

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 09881-15

AGENCY DKT. NO. 2015 22957

N.L. AND Q.G. ON BEHALF OF J.G.,

Petitioner,

v.

SUMMIT CITY BOARD OF EDUCATION,

Respondent.

N.L. and Q.G., pro se

Marie-Laurence Fabian, Esq., for respondent (Porzio, Bromberg and Newman,
attorneys)

Record Closed: October 16, 2015

Decided: October 23, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, N.L. and Q.G. have requested a due process hearing on behalf of their son, J.G., who is classified as eligible for special education and related services. At an annual review meeting in April 2015, the Summit Board of Education (the Board), through its Child Study Team (CST), proposed a change in J.G.'s educational program that would return him to his neighborhood school, and would reduce the occupational therapy (OT) services delivered under his individualized

education program (IEP). Petitioners' due process petition seeks to have their son remain in his current school building, and seeks to maintain his current level of OT. The petition does not otherwise challenge J.G.'s educational program, and the parties have stipulated that they are in agreement that the proposed change from a self-contained applied behavioral analysis (ABA) classroom to a mainstream classroom is appropriate for J.G. at this time.¹

Petitioners' request for a due process hearing was received by the Office of Special Education Programs on June 8, 2015. The contested case was transmitted to the OAL, where it was filed on July 8, 2015. A hearing was conducted on October 5, 2015. The record closed on October 16, 2015, following the receipt of written post-hearing submissions from the parties.

FINDINGS OF FACT

The parties filed a comprehensive stipulation of fact and I **FIND** as follows:

J.G. is four-years-old. In October 2013, the Board, through its CST, convened an evaluation planning meeting to begin the process of assessing J.G.'s eligibility for special education services. Evaluations were completed and an eligibility meeting took place on January 24, 2014, at which time it was determined that J.G. was eligible for services under the classification category "Preschool Child with a Disability." At an IEP meeting also conducted that day, it was agreed that from February through June 2014, J.G. would be placed in an ABA-based preschool disabled class. His IEP specified that he would receive individual speech therapy once per week for thirty minutes; group speech therapy one time per week for thirty minutes; small group/individual OT two times per week for thirty minutes per session; quarterly related services consultation; and parent training.

The District operates two primary school centers, which serve students in grades pre-k and kindergarten. Students are zoned to attend either Wilson Primary Center

¹ For the first time at the hearing, petitioners questioned the decision not to include a full-time one-to-one aide for J.G. in his mainstream classroom. Counsel for the Board correctly noted that this issue was not raised in the petition for due process and hence is not properly before me.

(WPC) or Jefferson Primary Center (JPC), based upon where they reside in Summit. But since the self-contained ABA class is housed at WPC, all students who require that program must attend WPC regardless of where their home is located. J.G. and his family live in the JPC zone; but he was assigned to WPC, in view of his need for the ABA program.

In March 2014, the CST recommended a physical therapy (PT) evaluation, and petitioners consented to further testing. At an IEP meeting conducted on April 30, 2014, the IEP was amended to include small group/individual PT one time per week. The IEP moreover was amended to provide for an extended school year (ESY) program, during which J.G. would receive OT and PT once per week. For the 2014-2015 school year it was agreed that J.G. would continue in his ABA classroom, and that his related services would include OT twice weekly; PT once weekly; group speech therapy twice weekly; quarterly related services consultation; and parent training.

J.G. thrived in this program; so much so, that in October 2014, his IEP was amended without a meeting to permit him to attend a general education classroom in the afternoon, and continue to attend the ABA class in the mornings. The parties agreed that J.G. “would benefit from the social and academic opportunities provided in this less restrictive setting.” On April 29, 2015, an IEP meeting took place to discuss J.G.’s program for the remainder of the 2014-2015 year; his ESY program; and his program for the 2015-2016 school year. The CST proposed continuing his program with no changes through June 2015. J.G.’s ESY program was to include speech therapy, and was to take place at JPC.

Effective with the 2015-2016 school year, the CST proposed that J.G. no longer attend the ABA class, but rather attend a general education preschool class full-time, with twice monthly consultation by a special education teacher. J.G. would receive small group/individual OT once per week from September 8, 2015, through December 31, 2015, and then, commencing in January 2016, receive consultative OT three times per year. J.G. would continue to receive PT once per week for thirty minutes, and group speech therapy twice weekly for thirty minutes. Insofar as J.G. lives in the JPC

attendance area, and no longer required the services of the ABA class, the IEP provided for his transfer to JPC.

