

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 03928-19

AGENCY DKT. NO. 2019-29422

D.K. AND E.K. ON BEHALF OF D.K.,

Petitioner,

v.

PARSIPPANY-TROY HILLS BOARD OF EDUCATION,

Respondent.

D.K. and E.K., petitioners, pro se

Katherine A. Gilfillan., Esq., for respondent (Schenck, Price, Smith & King, LLP,
attorneys)

Record Closed: November 26, 2019

Decided: November 26, 2019

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, petitioners, D.K. and E.K., have requested a due-process hearing on behalf of their son, D.K., (student) who is classified as eligible for special education and related Services under the category of Communication Impaired.¹

¹ Petitioners were originally represented by Staci J. Greenwald, Esq., when the underlying due process petition was filed in February 2019. Ms. Greenwald submitted for filing a Substitution of Attorney dated June 30, 2019, substituting petitioner E.K., as pro se representative for petitioner D.K., and the student D.K.

The due process petition seeks to challenge the Respondent, Parsippany-Troy Hills Board of Education's (District) proposed Individualized Education Program ("IEP") that calls for the student to participate in resource replacement classes for Science and Social Studies. While the IEP also provides for the student's attendance in the resource replacement classroom for English and Language Arts, the parties previously reached a settlement wherein the petitioners waived their right to challenge that particular portion of the IEP.²

PROCEDURAL HISTORY

The request for due-process was received by the Office of Special Education Programs (OSEP) on February 19, 2019. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on March 21, 2019, pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13.

On May 7, 2019, a telephonic prehearing conference was held, and prehearing order was issued accordingly. The hearing was originally scheduled to commence July 9, 2019. On the morning of the hearing, petitioners did not appear. E.K., contacted her former counsel, Ms. Greenwald, who then communicated with me and counsel for the District, Katherine A. Gilfillan, Esq., that petitioner D.K. was taken to the hospital via ambulance earlier in the morning and thus they would not be appearing. The hearing was adjourned to August 21, 2019, over the objection of the District and the District request for leave to file a motion for summary decision, which was granted. A motion schedule was put on the record, which was later amended by correspondence on July 12, 2019.

The District filed its motion for summary decision on July 22, 2019, and petitioners filed their opposition August 26, 2019. The District filed a reply on September 9, 2019.

Despite the filing of the motion for summary decision, the record in this matter remained open as hearings were conducted on August 21, 2019, September 25, 2019,

² The settlement concerned a due process petition under OAL Docket Number EDS 05480-18 and Agency Docket Number 2018-27645 and entered on March 1, 2019.

and November 6, 2019. The District has presented its case and petitioner is scheduled to present their case on December 10, 2019, March 31, 2020, and May 1, 2020.

FACTUAL SUMMARY AND FINDINGS

The student is a minor child, attending Central Middle School (CMS) within the District. The student has been classified by the District as eligible to receive specialized instruction and related services under the Individuals with Disabilities Education Act under the category of Communication Impaired. The student has the following disabling conditions that require specialized instruction and related services within his educational environment: Autism Spectrum Disorder, Childhood Apraxia of Speech, Attention-Deficit/Hyperactivity Disorder (ADHD) and Nocturnal Epilepsy. As a result of the student's disabilities he struggles with communication.

The underlying due process petition arises from the petitioners' challenge to the District's proposed IEP that calls for the student to participate in a resource replacement classes for Science and Social Studies. While the IEP also provides for the student's attendance in the resource replacement classroom for English and Language Arts, the parties previously reached a settlement wherein the petitioners waived their right to challenge that particular portion of the IEP.

The District argues that the resource replacement classes are necessary for the student to receive a meaningful educational benefit as he has not demonstrated progress in the less restrictive, general education in-class support classroom with significant supplementary aides and services. The District has had to modify the curriculum for the student in order for the student to gain minimal conceptual knowledge of the matters being taught and along with his modifications. Despite the same, the District argues that the student has not demonstrated meaningful progress towards his IEP goals and objectives.

