

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 01173-16

AGENCY DKT. NO. 2016-23779

T.M. AND S.M. ON BEHALF OF J.M.,

Petitioners,

v.

BRANCHBURG TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Lori M. Gaines, Esq., for petitioners (Barger & Gaines, attorneys)

Marc G. Mucciolo, Esq. for respondent (Methfessel & Werbel, attorneys)

Record Closed: July 21, 2016

Decided: September 13, 2016

BEFORE **BARRY E. MOSCOWITZ, ALJ:**

STATEMENT OF THE CASE

On October 20, 2015, Branchburg provided J.M. with an IEP based on incomplete evaluations and insufficient therapies. It also failed to provide a behavior plan and a transition plan. Branchburg, however, promised to provide more. Was the IEP appropriate? No. In determining whether an IEP is appropriate, the focus is on the IEP actually offered and not on one that the school board could have provided. Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 46 (1989).

PROCEDURAL HISTORY

On December 11, 2015, petitioners filed a request for a due-process hearing with the Office of Special Education Programs. In their request, petitioners complain that Branchburg failed to provide J.M. with an individualized education program (IEP) that was reasonably calculated to provide J.M. with significant learning and meaningful benefit and, in doing so, failed to provide J.M. with a free appropriate public education (FAPE) for the 2015–16 school year. Ultimately, petitioners seek reimbursement for private tuition and associated costs at Somerset Hills Learning Institute (Somerset Hills), where J.M. was enrolled for the 2015–16 school year.

On December 28, 2015, Branchburg filed an answer with affirmative defenses. In its answer, Branchburg denied the substantive allegations contained in the petition for due process and asserted, among other things, that it did in fact provide FAPE for the 2015–16 school year. As a result, Branchburg requests that this case be dismissed in its entirety.

On January 21, 2016, the Office of Special Education Programs transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.4.

On February 8, 2016, the case was assigned to me for a hearing. Hearing dates were agreed upon for May 2016, but were later adjourned to June 2016 to accommodate settlement discussions. When the settlement discussions failed, the hearing was held on June 27 and June 29, 2016.

On July 21, 2016, the parties submitted their closing briefs and I closed the record.

FINDINGS OF FACT

Based on the testimony the parties provided and my assessment of its credibility, together with the documents the parties submitted and my assessment of their sufficiency, I **FIND** the following as **FACT**:

I.

Petitioners

J.M. was born on July 14, 2011, and is six years old. She was diagnosed with autism spectrum disorder on January 1, 2014, and is eligible for special education and related services under the classification or category “preschool child with a disability.” J.M. had begun receiving Early Intervention Services on December 9, 2013, in Hampton, New Jersey, where petitioners were then residing, and began receiving applied behavioral analysis (ABA) therapy through the Early Intervention Services on February 14, 2014.

On January 29, 2014, a transition planning meeting was held in Union Township, New Jersey, where petitioners intended to move, but on June 17, 2014, petitioners notified Union Township of their intent to place J.M. at Somerset Hills.

On July 7, 2014, petitioners unilaterally placed J.M. at Somerset Hills.

In October 2014, petitioners filed a request for a due-process hearing, seeking reimbursement for private tuition and associated costs at Somerset Hills for the 2014–15 school year, and in July 2015, the parties settled their case for J.M. to remain at Somerset Hills.

Meanwhile, petitioners moved to Branchburg. Branchburg alleges that petitioners never sought to enroll J.M. in the district autism program and always intended for J.M. to remain at Somerset Hills. Whether or not this allegation is true, Branchburg was obligated and required to provide J.M. with an IEP that was reasonably calculated to provide J.M. with significant learning and meaningful benefit for the 2015–

16 school year in light of her individual needs and potential. As such, that is the seminal issue in this case.

As will be seen below, Branchburg fell short of that requirement and failed to meet its obligation to J.M.

II.

Michelle Nash

A.

Expertise

Nash is a school psychologist in Branchburg and the case manager for J.M. Nash received a bachelor's degree in history from Johns Hopkins University in 2004 and a master's degree in school psychology from Fairleigh Dickinson University in 2010. Nash completed the School Psychologist Certification Program at Fairleigh Dickinson University in 2011 and holds a certificate in school psychology from the State Board of Examiners. She participates in professional-development programming on an ongoing basis each year and was offered and accepted as an expert in school psychology and case management without objection.

B.

Identification and Planning

Nash testified that on July 22, 2015, T.M. came to Whiton Elementary School in Branchburg to register J.M. with the district. On July 30, 2015, Nash spoke with Carol Webb, the director of Special Services, to schedule an identification-and-planning meeting, and on that date Nash sent petitioners an invitation to such a meeting. On August 5, 2015, the parties met for the meeting, and petitioners consented to an initial evaluation, which would include the following evaluations or assessments:

- Social History
- Speech/Language Evaluation
- Battelle Developmental Inventory
- Classroom Observation
- Nurse's Report

[J-7.]

Nash testified that J.M. "did well" while waiting at the meeting. Nash testified that J.M. played "nicely and independently" and only had a tantrum when it was time to leave because she had not been prepared to leave. Nash testified that "nothing stood out" at the meeting, either by what she observed or by what petitioners reported. More significantly, Nash testified that the parties determined that these evaluations or assessments would be conducted at the beginning of the school year.

C.

