

**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

OAL DKT. NO. EDS 09024-17

AGENCY DKT. NO. 2017 26268

**S.V. and M.V. ON BEHALF OF C.V.,**

Petitioners,

v.

**MADISON BOROUGH BOARD OF  
EDUCATION,**

Respondent.

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

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

Record Closed: October 17, 2018

Decided: November 7, 2018

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

**STATEMENT OF THE CASE**

S.V. and M.V. (petitioners) on behalf of their four-year-old daughter, C.V., seek an individualized education plan (IEP); an applied behavioral analysis (ABA) program with a one-to-one aide; transportation to and from approved program to support student development (PSSD); parent training; and home instruction.

## ISSUE

Is the IEP proposed by the district reasonably calculated to provide significant learning and meaningful educational benefit, in light of C.V.'s individual needs and potential, so as to provide C.V. with a free and appropriate public education (FAPE)? If not, was petitioner's unilateral out-of-district placement of C.V. at SEARCH Consulting proper?

## PROCEDURAL HISTORY

Petitioners filed a request for a due process hearing which was received by the Office of Special Education Policy and Planning on May 23, 2017, and the matter was transmitted to the Office of Administrative Law (OAL) on June 26, 2017, for determination as a contested case. A hearing was originally scheduled in front of the Honorable Laura Sanders, ALJ, for June 29, 2017, and adjourned to January 10, 2018, at the request of the parties. The case was transferred to the undersigned on January 9, 2018, and a hearing was conducted on January 10, 2018, January 12, 2018, February 26, 2018, March 28, 2018, and May 30, 2018, at the Office of Administrative Law in Newark, New Jersey. Initial Post Hearing Briefs were received by September 11, 2018. The record was closed on October 17, 2018.

## UNDISPUTED FACTS

The following facts are undisputed and I therefore **FIND** them to be the **FACTS** of the case:

1. C.V. is a four-year-old girl who was born on April 26, 2014.
  
2. C.V. lives with her parents, S.V. and M.V., and her younger brother, in Madison, New Jersey.

3. C.V. started receiving early intervention services on or about February 5, 2016. C.V. received speech, occupational therapy, and developmental intervention from February 2016 until April 26, 2017.

4. C.V. was diagnosed with autism spectrum by Dr. Tosan Livingstone at Goryeb Children's Hospital March 4, 2016.

5. The parents have provided C.V. with services based on Applied Behavioral Analysis through Hand over Hand (a service provider).

6. On November 14, 2016, a transition meeting occurred with the parents, a Madison child study team member, and representatives of early intervention.

7. Early intervention formally referred C.V. to her home district of Madison via notification dated December 19, 2016.

8. An initial evaluation planning meeting and evaluation plan proposal was agreed upon on January 6, 2017. The parents consented to all evaluations.

9. A collaborative preschool evaluation dated March 2, 2017, was created by the psychologist, speech language specialist, and occupational therapist.

10. An invitation was sent to the parents for an initial eligibility determination and IEP meeting dated March 21, 2017, for an April 3, 2017, meeting.

11. The eligibility/IEP meeting occurred on April 3, 2017, and the district proposed an in-district preschool disabled program with the related services of occupational therapy, physical therapy, and speech therapy to begin on April 26, 2017.

12. On April 26, 2017, the parents unilaterally placed C.V. in a home program with Hand over Hand pending placement at SEARCH Learning Group in Mountainside, New Jersey (now located in Warren, New Jersey).

13. Due process was filed on May 26, 2017.

### **SUMMARY OF TESTIMONY**

#### **Dawn McNichol**

Dawn McNichol (McNichol) is a school psychologist with the district and testified on their behalf. She was qualified as an expert in child psychology and as an expert in developing educational programs for children with autism. It should be noted that this qualification as an expert does not bear with it any expertise in diagnosing or treating autism. Rather, during voir dire, the witness testified that she had been involved in the development of hundreds of IEP's for children with autism as a part of the IEP team. Her expertise is in her collaboration as a team member, having given input as a psychologist in each of those IEP meetings over the course of her career. McNichol testified that as part of her role in the district, she trains teachers and paraprofessionals regarding teaching children with autism and she also provides workshops to parents.

McNichol testified that she was present at the transition planning conference meeting on November 14, 2016. The purpose of this meeting is to transition C.V. from early intervention to district. McNichol testified that Jen Schaefer, the early intervention coordinator, was also in attendance along with the early intervention service providers. The meeting took place at petitioner's home and both petitioners were present.

McNichol testified that no district personnel were required to attend this meeting but that she decided to attend because she likes to introduce herself to the incoming family and explain the process of transitioning in-district and develop a rapport with the family.

McNichol testified that she was present at the initial identification evaluation planning meeting held on January 6, 2017. She testified that purpose of the meeting is to discuss which evaluations are warranted in determining proper programing for the child. In the case of C.V., the district proposed several evaluations which included a cognitive evaluation, a speech and language evaluation, an occupational therapy

evaluation, and a physical therapy evaluation. McNichol testified that the district obtained written permission from petitioners to conduct all the evaluations discussed at the meeting. McNichol testified that she did not receive any early intervention records after this meeting.

### Cognitive Evaluation

As the school psychologist, Ms. McNichol is charged with assessing cognitive and adaptive functioning. This process involves administering a formal cognitive assessment and the completion of a Behavioral Assessment Scale for Children (BASC) tool by the parents.

McNichol conducted her cognitive evaluation of C.V. in early March. The evaluation took place at the child's home. McNichol testified that C.V. was fully able to complete the formal cognitive assessment and achieved a full-scale score of 91. She stated this score is within the average range and indicates very good cognitive potential for a student, the ability to learn, the ability to continue to scaffold perceptive vocabulary, expressive vocabulary, and to continue to learn.