Petitioners rejected the IEP, and this due process appeal followed. But they concurred then, and stipulated now, that their son no longer requires the support provided by the ABA class. Nonetheless, petitioners feel that J.G. should continue “in his familiar environment (same school building, regular PM class, same pre-school teacher)” They likewise would like to see no reduction in OT services. During the pendency of this matter, J.G. has continued in his program at WPC under the requirements of “stay put.” As he will turn five in February 2016, he will be reevaluated prior to April 30, 2016, to determine if he continues to be a student with a disability, and if so, what classification and programming would be appropriate moving forward.

The Testimony

Patricia Vesper, an occupational therapist, shared J.G.’s progress toward meeting his OT goals. Vesper is a well-qualified therapist with over twenty years of experience in delivering services in the public school setting. Although J.G.’s initial OT assessment was completed by one of Vesper’s colleagues, she attended the eligibility meeting in January 2014, and has worked with J.G. directly in delivering OT services. Those services centered on three areas of deficit, to include, sensory regulation; fine motor; and activities of daily living. Vesper tracked J.G.’s progress and summarized her findings in June 2014; February 2015 and June 2015. These summaries confirm that J.G. made excellent progress in meeting his OT goals. In June 2014, Vesper related that J.G. “[presented] with decreased motor planning, decreased balance and limited body in space awareness that impacts upon his ability to safely negotiate his educational environment.” She noted deficits in his pencil grasp and in using his non-dominant hand to stabilize his work. He was progressing nicely in completing the entrance routine in the classroom.

By February 2015 Vesper reported that J.G.’s “ability to navigate his environment has improved,” although he continued “to have difficult[y] with body and space

awareness especially in confined spaces.” He was more independent with cutting and writing, and in school related self-help skills. By June 2015, he had mastered most of his ADL goals, as well as the goals related to cutting, writing, and drawing. His ability to navigate the educational environment was greatly improved. Vesper gave the example of J.G.’s new ability to sit at a desk; when she first met him he could not do so for any extended period, and would slump or slide out of the chair. In light of J.G.’s progress, Vesper opined that, effective with the 2015-2016 school year, his IEP correctly reduced OT to one time per week until the end of December 2015, to assist in J.G.’s transition to a new school. Vesper likewise opined that the IEP thereafter correctly transitioned his OT services to a consultative model, through which his progress could be monitored, and adaptations made to his environment as needed based on observation and teacher report.

As required by “stay put,” Vesper has continued to provide OT to J.G. two times per week. He has mastered most of his goals, and Vesper continues to recommend the diminution in services proposed in the April 2015 IEP. Although he has some lingering sensory issues, Vesper opined that J.G. is functional in the classroom. She moreover noted that even with the reduction in OT services proposed by the IEP, J.G. would continue to receive significant related services interventions, to include speech and PT services, and a consultative model whereby at least four times yearly, Vesper would confer with the other therapists to ensure that J.G. is progressing and receiving sufficient assistance. Vesper’s testimony is borne out by the IEP itself, which continues to include OT goals, thus providing a vehicle to continue to adjust J.G.’s interventions as the year progresses and he responds to the services provided. Moreover, Vesper confirmed that if a transfer to JPC is directed by this decision, she would continue to recommend that OT services be reduced in phases, as set forth in the IEP document.

J.G.’s parents presented their concerns on their son’s behalf in an eloquent presentation. Their love for their son and desire to see him succeed was clear. But while they expressed worry about their son, petitioners did not dramatically disagree with the CST’s view of his educational development. Indeed, they readily concurred that J.G. had made great progress. Relative to OT, their main concern was his sensory

regulation deficits. They related that J.G. still physically bumps into friends when at play; recently pushed his sister too hard during a game; and runs into other children on playground swings. Notwithstanding her agreement that sensory regulation had been a therapeutic focal point, Vesper has observed none of these behaviors in school, and did not feel that J.G. was in any way a danger to himself or others. She consistently and repeatedly opined that his progress warranted the reduction in services she has proposed. Petitioners presented no expert testimony that would rebut Vesper's professional judgment about their son's OT progress and needs. I **FIND** that the OT services proposed by the April 2015 IEP are appropriate to J.G.'s needs.

Petitioners expressed concern that J.G. will be uncomfortable in a new building and finds change hard. They pointed out that some of his friends from last year did not return to school, and that even this has thrown him off a bit and made him express reluctance to attend school. They urged that because J.G. has progressed, the school district erroneously believes he is ready to move to a regular class setting with no support. But a review of the contested IEP readily reveals, and I **FIND**, that it is not the CST's intention to leave J.G. unsupported. That IEP does place J.G. in a general education classroom, a transition that all parties agree is appropriate. But twice monthly, a special education teacher will continue to monitor his progress and consult with the classroom teacher. In addition to the reduced OT services discussed by Vesper, the IEP continues to offer behavioral consultations, PT, and speech therapy services. The modifications page of the IEP offers a roadmap for assisting J.G. in the educational environment, and includes such modifications as breaking tasks into manageable units, verbal prompting, and providing individual oral instructions as needed. Petitioners' argument that their son will receive no help under this IEP is simply not borne out by the IEP document.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

As a recipient of federal funds under the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education

(FAPE). 20 U.S.C.A. § 1412. FAPE includes special education and related services. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public school district. N.J.A.C. 6A:14-1.1(d).