Evaluations

Speech-Language Evaluation

On September 8, 2015, Branchburg performed a speech-and-language evaluation. In its report, Branchburg noted that J.M. had significantly impaired communication skills, as weaknesses were identified in the areas of receptive, expressive, and pragmatic language. Articulation of speech sounds, however, was deemed age-appropriate. Moreover, Branchburg noted that the impaired communication skills impacted social-skills development because the social skills were well below average when compared to other preschool girls in the standardized sample.

Social History Evaluation

On September 21, 2015, Branchburg wrote a social history. In its report, Branchburg noted that J.M. had received Early Intervention Services, including ABA therapy. In addition, Branchburg noted that the child study team in Union Township had proposed placement in the autism program in Clinton Township, but petitioners pursued an out-of-district placement at Somerset Hills instead, and that J.M. started at Somerset Hills on July 7, 2014. Finally, Branchburg noted that TM felt that J.M. needed special education and support for global delays in communication, behavior, and socialization.

Classroom Observation

On September 24, 2015, Branchburg observed J.M. in class at Somerset Hills for one hour. In its report, Branchburg noted that J.M. had a tantrum in response to a request to clean up her materials, with her one-to-one assistant standing behind her holding her hands on the table, and that this tantrum continued for fifteen to twenty minutes.¹ Branchburg further noted that once the tantrum subsided, the trainer who works with the staff stepped in behind J.M. and began running programs, using hand-over-hand prompting and minimal verbal prompting until J.M. resumed typical levels of compliance. Branchburg noted that the teacher in the classroom later rotated in and that J.M. remained on task and completed her programs.

Nash is the one who observed J.M. on behalf of Branchburg and she testified that she did not like the fact that the one-to-one assistant held J.M.'s hand on the table. Nash further testified that she discussed this episode with the board-certified behavior analyst (BCBA) for Branchburg, and she believed that these behaviors could have been handled in the district program as well. Nash also testified that J.M. later transitioned to the playground without issue but did not interact with any of the other students.

Returning to the report, Branchburg noted that J.M. used a token board for reinforcement, that the one-to-one assistant used "preferred touch" (rubbing J.M.'s back

¹ The report of the classroom observation is contained in the report for the Battelle Developmental Inventory evaluation.

and squeezing J.M.'s shoulders) to encourage J.M., and that J.M. earned a swing during the observation.

Finally, Branchburg noted that J.M. was prompted to say goodbye, and that J.M. complied and then resumed her work.

Battelle Developmental Inventory Evaluation

On October 5, 2015, Branchburg performed a Battelle Developmental Inventory evaluation.² In its report, Branchburg noted that J.M. performed in the “significant developmental delay” range for the adaptive, personal-social, communication, and cognitive domains and in the “mild developmental delay” range for the motor domain, but that these scores should be interpreted with caution because J.M. had difficulty complying with directions and engaging in activities during the testing. More specifically, J.M. scored in the 0.3 percentile for the adaptive domain, the 1.0 percentile for the personal-social domain, the 0.1 percentile for the communication domain, the 1.0 percentile for the cognitive domain, and the 4.0 percentile for the motor domain.

D.

Eligibility Determination and IEP Development

On October 2, 2015, Nash invited petitioners to an initial eligibility determination and IEP development meeting to review J.M.'s evaluations, determine J.M.'s eligibility for special education and related services, and develop J.M.'s IEP.

² The Battelle Developmental Inventory (BDI) is an early-childhood instrument based on the concept of developmental milestones. As a child develops, he or she typically attains critical skills and behaviors sequentially, from simple to complex. The BDI helps measure a child's progress along this developmental continuum by both global domains and discrete skill sets in the following areas: adaptive, personal-social, communication, motor, and cognitive. (J-12.)

Initial Eligibility Determination

On October 20, 2015, the parties met. In attendance were petitioners, Nash, Webb, and other personnel from Branchburg, including a general education teacher, a special education teacher, an occupational therapist, a speech-and-language therapist, and a social worker. Personnel from Somerset Hills were also in attendance. The BCBA for Branchburg, however, was not in attendance. In fact, the BCBA for Branchburg had performed or conducted no evaluations or assessments to that point and had reviewed none either. She had not even met J.M. Nevertheless, Nash testified that J.M. was deemed eligible for special education and related services under the classification or category “preschool child with a disability,” and that no one at the meeting disagreed with this classification or categorization.

IEP Dated October 21, 2015

The parties also developed an IEP on October 20, 2015, the draft of which is the IEP at issue in this case. For that portion of the meeting, the BCBA for Branchburg appeared by phone, but not for the entire meeting. The BCBA would later testify that she appeared by phone for half an hour while working in another district.

Nash testified that petitioners were concerned that the IEP did not contain a behavioral plan, but Nash explained that Branchburg typically waits for a student to enter its program so it can collect data. Nash further testified that petitioners were also concerned that the IEP did not contain a transition plan. In fact, Nash explained that petitioners voiced these specific concerns at the IEP meeting and that she wrote them into the IEP herself: “[J.M.’s] behavior is a concern and a priority. [Petitioners] have concerns with transitioning [J.M.] to a new program, her readiness for moving, and the in-district program’s ability to meet her needs.” Nevertheless, Nash testified that the IEP was appropriate because it contained a range of programs for J.M.