Petitioners' claim that the student can participate in the less restrictive classroom for Science and Social Studies and that his participation in these classes provides him with positive social and communicative peer models from which he can benefit. Petitioners' claim that the student's failure to make progress within the in-class support

classrooms is due to the District's failure to implement the Behavior Intervention Plan outlined in his IEP.

I **FIND** the following facts undisputed, and therefore to be **FACTS** in this case.

The student is presently thirteen-years old entering the eight-grade at CMS. The student has attended In Class Support (ICS) settings for his academic classes of math, science, social studies and English language arts (ELA) since starting at CMS in the sixth-grade. During said time period, the District provided the student with six-hours of afterschool instruction in a Corrective Reading Program.

During the 2017-2018 school year, on February 8, 2018, while the student was in the sixth-grade, the District proposed an IEP to change the student's in-class support setting for his ELA class. The student had been participating in an intensive supplemental reading program that involved daily instruction on a 1:1 basis to assist the student in his decoding skills. In addition, the District proposed that this instruction be provided within one of the student's resource replacement classes.

The petitioners filed a due process petition, challenging the February 2018 IEP. Petitioners specifically challenged the District's decision to move student into the resource room setting for ELA course and the District's request to move the student's supplemental reading program into the time confines of the school day.

On February 2019, petitioners and the District would settle the due process petition concerning the February 2018 IEP. Since the settlement agreement was not executed until February 2019, the Child Study Team (CST) proposed an IEP for the remainder of the student's seventh-grade (2018-2019), and eighth-grade (2019-2020) school year. The settlement of the prior due process petition resulted in, among other things, the student remaining in the ICS setting for ELA for the remainder of his seventh-grade year but would move into the resource replacement for ELA during his eighth-grade year. Petitioners' contest the February 2019 IEP's placement of the student in the resource replacement for scient, social studies, and math, and instead request that the student remain ICS for the said subjects for the 2019-2020 school year.

LEGAL ANYALSIS AND CONCLUSION

Summary decision may be granted when “the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). The rule further provides that an adverse party must respond by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. Ibid. “If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.” Ibid.

N.J.A.C. 1:1-12.5(b) is patterned on the New Jersey Supreme Court’s rules concerning summary judgment. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

A determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

[Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

Further, the non-moving party has the burden “to make an affirmative demonstration . . . that the facts are not as the movant alleges.” Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the “movant’s burden to exclude any reasonable doubt as to the existence of any genuine issue of fact.” Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)).

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the District is entitled to judgment as a matter of law.

The due process petition asks that I determine whether the student must attend a resource-replacement setting for Social Studies and Science for the 2019-2020 school year based upon an IEP created in February 2019. Petitioners' seek a determination that the District's proposed IEP, program and placement are not appropriate, not geared toward providing the student with significant educational benefits and do not represent the least restrictive environment and fail to provide the student with FAPE. Despite filing the aforesaid due process petition, the petitioners have not identified any additional or different accommodations or modifications that should be included in the IEP and have not disclosed any expert witness to testify to the appropriateness of any such additional/different modification during the discovery phase, as required by N.J.A.C. 1:6A-10.1.

Moreover, a review of petitioners' moving papers reveals that they have failed to submit any certification or report from any expert to support their position that the student can receive a meaningful educational benefit in the ICRS classroom for Social Studies and Science. I **CONCLUDE** that since petitioners have failed to submit any affidavits – even one from themselves – all material facts set forth in the District's motion, which are supported by certifications, are not rebutted. A review of the District's asserted facts that are contained in the certifications submitted along with the moving papers that the student is unable to educationally benefit from inclusion within the ICRS classroom for social studies and science, will follow.

New Jersey as a recipient of Federal funds under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. must have a policy that assures all children with disabilities the right to a free appropriate public education (FAPE), 20 U.S.C. § 1412. IDEA defines FAPE as special education and related services that are provided at public expense, under public supervision and direction, without charge; that meet the standards of the state educational agency that include an appropriate preschool, elementary school or secondary school education in the state involved; and that it is

provided in conformity with an IEP. 34 C.F.R. § 300.17; 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.

