v.

MIDDLETOWN TOWNSHIP BOARD OF

EDUCATION,

Respondent.

Judith A. Gran, Esq., appearing for petitioners (Reisman, Carolla, Gran, Zuba, LLP, attorneys)

Eric A. Harrison, Esq., appearing for respondent (Methfessel & Werbel, attorneys)

Record Closed: April 17, 2019

Decided: May 20, 2019

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Petitioners V.P. and R.P. (petitioners or parents) on behalf of their daughter H.P., a fifth-grade student in the Nut Swamp Elementary School (Nut Swamp), her neighborhood school in the Middletown Township Board of Education (Middletown or District) school district, allege that H.P. should remain in her current placement in general-

education classes with supplementary aids and services for most of the day. The parents assert that the self-contained placement in the language and learning disabilities (LLD) class for most of the day at a different district school, as set forth in the March 14 and May 24, 2018, individualized education program (IEP) prepared by respondent District, for the 2018–2019 school year, is not appropriate. The District contends that H.P.’s needs and functional limitations require a more restrictive placement than in the general-education class with supplementary aids and services, and that the LLD class will provide a free and appropriate public education (FAPE) in the least restrictive environment (LRE).

PROCEDURAL HISTORY

On or about June 7, 2018, the petitioners filed a petition for a due-process hearing with the Office of Special Education, Bureau of Policy and Planning. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on or about July 9, 2018. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The parties appeared at a settlement conference on or about June 27, 2018, and the matter was not resolved.

The hearing was conducted on January 8, 9, and 16, 2019. The parties requested an adjournment of the April 17, 2019, hearing date and submitted closing statements. The record closed on April 17, 2019.

FACTUAL DISCUSSION

For respondent

Tara Martinho is a school psychologist and has been the Nut Swamp case manager since 2011. She manages approximately fifty-five students each year, writing IEPs and working with the child study team (CST), including therapists, such as speech and occupational. Martinho has a degree in educational psychology and a master’s degree in school psychology. She is a certified school psychologist. She works with learning disabilities teacher consultants and speech-language specialists in formulating sections of the IEP that she does not have the experience to write.

This is Ms. Martinho's sixth year case-managing H.P., who was born with Down syndrome and has a communication disability and is classified as communication impaired.¹ This is the first time Ms. Martinho has managed a student with Down syndrome and the first time she conducted an evaluation as a certified school psychologist for a Down-syndrome student.

In her professional experience, Ms. Martinho maintains that the LRE starts in a general-education setting, and "then you go into a . . . more restrictive, . . . an in-class resource type of setting, a pull-out setting, a self-contained setting, autism behavioral disabilities and then an out-of-district setting." Tr. 1 at 56. A review of the student's current functioning, academically, behaviorally, socially, and emotionally, is conducted in order to determine a student's placement based upon the LRE.

Ms. Martinho first met H.P. at the last preschool meeting and then met her again when she arrived at Nut Swamp for her second year of general-education kindergarten.

H.P. received early-intervention services and then attended a general-education preschool program at Harmony Elementary School for the 2009–2010 school year beginning March 25, 2010. Eventually H.P. return to Nut Swamp, her home school, where she is currently a fifth-grade student who is being educated in the general-education setting for the majority of her school day. H.P. receives in-class resource services and pull-out support for language arts and math and related services of speech-language therapy, occupational therapy, physical therapy, and behavioral consultations. She also has the support of a 1:1 paraprofessional throughout the school day. The IEP presented at the March 14, 2018, meeting sets forth that the following supplementary aids and services were previously used in the general-education setting, but are now being rejected as sufficient to meet H.P.'s needs because the pace of the curriculum in the general-education setting is too fast for H.P. to keep up:

Modified testing, an in-class support teacher for English Language Arts and Math, pull out support with a special education teacher for math and language arts, personal

¹ Petitioners point out that the District testing has not established that H.P. has an intellectual disability, although most children with Down syndrome are intellectually disabled.

paraprofessional, additional processing time, instructional modifications, curricular modifications, small group and individual instruction with regular and special education teachers, utilize visual supports, listening to audiobooks/videos when content is above reading level, verbalize before performing, scribing by teacher or paraprofessional, provide breaks, rephrase written directions, allow breaks during testing, rephrase and explain oral/written directions.

[Exhibit R-46.]

The District notes that even with the additional support of a special-education teacher and a paraprofessional, H.P.'s work is individualized so extensively that she spends most of her time working independently. The District further notes that the gap between H.P.'s academic level and that of other students has increased to a point at which she is not able to work on similar assignments during group activities; H.P. tends to observe most of the time; and she experiences great difficulty working on differentiated material from her peers. Ibid.

