



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 15446-19

AGENCY DKT. NO. 2020 30752

J.J. AND U.L. ON BEHALF OF S.L.,

Petitioners,

v.

MONTCLAIR BOARD OF EDUCATION,

Respondent.

J.J. and U.L. on behalf of S.L., pro se, petitioners

Alison Kenny, Esq., for respondent (Schenck, Price, Smith and King, attorneys)

Record Closed: June 3, 2020

Decided: June 9, 2020

BEFORE **ELLEN S. BASS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arose with the October 1, 2019, filing of a due process petition under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §1415 et seq., by J.J. and U.L. on behalf of their son, S.L. Petitioners urge that the Montclair Board of Education (the Board) denied a Free and Appropriate Public Education (FAPE) to S.L. during the 2019-2020 school year. They seek a one-to-one homebased tutoring program at public expense, urging that this is the only setting that will provide FAPE to S.L. in the least restrictive environment.

PROCEDURAL HISTORY

The contested case was transmitted to the Office of Administrative Law (OAL) on October 31, 2019. Hearings were conducted on February 21 and 26, 2020 and May 19, 2020.¹ Written summations were submitted in lieu of a final day of hearing on June 3, 2020, at which time the record closed.

FINDINGS OF FACT

At the time of the hearing, S.L. was a thirteen-year-old seventh grader. He is classified as eligible for special education services under the eligibility category “Multiply Disabled.” At issue is the appropriateness of an Individualized Education Program (IEP) offered to S.L. in January 2019, during sixth grade. The chronology of events leading up to the development of that IEP is uncontroverted, and I **FIND:**

S.L. has not attended school since the 2017-2018 school year, having spent his entire sixth-grade year (2018-2019) on Homebound Instruction. At the end of fifth grade, school personnel had determined that S.L. needed a higher level of support and had recommended an out-of-district placement. But the parties could not agree on an educational program and his parents filed for due process in August 2018. S.L. began sixth grade on Homebound Instruction while the parties explored next steps. In January 2019, while due process was pending, the parties met as an IEP Team and the Child Study Team (CST) modified its position, now proposing an IEP that would return S.L. to a supportive in-district setting.

The 2018 petition was amicably resolved in April 2019 with an agreement that S.L. remain on Homebound Instruction for the duration of the 2018-2019 year. The parties moreover agreed that the Board would reimburse the parents for an Extended School Year (ESY) program. It was agreed that attendance at this program would serve as an opportunity for school personnel to observe S.L. and consider a change to the January 2019 IEP.

¹ Due to social distancing measures mandated by Executive Order 107 as a result of COVID-19, the final day of hearing was conducted via remote technology at the consent of the parties. An earlier date was adjourned due to the pandemic.

S.L. enrolled at the Harbor Haven Day Camp during the summer of 2019, but only attended for one day. According to Director of Pupil Services Thomas Santagato, the parties had planned to convene the IEP Team in July 2019 but did not do so once S.L. withdrew from his summer program. Counsel for the Board communicated with petitioners via letter dated July 9, 2019, and advised that, as a result “there is no basis on which the CST would re-consider the placement in the [in-district] program for the 2019-2020 school year.” The January 2019 IEP thus remained in effect. S.L. started his seventh-grade year, in September 2019, without any services from the school district. S.L. continues to be home schooled by his parents and is receiving tutoring and other services at their expense.

Dr. Grace Ann Furnari is a School Psychologist and Behaviorist who has been employed by the Board for six years. Dr. Furnari was admitted as an expert in Behavioral Psychology and educational programming for students with behavioral issues. She described the district’s rationale for the program proposed in January 2019. A history of maladaptive behaviors led to S.L.’s classification near the end of his fourth-grade year.² Dr. Furnari related that his challenges were primarily social and behavioral, although he would also shut down academically at times. Dr. Furnari recalled that S.L. would use unkind words in addressing peers; could be physically aggressive; and on occasion ran away and out of the building. A Neuropsychiatric Evaluation completed in May of the fourth-grade year informed the CST’s thinking and included the following, quite concerning observations:

Indeed, [S.L.’s] oppositional behaviors are a tremendous concern, particularly as they occur outside the home. Not only are they virtually guaranteed to affect this school performance as noted, but they portend poorly in terms of his ability to engage effectively with authority figures of any kind (and rules for that matter.) Again, this puts him at high risk in terms of the possibility of anti-social behaviors...[t]aken together, it is clear that [S.L.] is a bright young man with good academic potential and beyond. That future, however, currently comes with high risk, given the severe limitations that are in place based on his attitude, behaviors, respect for authority, focus, and judgment.

