

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 11104-18

AGENCY DKT. NO. 2019-28437

E.M. AND J.M. ON BEHALF OF A.M.,

Petitioners,

v.

NORTHERN VALLEY REGIONAL BOARD OF EDUCATION,

Respondent.

E.M. and **J.M.**, pro se

Cherie Adams, Esq., for respondent (Adams, Gutierrez and Lattiboudere,
attorneys)

Record Closed: April 22, 2019

Decided: May 14, 2019

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

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415, E.M. and J.M. have requested a due-process hearing on behalf of their daughter, A.M., who is classified as eligible for special education and related services. They contend that the Northern Valley Regional Board of Education (the Board), through its child study team (CST), failed to offer their daughter an individualized education program (IEP) that delivered a free and appropriate public education (FAPE) for the 2018–2019 school year. They have unilaterally placed A.M. at the New York

Institute of Technology, Vocational Independence Program (NYIT-VIP), and seek reimbursement for their expenses there.

PROCEDURAL HISTORY

The request for due process was received by the Office of Special Education Programs on July 3, 2018. The contested case was transmitted to the Office of Administrative Law (OAL) on August 2, 2018.

Two amended petitions were filed, the first to update the pleading to reflect a unilateral placement by the parents, and the second to correct an error in the name of the program recommended by the CST. Additionally, pending the hearing, the parents made a request for an independent neuropsychological evaluation. The Board filed an amended answer and counterclaim on February 21, 2019, challenging the parents' right to this evaluation, and alleging that all testing by the district was appropriate and up-to-date. On the first day of hearing I indicated that although the independent evaluation issue was beyond the scope of the due-process petition, I would rule on this additional issue in the spirit of efficiency.

The hearing was scheduled for dates in February 2018, but those dates were adjourned at the request of the parties, who wished to engage in settlement discussions. These discussions proved unsuccessful, and the hearing was conducted on March 15, and 22, 2019. Written summations were received on a final hearing date of April 22, 2019, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

This petition for due process concerns A.M., a nineteen-year-old young woman who completed twelfth grade, but who all agree is eligible for continued services to assist in her transition to post-secondary academic or vocational settings. A.M. was referred to the CST in May 2008 and found eligible for special education and related services under the category Other Health Impaired. She has been diagnosed with

attention deficit hyperactivity disorder, depression, and anxiety. During eleventh grade she received instruction in a self-contained classroom, with mainstreaming opportunities in physical education, health, and elective subjects. A similar program continued into the twelfth grade. A.M. was reevaluated in 2017, when she was in the eleventh grade. Psychological testing revealed that she has a full-scale intelligence quotient (IQ) of 75, which places her in the borderline range. Educational testing, also completed during the eleventh-grade year, recommended that A.M. receive support services in a post-secondary environment. I heard no facts that would lead me to determine that the reevaluation done in 2017 was inappropriate or inadequate, and I **FIND** that A.M. was comprehensively evaluated by the district.

IEP documents reveal that the parties began to anticipate A.M.'s post-secondary needs at least as early as eleventh grade. Her IEP discussed her desire to attend community college and noted her interests relative to vocational training. Per the IEP, she would participate in a technology and careers class to develop post-secondary goals related to training, education, and employment. The IEP recommended that A.M. register with the Division of Vocational Rehabilitation Services (DVRS).

On April 6, 2018, the parties met as an IEP Team to discuss post-secondary programming for A.M. Her case manager, Laura Robinson, attended that meeting. A.M.'s class was to graduate in June 2018, and she had met the academic requirements for graduation. The CST recommended A.M.'s transition to the district's Summit Academy Program (Summit) for eighteen-to-twenty-one-year-old students. Both A.M. and her parents expressed hesitation about the program, indicating that they felt that A.M. needed a change, or "fresh start," in a setting not affiliated with the public-school district. The parties discussed whether A.M. would receive her diploma from the high school if she chose to attend an alternative out-of-district program. It was explained that students who continue at Summit walk at graduation with their peers, but receive a certificate pending completion of their educational programming in the district. Conversely, A.M. could choose to leave the district and receive a diploma with her peers.

An IEP was proposed that would change A.M.'s classification to Multiply Disabled (MD) and place her at Summit for her thirteenth year of education. She related that A.M. and her parents did not sign the April 2018 IEP, and the document was left open to afford fifteen days' notice. Robinson felt confident that transition options were fully and adequately explained to the family. A.M. toured Summit on May 16, 2018. In Robinson's view, the April 2018 IEP offered an appropriate program for A.M. in the least-restrictive environment.