In particular, the IEP contained placement in the district autism program (in its preschool autism class) with a personal aide and individual and group occupational therapy, individual and group speech-language therapy, and parent counseling or

training. All therapies would be once a six-day cycle for twenty minutes, except for individual speech-language therapy, which would be three times a six-day cycle. Meanwhile, parent counseling or training would be once a week for sixty minutes. The IEP also provided consultation with the child study team at least once a month, consultation with a behavioral specialist at least one time per cycle, and consultation with the related-service providers with no particular frequency. Finally, the IEP contained an extended-school-year program.

Yet Nash testified that additional programs could be added, explaining that a district can provide no less than what is contained in an IEP, but that it could provide more than what is contained in an IEP, as if that could remedy any deficiency in an IEP. Indeed, this fundamental misunderstanding of what an IEP must contain for it to be considered appropriate continued in her testimony about the goals and objectives, when she testified that additional goals and objectives were going to be added after J.M. spent some time in the district program. In fact, the IEP states, “Additional goals and objectives in the areas of cognitive, communication, and self-help skills will be added as needed, based on classroom assessment once [J.M.] has entered the program.” Thus, Nash concluded that the IEP was appropriate as written because it could have been modified as needed later. “It’s a working document,” she said.

Tellingly, Webb, her supervisor, would testify at the conclusion of the hearing that an IEP is merely a shell to be filled in after a student enters the district program. “It’s a shell until we know what a child needs,” Webb asserted. Such a statement revealed that Webb, the director of Special Services, had turned the IEP process in Branchburg on its head by requiring families to agree to IEP’s that were IEP’s in name only—IEP’s that placed children in generic programs with the promise that the IEP’s would be individualized later—and of course with the promise that the IEP’s would be individualized appropriately.

E.

Cross-Examination

On cross-examination, Nash was confronted with the facts that the Battelle Developmental Inventory evaluation revealed significant developmental delays, and Branchburg conducted no additional evaluations to determine whether J.M. had the prerequisite skills to enter the district program. This was all the more significant when petitioners' BCBA had determined that J.M. could not yet receive instruction in a dyad or group and the IEP revealed that most of the educational instruction would be in a dyad or group. More disconcerting was the fact that Branchburg's BCBA never conducted any evaluation, let alone an evaluation to determine whether J.M. had the prerequisite skills to enter the district program and receive instruction in a dyad or group.

Nash was also confronted with the fact that the teacher in the classroom was only a special education teacher, not a BCBA, and the fact that the one-to-one aide, not even the special education teacher, would be the one to deliver much of the ABA instruction in the classroom. When confronted with these facts, Nash could only reply that neither a BCBA nor even a special education teacher was needed to deliver all of the ABA instruction. Such a statement was not only unconvincing, but also unbelievable. In fact, petitioners' BCBA explicitly wrote in her report that J.M. required highly individualized procedures, instruction, and supervision:

The level and intensity of [J.M.'s] challenging behavior requires that her instructors be skilled in using highly individualized antecedent- and consequence-based teaching procedures [J.M.] requires highly individualized instruction and program supervision [J.M.] has not yet begun to participate in formal group instruction, as she has not yet demonstrated appropriate prerequisite skills (such as maintaining appropriate behavior, remaining on task, and completing tasks in the absence of disruptive behavior). Given her notable deficits in remaining focused and engaged and maintaining appropriate behavior, she is clearly not ready for group instruction at this time.

[P-20 at 11–12.]

Similarly, Nash was confronted with the fact that J.M. was prone to high rates of severe behavior and the fact that Branchburg never provided a behavior plan.

Finally, Nash was confronted with the facts that petitioners' BCBA concluded that J.M. needed discrete-trial instruction for a minimum of thirty hours per week, yet the IEP provided only fifteen hours of discrete-trial instruction per week.

All of this was especially jarring since petitioners had told Nash and the entire child study team at the IEP meeting that J.M.'s behavior was a priority and her readiness to enter the district program was a concern.

III.

Hannah Hoch

A.

Expertise

Hoch is a doctoral-level BCBA. Hoch received a bachelor's degree in psychology from Queens College of the City University of New York in 1997, a master's degree in psychology from Queens College in 2001, and a doctorate in psychology from the Graduate Center of the City University of New York in 2006. Significantly, Hoch completed the subprogram at the Graduate Center: Behavior Analysis and Learning Processes Psychology.

Hoch obtained board certification in behavior analysis in 2004 and a license in behavior analysis in New York in 2014. She is currently an adjunct professor in the psychology department at Barnard College of Columbia University and has worked in various roles as a behavioral consultant, trainer, assistant director, and supervisor at numerous schools and centers for autism over the years. Hoch was offered and accepted as an expert in autism, the evaluation of students with autism, and applied behavioral analysis on behalf of petitioners without objection. She was also offered and

accepted as an expert in the development and oversight of programs for students with autism without objection. Hoch was an exceptionally well-credentialed expert and proved to be a most reliable witness.

B.

Requirements

Hoch testified that J.M. needs a minimum of thirty hours of individualized, intensive, one-to-one, ABA-based instruction per week because J.M. has significant deficits in social skills and language and engages in substantial behaviors across all settings. Hoch continued that J.M. really needs more like forty to fifty hours of ABA instruction per week throughout the entire calendar year. In addition, Hoch highlighted the fact that J.M. cannot sit in a dyad or group because she does not know how to wait her turn or follow directions. Moreover, Hoch noted that all programs must be highly individualized and that all behaviors must be intensely monitored. Finally, Hoch asserted that both parents and staff alike should receive ongoing training to help J.M. manage her complex behaviors.