The Board will satisfy the requirement that a child with disabilities receive FAPE by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). In determining where to provide educational programming, it is clear that a school district must be guided by the strong statutory preference for educating children in the “least restrictive environment.” 20 U.S.C.A. § 1412(a)(5) mandates that

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

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school setting as least restrictive, to enrollment in a residential private school as most restrictive. 34 C.F.R. § 300.115 (2015); N.J.A.C. 6A:14-4.3. Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3) (2015); N.J.A.C. 6A:14-4.2; Oberti v. Clementon Bd. of Educ., 789 F. Supp. 1322 (D.N.J. 1992). Here, the District’s decision to change J.G.’s school location to JPC is consistent with its obligation to educate him in the least restrictive environment. The uncontroverted testimony reflects that all components of his IEP can be delivered in J.G.’s neighborhood school. As the Oberti court stated, “[t]he point of the IDEA is to bring children with disabilities back into the community to which they belong.” Id. at 1326 n.7.

A genuine concern for J.G.’s well-being resonated in his parents’ presentation on his behalf. Yet, by their own admission, they do not genuinely challenge the

appropriateness of the JPC program. Rather, they are simply reluctant to change a school location that they view as comfortable for their son. While their reservations about such a change are understandable, they have presented an insufficient legal basis upon which to direct the school district to maintain J.G.'s program at WPC. Case law recognizes that "[w]hat the [IDEA] guarantees is an 'appropriate placement' not one that provides everything that might be thought desirable by loving parents." Walczak v Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998). Indeed, "meaningful parental participation does not require deferral to parent choice." S.K. ex. rel. N.K. v Parsippany-Troy Hills Bd. of Educ., 2008 U.S. Dist. LEXIS 80649, at *34 (D.N.J. October 9, 2008).² Accordingly, I **CONCLUDE** that the District's placement of J.G. at JPC meets the requirements of the IDEA; affords J.G. FAPE as that term is defined by law; and constitutes the appropriate placement in the least restrictive environment.

For the same reason, I **CONCLUDE** that the OT services proposed by the April 2015 IEP likewise deliver FAPE to J.G. His parents have expressed a preference for a higher level of OT services, but have done so without presenting the expert evidence needed to convincingly rebut the opinion of the school district professional responsible for charting J.G.'s therapeutic course. The parents' view of their child's best interest is valuable, and for this reason the law makes them an integral part of the IEP team. But the standard for determining whether FAPE has been delivered is whether the program was "reasonably calculated to enable the child to receive educational benefits." Rowley, supra, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. This is a determination that can be made by this tribunal only based upon the input and advice of professionals with expertise specific to the area of educational programming in contention. As recommended by Vesper, I **CONCLUDE** that, moving forward, OT services for J.G. should be reduced in stages, as set forth in the April 2015 IEP. Upon J.G.'s transfer to JPC, OT should be reduced to once weekly sessions for four months; thereafter reduced to consultation three times per year.³

² Indeed, where a child requires a specialized program a district may send that child elsewhere than his neighborhood school. Lebron v N. Penn Sch. Dist., 769 F. Supp. 2d 788 (E.D. Pa 2011). The Board argues persuasively that conversely, a district retains the discretion to return a child to his home school when that specialized programming is no longer needed.

³ The four-month time period is derived from the September through December timeframe in the IEP. While I am aware that J.G. has received OT services pending this decision that exceeded those originally

ORDER

Based on the foregoing, the petition is **DISMISSED**. It is **ORDERED** that the April 2015 IEP be implemented as soon as practicable, and that J.G. be transitioned to his program at JPC. For the first four months after that transition, J.G. will receive the once weekly OT sessions described in that IEP; thereafter OT will be converted to the consultative model likewise described in the IEP.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) 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 (2015).

October 23, 2015

DATE

ELLEN S. BASS, ALJ

proposed by the IEP, based on Vesper's testimony, I **CONCLUDE** that J.G. needs this level of services to successfully transition to his new school.

APPENDIX

Witnesses

For Petitioners:

N.L.

Q.G.

For Respondent:

Patricia Vesper

Exhibits

Joint Exhibits:

J-1 January 2014 IEP

J-2 April 2014 IEP

J-3 Consent to Amend

J-4 April 2015 IEP

For Petitioners:

None

For Respondent:

R-1 through R-14 Not admitted

R-15 Progress summary

R-16 through R-19 Not admitted

R-20 Progress summary

R-21 through R-25 Not admitted

R-26 Resume

R-27 Progress summary