Jessica Amaral is a teacher at Summit, and she explained the components and philosophy of her program in greater depth. Summit is an in-district MD program for eighteen-to-twenty-one-year-old students that is designed to foster independence and assist in their successful integration into the greater community. The level of supervision is high, with a one-student to five-adult ratio. Program components focus on daily-living skills; interpersonal skills; self-determination; functional academics; and employment readiness. The program is highly individualized and would have included opportunities for A.M. to explore academics at Bergen Community College, as well as vocational training in New York via programs offered at the Board of Cooperative and Educational Services (BOCES).

Amaral described a typical week in the program. Mondays are spent budgeting for food shopping, and shopping in the community. Wednesdays are fitness days; Fridays are spent taking trips. Time is spent engaged in current event discussions and social-skills training. A book club offers the opportunity to read and discuss a shared book, which is modified based on student need and ability. Amaral gave the example of Tuesdays with Morrie, which she noted offered an opportunity to discuss empathy and other social-skills issues with the students. The students run a coffee business via which they learn to exchange money, purchase supplies, do financial budgeting, and engage with customers. Course work during the week emphasizes functional academics to include banking, writing checks, paying bills on-line, financial budgeting, and understanding sales tax. Trips into the community include but are not limited to restaurants, movies, the mall, the police station, the firehouse, banks, doctors' offices,

and local businesses like craft stores and bakeries. All these activities encourage functional independence.

Career training is emphasized in the program. Staff work with students to target potential interests and secure a job placement geared to those interests. Students are also encouraged to sample a variety of job possibilities, to better hone in on their true talents and interests. They attend their field placements four times a week. Attendance at Bergen County College can lead to an associate's degree; BOCES is a certificate program. Job placements take place in either the morning or the afternoon. Summit provides bussing, and a job coach who accompanies the student. While some placements begin as unpaid internships, others are paid positions. A.M. has an interest in technology; Amaral noted that graphic-design, website-design, and internet-technology job placements have been made available to students in the past and would be available to her.

Communication with families is ongoing. Parents are updated via regular emails, receive a formal monthly update, and are invited to periodic night meetings. Amaral met A.M. and her parents when they toured Summit in May 2018. She stressed that she made every effort to fully explain the program and answer any questions. Amaral let the family know about the options of attending BOCES and Bergen Community College.

Sandra Blumenreich was admitted at the hearing as an expert in special education transition services. According to Blumenreich, transition planning should be "person centered," and focus on individual skills and interests. She reviewed A.M.'s records and interviewed her. Based on the input she received, Blumenreich opined that "[A.M.] is most successful in a highly structured program, that enables her to be independent within the framework of the program." Blumenreich toured Summit on February 11, 2019, and NYIT-VIP on February 5, 2019, and prepared a chart comparing the two programs. Prior to her observations Blumenreich purposefully received little to no information about the programs, so that her observation would be entirely unbiased.

Blumenreich visited Summit on a Monday from 8:30 to 10:30 a.m. She described the facility as “lovely,” and she met with Summit teachers, who accompanied her on her observation. Blumenreich observed the students engaged in the development of a budget for shopping. They then broke out for an activity period that included puzzle making and engaging in other games. Blumenreich was plainly unimpressed by these activities, and felt they were not differentiated based on ability, or educationally productive. When asked if she felt she had enough time to make a thorough observation, Blumenreich admitted she did not. While the implication was that this was the school district’s fault, Barbara Battaglia, Director of Special Services, made it clear that numerous time slots were offered. And Blumenreich admitted she did not ask to come again so that she could observe the programs of greater interest to her, such as academics.

Blumenreich urged that there was no scaffolding based on ability at Summit, but also admitted in both her report and her testimony that she had insufficient information to opine about the program, stating, “no professional opinion can be given as to the appropriateness of [academic programming] and how [it is] delivered to a diverse group with various intellects and years in the program.” She urged that certain key components of an appropriate program were missing, to include banking skills and transportation skills. Blumenreich stated, “I am not able to give a professional opinion on how the Summit program would provide [A.M.] with growth and independence” in such areas as food and nutrition, sex education, technology-career options, health, financial planning, and social and psychological issues.

Amaral replied that Blumenreich based any criticisms of the Summit program on less than adequate information. It was clear to me and I **FIND** that Summit would provide exactly what Blumenreich herself recommended, that is, a highly structured program that fosters independence. Relative to the shopping exercise, Amaral stressed that this is an established routine, and most students can navigate it independently. They are thoughtfully paired to do their budget work; each week the shopping list changes, and students must research the store website to compare costs, brands, and

sizes of items to work within their budget. They then go to the store for an authentic shopping experience. The list is thoughtfully assigned and created as well; it varies in complexity based on student ability and need. Health and nutrition is discussed and is part of the curriculum, although that was not the objective of the lesson Blumenreich observed. Instruction is separately provided on this topic; sessions are conducted with a nutritionist; the students make a healthy lunch as a group; and the students work-out with a personal trainer once per week.