All of Hoch's program recommendations are contained in her report, which she referenced at the hearing, and are reproduced below exactly as they appear in her report:

RECOMMENDATIONS:

1. A behaviorally-based educational program designed to address skill deficits and behavioral challenges and guide all areas of programming with fidelity.
2. A formal behaviorally-based teaching curriculum that contains systematic programs to address skill deficits and behavioral challenges in all areas.
3. Full-time program supervision and staff training by a senior level Board Certified Behavior Analyst.

4. A variety of research-based teaching procedures to include teacher-directed interventions (e.g., discrete trial teaching) and child-directed interventions (e.g., incidental teaching), as well as other ABA-based teaching techniques that have been empirically demonstrated to promote skill acquisition (e.g., activity schedules, video modeling, script fading, etc.).
5. A full day of active, individualized instruction.
6. A data-based approach to instruction to systematically evaluate the effects of teaching and treatment interventions.
7. A 12-month program.
8. Special education teachers, instructors, and aides with specific training and education in ABA and education.
9. A systematic staff training and supervision program.
10. An active family consultation program.
11. Procedures to systematically increase [J.M.'s] participation in small group instruction.
12. Systematic transition to less restrictive environments.

[P-20 at 16–19.]

Essentially, these program recommendations were program requirements for Hoch. As such, Hoch wrote in her report that the district program was inappropriate because it was missing many of these recommendations or requirements—“crucial components that are essential for [J.M.'s] progress and development.” More expansively, Hoch wrote that she was concerned about the clinical competence of the program professionals and the overall structure of the district program itself, including supervision.

C.

Criticisms

Competence

Regarding the clinical competence of the program professionals, Hoch wrote that she had serious concerns about the teaching interactions she observed. First, Hoch wrote that there was a noticeable lack of effective instruction and foundational skills, such as making eye contact, sitting appropriately, and attending the lesson.

Second, Hoch wrote that there were multiple instances of inappropriate and incorrect delivery of instruction, prompting, and reinforcement. Hoch continued that ineffective prompts were used on multiple occasions, instructions were delivered in a sing-song voice, and directions were given without prompts. Similarly, instructions, prompts, and reinforcements were delivered when the student was not attending.

Third, Hoch wrote that stereotypic behavior was not redirected or addressed in any meaningful way, non-specific praise statements were provided in a repetitive manner, and no differential reinforcement was evident.

Finally, Hoch wrote that formal reinforcement procedures were in place only during discrete-trial teaching and were not used in any other activities across the day.

Structure

Regarding the overall structure of the district program itself, Hoch wrote that she had similarly serious concerns about what she observed. First, Hoch wrote that students received direct, individualized instruction for only three hours per day, which is only fifteen hours per week, and not close to the minimum of twenty-five hours that the research supports for all students with autism, not to mention the minimum of thirty hours that she recommended for J.M. And of these fifteen hours, much of it was delivered in a dyad and not one-to-one.

Second, Hoch wrote that students spend a substantial portion of the day in group activities, yet no formal programming exists for any student. For example, no formal programming exists to teach social interactions or conversation skills during recess, which is a prime time for such programming, and no data is collected during circle time on such general skills as following directions and taking turns. Thus, these time periods were unproductive uses of time.

Third, Hoch wrote that no formal goals were addressed and no individualized instruction was given during the morning group-activity period, which again was an unproductive use of time.

Finally, Hoch wrote that only the paraprofessional aides accompany the students to specials, which makes the specials unproductive uses of time as well, because the aides do not possess the experience or skill needed to make these activities learning experiences for the students.

Supervision

Equally disconcerting to Hoch was the program supervision. Hoch wrote that Branchburg contracts with a BCBA who provides consultation to all of the students in the preschool classroom one day per six-day cycle, which is less than one day per week and wholly insufficient. "There is no possible way that appropriate supervision can be provided on this limited basis," Hoch asserted. That the BCBA was in-district twice a week did not make it better because the supervisor had to be on site full time:

Appropriate implementation of graphing and data analysis, staff training and supervision, problem solving, and program planning cannot possibly be implemented in less than one day per week. It is absolutely imperative that an individual with professional credentials or equivalent documented training and experience in ABA be on-site full-time, providing curriculum development, programming coordination, clinical supervision, and staff training for [J.M.'s] program.

[J-20 at 15.]

More pointedly, Hoch wrote that the structure of the district program did not allow for the training, supervision, or clinical problem-solving that J.M. needed in an ABA program, and the teacher in the classroom (although she had completed some of the requirements for certification in behavior analysis) was not yet a BCBA and had made enough errors during her observation to prove to Hoch that she did not have sufficient experience to provide the training, supervision, or clinical problem solving that J.M. needed in a classroom teacher. For example, if a problem occurred on a day when the BCBA was not in-district, Hoch continued, then the teacher in the classroom would have to wait until the BCBA returned to address the problem, which would cause delays in programming. As such, Hoch concluded that the absence of such oversight would be detrimental to J.M. and her progress.

Training

Hoch wrote that she also had serious concerns about the lack of formal parent participation in the district program. Although petitioners could come to school for training, and home visits could be conducted if needed, such visits were to be faded quickly and little criteria existed for noting progress. In addition, Hoch noted that these arrangements did not allow for consistency in teaching, which she believed would have inhibited learning and generalization across environments. According to Hoch, petitioners needed systematized and structured training and support on an ongoing basis, especially because J.M. had difficulties with generalization and exhibited substantial behaviors at home and in the community. Taken together, these were all crucial components to an appropriate educational program for J.M., which were not available to her in Branchburg.