Further, the work is heavily modified to her level, which results in significantly limited participation with her general-education peers, due to the significant difference in the work. She reads below grade level, and she requires modifications in reading and math. Ibid.

For school year 2017–2018, the parents filed a complaint with the New Jersey Department of Education alleging that the District violated the Individuals with Disabilities Education Act (IDEA) by refusing to modify the general-education curriculum for H.P. The parents believed that it became clear during mediation that the District staff did not understand the difference between an accommodation and a modification, and it was agreed that a meeting would be held to discuss this for the next school year. The District was found to be noncompliant, and the State ordered corrective action in the form of a letter to the teacher informing them that modification to the general-education curriculum was appropriate. The CST met again on November 3, 2017.

H.P. has remained in the general-education placement for the 2018–2019 school year based on the parents’ filing of this due-process petition to challenge the District’s proposed March 14, 2018, and May 24, 2018, IEPs to place H.P. in the self-contained LLD classroom at Harmony School.

Ms. Martinho referred to the evaluation scores to demonstrate that H.P. functions well below the average level cognitively. In the spring of 2012, H.P.’s IQ score was 74, and in 2018 her full-scale IQ was 48. Martinho wasn’t sure why there was such a significant drop. She noted that on the 2015 psychological evaluation H.P. scored an IQ of 68. By comparison, H.P.’s score dropped on the 2015 educational evaluation to a very limited range, with many scores less than the first percentile. Martinho believed that these scores demonstrate that H.P. was not making academic progress and that she was unable to “keep up” with standardization for her age. The results of the recent re-evaluations of H.P.’s cognitive function assessed with a standardized assessment indicate that H.P.’s cognitive functioning is within the “moderately impaired” range, and she scored in the “very low” range in many cluster areas. Her speech and language scores fall within the “very low” range.

After completing another set of evaluations during January and February 2018, the District conducted a reevaluation eligibility and IEP meeting on March 14, 2018. Martinho acknowledged that staff brainstormed about the IEP in advance of the meeting, but that she did not find anything wrong with that in this case, especially when there is a lot of data and information to review. The District proposed placing H.P. in a self-contained LLD classroom at a different District school location, because the testing demonstrated a widening gap between H.P. and her non-disabled peers. The parents vehemently objected and asked for each team member to voice their opinion separately.

Recordings of the March 14, 2018, and May 24, 2018, IEP meetings were entered into evidence. (Exhibits R-78, R-79.) General-education teacher Ms. MacLellan expressed that she was 100 percent on board with inclusion for H.P. through the fall, but she feels that H.P. is uncertain about herself, that she is not interacting with her peers, and that while the other students are forming friendships, she is not. She is constantly working on skills that are heavily modified, and H.P. is becoming frustrated by her heavily

modified work—“she comes in and we just busy her because this is what she can do.” Ms. Shapow, the science and social studies teacher, stated that the material is at a very high level and that H.P. needs visual supports and has difficulty understanding the concepts being taught. Reading was taught by special-education teacher Ms. Shaw, but H.P. displayed frustration in the small-group setting and mostly learned reading one-on-one with an adult. The CST acknowledged that H.P. made progress, but the progress was limited and not sufficient to continue H.P. in the inclusive general-education placement with heavily modified work and many supports.

Ms. Martinho explained that even though the CST offered pull-out resource placement over the last few years, this type of service was a better fit for students that were moving toward grade level, which at this point the team did not feel H.P. was doing. Not only was H.P.’s work heavily modified, but in order to complete the work, H.P. required constant prompting. In the LLD class she would have more intensive supports over a less intensive curriculum and more opportunities to initiate the work and come up with answers on her own. She recognized H.P.’s needs to interact with non-disabled peers, and saw her having those opportunities in lunch, specials, and recess.

Martinho believes that the advantage to the LLD self-contained classroom for H.P would be the availability of instruction at a slower pace. In this setting H.P would be able to communicate with other students who are closer to her level and speak more slowly, and she would have the opportunity to work with peers who are working on similar skills rather than modified work. This would also increase her social skills. She would work on simpler projects, and the text and concepts are at a lower level.

Ms. Martinho believes the gap between H.P. and her non-disabled peers is now “huge.” In addition, Ms. Martinho states that H.P has not mastered the goals in her IEP for fourth grade, but acknowledges that H.P. has made progress, going from “introduced” to “partially proficient” in most of her objectives. Ms. Martinho also noted that H.P.’s assignments have been modified by answering questions that are more basic.