Blumenreich urged that the program would not afford A.M. an opportunity to integrate with non-disabled peers, but Amaral replied that these opportunities are plentiful when her students go out into the community to work, or on trips, or if they choose to attend Bergen Community College or BOCES. Blumenreich felt there was insufficient attention paid to self-sufficiency in transportation at Summit. But Amaral related that because of where they are located, public transportation options are a bit limited. Summit does instruct students in accessing public transportation, but also emphasizes the safe use of Uber and Lyft, as these modes of transportation are more useful to the Summit student body due to their geographical location.

Amaral took exception as well to Blumenreich's contention that the program lacked any emphasis on banking or financial skills. Amaral urged that they covered all aspects of personal finance, including but not limited to banking, using ATMs, check writing, use of a debit/credit card, reconciling and maintaining a checking-account statement, restaurant skills, and budgeting. Blumenreich asserted that students were instructed using a sample check that did not resemble a real check. Amaral shared a copy of the check shown to Blumenreich, noting that it resembled a real check. Upon examining it, I agree.

Blumenreich also spent about two hours at NYIT-VIP, where she observed a transportation class. The program is in Old Westbury, New York, and includes residential and classroom campuses. Students use a shuttle bus to travel between the two locations. They maintain a budget for dining halls on both campuses. NYIT-VIP emphasizes executive functioning and activities of daily living, as well as interpersonal,

employment, and educational skills. Students can pursue post-secondary education or go directly to employment. Classes are small, with an 8/1 student/staff ratio. Blumenreich observed a travel-training class; students explained that they were learning to read train schedules and were excited about a trip to Grand Central Station.

Blumenreich urged that NYIT-VIP offered much more than Summit. But Amaral persuasively demonstrated that the two programs are quite comparable; there is little NYIT-VIP offers that Summit does not. Amaral's testimony was clear, concise, professional, and reflected a genuine passion for her students and her program. She was quite credible. And when asked if Amaral's testimony was accurate, Blumenreich admitted with candor that she could not say one way or the other. I **FIND** that the two programs are comparable.

Both are three-year programs that students attend for as long as is appropriate to their needs. Blumenreich opined that Summit's curriculum is static, but Amaral made it plain that the curriculum grows and evolves with each individual student. Social-skills opportunities are more expansive than Blumenreich realized, as well. There are scheduled social-skills groups, and students work with social workers and speech therapists. The trips into the community afford additional time to work on social interactions in natural settings.

Life-skills strategies are emphasized in both programs. Students have access to computers and technology in both programs. Both allow students to explore employment. Both teach nutrition. Both explore human sexuality; at Summit speakers meet with students via a Planned Parenthood grant. Civics classes and discussions of current events take place at both programs. Office skills are offered at both programs, at Summit via job placements. NYIT-VIP has a retail program; the Summit coffee shop was discussed above. While at NYIT-VIP students live on campus, transition to independent living options are explored at Summit. Battaglia visited the New York program and not only confirmed that it was similar in content to the program offered in-district, she felt that A.M. would have had greater exposure to technology and college-level courses at Summit.

E.M. called Battaglia as a witness; the thrust of his questioning was to emphasize that he received insufficient information to make an informed decision about Summit on his daughter's behalf. E.M. felt this way even though A.M. toured Summit in May 2018 and had visited the BOCES program. Battaglia indicated that documentation was given early on to E.M., to include a copy of the curriculum; she later corrected herself and agreed that this information was shared only after litigation was filed. Likewise, E.M. emphasized in his own testimony that he felt school personnel were less than forthcoming about Summit.

E.M. urged that historically, he was unsure that the district had offered optimal programming to his daughter; thus, much like her, he wanted a change. E.M.'s genuine concern for his daughter resonated in his testimony. But he offered no concrete evidence that Summit was programmatically different than NYIT-VIP. Information that E.M. shared from less than fully satisfied parents of Summit participants was of little assistance, as it was uncorroborated hearsay. E.M. felt that the curriculum at Summit was beneath his daughter, and that the goals and objectives in her IEP so reflected. He urged that generally the IEP goals were insufficiently individualized. But school personnel made it clear that the program was intended to evolve in order to meet A.M.'s unique needs. And the April 2018 IEP clearly stated that the program proposed for A.M. would include functional academics, internships, and structured learning experiences.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

FAPE

As a recipient of federal funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to FAPE. 20 U.S.C. § 1412. FAPE includes special education and related services. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district.

N.J.A.C. 6A:14-1.1(d). The Board will satisfy the requirement that A.M. receive FAPE by providing “an educational program reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances.” Andrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335, 352 (2017).