D.

Summary

Hoch summarized that the IEP was inappropriate because it disregarded behavioral needs, failed to provide individualized goals and objectives, and provided no programming for maintenance and generalization of skills across environments:

The IEP offered by the Branchburg School District dated 10/20/15 is inappropriate for [J.M.]. It disregards her educational and behavioral needs, fails to provide individualized and objectively measurable goals and objectives, and is not indicative of a program based on the science and principles of behavior analysis. First, although [J.M.] clearly engages in high rates of severe tantrum behavior across all environments, the IEP states that behavioral interventions are not needed at this time. There are goals addressing skills [J.M.] has mastered (e.g., following one-step directions), and goals that address skills for which [J.M.] is in no way ready (e.g., using possessive pronouns and marking plurals when labeling nouns and verbs). Others include inappropriate targets (e.g., follow daily routines without prompting). There is noticeable absence of goals addressing [J.M.'s] greatest area of need, specifically reduction of disruptive behavior and acquisition of coping and tolerating skills. The evaluation procedures ("portfolio materials") are ambiguous and not clearly based on accurate, objective performance data. Finally, the goals do not include any mention of programming for maintenance and generalization of skills across environments, a foundational and essential component of Applied Behavior Analysis.

[J-20 at 12.]

E.

Emphasis

At the hearing, Hoch emphasized that J.M. did not have the prerequisite skills to sit or learn in a dyad or group—yet the district program scheduled most learning or provided most instruction in dyads or groups.

In addition, Hoch emphasized that she did not see all seven dimensions of ABA being applied consistently in the classroom, and that she saw inconsistencies in attending, reinforcing, and prompting, in particular. For example, Hoch emphasized that J.M. needs prompting for social interaction and that she saw no such prompting during recess. Without such instruction, no learning takes place, Hoch explained. And no data was collected either, Hoch continued.

The same was true during specials, which Hoch characterized as “chaotic.” According to Hoch, behaviors were not redirected, the teachers did not have a “good handle” on them, and the aides delivered instruction with errors. ABA is difficult to implement, Hoch commented, which is why a BCBA needed to be in-district every day—to supervise staff, modify plans, and intervene when necessary.

Moreover, Hoch emphasized that the fifteen hours of one-to-one discrete-trial instruction was insufficient and that a one-to-one aide cannot make up the time difference in a group setting. “A one-to-one aide does not render the program appropriate,” she said. For that to be possible, and for there to be generalization, Hoch corrected, the one-to-one aide would have to be highly qualified, and the one-to-one aides would have to be varied. In short, Hoch asserted that J.M. was not yet ready to transition to Branchburg and that Branchburg was not yet ready to receive her.

Finally, even if the amount of ABA instruction were increased, Hoch anticipated, the instruction itself was still substandard. Plus, no behavioral interventions were in place and no transition plan existed. As a result, Hoch concluded that J.M. would have regressed in Branchburg.

IV.

Anne Holmes

A.

Expertise

Holmes is a BCBA. She received a bachelor’s degree in speech pathology and audiology from Trenton State College in 1978 and a master’s degree in speech pathology from Rutgers University in 1981. She obtained her certification as a speech correctionist from the New Jersey Department of Education in 1978, her license as a speech-language pathologist from the State Board of Examiners in 1987, and her board certification as a behavior analyst from the Behavior Analyst Certification Board in 2003.

Holmes also obtained a certificate of clinical competence from the American Speech-Language-Hearing Association in 1983 and maintains it to this day.

Holmes is currently an adjunct professor for child study at Yale University and has worked in various roles as an officer, director, or supervisor at numerous schools and centers for children with disabilities, primarily in speech and language.

Holmes also serves as a part-time consultant to eight school districts in New Jersey, including Branchburg, and is in-district two days a week, but not for full days.

Branchburg offered Holmes as an expert in autism and applied behavior analysis and she was accepted as one without objection. Branchburg also offered Holmes as an expert in designing and overseeing programs for students with autism in both public and private schools, and she was accepted as one too without objection. Like Hoch, Holmes was a well-credentialed expert, but unlike Hoch, Holmes had relatively no interaction with J.M. and relatively no familiarity with J.M., having never met J.M. before the IEP meeting and having never evaluated J.M. before the IEP meeting. In fact, Holmes never even reviewed the evaluations or assessments of J.M. before the IEP meeting. Therefore, I gave Holmes's testimony significantly less weight than Hoch's testimony.

B.

Program

Holmes testified that Branchburg uses Eden Autism to establish its autism program, and explained that Eden Autism is grounded in the principles of ABA. Holmes further explained that the salient feature of Eden Autism programming is two-and-a-half to three hours of direct instruction each day. Holmes noted that students are moved to a dyad or small group when appropriate, and that goals are developed and implemented following Eden Autism assessment and curriculum.

Holmes testified that J.M. was to receive four hours of discrete-trial instruction a day, but clarified on cross-examination that J.M. was to receive only three hours of one-to-one discrete-trial instruction a day, with the remaining discrete-trial instruction in a dyad or group. Holmes also clarified that data collection would not be every day and not for every interaction. Moreover, Holmes clarified that she did not need to be in Branchburg more than twice a week, and that the teacher in the preschool classroom was competent in implementing discrete-trial instruction and in handling any behavior or incident that came her way.