Ms. Martinho and the petitioner’s expert, Dr. Whitbread, observed the LLD classroom together, but had differing views of the classroom structures and assignments.

Ms. Martinho felt that the activity, “pretend you are on Santa’s elves and write about your day” was appropriate because it was fun and relatable. H.P. could have worked on sentence starters at a slower pace, and the text and concepts are at a lower level than in the general-education classroom. Ms. Martinho also opined that the teacher’s decision to dismiss the students for recess fifteen minutes early during her observation was an incentive for the students to work hard.

Ms. Martinho believes that pulling a student out of a general-education class is a service because it provides more direct individualized instruction. For H.P., she would be provided with more intensive academic instruction by a special-education teacher in areas that she is struggling in. In addition, this year the students in the LLD classroom have similar communication and learning needs as H.P., and are in third, fourth and fifth grade who like H.P. are working on a first-grade reading level. Ms. Martinho also believes that the LLD class will help alleviate H.P.’s dependency on her paraprofessional, because she would be working with the special-education teacher, which would allow for the paraprofessional to back away.

Ms. Martinho emphasized that in addition to the advanced nature of the general-education curriculum for H.P., the pace of the curriculum is too fast for H.P. to keep up with. Ms. Martinho feels the District did and continues to do everything it can to support H.P.’s inclusion, but she has not sought out an inclusion facilitator to help address the issue. She agreed that modifications to a curriculum include changes to the instructional level of material or curriculum that the student is expected to learn. These modifications may include changes in the content of the curriculum, changes in the performance criteria, or changes in how the student is expected to demonstrate learning. However, the District was concerned about taking away parts of the curriculum when H.P. was placed in the general-education class and has not created a modified version of the curriculum for the general-education classroom. In the LLD class, H.P would not be expected to learn the entire general-education curriculum. Martinho indicated that reports indicate that H.P. is not suited for a general-education class. She explained that certain triggers cause H.P. to shut down, such as too much attention on her, loud noises that she is not prepared for, laughter that she does not understand, and a new task that she perceives as difficult.

For petitioners

Petitioner V.P. is the mother of H.P. She expressed the importance of seeing H.P. educated in her neighborhood school, with the opportunity to make friends, and to prepare H.P. to be successful in her adult life. She described H.P. as a shy child. Throughout H.P.'s elementary-school years, V.P. requested supplementary aids and services on behalf of H.P., and emphasized the importance of H.P. modeling behavior of her peers in the general-education setting. V.P. reported that in addition to H.P.'s progress in fourth grade, H.P. made progress throughout her early years at Nut Swamp. In the second-grade general-education class, the speech therapist documented that H.P. highly motivated by her peers; for gym, the physical therapist told H.P. "you don't need me anymore" after H.P. participated fully in class, on her own. At the end of the year, the second-grade general-education teacher concluded that H.P. was doing much more academically than other children with similar disabilities who were not in the general-education class.

In third grade H.P. began to struggle when the District expected her to meet every standard set forth in the general curriculum. V.P. believes that the teacher reports of H.P.'s deficits were based only on assessment reports that were not modified. For example, in fifth grade, H.P. read lower-level books, which V.P. reported she enjoyed reading. However, a review of the books indicated that they were unmodified books for younger children, not a modified version of grade-level materials.

V.P. found subsequent reports from the District, for example, H.P. would not enter the fourth-grade regular classroom for the first part of the year, contrary to what staff reported at her teacher conference, which was that H.P. independently performed her morning routine. The Present Levels of Academic Achievement and Functional Performance in H.P.'s fifth-grade year contained allegations that H.P. was socially isolated in the classroom and complained about having work that was different from that of her peers. V.P. never received data from the District to support its report. The District also reports that H.P. sometimes preferred to sit and watch her friends during recess to which V.P. responded that is because sometimes she likes doing just that. She engages with a core group of friends that "are everything to her." V.P. did not receive data from

the District showing that H.P. does better in Core Plus More, a program where she receives individualized instruction in a small group.

The petitioner notes numerous conversations during the CST meeting and asserts that the CST audio recording provided evidence of H.P.'s ability to do better when she, for example, answered questions with support, or the directions were reworded with prompting. More specifically, it was noted that when H.P. understood the test directions she wanted to correct her work. The District conducted standardized testing for five consecutive days, the tests were timed, yet H.P. did in the average range. Her noncompliant behavior described by the District occurred during the educational evaluation period when she was pulled out of her classroom for five straight days. The District understood that the parents adaptive scores of H.P.'s skills in the home environment would be higher.