The responsibility to provide a free appropriate public education (FAPE) rests with the local public-school district. N.J.A.C. 6A:14-1.1(d). The local district satisfies the requirement that a child with disabilities receives a free appropriate public education by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. Of Education v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). It is only after the program offered by the District is found not to provide a FAPE can an appropriate alternative program selected by the parents be evaluated and reimbursement ordered. See Forest Grove Sch. Dist. V. T.A. 129 S. Ct 2484, 2496, 174 L. Ed. 2d 168, 183 (2009).

In order to provide a FAPE, a school district must develop and implement an IEP N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. Of Burlington v. Dept. of Education of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). The educational opportunities provided by a public-school system will differ from student to student, based upon the “myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.” Rowley, Supra., 458 U.S. at 198. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry.

I **CONCLUDE** that the District has provided the student with FAPE, inasmuch as the February 1, 2019 IEP sets out the student’s present levels of academic achievement and functional performance, (Riedel Cert., Exhibit L, pgs. 2-6; 6-11); annual measurable academic and functional goals (Ibid., pgs. 13-16); accommodations and modifications as well as supplementary aids and services for use in the general and special education classrooms (Ibid., pg. 17); a description of the related services (Ibid, pg. 1) and a description of the special education services he requires to be able to progress towards his goals. (Ibid., pgs. 18-19).

Petitioners' due process petition against the District in this matter can be distilled into two distinct allegations: 1) the District has not provided the student with the accommodations set forth in the IEP, specifically teachers are not "requesting him to participate in class nor have they been communicating with the Parents" (Gilfillan Cert., Exhibit B, Petition, ¶32); and 2) the student's social, emotional and behavioral needs will not be met in the resource center program. (Ibid at ¶33). However, as Petitioners have raised no issue with respect to the actual content of the IEP, the provision of related services, the appropriateness of the accommodations and modifications or the goals and objectives, in either their Petition or within their mandated disclosures (Gilfillan Cert., Exhibits B&D), I **CONCLUDE** that the February 2019 IEP was designed to confer a meaningful educational benefit on the student.

Intertwined with the concept of FAPE but a separate and distinct concept is the requirement that the disabled child be educated in the "least restrictive environment" ("LRE"), i.e. to the maximum extent appropriate handicapped children are educated with children who are not handicapped." 20 U.S.C.A. §1412(a)(5)(A). LRE has been also explained as the environment which "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." Scott P., 62 F.3d at 535.

The two-part test employed in the Third Circuit for assessing compliance with the LRE requires a determination of : (i) whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily; and (ii) if placement outside of a regular classroom is necessary, whether the school has mainstreamed the child to the maximum extent appropriate, i.e., whether the school has made efforts to include the child in school programs with non-disabled children whenever possible. Oberti v. Board of Education of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215-1217 (3d Cir. 1993). Although Congress preferred education in the regular classroom, it also recognized that such an environment is not suitable for every student. Rowley, 458 U.S. at 181, n.4. Oberti's approach was meant to assist courts in explaining the tension that exists between the statutory presumption that children be taught with their

nondisabled peers and the requirement of providing a meaningful educational benefit for the student.

Moving to the crux of the within case, a determination must be made that addresses whether the student can be satisfactorily educated within the regular 8th grade Social Studies and Science classrooms, with supplementary aids and services. To assist me in answering this question, I must consider whether the following steps were adhered to: (1) steps the district has taken to accommodate the child in a regular classroom; (2) child's ability to receive an educational benefit from regular education; and (3) effect the disabled child's presence has on the regular classroom. Id.

While a student's access to the regular education classroom cannot be predicated on the child's "ability to perform on par with non-handicapped children" or "simply because his educational achievement lags behind that of his classmates," Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1045 (5th Cir. 1989), consideration must be given whether the child will receive an educational benefit from the regular education classroom, i.e., whether the student has the ability to grasp the essential elements of the regular education classroom. Ibid at 1049.