C.

Evaluation

Holmes testified that she formally observed J.M. in Somerset Hills, but never evaluated J.M. for the district program and was never asked to do so even though Branchburg had never attempted to place a child in its autism program before from another autism program. Holmes was similarly forthright that she never conducted an Eden assessment of J.M. and had only planned on doing so if petitioners agreed in advance to place J.M. in the district program. Similarly, Holmes testified that she never offered petitioners a behavioral plan and only planned on doing so if petitioners agreed in advance to place J.M. in the district program, and only then after J.M. had spent some time in the program so Branchburg could collect data. Moreover, Holmes confirmed that she did not attend the IEP meeting in person, but explained that she was never asked to do so and that she participated by phone for approximately half an hour while working in another district. Finally, Holmes testified that she did not believe that greater participation in the IEP meeting was required on her part because she had spoken with Nash about J.M. and Nash had no concerns about J.M. and their ability to accommodate her.

D.

IEP

At the hearing, Holmes provided a written summary of the general attributes of the preschool autism class at Whiton Elementary School. But this document was not specific to J.M. and not part of the IEP. Indeed, this document is the working document or shell to which Nash and Webb refer.

For example, one bullet point states that the teacher in the classroom would be a BCBA, but the teacher in the classroom had not yet become a BCBA. Another bullet point states that parent training and home programming are individually designed for families, but neither parent training nor home programming was individually designed for petitioners. Yet another bullet point states that J.M. would be exposed to typical peers when J.M. established the prerequisite skills, but no prerequisite skills were identified, no measures were established, and no timetables were given.

That the IEP was a generalized education plan to be individualized later was further established by Holmes when she testified that she did not have a problem with the criticisms contained in Hoch's report and then provided a written response to that report. In her written response, Holmes clarifies some of Hoch's statements and explains how Branchburg can fulfill Hoch's recommendations. But this document too was not specific to J.M. and not part of her IEP. Thus, this document does little more than provide greater detail about the general attributes of the preschool autism class at Whiton Elementary School.

For example, in the first part of her response, where she clarifies some of Hoch's statements, Holmes writes, "One of the goals of the Branchburg program is to prepare students so they can learn in small group instruction sessions as learning beyond a 1:1 teaching ratio is critical for future success." This is her response to Hoch's statement, "The classroom is set up to follow a dyad model." But Holmes's statement is merely a general statement about the preschool autism class in Branchburg and is not specific to

J.M. We also know from Holmes that Branchburg never even assessed J.M. to determine whether she had the prerequisite skills to sit or learn in a dyad or group.

In the second part of her response, where she explains how Branchburg can fulfill Hoch's recommendations, Holmes writes, "The Branchburg program is behaviorally based utilizing the principles of applied behavior analysis. It is modeled after the program at Eden Autism Services. Reliability of techniques, strategies, and data are monitored on an ongoing basis." This is her response to Hoch's recommendation of "[a] behaviorally based educational program designed to address skill deficits and behavior challenges and guide all areas of programming with fidelity." But Holmes's response is again a general statement about the preschool autism class in Branchburg and is not specific to J.M. Indeed, we know from the remainder of Hoch's report that the reliability of techniques, strategies, and data was in doubt, and Holmes's written response removed none of that doubt.

To be sure, Holmes's remaining testimony again supported that notion that J.M.'s IEP was a generalized education plan—a shell to be filled in later—and not an individualized education plan specific to J.M. For example, Holmes testified that petitioners were offered parent training once a week for sixty minutes but could have been provided more. Similarly, Holmes testified that no transition plan was offered as part of the IEP, but was going to be offered later. Finally, Holmes concluded that Branchburg could have provided J.M. with a FAPE, not that Branchburg did provide J.M. with a FAPE.

E.

Cross-Examination

On cross-examination, Holmes revealed just how busy she is at work and just how thinly her time is spread. Holmes explained that she is in Branchburg on Mondays and Thursdays but not for full days on either day. Meanwhile, Holmes acknowledged that she consults with at least eight other school districts during the week and that her caseload consists of sixty to eighty students spread out among eleven to thirteen

classes. Holmes further explained that her time in the other school districts varies. Regardless, her time spread among so many districts, classes, and students reveals a clear challenge with focus. On top of this, Holmes acknowledged that she also teaches one college course at Rider University each semester.

In addition, Holmes explained that Branchburg was already in the process of evaluating J.M. when she was apprised that J.M. had moved into the district, and that the standard operating procedure in Branchburg is for her not to evaluate students with autism.

Moreover, Holmes explained that she participated in the IEP meeting for J.M. by phone while working in another district, that she is only involved in some and not all of the IEP meetings in Branchburg, that she never saw the IEP for J.M. in this case before the call, and that she simply knew J.M. was to be placed in the district program.

Thus, Holmes confirmed on cross-examination that the IEP was not individualized for J.M.

Holmes also confirmed that the IEP contained no behavior plan, no transition plan, no home programming, and no community-based programming.

In fact, Holmes confirmed that she did not even know—and the IEP did not contain—the classroom schedule J.M. would follow in the 2015–16 school year.

Finally, Holmes confirmed that the teacher in the classroom was not a BCBA and that she was not even sure if the teacher in the classroom had a master's at the time the IEP was offered.