M.L. is H.P.'s aunt and has been a special-education teacher since 1981. She has experience as a teacher in a special-education classroom and has her doctoral degree. Since 2012 she has been working as a consultant with a charter school in New Orleans. As H.P.'s aunt she has been involved in the case and has attended IEP meetings, both in person and by phone. All along Dr. L. believed that H.P. was making great progress in the general-education setting. She also agreed that H.P.'s progress was not the same progress as that of other students. At the most recent IEP meeting for H.P.'s fifth-grade year the District set forth a plan for removing H.P. from the general-education setting, and during the meeting did not discuss supplementary aids and services that the District could provide to her in the general-education setting. Dr. L. also provided an example of modified grades. She pointed out that the District did not properly modify the grading system for H.P. which would have resulted in earned proficient scores because H.P. successfully reached her goals by performing them with the support outlined in her IEP goal. Instead, the District, misconstrued the grading and, assessed H.P. as partially proficient because she achieved the goal with the use of the specified supports. Dr. L. acknowledged that she has not observed H.P. in a school setting since third grade, and since then has relied on V.P. for information.

Dr. Kathleen Whitbread, an educational consultant and adjunct professor, with more than thirty years of experience working with students with Down syndrome, testified on behalf of the petitioners. She was qualified as an expert witness in special education, education of students with intellectual disabilities, education of students with Down syndrome, education of these students in general-education classes and strategies for educating them, and literacy instruction for students with intellectual disabilities.

To offer her opinion about H.P.'s program and placement—which she was hired by the petitioner to do—Dr. Whitbread reviewed her records and observed her in her current placement (general-education classes) and the recommended placement (language and learning disabilities class).

In the two general-education classes Dr. Whitbread observed—English/language arts and science—she found that, although H.P. was indeed shy, she appeared engaged and interacted with her classmates. In particular, during the science class, H.P. worked in a collaborative way with others.

Dr. Whitbread testified that the ability to cooperate and collaborate are important skills to develop. She noted, however, that these skills are not typically prominent in self-contained special-education classrooms. In the LLD class, which is such a class, Dr. Whitbread observed that there was very little group work and interaction among the students.

Dr. Whitbread observed that, like many students with Down syndrome, H.P. responded better to questions when prompted to answer, a common technique for teaching students with disabilities. Prompting can be verbal (a more specific question), physical (a touch), or visual (a look). Dr. Whitbread testified, however, that the need for prompting is not a good reason to remove a student from a general-education classroom.

Dr. Whitbread acknowledged that there was a gap in ability between H.P. and her peers in the general-education classes. She also acknowledged that students with Down syndrome typically learn at a slower pace and may at times feel frustrated among general-

education students. Dr. Whitbread testified, however, that these too are not good reasons to remove students from general-education classes.

Based on research and her experience, Dr. Whitbread finds that all students learn at different paces and in different ways. The good teachers, she finds, can adapt their techniques—by varying instruction and how students demonstrate what they learned—to reach them all. Dr. Whitbread testified that H.P.’s teachers were good in this respect. She also finds that students can perform well when they are challenged and struggle, so long as they feel supported by their teachers and classmates. In this respect too, Dr. Whitbread found that H.P. had enough support in her classes.

Dr. Whitbread testified that it is not necessarily true that all students in a self-contained classroom are at the same level in terms of ability. She also testified that student outcomes, in terms of graduation rates, etc., are not more positive in such classes.

In conclusion, Dr. Whitbread testified that H.P. was a very capable student and would receive greater academic, social, and communication benefits in her current general-education classes compared to the recommended placement in the LLD class.

Dr. Whitbread acknowledged that in her more than thirty years of experience, she had not once recommended a self-contained setting for a student she was hired to evaluate. Before she met H.P., Dr. Whitbread knew that the District had recommended a self-contained setting, and that H.P.’s parents disagreed and filed this due process petition.

Dr. Whitbread admitted that she spent only eighty minutes with H.P., and that she did not speak to H.P.’s current or former teachers or listen to the recorded IEP meeting where the proposed change was discussed.

Dr. Whitbread did review H.P.’s first standardized test scores—where she ranked at or below the first percentile—but she finds such tests unhelpful because students with Down syndrome typically do not score well on them.

Dr. Whitbread reviewed H.P.'s report cards and at least some of the associated comments, which she found helpful in making her evaluation. She also reviewed H.P.'s progress reports, where she found many specific, positive comments about H.P.'s classroom performance. Based on this material, Dr. Whitbread concluded that H.P. made meaningful progress in the 2017–2018 school year.