The BASC tool is an electronic questioner that addresses social and emotional functioning and adaptive skills. McNichol sends the BASC questioner to the parents via e-mail and she then scores the questions using an online scoring program. McNichol testified that she was not able to score the BASC questioner she sent to C.V.'s parents because the online-scoring system indicated that the questionnaire was started but not completed.

McNichol contributed her observations and assessment findings to a Collaborative Preschool Evaluation. (J-8.) At the meeting all the evaluators reviewed their results and determined that C.V. was eligible for special education related services.

McNichol testified to (J-11), the IEP that she helped to prepare. The full-day preschool disabled program in Madison has components of ABA, specifically discrete trials, individual behavior intervention programs, and reward systems.

She testified that academic goals were not included in that IEP at the time of the eligibility meeting because before a student enters a program they cannot speculate on how a student is going to perform. The student has to be in the program for them to take baseline information. Goals are determined by the special education teacher when the teacher assesses the student upon entry to the program. She testified that the assessment of basic language and learning skills (ABLLS) assessment would have been completed upon entry into the program in the particular classroom.

### Cross-Examination

McNichol has never directly provided educational and behavioral ABA services to children with autism. She testified that she did not receive any Early Intervention (E.I.) documents when collaborating on the IEP. She contacted Jennifer Shaefer, the Early Intervention coordinator, who said she would look into finding the documents and sending them to her. She did not reach out to the parents regarding the E.I. documents. McNichol had input from E.I. as to what they were working on because she spoke with them at the transition planning conference and at the initial determination and planning meeting. She testified that the parents were giving C.V. ABA therapy. She testified that when she evaluated C.V. she had had some home ABA therapy and Early Intervention.

McNichol testified that she invited the parents to observe the district's program while at the transition planning conference in their home. She testified that she did not ask the parents for a copy of the child's neurodevelopmental evaluation. She testified that a diagnosis is relevant to developing a program. She does not remember formally asking for a copy of the diagnosis. She had enough information given the PT, OT, Speech, and her evaluation to develop an appropriate program for C.V. She testified that not having the neurodevelopmental evaluation did not interfere with the ability to develop an appropriate program because they were able to develop an appropriate

program based on the evaluations that they were able to conduct. She stated that the IEP offered does not refer to parent training.

The ABA therapist was not present at the transition planning conference, but the E.I. people were. She knew that C.V. was getting ABA therapy through E.I. and she also knew that C.V. was getting ABA therapy through a private agency. She testified that the frequency and duration of the board-certified behavior analyst (BCBA) was not noted in the IEP. She testified that it does not say how many hours of one-to-one this student was going to get because they could not speculate that at the time.

### **Jessica MacDougall**

Jessica MacDougall (MacDougall) is a board certified behavior analyst who holds a Bachelor's degree in education and a Master's degree in special education. MacDougall holds NJDOE issued Certificates as a General Education Teacher and a Special Education Teacher. In connection with her Bachelor's and Master's degrees, MacDougall took courses in education, assessment, autism, child psychology, and exceptional child psychology. MacDougall also completed an intensive practicum at a school for children with autism, which involved observing and then systematically taking over the responsibilities of an autism program classroom teacher e.g., writing programs, designing behavioral interventions, and conducting assessments.

MacDougall is no longer employed with the district but she has been working with children with disabilities for over seventeen years. In that time, she has primarily supported children with Autism. In so doing, she helped teachers to write programs based on the ABLLSs Assessment, wrote behavior plans, performed crisis management, and administered training to a broad spectrum of individuals. MacDougall has also helped plan educational programs for roughly 200 students with Autism. Based on the foregoing, MacDougall was qualified as an expert BCBA and an expert in Developing Programs for Students with Autism.

MacDougall testified that the ABLLS is among the various evaluations and assessments completed by the district. She explained that the ABLLS is a

comprehensive assessment routinely administer for students coming into the preschool program. MacDougall further testified that based upon her experience, this assessment is administered after the student enters the district's program and the programs are developed based on that information they gather.

### Cross-Examination

On cross-examination MacDougall testified that she has never evaluated or otherwise interacted with C.V. but she was at C.V.'s IEP meeting. While employed with the district she provided ABA services to students and she also provided instruction to Madison board of education employees regarding ABA.

MacDougall testified that as a part-time employee who serviced four schools, she did not have enough time as a BCBA to properly supervise the preschool disabled program. She testified that she serviced the preschool classroom, the LLD classroom, the middle school classroom, and the students in the rest of the district. She testified that she was the only BCBA employed at the time. She agreed that the supervision piece of the program is critical to the quality of an ABA program. She testified that she tried to make it a point to be in the school district once a week. She agreed that once a week is not sufficient supervision in an ABA program for eight learners.

MacDougall testified that there needs to be measurable goals and objectives and corresponding data in order to make an educational program for a child with autism (such as C.V.). She further testified that in the case of CV, the individualized program would be developed *after* the parents signed the IEP placed the child in the program.

### Redirect

She testified that she did not meet C.V. because C.V. did not enter the program. She testified that the number of hours of one-to-one listed in the IEP depends on the needs of the student, sometimes it is in the IEP other times it isn't. She testified that if the student required one-to-one services it would be written in the IEP under "services."



She testified that if a student needed one to one instruction, they could receive it in the program even if it wasn't written in the IEP.

### **Kady Lubin**

Kady Lubin (Lubin) is a special education teacher for Madison Public Schools who possesses a Bachelor's degree in sociology, a Master's degree in teaching, a preschool to third grade regular education certification, and a teacher of students with disabilities certification. She was qualified as an expert in teaching students with disabilities.

Lubin became familiar with C.V. when she attended developmental planning meeting in January of 2017. At the meeting Early Intervention was discussed. They discussed the duration and the frequency of the Early Intervention services for C.V. They also discussed the various evaluations to be performed on C.V. She testified that only M.V. was present at the meeting but she offered no objection to any of the evaluations proposed.