Yet Holmes testified on redirect that the teacher in the classroom—the special education teacher who was not a BCBA—would be the one to develop the ABA programming from the Eden Autism curriculum and that Holmes would be merely reviewing the programming after the fact.

V.

Carol Webb

A.

Expertise

Webb is the director of Special Services for Branchburg. Webb received a bachelor's degree in science from Montclair State University in 1983 and a master's degree in special education from The College of New Jersey in 2002. Webb holds numerous certificates from the Department of Education, including certificates as a school administrator, supervisor, and principal. Webb served as the interim supervisor of Special Services for an intermediate or middle school for the 2011–12 school year and then as the director of Special Services for Branchburg from 2012 to present. Webb was offered and accepted as an expert in the oversight of programs for students with disabilities on behalf of respondent without objection.

B.

Credibility

As a witness Webb was woeful. Her demeanor was smug and condescending and her paradigm as director of Special Services was flawed, calling into question her core competence as a director of Special Services. Incredibly, Webb testified that she did not trust petitioners from the start and thought her job as the director of Special Services was to support the child study team. Most disconcerting was her belief that the appropriateness of an IEP is based not on the IEP actually offered but on the one the district could have provided. As such, I gave her expert testimony no weight and will comment on it no further.

CONCLUSION OF LAW

I.

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482. One purpose of the Act is to ensure 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.” 20 U.S.C.A. § 1400(d)(1)(A). This “free appropriate public education” is known as FAPE.

Another purpose of the Act is to assist states in the provision of FAPE. See 20 U.S.C.A. § 1400(d)(1)(C). Toward this end, a state is eligible for assistance if the state has in effect policies and procedures to ensure that it will meet the requirements of the Act. 20 U.S.C.A. § 1412(a). In New Jersey, such policies and procedures are set forth in the State statute, Special Schools, Classes and Facilities for Handicapped Children, N.J.S.A. 18A:46-1 to -55, and the implementing regulations, Special Education, N.J.A.C. 6A:14-1.1 to -10.2. See Lascari, supra, 116 N.J. at 34.

The issue in this case is whether Branchburg failed to provide J.M. with FAPE for the 2015–16 school year.

A.

The Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C.A. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public

education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, supra, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701.

B.

Yet the Act did not impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. In support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972) (PARC), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866, 876 (DC 1972). Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043–44, 73 L. Ed. 2d at 703. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, supra, 458 U.S. at 192–93, 102 S. Ct. at 3043–44, 73 L. Ed. 2d at 703–04. Thus, the inquiry is whether the IEP is “reasonably calculated” to enable the child to receive educational benefits. Rowley, supra, 458 U.S. at 206–07, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

C.

The Third Circuit has since held that this educational benefit must be more than “trivial.” See Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988). Stated otherwise, it must be “meaningful.” Id. at 184. Relying on the phrase “full educational opportunity” contained in the Act, and the emphasis on “self-sufficiency” contained in its legislative history, the Third Circuit inferred that Congress must have envisioned that “significant learning” would occur. Id. at 181–82. The Third Circuit also relied upon the use of the term “meaningful” contained in Rowley, as well as its own interpretation of the benefit the handicapped child was receiving in that case, to reason that the Court in Rowley expected the benefit to be more than “de minimis,” noting that

the benefit the child was receiving from her educational program was “substantial” and meant a great deal more than a “negligible amount.” Id. at 182.

Nevertheless, the Third Circuit recognized the difficulty of measuring this benefit and concluded that the question of whether the benefit is de minimis must be answered in relation to the child’s potential. Id. at 185. As such, the Third Circuit has written that the standard set forth in Polk requires “significant learning” and “meaningful benefit”; that the provision of “more than a trivial educational benefit” does not meet that standard; and that an analysis of “the type and amount of learning” of which a student is capable is required. Ridgewood, supra, 172 F.3d at 247–48. In short, such an approach requires a student-by-student analysis that carefully considers the student’s individual abilities. Id. at 248. In other words, the IEP must confer a meaningful educational benefit in light of a student’s individual needs and potential. See T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).

D.

In determining whether an IEP is appropriate, the focus has long been on the IEP actually offered and not on one that the school board could have provided if it had been so inclined. See Lascari, supra, 116 N.J. at 46. Toward this end, the regulations demand the use of a variety of assessments tools and strategies to gather relevant functional and developmental information, including information provided by the parents, and the use of technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. N.J.A.C. 6A:14-2.5(a). Moreover, each school board must ensure that the evaluation procedures are sufficiently comprehensive to identify all of the child’s needs. N.J.A.C. 6A:14-2.5(b).

E.

If the IEP is not reasonably calculated to provide a student with significant learning and meaningful benefit in light of that student’s individual needs and potential,

then the parents may be reimbursed for the costs of a private placement, provided the placement was appropriate under the Act. See N.J.A.C. 6A:14-2.10(b).

II.

In this case, the IEP was not reasonably calculated to provide J.M. with significant learning and meaningful benefit in light of J.M.'s individual needs and potential because Branchburg ignored Hoch's evaluation and conducted no evaluations or assessments of its own to determine whether J.M. was ready to enter the district program. First, Hoch determined that J.M. could not sit and learn in a dyad or group, and Branchburg failed to accept that determination or conduct its own evaluation or assessment to determine otherwise.