Findings

It is my obligation and responsibility to weigh the credibility of the witnesses in order to make a determination. Credibility is the value that a fact-finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness, and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives, or bias of a witness is relevant, and a fact-finder is expected to base decisions of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514.

The witness from the District testified credibly as to their knowledge of Nut Swamp Elementary School and the education plans established to remove H.P. from the general education class and place her in the LLD class in a different District school. The District, however, did not provide testimony and evidence to prove that H.P. cannot make meaningful progress in her current placement and did not demonstrate that her current placement is hindering the education of the non-disabled students. The District witness appeared to do her best to testify about the supplementary aids and services provided to H.P. and the effort made by the District to abide by the parents' strong desire to keep H.P. in her neighborhood school with her friends. However, the District witness acknowledged that the District did not create a modified version of the general education curriculum because it did not want to take away parts

of the curriculum and she could not make specific recommendations as to how the curriculum could be modified other than for example answering more basic questions. The witness could not state with certainty the supplementary aids or combinations of aids and supports considered for the upcoming school year and why they were not effective. The District did reference low test scores and provided the most recent reevaluations in which H.P. scored to support its conclusion that it's now time to place H.P. in the self-contained LLD classroom, which consists of all disabled students, however there was no specific recommendations as to a modified curriculum. I do **FIND** the District witness testified in a credible manner, however the testimony was limited by her description of the narrow range of supplementary aids that the District currently has in place for educating a child with a disability in the general education classroom.

The testimony of V.P., H.P.'s mother, and Dr. L., H.P.'s aunt, made clear their advocacy for the continuation of H.P. in the general-education program. I **FIND** both witnesses testified credibly as to H.P.'s progress in the general education curriculum and the strong support H.P. receives at home. They raised the important distinction between a curriculum that contains accommodations for a student and one that also includes modifications and set forth important examples of the lack of modifications in H.P.'s IEP, and the nonmodified grading system which made it appear that H.P. was not progressing.

Dr. Whitbread opined that H.P. made progress in the general education class and also noted that her teachers did a good job including H.P. in the general education class lesson. She found that H.P. has a greater ability to cooperate and collaborate with her peers in the general education class, and she pointed to the academic and social limitations imposed in the LLD class. Dr. Whitbread did not agree with the District's reasons for removing H.P. from the general education class, such as pacing and the need for prompting, and found them not to be sufficient and opines that students do well when they are challenged as long as they have the necessary supports. She pointed out the academic and social benefits inherent in a general education class that cannot be provided in the LLD classroom and in her expert opinion recommended that H.P. remain in the general education classroom. Dr. Whitbread did not spend time one on one with H.P. which probably would have enhanced her testimony, and the data she reviewed to make her conclusion was from 2019, not from the data she should have received from

the previous school year. I **FIND** Dr. Whitbread to be a knowledgeable and credible expert in her field, to which the District did not produce an expert to refute her conclusions.

It is undisputed, and I **FIND**, that H.P. has made progress in the general education classroom. What is unclear is whether the appropriate supplementary aids and services were provided to her to maintain meaningful progress in the classroom.

The audio recordings of the CST meeting provided by the District included a spirited discussion of the differing views on the best placement for H.P. and included insight into teachers' observations and their recommendation for the LLD placement, although none of the participants were under oath and I **FIND** that the information can only be used as guidance and not for fact-finding.

I also **FIND** that there is no evidence in the record that the District attempted to train its teachers in how to modify the general-education curriculum for students like H.P.

LEGAL ANALYSIS AND CONCLUSION

The Individuals with Disabilities Education Act (IDEA) provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982). One of the purposes of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public-school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d).

The United States Supreme Court has construed the FAPE mandate to require the provision of “personalized instruction with sufficient support services to permit the child to

benefit educationally from that instruction.” Rowley, 458 U.S. at 203. The Rowley standard was recently questioned by the United States Supreme Court in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____, 137 S. Ct. 988 (2017). The Supreme Court determined that to meet its obligation to deliver FAPE, a school district must show a cogent and responsive explanation for its decisions that shows that the IEP is reasonably calculated to enable the child to make progress that is appropriate considering the particular student’s circumstances. The Court declined to devise a “bright-line rule” for “what ‘appropriate’ progress will look like from case to case,” because “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” Endrew F., 137 S. Ct. at 1001.

In addressing the quantum of educational benefit required, the Third Circuit has always made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the IEP provides for “significant learning” and confers “meaningful benefit” to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988), cert. den. sub. nom. Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030 (1989).