Lubin became familiar with the fact that C.V. had autism through the case manager, school psychologist Dawn McNichol, who attended the Early Intervention transition meeting and planning meeting. The parents did not produce any documents at the meeting.

Lubin testified with regard to the 2017 IEP meeting. The purpose of the meeting was to go over the different evaluations that were completed and to discuss a proposed program for C.V. She testified that the ABLLS is an assessment that is completed when a student enters the program to develop individual programs for students. The ABLLS looks at academic programs such as receptive language, express language, fine motor, gross motor, social and emotional, life skills, and play skills. She told the parents when C.V. starts the program and when she gets adjusted the assessment would be completed to create her individual program.

Lubin then went over the daily schedule for the proposed program with the parents. She described daily morning meeting, as well as the individual programs, the discrete trial, work time, the small group instruction, and the centers. She testified that the individual programs are based off of the ABLLS assessment, which builds a program based on areas of weakness. She noted that some students work in a small group and some students work individually.

### Cross-Examination

Lubin testified that she writes some of the IEP goals for the students in her class, but she did not write any of the goals for C.V. because she has never met C.V. Lubin stated that any child with autism would benefit from her program and that children with autism do not necessarily need a one-to-one to learn. Lubin agreed that no two children with autism are the same and that autism can impact children in different areas of development in a different way. She admitted that one of the hallmarks of autism is lack of appropriate communication skills.

Lubin testified that teacher's assistants are not required to work in the summer. She testified that during Dr. Fiorelli's observation, in addition to herself, the BCBA Jessica McDougal was with Dr. Fiorelli.

Lubin is not a board certified behavior analyst and her program at the District is not a full Applied Behavior Analytic Program. She testified that ABA is primarily used in the discrete trial period. Behavior analyst did not have a set schedule on when to come in and supervise the program and there was no behavior specialist or board certified behavior analyst assigned to her classroom, just the district-wide behavior analyst. Lubin testified that C.V.'s mother being on her phone during the IEP meeting could have been the mother taking notes on her cell phone during the meeting. The only time she ever met the parents was at these two meetings.

**Erica Zuckerman**

Erica Zuckerman (Zuckerman) is a speech language specialist who holds a Bachelor's degree in therapeutic recreation and a Master's degree in speech language pathology. Zuckerman was qualified as an expert in speech language pathology.

Zuckerman evaluated C.V. in March of 2017. The evaluation took place at the C.V.'s home. When she arrived, C.V. was with her mother and the occupational therapist. Zuckerman informally observed child and administered a formal assessment. She was able to get a decent amount of information.

Zuckerman ultimately recommended the in-district special education program for C.V. She testified that she found SEARCH not to be appropriate because it did not have a speech therapist on staff. She also testified that when she went to SEARCH she did so to evaluate a program for a different child, not C.V.

**Megan Petersen**

Megan Petersen (Petersen) is an occupational therapist for the district. She holds a Bachelor's degree in social and behavioral science and a Master's degree in occupational therapy. Peterson was put fourth and admitted as an expert in Occupational Therapy. She performed and O.T. assessment on C.V. and evaluated the results. Peterson found C.V. needed to improve her skills in the areas of coordination, strengthening, and motor planning. Peterson opines these skills must be addressed through occupational therapy.

**Petitioner's Case**

**Carrie Kahana**

Carrie Kahana (Kahana) has a Bachelor's degree in special education and elementary education and is certified in special and elementary school education. She also holds a Master's degree in communication sciences and disorders as well as a

graduate certificate in ABA. She is a board certified ABA analyst and a licensed behavioral analyst. Kahana testified that she completed 1500 hours of clinical supervision and field work at the Bernards Township Board of Education in order to achieve her board certification in ABA and she was also the founder of the preschool autism program there.

She was offered and admitted as an expert in ABA, special education, and special education of children with autism.

Kahana is the founder and current owner of SEARCH. She described SEARCH as a learning center that provides one-to-one intensive behavior analytic services for children with autism between the ages of eighteen months and eleven years. SEARCH is not a school and did not seek State-approved clinic certification from the State of New Jersey. The requirements for the State-approved clinic mandate that they are not able to provide full-time services—they could only do part-time. SEARCH does not provide part-time programs—they only do full-time thirty-hour per week programs.

Kahana evaluated C.V. and ultimately recommended the full-time comprehensive one-to-one behavior analytic program at SEARCH. She testified to the intake of C.V. that occurred in the spring of 2017. C.V. was brought down into one of the classrooms and was interacted with her using play-based interaction. They then brought her to a table for a more direct instruction. Kahana testified that C.V. had a lot of classic signs of autism and behaviors that interfered with her ability to learn, such as engaging in vocal stereotypy where she would talk to herself and not respond if spoken to. C.V. also engaged in visual stereotypy where she might look at an object in an unusual way. She testified that when C.V. was engaging in that type of behavior she was not available for any sort of interaction. C.V. did not display skills that you would expect a three-year-old to have in terms of conversation. C.V. required a lot of direct adult instruction to be able to interact at all. Kahana testified that Nicole Journe, who is an assistant director and BCBA, worked with C.V., so it was Kahana and Journe working with her.

Though the parents were not in the room during the intake, Kahana later learned of additional behaviors from the parents. The parents talked about how C.V. engaged

in elopement where she would run away and would not respond to the direction “stop,” which is a dangerous behavior. The parents also discussed how C.V. would mouth and attempt to eat inedible objects and how C.V. was not able to engage in conversation or use language to interact with others.