² The parents had resisted an earlier attempt to classify S.L. in the third grade.

He was assessed by an Occupational Therapist, who found that “[S.L.] is not ‘seeking out’ sensory stimulation or responding to any sensory stimulation overload that will affect his ability to perform successfully.” Occupational Therapy services thus were not recommended.

Per his IEP, during fifth-grade, S.L. remained in the mainstream and was assisted by a paraprofessional and received counseling. A Behavioral Intervention Plan (BIP) was developed. But fifth grade was a challenging year, and the BIP was revised more than once to attempt to meet S.L.’s needs. Miya Thompson-Smith was the Learning Consultant and Case Manager during S.L.’s fifth grade year. She offered no testimony that was at odds with that of Dr. Furnari. By the end of fifth grade, school personnel were firm in their belief that S.L. needed more support than could be provided in a traditional classroom.

At the January 2019 IEP meeting, it was proposed that S.L. attend an in-district behavioral disabilities program for language arts, mathematics and social studies. The Montclair Achieve Program (MAP) would offer a small class setting, and mainstreaming opportunities for S.L.’s remaining classes. He would be supported by a one-to-one paraprofessional. S.L. would receive individual counseling and an occupational therapy consultation three time annually.³ Science would be delivered in the mainstream, as this was a strength for S.L. Per Dr. Furnari, the program would offer S.L. a formal Behavioral Management Plan that would allow him to progress behaviorally and receive privileges. It would include social skills training, and the opportunity for flexible seating and sensory breaks. The MAP staff are trained in the de-escalation of behaviors. The students in the class would, like S.L., be academically able.

Dr. Furnari opined that the MAP program would have been an appropriate setting for S.L. at the time it was proposed and would have provided him with FAPE in the least restrictive environment. She did not agree that one-to-one instruction would be appropriate for a child with social challenges, as there would be no opportunity to learn to resolve conflicts. Indeed, in a public-school setting, S.L. would be forced to interact successfully with all sorts of students, including those he might not choose as a friend. While petitioners felt

³ The occupational therapy consult was intended to be responsive to the parental concern that a sensory processing disorder was interfering with S.L.’s academic success.

strongly that their son was the victim of bullying, and that the fifth grade environment fostered name calling and the hurling of insults among all the boys, Dr. Furnari maintained her view that S.L. perpetrated a good deal of the verbal abuse, and could not maintain himself behaviorally in a mainstream setting. Dr. Furnari indicated that many peers were fearful of S.L. in fifth grade. She stressed that S.L. was capable academically but would not be cooperative if a subject matter was not interesting to him.

S.L.'s parents urged that Dr. Furnari has not interacted with S.L. since fifth grade, and that he is doing well now and participating in activities outside the home that engage him with peers, such as the lacrosse club. But Dr. Furnari pointed out that this still does not challenge S.L. to navigate non-preferred settings. When it was suggested that S.L. had overcome the challenges that caused the CST to recommend the MAP program, Dr. Furnari opined that this would surprise her, because nothing has been done to address his prior difficulties.