In other words, the school district must show that the IEP will provide the student with “a meaningful educational benefit.” S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). This determination must be made in light of the individual potential and educational needs of the student. T.R., 205 F.3d at 578; Ridgewood, 172 F.3d at 247–48. “When students display considerable intellectual potential, IDEA requires ‘a great deal more than a negligible [benefit].’” Ridgewood, 172 F.3d at 247 (quoting Polk, 853 F.2d at 182). The pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

The IDEA describes education in the “least restrictive environment” as follows:

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care

facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

[20 U.S.C. § 1412(a)(5)(A).]²

New Jersey regulations promulgated under the IDEA mirror this federal directive.

Students with disabilities shall be educated in the least restrictive environment. Each district board of education shall ensure that:

1. To the maximum extent appropriate, a student with a disability is educated with children who are not disabled;
2. Special classes, separate schooling or other removal of a student with a disability from the student's general education class occurs only when the nature or severity of the educational disability is such that education in the student's general education class with the use of appropriate supplementary aids and services cannot be achieved.

[N.J.A.C. 6A:14-4.2(a).]

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

² This federal regulation according to 34 C.F.R. 300.116(e) (2018) incorporates that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general-education curriculum.

Courts in this circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom. Scott P. v. Carlisle Area Sch. Dist., 517 U.S. 1135 (1996).

To underscore this point, the Third Circuit has emphasized that just because a child with disabilities might make greater academic progress in a segregated, special-education classroom does not necessarily warrant excluding that child from a general-education classroom. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1217 (3d Cir. 1993). Thus, removal of children with disabilities from the regular-education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Id. at 1213. Indeed, this provision evidences a “strong congressional preference” for integrating children with disabilities in regular classrooms. Id. at 1213–14.

Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3) (2018); see also N.J.A.C. 6A:14-4.2; Oberti, 995 F.2d at 1216 (citation omitted). The Oberti court noted that the key to resolving any apparent tension between

the strong preference for mainstreaming and the requirement that schools provide individualized programs tailored to the specific needs of each disabled child . . . [lies] in the school’s proper use of “supplementary aids and services,” to which may enable the school to educate a child with disabilities for a majority of the time within a regular classroom, while at the same time addressing that child’s unique educational needs.

[Oberti, 995 F.2d at 1214.]

The court confirmed that before placing a child outside the district the school must consider, among other things, the whole range of supplemental aids and services, including resource rooms and itinerant instruction, speech and language therapy, special-education training for the regular teacher, or any other aid or service appropriate to the child's needs. Id. at 1216. "If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." Ibid. Indeed, the Act does not permit states to make mere token gestures to accommodate students with disabilities, and its requirement for modifying and supplementing regular education is broad. Ibid.

To determine whether a school is in compliance with the Act's mainstreaming requirement, a court must first determine whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. Id. at 1215. If such education cannot be achieved satisfactorily, and placement outside of the regular classroom is necessary, then the court must determine whether the school has made efforts to include the child in school programs with nondisabled children whenever possible. Ibid. This two-part test is faithful to the Act's directive that children with disabilities be educated with nondisabled children to the maximum extent appropriate, and closely tracks the language of the federal regulations. Ibid. The court also established a number of factors that should be considered in analyzing the initial prong of the inquiry, including: (1) the steps the school district has taken to try to include the child in a regular classroom; (2) a comparison between the benefits the child will receive in a regular classroom and the benefits the child will receive in the segregated, special education classroom; and (3) the possible negative effect the child's inclusion will have on the education of the other children in the regular classroom. Id. at 1217-18.

The education of a child with a disability must also be tailored to the unique needs of the child through an IEP, and the provisions of the IEP must be reviewed and, if appropriate, revised periodically, but not less than annually. 20 U.S.C. § 1414(d)(4)(A). An IEP should be developed with the participation of parents and members of a district board of education's child study team who have participated in the evaluation of the child's eligibility for special education and related services. N.J.A.C. 6A:14-3.7(b). The IEP team

should consider the strengths of the student and the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluations of the student; the student's language and communication needs; and the student's need for assistive-technology devices and services. The IEP establishes the rationale for the pupil's educational placement, serves as the basis for program implementation, and complies with the mandates set forth in N.J.A.C. 6A:14-1.1 to -10.2.

The parents here, who are dissatisfied with H.P.'s IEP, appropriately filed for an administrative due process hearing. 20 U.S.C. § 1415(f). The burden of proof is placed on the school district. N.J.S.A. 18A:46-1.1. The District also bears the burden of proving compliance with the mainstreaming requirement of the IDEA. 20 U.S.C. §§ 1400–1485.