Kahana testified that they did a VB-MAPP assessment on C.V., which is a normed reference assessment and it looks at what children of typical development will do at different ages. It was designed by a behavior analyst specifically for individuals with autism and it provides to broad areas of information, one is the “Milestones Score” and the other is the “Barriers Score.” The Milestones Score are the milestones, so they want that score to be high; there are 170 points available and it is broken down into three levels based on age. C.V. fell primarily into Level 1 which would be “0 to 18 months” but she was three years old at the time. The VB-MAPP results confirmed what they had garnered from the intake as well as the record review. The VB-MAPP is used at SEARCH because it is a universally accepted assessment. She testified that it gives them an idea of what typically developing kids are doing as well as it looks specifically at core deficits of autism. They run it every six months, so it gives them information over time about how a child is learning, how quickly they are learning, and if they are learning across areas. Data is collected on a daily basis in a number of different areas. This helps to identify pockets in the child’s learning and it also helps them to develop further goals and objectives and assure the intervention program is effective.

Kahana testified that in her experience with autism she is not aware of any research or any programming with something other than ABA that would be appropriate for children like C.V. She added that there are decades of research supporting the efficacy of ABA for children with autism and that such a program is recommended by the American Academy of Pediatrics. She testified that ABA is discussed in the Autism Program Quality Indicators of the State of New Jersey and that the SEARCH program meets the recommendations of the Autism Program Quality Indicators.

### Cross-Examination

Kahana testified that when she observes a program, she does a direct observation of the instructional procedures, the data collection methods, interview the staff on the staff-training procedures, on the curriculum scope, the sequence development, and perhaps collect some data on what is being observed in the classroom.

Kahana visited the district's program during the 2016-2017 academic school year, to observe another learner, not C.V. The BCBA was not there that day so she could not interview that person.

Kahana testified that an IEP with related services like Speech, OT, and PT cannot be implemented at SEARCH. Ms. Kahana testified that the SEARCH program runs for thirty hours a week from 8:30 to 2:30, so all the learners receive thirty hours of direct instruction, the content of what is being taught varies from learner to learner

Kahana testified to the tiered system of staffing being comprised of the clinical leadership team made up of six BCBA's, including herself, the clinical director, and four team leaders. The team leaders are responsible for overseeing enrolled learners and provide the five hours a week of direct and indirect supervision. The next tier is the instructor/data analysts and those are the team members responsible for direct instruction. There are sixteen of those who are all either RBT's or pursuing their BCBA.

Kahana testified that at the intake C.V. eloped (ran away) by moving away from the teacher or instructional area without the direction to do so and then when they said "stop" or called her name, she did not turn her head to look.

### Jessie Northgrave

Jessie Northgrave (Northgrave) is the assistant director of clinical management at SEARCH. She has a bachelor's degree in psychology, anthropology, and sociology. She holds a Master's degree in ABA and is a board certified behavior analyst.

Northgrave is C.V.'s team leader at SEARCH, which means she routinely sits in a session with C.V. and C.V.'s instructor and will oversee her programing and monitor C.V.'s development of skills and overall performance/progress. Northgrave testified that she regularly reviews and analyzes C.V.'s data in order to make programing decisions. All of the programs are objectively measured through data because that is the best way to make decisions. They analyze trends through the graph. She testified if C.V. is not making any progress, they can see that objectively on the graph. It is the same for the parent training. They collect data on their staff as well. They do a ten-minute sample of the staff member and if the staff member is engaged with the learner they get a plus and if not, they get a minus.

### Cross-Examination

She testified that they want to guide C.V. with prompting for her to engage in the correct response. She testified that they want to ultimately fade out the prompt and no longer guide C.V.'s hand but have her do it independently. The difference between a prompt and a modeling behavior is that a modeling behavior is something you want the child to imitate. The prompt should happen before the behavior, whereas modeling can happen during or after the response.

She testified with regard to feeding they guide her hand to the spoon and then guide the spoon to her mouth. In Williams and Fox book they talk about tongue lateralization in terms of prompting and reinforcement. For C.V. they did not have to do this but if they needed to teach C.V. to move her tongue from side to side, maybe using peanut butter, to teach her to move her tongue in that way would help her learn to chew.

### Dr. Fiorelli

Dr. Fiorelli holds a Ph.D. in health and behavior studies with a concentration in applied behavior analysis. Dr. Fiorelli is a board certified behavior analyst at the doctoral level (BCBA-D). She has been in the field of behavior analysis for twenty-three years. Dr. Fiorelli is an adjunct professor at City University of New York at Queens

College where she teaches graduate-level special education and advanced research in special education to graduate students who are pursuing a Master's degree in special education. Fiorelli testified that she has evaluated over one thousand preschoolers with autism over the years and has developed programming for over two hundred such autistic preschoolers. Fiorelli was qualified by the court as an expert in behavior analysis, applied behavior analysis, and an expert in the use of ABA in the education and treatment of children with Autism.

Dr. Fiorelli was retained by petitioners to assess C.V.'s needs and to assess the program offered by the district for C.V. In her assessment Dr. Fiorelli observed C.V. and reviewed various documents, including the IEP proposed by the district, a report from Hand over Hand, and a pediatric neurodevelopment report that confirmed C.V.'s diagnosis of autism.

Dr. Fiorelli testified with regard to J-8, a document entitled "collaborative preschool evaluation" dated March 21, 2017. Referring to the report, Dr. Fiorelli affirmed that the district identified the same issues with C.V. that Dr. Fiorelli identified, such as inattention, failure to make eye contact, possible PICA (eating or mouthing non-edible objects), food refusal, non-toilet trained, and self-directed (non-compliant with instructions).

Dr. Fiorelli noted that C.V. was unsafe in her environment as she would break out in severe temper tantrums and was not able to wait with her parents (impatient) and was having behavioral problems both in and out of the home, including during instructional programming.

Dr. Fiorelli testified that she observed the district's program for seventy-five minutes. She was accompanied by Ms. Piro, a school psychologist and McDougal, a BCBA. They entered into and observed the classroom of Lubin.