Initially, while petitioners have alleged that the District staff have not implemented the accommodations and modifications set forth in the student's IEP, (i.e., requesting that the student participate in class), the only individual petitioners have identified as testifying to that fact is Dr. Nirgudkar. However, the certification of Dr. Nirgudkar reveals that he observed the student a few times during his 6th grade year and not at all during his 7th grade year. (Nirgudkar Cert., ¶¶18, 20, 25). The certification of the student's teachers state that they have employed the accommodations and modifications set forth in the IEP without meaningful success. (See Pettinelli Cert., ¶¶3, 4, Exhibit A; Hilgendorff Cert. ¶¶3, 5, 7, Exhibit A).

The supplementary aides and services provided by the District are specifically laid out in the student's IEPs. Particularly, the IEP reveals that the District has increased both the number and the nature of the modifications/accommodations in the student's IEPs from fourteen (14), during his 6th grade year, (Riedel Cert., Exhibits B&C, pg. 14 of each

exhibit respectively) to eighteen (18) as proposed by his 7th and 8th grade IEPs. (Ibid., Exhibits J&K, pg. 15 respectively).

The certification of Riedel further discloses that the District has supported the student with individual and group speech and language therapy with the speech therapist pushing into the ICS classrooms to work on language skills within his writing, reading and responding (Riedel Cert., Exhibit L). Riedell's certification also reveals that the student receives the personalized support on a 1:1 paraprofessional in the ICS and regular education classrooms;³ supplementary reading program in an attempt to bring him to a functional reading level.⁴

The District's proofs as contained in the certification of Reidel, disclose that foregoing aides and services, coupled with significant modifications to the overall curriculum, via modifications to assignments and tests, the allowance of continual re-tests and modified grading to exclude certain assessments from his overall grade if he does not perform well, and the accommodations of focusing, cueing, prompting for participation, the provision of study guides – with “answers” - additional time for assignments, breaking down tasks, rewording of directions, repeating of directions, still have not resulted in adequate progression on the goals and objectives outlined in D.K.'s IEPs in a meaningful manner. (Riedel Cert., Exhibits I&K).

The certification of Nirgudkar demonstrates that the implementation of these modifications and accommodations have caused the student to miss class instructional time due to the fact that he is either working with the paraprofessional during class time or he is out of the class to re-take assessments/quizzes or tests. (Nirgudkar Cert., ¶11)
I **CONCLUDE** that it is apparent that despite a substantial arrangement of supplementary aids and services, the student is not accessing the skills, lessons and concepts being taught within the general education classes.

³ While the student's 7th grade IEP was changed to require a classroom aide rather than a 1:1 paraprofessional (due to the proposed resource room setting) the Parents invocation of stay-put required that the District continue to provide the 1:1 support throughout his 7th grade year.

⁴ While petitioners claim that the District is “taking away” this program the District's proofs rebut this argument as Riedel's certification reveal that the program will be provided to the student within his ELA classes and/or if needed, within a separate timeslot within the school day.

A second factor in the Oberti inquiry is the comparison between the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated setting. Id. On this subject, the Oberti court appropriately observed:

The court will have to rely heavily in this regard on the testimony of educational experts. Nevertheless, in making this comparison the court must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers. Id.

Here, the certification of Santaniello elucidates that the nature of the student's disabilities, specifically a Full-Scale IQ of 79 and demonstrated deficits in his ability to verbalize meaningful concepts, inability to acquire information verbally, and inability to acquire vocabulary, is such that he cannot grasp the essential concepts of the regular education classes. (Santaniello Cert., ¶¶11-13). The certification of Fertig further highlights that these deficits are exacerbated by a communication impairment that prevents the student's ability to express himself on any topic requiring analysis or critical thinking. (Fertig Cert., ¶14, 17), The 8th grade curriculum, and concepts within the social studies and science classes, require the application of all of these higher level skills, indeed the application of learned concepts to novel information is a keystone skill itself, the experts in this case have all certified that the student will not be able to grasp these concepts leaving him vulnerable to additional missed instruction. (Riedel Cert., ¶28)

The Petition alleges that the general education classroom provides the student with language and behavior models from non-handicapped children which are essential to his overall development. (Gilfillan Cert., Exhibit A). However, the proofs provided by the District disclose that the student's placement in ICS classes to date has not demonstrated that this exposure has had any benefit upon the student's language-based or academic deficits. (Riedel Cert., Hill Cert.). The certification's provided by the District demonstrate that it has only been within small group settings, (i.e., in speech therapy and when working within a smaller group within the ICS class) that the student demonstrates

and practices the spoken and written communication skills that are so necessary for achievement in the regular classroom. (Fertig Cert.)