Second, Hoch determined that J.M. was in need of a behavior plan and a transition plan, but Branchburg failed to provide either of them, and then promised to provide both of them after petitioners agreed to sign the IEP and accepted placement in the district program.

Third, Hoch determined that the ABA program had to provide at least thirty hours of ABA therapy per week, and the district program provided only fifteen hours—not even the minimum of twenty-five hours ABA research requires.

Fourth, Hoch determined that the teacher in the classroom needed to be a BCBA or that the program at least needed a BCBA to be on site full time, and the district program provided neither.

Fifth, Hoch determined that petitioners needed more comprehensive parent training with greater structure so J.M. could generalize her skills across all environments, and Branchburg merely responded that it could provide more.

Indeed, the notion that Branchburg could provide more was fatal to its case. The measure of an IEP is of the IEP actually offered, not one that could have been. That Webb and her staff did not understand or appreciate this was surprising, but not after

Webb testified. Thus, questions about the competence of district personnel, the supervision and training of staff, and the creation of the programming for J.M. remain in doubt.

Therefore, I **CONCLUDE** that Branchburg failed to provide J.M. with FAPE for the 2015–16 school year and that petitioners should be reimbursed for private tuition and associated costs at Somerset Hills, where AT was enrolled for the 2015–16 school year.

As petitioners aptly argue in their post-hearing brief, not every student with autism is the same and school districts cannot take a one-size-fits-all model of education for them, especially they fail to conduct comprehensive evaluations and modify programs for them. Pet’rs’ Br. at 19.

Finally, petitioners argue that they should also be reimbursed for private tuition and associated costs at Somerset Hills for the 2016–17 school year because Branchburg has failed to propose an IEP for that school year. That issue, however, is not before me. Therefore, I need not address it.

With this decision in hand, Branchburg should reconvene an IEP meeting to conduct further evaluations and assessments so the parties can draft a new IEP, which considers all of Hoch’s recommendations.

ORDER

Given my findings of fact and conclusion of law, I **ORDER** that Branchburg reimburse petitioners for private tuition and associated costs at Somerset Hills, where J.M. was enrolled for the 2015–16 school year.

I also **ORDER** that the parties reconvene an IEP meeting to conduct further evaluations and assessments so they can draft a new IEP that considers all of Hoch’s recommendations.

Finally, I **ORDER** the parties to conduct these evaluations and convene this IEP meeting within the next thirty days.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2016). 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.

September 13, 2016
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency

September 13, 2016

Date Mailed to Parties:

APPENDIX

Witnesses

For Petitioners:

Hannah Hoch

For Respondent:

Michelle Nash
Anne Holmes
Carol Webb

Exhibits

J = Joint

P= Petitioners

R = Respondent

- J-1 Not in evidence
- J-2 Not in evidence
- J-3 Not in evidence
- J-4 Not in evidence
- J-5 Not in evidence
- J-6 Invitation to Evaluation Planning Meeting dated July 30, 2015
- J-7 Consent for Initial Evaluations dated August 5, 2015
- J-8 Not in evidence
- J-9 Communication Log of Carol Webb from July 22, 2015, to August 18, 2015
- J-10 Speech Evaluation dated September 18, 2015
- J-11 Social History Evaluation dated September 21, 2015
- J-12 Battelle Developmental Inventory evaluation dated October 5, 2015

- J-13 Not in evidence
- J-14 Initial Eligibility Determination dated October 21, 2015
- J-15 Draft IEP dated October 21, 2015
- J-16 Final IEP dated October 21, 2015
- J-17 Not in evidence
- J-18 Not in evidence
- J-19 Memorandum from Anne Holmes to Carol Webb dated December 19, 2015
- J-20 Consultation Report by Hannah Hoch dated January 20, 2016
- J-21 Not in evidence
- J-22 Communication Log of Michelle Nash from July 22, 2015, to December 11, 2015
- J-23 Not in evidence
- J-24 Memorandum from Anne Holmes to Carol Webb dated March 13, 2016, in response to Consultation Report by Hannah Hoch dated January 20, 2016
- J-25 Reevaluation Planning with Form for Additional Assessment dated April 4, 2016
- J-26 Curriculum Vitae of Carol Webb, undated
- J-27 Curriculum Vitae of Anne Holmes, undated
- J-28 Curriculum Vitae of Michelle Nash, undated
- J-29 Not in evidence
- J-30 Not in evidence
- J-31 Not in evidence
- J-32 Not in evidence
- J-33 Not in evidence
- J-34 Not in evidence
- J-35 Landon Schedule 2015–2016
- J-36 Not in evidence
- J-37 Not in evidence
- J-38 Not in evidence
- J-39 Not in evidence
- J-40 Not in evidence
- J-41 Not in evidence

- J-42 Curriculum Vitae of Hannah Hoch, undated
- R-43 Type-written notes by Carol Webb dated March 24, 2016
- R-44 Not in evidence
- R-45 Not in evidence
- R-46 Hand-written notes by Michelle Nash dated October 20, 2015
- P-47 Not in evidence
- P-48 Not in evidence
- P-49 Not in evidence
- P-50 Not in evidence
- P-51 Not in evidence
- P-52 Not in evidence
- P-53 Memorandum from Anne Holmes to Carol Webb dated May 23, 2016
- P-54 Not in evidence
- P-55 Not in evidence
- P-56 Letter from petitioners to respondent dated November 3, 2015