In this case, unlike in Oberti, the District has not refused to place H.P. in the general-education classroom. In fact, against the District's recommendation, H.P. has been mainstreamed ever since she began her education at Nut Swamp. The District believes it has done everything it can to help H.P. achieve a meaningful education in the general-education classroom, but it's no longer working, mainly because the gap between H.P.'s achievements and those of her non-disabled peers is plainly too large. The parents, on the other hand, have worked tirelessly to achieve the appropriate level of learning for H.P. in the general-education classroom, and they are willing to put in whatever effort it takes both at school and at home to achieve this goal. They feel that H.P. had made meaningful progress on the IEP goals while remaining in the general-education class. The District also acknowledged some progress by H.P. in the general-education setting.

The parents, along with the educators and experienced professionals who work with the child each day, are part of the child study team that can best determine a child's educational placement. The parents' input and desire to keep H.P. in the general-education classroom for a majority of the school day is appropriate. The District has placed H.P. in the general education class since she began in early school years at Nut Swamp and does not deny that H.P. has made progress. The District reliance on the comparison of H.P.'s progress with that of her nondisabled peers to demonstrate a vast

gap in her education is not the appropriate measure, nor is it persuasive enough to restrict her placement to a self-contained classroom.

H.P.'s current proposed IEP is without an explanation of supplementary aids and services, namely, modification of the general-education curriculum. The record is clear that H.P. has a 1:1 paraprofessional and the support of the resource room. Furthermore, unlike in Oberti, where the student displayed a number of serious behavioral problems—including temper tantrums and touching, hitting, and spitting on other children—which disrupted the class and frustrated the general-education teacher, H.P. is a well-behaved student, and there is no evidence that she disrupts the class or the education of her non-disabled peers in the general-education class in any manner. The District's effort to red-flag potential behavioral issues was insufficient and not contextually accurate.

It is undisputed that the children in the LLD classroom are lower functioning, and some have behavioral problems, and the level of the education is lower. It is also undisputed that H.P. is communication impaired. H.P. needs to learn in an enriched environment that requires her to do her best and provides the greatest opportunity for her education. The LLD class is too restrictive. H.P. would run the risk of modeling poor behaviors. H.P. needs specialized modified instruction in an appropriately enriched general-education classroom where she learns from the behavior and language used by her peers and where the teacher engages in interactive teaching to make sure H.P. understands what is being taught, and while she learns to express herself and interact with her schoolmates appropriately.

I **CONCLUDE** that the District did not demonstrate that a free and appropriate public education reasonably calculated to provide a meaningful educational benefit could not be provided to H.P. in the general-education placement with a modified regular curriculum appropriate supplementary aids and support services. I also **CONCLUDE** that H.P. should be included in the general-education program with supplementary aids and services and a modified regular curriculum to accommodate her learning. I further **CONCLUDE** that this placement is less restrictive than the placement recommended by the District, which meets the requirement that students with disabilities shall be educated in the least restrictive environment. I also **CONCLUDE** that it is evident from the District's

attempts to modify and accommodate H.P. in the general-education classroom that the District would benefit from retaining an inclusion facilitator to help address the issue.

I further **CONCLUDE** that there was insufficient evidence to determine that the parents are entitled to compensatory education.

ORDER

It is **ORDERED** that the petitioners' request for due process is **GRANTED** as follows:

The IEP for the 2018–2019 school year shall be revised to provide H.P. with specially designed modified instruction and supplementary aids and services that will provide her with meaningful progress in the general education classroom in her home school for the majority of the school day, and to the maximum extent appropriate.

The District shall retain an inclusion facilitator to assist with the development of appropriate supplementary aids and services in the District's regular education classes, which shall include training for all staff who work with H.P.

The award of compensatory education for the period before the complaint was filed is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2018). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.



May 20, 2019 _____

DATE

MARY ANN BOGAN, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

MAB/cb

APPENDIX

WITNESSES

For petitioners:

V.P.
Dr. L.
Dr. Whitbread, expert

For respondent:

Tara Martinho, case manager

EXHIBITS

Jointly submitted:

- R-1 Not Admitted
- R-2 Not Admitted
- R-3 IEP, March 25, 2010
- R-4 IEP, November 17, 2010
- R-5 IEP, May 23, 2011
- R-6 IEP, November 22, 2011
- R-7 Educational Evaluation, March 14, 2012
- R-8 Psychological Evaluation, March 19, 2012
- R-9 IEP, April 23, 2012
- R-10 IEP, May 24, 2012
- R-11 IEP, September 14, 2012
- R-12 IEP, April 19, 2013
- R-13 Not Admitted
- R-14 Physical Therapy Evaluation, March 10, 2015
- R-15 Psychological Evaluation, March 12, 2015
- R-16 Educational Evaluation, March 16, 2015
- R-17 Speech/Language Evaluation, March 18, 2015
- R-18 Occupational Therapy Re-evaluation, March 2015