Dr. Fiorelli opined that the IEP proposed by the district was insufficient in many ways, specifically regarding the goals as they were written. She stated some goals contradicted others and that she was surprised to see no behavioral goals in the IEP at



all. She also noted that there were no parent training goals or academic goals. She stated that some of the motor goals in the IEP were appropriate.

Dr. Fiorelli stated that it was her understanding that she was observing a full-time ABA program. She observed Lubin working with one student for a period of five or ten minutes and then switch to another. Sometimes she would work with two students at the same time. After observing what she believed to be an ABA program Dr. Fiorelli came to learn the teacher was conducting an ABLES assessment. Dr. Fiorelli noted this was not the proper way of conducting ABLES assessment.

She discussed with MacDougall, the behaviorist, how much time she would be with C.V. in the classroom but MacDougall could not provide an answer. Dr. Fiorelli noted this information was also not in the IEP. MacDougall informed Dr. Fiorelli only there three days a week. MacDougall could not even commit to being in the classroom with C.V. once a week, which Dr. Fiorelli felt was a problem.

Dr. Fiorelli testified that she did not think that the IEP was appropriate to meet CV's needs and she opines that had petitioners placed C.V. in the program C.V. would not have made meaningful educational progress.

Dr. Fiorelli then testified that she her teaches students how to draft IEP's and is very familiar with goals and objectives. She then addressed specific areas of concern. On page one of the IEP, there is no behavior intervention plan despite the fact that when evaluated by the district, C.V. presented multiple areas identified by the district that were problematic and the parents reported behavioral issues to the district as well yet no behavior plan in place.

C.V. requires a very intensive one-to-one instructional program like the one she was receiving through early intervention, but, based on her observations, no such program was available at the district.

Dr. Fiorelli testified that she also had concerns regarding the amount of days in the extended school year proposed in the IEP. Dr. Fiorelli stated that the New Jersey

Program Quality indicators recommend a 210-day school year for children with autism while the extended school year proposed by the district only called for 194 days, which Dr. Fiorelli found to be insufficient based on C.V.'s needs. Dr. Fiorelli further testified that, according to the IEP, C.V. would only receive four four-hour days per week of instruction. Dr. Fiorelli testified that, based on C.V.'s needs, she required a full program consisting of twenty-five to thirty hours per week.

Dr. Fiorelli added that under the district's program, C.V. would have a different teacher for her summer program than for her new year. Given the proposed IEP projected C.V. starting school in April, C.V. would only have a few months with her teacher before having to transition and adapt herself with a new teacher for the district summer program. Given C.V.'s significant interfering behaviors, Dr. Fiorelli opines that such a transition early on in the program could cause C.V. to regress over the summer. Dr. Fiorelli recommended a more intensive summer program for C.V.

Dr. Fiorelli then testified that the IEP did not mention parent training anywhere nor did it mention that C.V. was autistic. Dr. Fiorelli explained that this was a concern because autistic children require very precise methodologies of instruction and anyone reading this IEP would have no idea that cv was autistic unless they learned that information from some other source. Dr. Fiorelli added that if someone were to pick up a this IEP as it was written they would have no idea that C.V. had any behavior problems or any feeding issues.

Dr. Fiorelli went on to say that when writing an IEP, the goals should be written with precision so that if a trained individual read the IEP, and looked at a particular stated goal, the individual would know exactly how to implement that goal.

Dr. Fiorelli testified that she does not believe C.V. would have gained meaningful improvements in the areas discussed from the IEP as written and goals and objectives because the program was lacking behavior goals, academic goals, and many of the goals were written inappropriately. Dr. Fiorelli stated that there was no indication that she would have one-to-one instruction, and there was no behavior analyst supervising the class for a substantial amount of time and in some weeks, none. She testified that

all of those are significant problems that with C.V.'s presentation, would have not resulted in meaningful educational progress. She further testified that there was nothing in the IEP that talked about how her skills were going to be generalized.

Dr. Fiorelli then testified that she observed and evaluated the program at SEARCH. She testified that she is aware that SEARCH has no speech therapy, occupational therapy, or physical therapy components. She testified that the program at SEARCH is currently addressing C.V.'s needs appropriately and they have been able to demonstrate progress through their data collection system. She concludes that the SEARCH program is very appropriate for C.V. because it is a well-implemented program with continuity and consistency. She found that SEARCH develops an individualized program that identifies specific goals, and what procedure will be used for implementation, what responses are expected, criteria for mastery/ of those goals, and a separate set of goals for parent training that occurs at the home.

#### Cross-Examination

Dr. Fiorelli testified that she has never contracted with petitioner's attorney. She testified that in this particular case the parents contacted her two years ago asking her to provide direct services to C.V., but she was unable to do so because of travel times. When the hearing forgoing matter was initiated the parents contacted her again and asked if she would be able to provide an independent analysis of C.V. and the programs proposed by the district and at SEARCH. She testified that M.V. did not express any specific concerns at the time.

Dr. Fiorelli testified that there have been instances where, when charged with performing an independent analysis of a district program, she has recommended to the parents that their child should stay in the school district or return to the school district if placed elsewhere.

Dr. Fiorelli further testified that upon her request, M.V. provided Dr. Fiorelli with various documents such as C.V.'s early intervention documents, diagnostic documents

of neurological evaluations, and the proposed IEP. She also requested and received documents from SEARCH when she visited there. Dr. Fiorelli reviewed the documents and observed the programs and based her recommendation on her review and observation.

Dr. Fiorelli then testified to P-24 her report. Dr. Fiorelli testified that she did not talk to Ms. Piro, Lubin, or the BCBA about whether toileting would be addressed in the program because it is not in the IEP, so it is not a goal. Dr. Fiorelli then testified to (J-11), the IEP. She testified to a myriad of what she felt were inaccuracies or inconsistencies with several of the goals outlined in the IEP.