His parents are adamant that home schooling had been effective for S.L. and is the appropriate setting for him to achieve educational progress. U.L. thus feels that her son should not return to school, but rather should continue in a homebound program at public expense. S.L. is excelling academically and has taught himself to code. S.L. has "soared" in math and has done hands on lab work. He is a sought-after babysitter and helps the younger children in his neighborhood by escorting them on Halloween as they trick-or-treat. He continues to have sensory issues, but these are readily addressed by adjusting his clothing, or permitting him to listen to music while he studies. He is interested in data analytics and would like to attend the Naval Academy. S.L. follows the stock market and has brought the family up to speed with current ways to disconnect from cable television. Currently, S.L. is receiving instruction from a solid team that delivers instruction in data analytics, robotics and pottery. The family is part of the Home-Schooling Club Network in Montclair; and this, and league athletics, provide social outlets for S.L. He is happy.

Relative to the problems that were experienced by S.L. during the fifth grade, U.L. urged that a culture of bullying existed among the boys. If anything, her son was the victim

of this culture.⁴ And notwithstanding, U.L. urged that S.L. did well in fifth grade. His behaviors improved and he earned points via his BIP. At first the paraprofessional was not helpful, but once a new one was assigned, S.L. did well. His health remained his parents' primary concern, and they came to learn during that year that S.L.'s behaviors were the result of sensory processing issues. And a seizure disorder was depriving S.L. of adequate sleep. U.L. described the fifth grade as a "grueling year," but urged that S.L. earned A's and B's, nonetheless.

And although she urged that fifth grade was not as bad an experience as school personnel asserted, U.L. reiterated that the elementary school was "toxic." The proposed middle school setting was too hectic. S.L. did attend the middle school for one day, but he witnessed an assault, and found the crowds at the school frightening. Discussion of a future lock down at the school was stressful for S.L. Likewise, Harbor Haven was frightening and inappropriate. U.L. contended that staff called the children there "stupid." No school or summer program setting seemed suitable, and thus U.L. urged that she would like to continue homebound instruction.

U.L. urged that homebound is the right setting for S.L. not only due to academic and social concerns, but also due to his health. Two letters from Pediatric Neurologist Dr. Puja Joshi, dated September 19, 2019, and November 27, 2019, were sent to the school district; these attested to S.L.'s inability to attend school due to health concerns. Mr. Santagato indicated that these letters were shared with the school physician who found them insufficient to authorize homebound instruction. The parents strongly felt that the school district disregarded information about their son's medical condition in planning his educational programming.⁵

⁴ In their written summation his parents urge at length for the first time that S.L. was treated unfairly in fifth grade due to his race. At the hearing they had attempted to argue more generally about the disparate treatment of minority students. The experience of minority students in our schools is surely a matter of legitimate concern, but not one that can be addressed in the context of this IDEA due process petition, which calls upon me only to determine whether an IEP offered by the Board during the sixth grade year delivered an appropriate education to this one child. I so advised petitioners at the hearing.

⁵ It noteworthy that both letters well post-dated the development of the pertinent IEP. And the later letter also post-dates the filing of this petition for due process. Thus, clearly, the CST did not have Dr. Joshi's letters available for consideration when it offered the January 2019 IEP.

Dr. Joshi testified at the hearing and was admitted as an expert in Neurology. She confirmed the medical diagnoses contained in her letters and verified that her diagnoses were derived from a variety of extensive tests, including some during hospitalizations. She has followed S.L. for three years. I **FIND** that S.L. suffers from a condition known as Mesial Temporal Lobe Sclerosis. Dr. Joshi confirmed that this condition puts S.L. at risk for seizures, although she also stated that it was unclear clinically if S.L. has suffered any actual seizures.

Dr. Joshi also indicated, and I **FIND**, that S.L. suffers from a Sensory Processing Disorder and a generalized Anxiety Disorder. Dr. Joshi explained that a Sensory Processing Disorder presents challenges in interpreting one or more of the senses; and she confirmed that this could present with heightened personal space concerns. Due to S.L.'s anxiety, he could be impulsive, irritable and anxious. She also confirmed that when meeting with S.L., he expressed that school makes him anxious, and that he experienced bullying at school.