- R-19 Eligibility Determination Report, April 1, 2015
- R-20 Not Admitted
- R-21 IEP, April 1, 2015
- R-22 Report Card, 2015-2016
- R-23 IEP, September 28, 2015
- R-24 Assistive Technology Consultation, January 17, 2016
- R-25 IEP, March 21, 2016
- R-26 IEP, December 15, 2016
- R-27 IEP, March 16, 2017
- R-28 Settlement Agreement, April 26, 2017
- R-29 IEP, May 15, 2017
- R-30 Letter to parents, June 14, 2017
- R-31 Not Admitted
- R-32 Not Admitted
- R-33 Not Admitted
- R-34 Amended IEP, October 31, 2017
- R-35 Amended IEP, November 3, 2017 with changes
- R-36 Parents' response to proposed re-evaluation plan, November 22, 2017
- R-37 Occupational Therapy Services Re-evaluation, January 12, 2018
- R-38 Psychiatric Evaluation, January 19, 2018
- R-39 Assistive Technology Consideration, January 26, 2018
- R-40 Psychological Report, February 23, 2018
- R-41 Physical Therapy Re-evaluation, February 27, 2018
- R-42 Educational Report, February 28, 2018
- R-43 Not Admitted
- R-44 Revised Speech and Language Evaluation, March 6, 2018
- R-45 Eligibility Determination Report, March 14, 2018
- R-46 IEP, March 14, 2018
- R-47 Correspondence from B. Mondadori, March 21, 2018
- R-48 Email from Harrison to Mondadori, March 26, 2018
- R-49 Not Admitted
- R-50 Not Admitted
- R-51 Not Admitted

- R-52 Not Admitted
- R-53 Progress reports, 2017-2018
- R-54 Daily report sheets, 2017-2018
- R-55 Not Admitted
- R-56 Not Admitted
- R-57 Not Admitted
- R-58 Observation notes, December 14, 2018
- R-59 Progress reports, as of December 14, 2018
- R-60 Not Admitted
- R-61 Not Admitted
- R-62 Not Admitted
- R-63 Not Admitted
- R-64 Not Admitted
- R-65 Not Admitted
- R-66 Curriculum Vitae of Tara Martinho
- R-67 Not Admitted
- R-68 Not Admitted
- R-69 Not Admitted
- R-70 Not Admitted
- R-71 Not Admitted
- R-72 Not Admitted
- R-73 Not Admitted
- R-74 Not Admitted
- R-75 Not Admitted
- R-76 Not Admitted
- R-77 Not Admitted
- R-78 Recording of meeting, March 14, 2018 (CD-ROM)
- R-79 Recording of meeting, May 24, 2018 (CD-ROM)
- R-80 Not Admitted
- R-81 Not Admitted
- R-82 Not Admitted
- R-83 Not Admitted
- R-84 Not Admitted

- R-85 Not Admitted
- R-86 Not Admitted
- R-87 Not Admitted
- J-88 Not Admitted
- J-89 Not Admitted
- J-90 Not Admitted
- J-91 Documents supporting H.P. complaint, September 4, 2017
- J-92 Findings on H.P. complaint, October 16, 2017
- J-93 Request for reconsideration, October 30, 2017
- J-94 Not Admitted
- J-95 Response to request for reconsideration, November 20, 2017
- J-96 Memo to MTPS staff and documentation of Open Records request, November 27, 2017
- J-97 Not Admitted
- J-98 Social studies and math tests, 2018
- J-99 Daily reports showing refusal to participate in evaluation
- J-100 Not Admitted
- J-101 Not Admitted
- J-102 Not Admitted
- J-103 Not Admitted
- J-104 Not Admitted
- J-105 Not Admitted
- J-106 Notes of visit to Village School, April 13, 2018
- J-107 Not Admitted
- J-108 Vocabulary test, June 2018
- J-109 Parent concerns, June 2018
- J-110 Student profile of H.P., September 2018
- J-111 Not Admitted
- J-112 Not Admitted
- J-113 Daily reports for the 2018-19 school year, December 19, 2018
- J-114 Christmas notes from friends, December 21, 2018
- J-115 Not Admitted
- J-116 Report, December 31, 2018

J-117 Curriculum Vitae of Kathleen Whitbread, Ph.D.

J-118 Video, 2018