Dr. Fiorelli then testified that she would administer an ABLLS assessment before the IEP meeting and not after the child has entered into the program. She testified that the district did not do the ABLLS or an educational evaluation before the IEP meeting, but she was aware that they did do a psychological evaluation and a speech evaluation.

### Redirect

Dr. Fiorelli testified that over the course of her working relationship with Ms. Callahan, she was never told what to put in a report. She does not talk to Ms. Callahan, she talks to the parents.

Dr. Fiorelli testified that even if the ABLLS was conducted on C.V. it would not have entirely fixed the program because C.V. was not identified to have a behavior plan, she was not identified to have individual parent training and counseling for the parents to assist in generalizing skills, and she was not identified for one-to-one.

Dr. Fiorelli testified that in her opinion as a special education teacher and a BCBA at the Doctoral Level, C.V. would not have been able to learn without one-to-one. She further testified that C.V. clearly needed a full-time ABA program and that the District's program did not appear to be fully ABA.

**M.V.**

M.V. is the mother of C.V. M.V. testified that she gave consent to the district for any and all assessments to be performed on C.V. M.V. testified that she had never received any evaluation through a computer program as described by McNichol through testimony (referring to the behavioral assessment tool). M.V. testified that she would have filled out anything the district asked her to.

**Cross-Examination**

On cross-examination, M.V. testified that she did not articulate any concerns regarding the IEP at the IEP meeting because the document was incomplete and not a finalized IEP at that point. The finalized IEP was to be sent to her and her husband several days after the meeting. She testified that after she received the finalized IEP she did not immediately communicate her concerns regarding the document because no one from the district contacted her or her husband to discuss the IEP any further and she did not have any contact information for McNichol.

She testified that she heard about SEARCH Consulting through a friend who had a son who attended SEARCH and that she enrolled C.V. in SEARCH sometime in May of 2017, weeks after the IEP meeting. She further testified that she was never asked to produce any records or documents regarding C.V. by the district. She did not ask for parent training or home visits at the IEP meeting, but McNichol, the BCBA, did. The BCBA was told that the district does not have parent training that it offers in the home. M.V. did not voice any concerns or objections to this response at the time because the BCBA (McNichol) was there and M.V. felt she had the home programming in place.

**S.V.**

S.V. is a petitioner and the father of C.V. S.V. testified that early intervention started when C.V. was two years old. C.V. was initially given three hours of developmental intervention in the form of ABA. The parents pushed for more hours of ABA because the Neurodevelopmental Pediatrician, Dr. Livingstone, recommended

significantly more hours. Dr. Livingstone is also the doctor who diagnosed C.V. with autism and hypertonia. S.V. testified that they began to push for more ABA therapy because the ABA is where they saw progress starting with respect to C.V. being able to make eye contact and be able to focus so she could engage in tasks. He testified that he sat in on the ABA sessions and that the last five or ten minutes of each session involved the instructors writing down their notes and talking the parents regarding what had happened during the session and what the parents could do to reinforce the lesson when the ABA therapists were not present.

S.V. testified that his first interaction with the district child study team was at the transition planning conference. He attended this meeting along with his wife, the early intervention case manager, the early intervention ABA therapist (Sharon Saylor), and Dawn McNichol. Dawn McNichol was the only representative present from the district.

S.V. testified he recalls allowing the district to have full access to all early intervention documents and that he was unaware that the district did not have all the early intervention documents when forming the IEP. S.V. testified that when McNichol came to the house to evaluate C.V. At that time, S.V. offered to McNichol all early intervention paperwork he had available along with a written recommendation from a neurodevelopmental pediatrician recommending forty hours of ABA per week. S.V. testified that in response to his offering these documents, McNichol indicated that she did not need them as the district does their own assessment.

### **LEGAL ANALYSIS AND CONCLUSIONS**

State and federal laws require local public-school districts to identify, classify and provide a free and appropriate public education (FAPE) to children with disabilities. 20 U.S.C. § 1412; N.J.S.A. 18A:46-8, -9. As a recipient of federal funds under the IDEA (Individuals with Disabilities Education Act), the State of New Jersey has a policy that assures all children with disabilities the right to FAPE. 20 U.S.C. § 1412. The responsibility to provide FAPE, including special education and related services, rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). In accordance with N.J.S.A. 18A:46-1.1, the burden of proving that FAPE has been offered

likewise rests with school personnel. FAPE is an education that is “specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, \*5 (D.N.J. Feb. 27, 2009) (citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)). FAPE includes special education and related services that are provided at public expense under public supervision and direction and without charge; that meet the standards of the State Educational Agency; that include an appropriate preschool, elementary and secondary school education; and that are provided in conformity with an IEP as required under 20 U.S.C. § 1414(d).

Federal law is complied with when a local school board provides a handicapped child with a personalized education program and sufficient support services to confer some educational benefits on the child. Rowley, 458 U.S. at 192. In Rowley the Court determined that although the Act mandates that states provide a certain level of education, it does not require states to provide services that necessarily maximize a disabled child’s potential. Instead, the IDEA 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).

In order to provide FAPE a school district must develop and implement an Individualized Education Plan (IEP). The IEP is “the centerpiece of the statute’s education delivery system” and serves as the “vehicle” or “means” of providing a FAPE. Honig v. Doe, 484 U.S. 305, 311 (1988); Rowley, 458 U.S. at 181.

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. Dep’t of Educ. of Mass., 471 U.S. 359, 368 (1985).

Our courts have held that under the IDEA an IEP must provide meaningful access to education and confer some educational benefit upon the child. Rowley, 458 U.S. at 192. In order to be appropriate, the educational benefit conferred must be more than trivial. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999). The central

legal issue is whether the educational services and program offered are sufficient to confer an educational benefit that is meaningful and significant and, therefore, not de minimus, in nature. Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30 (1989).