Dr. Joshi was an extremely thoughtful witness, and answered the questions asked of her in a credible and professional manner. But she could not and did not opine that S.L. needed a homebound setting to achieve academic progress. Dr. Joshi had never attended an IEP meeting, and had never observed the program that was offered to S.L. She knew of the MAP program only anecdotally through conversations with S.L. and his parents. Dr. Joshi had only one brief conversation with the Case Manager from Montclair. It was clear that she knew little about S.L. educationally, other than that school was a stressor for him. While she explained the ways sensory processing and generalized anxiety disorders could affect a child, Dr. Joshi did not, and could not, offer any evidence that these disorders actually affected S.L. educationally. And, she is not an educator, and thus, understandably was not able to opine, nor did she at the hearing, about the sort of educational program that would be appropriate for S.L. Nor did Dr. Joshi reiterate the opinion, at hearing, that homebound was a medical necessity for S.L. And her description of his medical status lent no support to such a recommendation. As a result, the recommendation contained in Dr. Joshi's letters appeared to be simply an expression of parental preference.

Dr. Doris Walker Bennett is S.L.'s private Homebound Instructor. She holds a Bachelor's degree in Health and Physical Education and a Master's degree in Health

Professions. Dr. Bennett holds a Doctorate in Movement Science. She was employed for many years by the Montclair Schools as a teacher and as the Supervisor of the Health, Physical Education and Arts Departments. Dr. Bennett holds certifications as a Teacher of Health and Physical Education, and in Administration/Supervision. She was the Director of the district dance program.

Upon her retirement in 2002, Dr. Bennett began to serve as a Homebound Instructor. Her homebound services included instruction in a variety of subjects, and she stressed that she works often with children with special needs. Her passion for S.L. resonated in her testimony, and Dr. Bennett has worked with him as a tutor since third grade. Her description of S.L. and his progress echoed U.L.'s testimony; she described S.L. as well-spoken, articulate, smart and on top of his schoolwork. She finds that he is attentive to his studies regardless of the subject presented. She finds him respectful and easy to work with, and she noted that S.L. does well in a variety of settings, to include the library and restaurants. Dr. Bennett finds that S.L. interacts well with peers.⁶

She opined that the MAP program is inappropriate for S.L. But while Dr. Bennett is an experienced and highly qualified educator, she has no expertise that would qualify her to opine on educational programming for a special education student like S.L. I can thus give her opinion about the appropriateness of the MAP program little weight. Moreover, her only experience with the MAP program was some time ago, anywhere from eight to ten years ago. Dr. Bennett raised a concern about the peer cohort there but offered no insight into what the class composition would have looked like when the CST recommended that S.L. enroll in the MAP program.

Accordingly, relative to S.L.'s educational programming, the only persuasive testimony was that of Dr. Furnari. I thus **FIND** that the MAP program, when offered to S.L. during the 2018-2019 school year, was an appropriate educational program for him. Per Dr. Furnari's testimony, I **FIND** that a homebound program is inappropriate for S.L., as it is not a

⁶ Dr. Bennett was critical of the district's homebound program, and urged that at times, she was given insufficient materials for use in moving S.L.'s educational program forward. This testimony however was of no assistance in determining if S.L. should remain on a homebound program or would have been better served by attending a specialized school program.

setting that will permit S.L. to acquire the skills needed to interact successfully in group settings like school, college or the workplace.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

As a recipient of Federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities will receive FAPE. 20 U.S.C. §1412. FAPE includes Special Education and Related Services. 20 U.S.C. §1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d). To meet its obligation to deliver FAPE, the school district must offer an IEP reasonably calculated to enable S.L. to make progress appropriate in light of his circumstances. Andrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. ____ (2017); 137 S. Ct. 988; 197 L. Ed. 2d 335.

Case law recognizes that “[w]hat the [IDEA] guarantees is an ‘appropriate’ education, ‘not one that provides everything that might be thought desirable by loving parents.’” Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (citation omitted). Indeed, “meaningful participation does not require deferral to parent choice.” S.K. ex rel. N.K. v. Parsippany-Troy Hills Bd. of Educ., 2008 U.S. Dist. LEXIS 80616, at *34–35 (D.N.J. October 9, 2008) (citation omitted). Nor does the IDEA require that the Board maximize S.L.’s potential or provide him the best education possible. Instead, the law requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). Under this standard, I **CONCLUDE** that the January 2019 IEP offered to S.L. delivered FAPE.