The student's speech and language therapist, Ms. Fertig, has provided an expert certification explaining the benefits of the smaller classroom in regard to the student's communication goals. (Fertig Cert., ¶12). Ms. Fertig has opined that the student's limited and inconsistent progress on his communication goals (as compared to his articulation goals) is directly related to his inability or refusal to practice the emergent skills learned within small group setting within the larger classroom settings. (Fertig Cert., ¶17.) His teachers have opined that he lacks meaningful participation within the social studies and science classrooms. While he socially interacts with other students within the class, it is only when the class is broken up into smaller working groups that the student "participates" with his fellow classmates. (Id.).

I **CONCLUDE** that the District's proofs in the form of the certifications submitted demonstrate that the student's progress reports clearly and conclusively establish that his participation for the past two years within the ICS environment has not had any positive impact upon his acquisition of the social, communication or academic goals set forth in his IEP.

The third factor to be considered in the Oberti analysis is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom. Oberti, at 1217. The majority of school districts in the State utilize some form of software in order to create IEPs. This ensures that, provided that the information is accurately and comprehensively recorded, that the legal requirements of the IEP, including Oberti's analysis, are met. Specifically, the District is required to set forth its rationale for removing the student from the general education setting (where he is so removed) and document its analysis under Oberti. (Riedel Cert., Exhibit L, pg. 19).

The potentially beneficial or harmful effects which the student's placement in the general education class may have on him or other students in the class is documented as:

Placement in the general education class may lead D.K. to be increasingly frustrated as the materials continue to increase in difficulty. This placement may also result in D.K. missing key instruction as he needs extra time to comprehend and complete lessons in class. Due to the large amount of assistance and modifications D.K. requires in class, other students in the class receive less support from the special education teacher.

(Ibid.)

Notably, the ICS classes contain more than just one classified student who requires the special education teacher's assistance. When that teacher spends a significant amount of time with the student, the District runs the risk of other classified students not receiving the necessary supports that are outlined in their IEPs. The District's proofs reveal that the student's participation has not resulted in any progress on his communication or academic goals, the District is concerned that as neuro-typical peers continue to mature, the student's inability to appropriately deal with frustration will lead to social exclusion. The petitioners' insistence that teachers "force" the student to speak in class, does not constitute a sound educational practice and will only lead to his resentment and negative feelings about school and further his negative self-perception of his academic abilities. (Riedel Cert., ¶14)

I **CONCLUDE** that that, outside of the student's English/Language Arts classes (which the petitioners do not challenge), and the proposed Social Studies and Science classes, the student is wholly included with non-disabled children within his home school and within his school day. I **CONCLUDE** that the IEP reflects that the student's remaining academic classes including Math, his required specials such as art and gym and his electives are all general education classes, and that he attends these classes supported by the supplementary aides and services set forth in his IEP. Thus, with respect to the second prong of the analysis, I **CONCLUDE** that the District has included the student in school programs with non-disabled children whenever possible.

Based upon the foregoing, I **CONCLUDE** that the February 2019 IEP was designed to confer a meaningful educational benefit for the student, and that the District's proposed IEP program and placement are appropriate and geared toward providing the

student with significant educational benefits and represent the least restrictive environment and provide the student with FAPE.

ORDER

Based on the foregoing, the District's motion for summary decision is **GRANTED**, and the due-process petition 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.

November 26, 2019

DATE

JULIO C. MOREJON, ALJ

Date Received at Agency

November 26, 2019

Date Mailed to Parties:

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