To provide FAPE, a student's IEP must be reasonably calculated to enable the child to receive educational benefits. Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988 (2017). For a child who is "not fully integrated in the regular classroom and not able to achieve on grade level," the "educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom." Ibid. While the benefit conferred must amount to more than trivial progress the IDEA "does not require that a school district provide a disabled child with the best possible education." Ibid.

### **Discussion**

In the case at bar, the petitioners were presented with an IEP by the district. The petitioners refused to sign the IEP and avail themselves of the corresponding educational services because they felt the IEP did not adequately address the needs of their child, and thus, did not provided a meaningful and significant educational benefit considering C.V.'s individual needs. In other words, the petitioners argue that the district's proposed Individualized Education Plan was not, in fact, individualized. I Agree.

### **BCBA never evaluated C.V. or performed ABLLS**

MacDougall is the board certified behavior analyst who testified for the district. She was offered and admitted as an expert in BCBA and expert in developing programs for children with autism. Of all the districts witnesses, she had the most training and experience with working with children with autism. She possesses the greatest expertise regarding educating and working with children with autism of all witnesses offered by the district. MacDougall should have been charged with evaluating C.V. and



performing an ABLLS assessment before the formulation of the IEP and said evaluation and corresponding information should have been considered in formulating C.V.'s IEP.

It is undisputed that MacDougall never evaluated C.V. or even met with the child. Thus, she offered no testimony regarding her opinion specific to C.V. and the district's proposed program as she had no firsthand information to rely on. MacDougall spoke generally with regard to "youngsters in the program" but did not and could not possibly provide a professional opinion on suitable programming for C.V. as she never evaluated C.V. and could only testify as to what could have been offered by the District.

MacDougall testified that the ABLLS assessment would be administered after the parents signed the IEP and entered C.V. into the district's program. Given that the ABLLS is an assessment tool used to formulate programming it would stand to reason that it should be conducted before the IEP is finalized and presented to the petitioners for their signatures. Since MacDougall testified that in the case at bar the individualized program would be developed after the parents signed the IEP and the child entered into the program, I **CONCLUDE** the IEP offered could not possibly have set forth an individualized plan specific to C.V.'s needs as an autistic child because the ABLLS assessment or any similar assessment had not yet been administered at the time the IEP was drafted. The IEP presented by the district and rejected by the petitioners was therefore not individualized.

### **Procedural Violation**

Petitioners further argue that under Rowley, in order to provide FAPE when developing an IEP, the district must comply with the procedural requirements of the IDEA as outlined in 20 U.S.C. § 1415, and that in the present case, the district failed to do so. The parents specifically point to the district's alleged lack of consideration of documents that the parents had available at the time of the IEP meeting.

In order for procedural violations of the IDEA to be actionable, the violations must amount to a substantive deprivation of a free appropriate public education. 20 U.S.C. § 1415(f)(3)(E)(i). The procedural deficiencies must have (1) impeded the child's right to

a free appropriate public education; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the parents' child; or (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); N.J.A.C. 6A:14-2.7(k). A claim based on a violation of the IDEA's procedural requirements is thus not valid unless it alleges that the flaw affected the student's or the parents' substantive rights. Kingsmore v. Dist. of Columbia, 466 F.3d 118, 119 (D.C. Cir. 2006).

Where the rights of the child or parents are seriously infringed upon, a procedural violation can amount to a substantive violation. See Amanda S. by Susan S. v. Webster City Cmty. Sch. Dist., 27 IDELR 698 (N.D. Iowa 1998) (ruling that where the parents were given an entirely prepared IEP document and were never given the opportunity to make suggestions about the IEP or its placement decision, the rights of the parents were significantly impeded and the IEP was thus invalid). The case law is clear that courts should not be overzealous in transforming procedural violations into substantive rights violations:

Courts must strictly scrutinize IEPs to ensure their procedural integrity. Strictness, however, must be tempered by considerations of fairness and practicality: procedural flaws do not automatically render an IEP legally defective. Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process or caused a deprivation of educational benefits.

[Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990) (citations omitted).]

In the case at bar, the petitioners assert that the district failed to review relevant documents they offered to the district. Specifically, petitioner S.V. testified that he had offered documents to McNichol that were refused. The district, in response, claims that the petitioners unreasonably failed to produce significant documents and failed to work collaboratively and cooperatively with the District. To bolster their position, the district asserts that petitioners sat silently during C.V.'s April 3, 2017, IEP meeting declining to

engage, ask questions, or make contributions reflecting their preferences. This assertion directly contradicts petitioner S.V.'s testimony that he was actively engaged in the IEP meeting, asking numerous questions, including many questions focused on the BCBA and her involvement in the proposed program.

The district further asserts that petitioner M.V. was scrolling through her cell phone during the entire IEP meeting, seemingly uninterested and unengaged. M.V. testified that, while she did have her phone out during the meeting, she was using it to take notes and was fully engaged in the conversation. Further, it is undisputed that petitioners provided written permission to the board to conduct all the evaluations discussed at the transition planning meeting. I **FIND** the petitioners' testimony credible and I therefore **FIND** that petitioners did attempted to make available all documents that could potentially be useful in crafting an IEP for C.V. and that they did attempt to work collaboratively with the district. Thus, any claim made by the district alleging that petitioners acted in any way wrongfully by withholding information are unfounded.

In addition, N.J.A.C. 6A:14-3.4(a)(1) sets forth the obligations for evaluation and states the child study team must "review existing evaluation data on the student including evaluations provided by the parents, current classroom-based assessments and observations and the observations of teachers and related service providers and consider the need for any health appraisal or specialized medical evaluation."

The district's failure to consider information offered by the parents would significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the parents' child, which is a clear violation of the procedural safeguards as set forth by 20 U.S.C. § 1415(f)(3)(E)(ii), and N.J.A.C. 6A:14-3.4(a)(1). Said violations are therefore a substantive deprivation of a free appropriate public education and tend to show the IEP offered by the district did not provide FAPE.