In reaching this conclusion, I relied on the expertise and testimony of Dr. Furnari. Dr. Joshi did not opine about the educational program appropriate for S.L. at the hearing and her earlier correspondence provided an inadequate justification to keep a child out of school long term. Dr. Bennett is not a special educator, and likewise was not qualified to offer opinions that could guide the special education programming of a classified child. The opinion of the parents as to placement and educational programming must be viewed with some caution, as they are non-experts. And the soundness of their views can be affected by parental biases

arising from subjective judgments of their child. Parental love runs so strong, and so deep, it can be blinding. See M.S. & D.S. ex rel. M.S. v. Mullica Bd. of Educ., EDS 4741-05, Final Decision (November 9, 2005), <http://njlaw.rutgers.edu/collections/oal/>; Johnson v. Ann Arbor Pub. Schs., 569 F. Supp. 1502, 1508–09 (E.D. Mich. 1983); see also Oberti v. Clementon Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993) (where the court noted that judges must rely heavily on the input of educational experts in determining the appropriateness of placements).

Moreover, by maintaining S.L. in-district, the IEP at issue delivers services to him in the “least restrictive environment.” 20 U.S.C. § 1412(a)(5)(A) mandates that

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

Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3) (2018); see also N.J.A.C. 6A:14-4.2; Oberti v. Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993). The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115 (2018); N.J.A.C. 6A:14-4.3. Instruction at home is one of the most restrictive settings contemplated by the regulation.

The parents urged that S.L. has grown and evolved since the development of the controverted IEP. But our case law instructs that that the appropriateness of the educational plan developed by an IEP team cannot be judged exclusively in hindsight. An IEP is a “snapshot, not a retrospective.” Fuhrmann v East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3rd Cir. 1991), citing Roland M. v Concord School Committee, 910 F.2d 983,992 (1st Cir. 1991). Thus, “in striving for ‘appropriateness’, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the

IEP was drafted.” Ibid. Our courts have confirmed that “neither the statute nor reason countenance ‘Monday morning quarterbacking’ in evaluating a child’s placement.” Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3rd Cir. 1995), citing Fuhrmann, 993 F.2d at 1040.

I thus **CONCLUDE** that at the time this IEP was developed and presented to the family in January 2019, it was appropriate and delivered FAPE to S.L. I further **CONCLUDE** that continued Homebound Instruction is too restrictive a setting for S.L. and that I have not been presented with persuasive evidence that supports the notion that it is the only environment in which he can achieve educational success.

Would the MAP program and the IEP that proposed it still be appropriate today, over a year after that IEP was developed? The only way to answer that question would, in my view, be to comprehensively reevaluate S.L. Accordingly, I **CONCLUDE** that the parents may continue to home school their son at their own expense, provided they comply with all requirements pertinent to compulsory education. Conversely, if they desire a public-school education, they must consent to a comprehensive evaluation, so that the CST has updated information. An IEP Team meeting could then be convened to discuss an appropriate classification and school setting for S.L. moving forward.

ORDER

Based on the foregoing, together with the record as whole, the petition of appeal is **DISMISSED.**

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

June 9, 2020

DATE



ELLEN S. BASS, Acting Director and Chief ALJ

Date Received at Agency

June 9, 2020

Date Mailed to Parties:
sej

APPENDIX

WITNESSES

For Petitioners:

U.L.

Miya Thompson-Smith

Dr. Puja Joshi

Dr. Doris Walker Bennett

For Respondent:

Thomas Santagato

Dr. Graceann Dr. Furnari

EXHIBITS

For Petitioners:

P-1 Joshi letter, November 27, 2019

P-2 Joshi letter, September 19, 2019

P-3 Release

For Respondent:

R-1 IEP

R-2 Final Decision approving settlement

R-3 Letter from counsel, July 9, 2019