### **Placement at SEARCH**

After rejecting the IEP proposed by the district, the petitioners unilaterally placed C.V. in an in-home program with Hand over Hand pending placement at SEARCH Consulting. C.V. started at SEARCH on May 17, 2017, attended for the 2017-2018 school year, and continues in that placement currently.

At the intake, SEARCH identified that C.V. had a lot of classic signs of autism and behaviors that interfered with her ability to learn. During the intake, Kahana testified that C.V. engaged in vocal stereotypy, visual stereotypy, and motor stereotypy. C.V. did not display the conversational skills that is expected in a three-year-old. C.V. required a lot of direct adult instruction to be able to interact at all.

Based on the intake and reviewing C.V.'s documents, SEARCH recommended a full-time comprehensive one-to-one behavior analytic program for C.V. (P-6.) C.V. needed one to one because C.V. displayed the core deficits of autism. Kahana testified that C.V. was not yet learning, as typically developing kids do where they will learn from their environment. C.V. was significantly impacted with a number of interfering behaviors that prevented her from being available for learning so to make any of her learning meaningful. C.V. required and continues to require direct one-to-one instruction to be able to learn new material.

SEARCH developed a SITE Plan for C.V. (P-6, P-7, P-8). A SITE Plan is the individual treatment and educational Plan at SEARCH, which is essentially their version of an IEP. (P-6, P-7, P-8.) A SITE plan details program components that would be in place for C.V. in the program at SEARCH. It goes through the initial proposed goals and objectives for her based on the intake, the report review, and the dialogue with the family. (P-6, P-7, P-8.) In addition, SEARCH mapped out goals and objectives for the parents.

C.V.'s program at SEARCH consists of thirty hours per week. SEARCH also requires M.V. and S.V. to attend parent training sessions which are offered to them

once a week. The SEARCH instructors observe C.V. at home to make sure she is generalizing the skills learned at SEARCH and to continue parent training. The parents have continued to provide C.V. with additional hours of home programming through Hand Over Hand. The staff at SEARCH and Hand Over Hand have coordinated the programs so that C.V. can benefit in a meaningful way and the teaching approaches are the same.

Dr. Fiorelli, Ph.D., BCBA-D, the Autism expert for petitioners, testified that SEARCH Learning Group is appropriate for C.V. Dr. Fiorelli testified that the goals that SEARCH implemented are different from the goals the district implemented because SEARCH's goals were appropriate to meet C.V.'s needs at that time. Dr. Fiorelli testified that she is aware that SEARCH Consulting does not have speech, OT, or PT but nonetheless contends that SEARCH's program is the appropriate program for C.V.

Based on the testimony and evidence presented by petitioners, I **FIND** that C.V. has made meaningful educational progress at SEARCH Learning Group and I **CONCLUDE** the SEARCH is an appropriate placement for C.V.

In this case I **CONCLUDE** that the IEP presented by the district to petitioners was not appropriate as it was not reasonably calculated to provide significant learning and meaningful educational benefit, in light of C.V.'s individual needs and potential, so as to provide C.V. with FAPE. I also **CONCLUDE** that the SEARCH is an appropriate placement for C.V.

### **ORDER**

It is hereby **ORDERED** that the petitioner's complaint for an IEP to be developed that is individualized to C.V.'s needs as an autistic child, that is forty hours a week, with an ABA program, parental training and one-to-one instruction run by SEARCH Consulting or a State-approved school for children with Autism is hereby **GRANTED**.

It is further **ORDERED** that respondent reimburse petitioners for their out-of-district placement at SEARCH Consulting from May 17, 2017, to present and for transportation to and from SEARCH Consulting.

It is further **ORDERED** that C.V. continue her placement at SEARCH and once an IEP is developed as described above, that transportation be provided to and from SEARCH Consulting or a State-approved school for children with Autism going forward.

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.

November 7, 2018

\_\_\_\_\_

DATE

\_\_\_\_\_

**JUDE-ANTHONY TISCORNIA, ALJ**

Date Received at Agency

11/7/18  
\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

id

**APPENDIX**

**LIST OF WITNESSES**

**For Petitioner:**

Carrie Kahana  
Jessie Northgrave  
Dr. Fiorelli  
M.V.  
S.V.

**For Respondent:**

Dawn McNichol  
Jessica MacDougall  
Kady Lubin  
Erica Zuckerman  
Megan Petersen

**LIST OF EXHIBITS IN EVIDENCE**

**Joint Exhibits:**

- J-1 Invitation for Initial Identification and Evaluation Planning, dated January 5, 2017
- J-2 Meeting Attendance Sign-in Sheet, dated January 6, 2017
- J-3 Initial Identification & Evaluation Planning-Proposed Action, dated January 6, 2017
- J-4 Consent for Initial Evaluation, dated January 6, 2017
- J-5 Physical Therapy Initial Evaluation by P.G. Chambers School, dated February 2, 2017

- J-6 Weschler Preschool and Primary Scale of Intelligence (WPPSI-IV), Cognitive Assessment Protocol, dated March 2, 2017
- J-7 Preschool Language Scales Fifth Edition (PLS-5), Speech Language Assessment Protocol, March 8, 2017
- J-8 Collaborative Preschool Evaluation Report, dated March 21, 2017
- J-9 Invitation for Initial Eligibility Determination & IEP Development, dated March 21, 2017
- J-10 Meeting Attendance Sign-in sheet, dated April 3, 2017
- J-11 Individualized Education Program-DRAFT, dated April 3, 2017

For Petitioners:

- P-6 SITE Plan – Record Review
- P-7 SITE Plan – VB MAPP Assessment Tool
- P-8 SITE Plan – Parent Training
- P-24 Dr. Fiorelli's Report

For Respondent:

None Referenced in Final Decision