While under the holding in Andrew F. FAPE clearly requires something more than de minimis educational progress, case law has long recognized that “[w]hat the [IDEA] guarantees is an ‘appropriate’ education, ‘not one that provides everything that might be thought desirable by loving parents.’” Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (citation omitted). Indeed, “meaningful participation [in the IEP process] does not require deferral to parent choice.” S.K. ex rel. N.K. v. Parsippany-Troy Hills Bd. of Educ., 2008 U.S. Dist. LEXIS 80616, at *34–35 (D.N.J. October 9, 2008) (citation omitted). Nor does the IDEA require that the Board maximize A.M.’s potential or provide her the best education possible. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995).

I **CONCLUDE** that the 2018–2019 IEP offered FAPE to A.M. N.J.A.C. 6A:14-3.7(e)(12)(i) requires that IEPs for students age sixteen and older include a plan for transition services that “shall consist of a coordinated set of activities for a student with a disability that is designed within a results-oriented process, that is focused on improving the academic and functional achievement of the student with a disability to facilitate the student’s movement from school to post-school activities” The IEP at issue here did so. And Summit offered A.M. the transitional components that both school personnel and her own expert urged she needed.

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

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or

severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3) (2018); see also N.J.A.C. 6A:14-4.2; Oberti v. Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993). The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115 (2018); N.J.A.C. 6A:14-4.3. Here, a placement within A.M.’s own school district, that allows her to interact within the mainstream of her own local community, is consistent with the concept of least-restrictive environment. An out-of-state residential school is not.

Parents who unilaterally withdraw their child from public school and place her in a private school without consent from the school district “do so at their own financial risk.” Sch. Comm. of Burlington v. Mass. Dep’t of Educ., 471 U.S. 359, 374 (1985). They may be entitled to reimbursement for the costs of their unilateral private placement only if a court finds that the proposed IEP was inappropriate and that the private placement was appropriate under the IDEA. 20 U.S.C. § 1412(a)(10)(C)(ii); N.J.A.C. 6A:14-2.10(b). It is well established that the appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Rather, the pertinent inquiry is whether the district’s IEP offered FAPE and the opportunity for meaningful educational benefit within the least-restrictive environment. Having concluded that the district offered FAPE to A.M. in the least-restrictive environment, it is unnecessary that I determine whether NYIT-VIP is an appropriate program for A.M.

Relative to the adequacy of the IEP’s goals and objectives, the court in G.N. & S.N. on behalf of J.N. v. Livingston Bd. of Educ., 2007 U.S. Dist. LEXIS 57081 (D.N.J. 2007), recognized that a failure to include appropriate goals and objectives violated the IDEA. But the court went on to hold that “to elevate this failing to a denial of a FAPE

would be elevating form over substance. The true question is whether the failure to include goals and objectives 1) resulted in the loss of educational opportunity, or 2) seriously infringed the parents' opportunity to participate in the process." G.N., 2007 U.S. LEXIS 57081 at *21–22; see also Coleman v. Pottstown Sch. Dist., 2014 U.S. App. LEXIS 17685 at *16 (3d. Cir. 2014). Here, the IEP goals could have been more individualized and comprehensive. But poorly written goals did not deprive A.M. of educational opportunity. Indeed, the testimony at hearing convinced me that opportunities to pursue her interest in technology were readily available to her at Summit, and that these opportunities were imbedded in the more general academic and transitional goals contained in her IEP. In considering the adequacy of an IEP it is critical, in my view, to focus on substance, and not form.

Petitioners assert that the district failed to properly involve them in the planning and development of the IEP. But I **CONCLUDE** that the district afforded the family an adequate opportunity to participate in planning for A.M.'s transition. All the IEPs shared with me reflected an attempt to begin to focus on A.M.'s interests and strengths so that she could plan for transition to adulthood. Visits to both the BOCES program and Summit were made available to A.M. and her parents. It is regrettable that district personnel could not persuade the family that its program was appropriate and did not share additional information prior to litigation that more fully fleshed out its offerings at Summit. But it is likewise regrettable that the family did not more fully research the program before deciding that A.M.'s needs were best met away from home. Both sides could have tried harder to communicate better. But notwithstanding the shortcomings in the collaboration between the parties, I **CONCLUDE** that their conversations about transition were consistent with law. See N.J.A.C. 6A:14-3.

Independent Evaluations

In accordance with N.J.A.C. 6A:14-2.5(c), parents may request an independent evaluation if there is disagreement with the initial evaluation or reevaluation provided by a district board of education. The district may request a due-process proceeding if it wishes to decline that request and demonstrate that its evaluations were appropriate.

Here, the district conducted appropriate testing in 2017, and was fully able to plan for and provide an offer of transition services to A.M. based on that testing. Having heard nothing that would lead me to believe that the district's evaluations were in any way inadequate, I **CONCLUDE** that the parents' request for an independent evaluation is properly denied.

ORDER

Based on the foregoing, the due-process petition filed on behalf of A.M. is **DISMISSED**. The district's cross-petition asking for an Order denying the request for an independent neuropsychological evaluation is **GRANTED**.

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.

May 14, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency

May 14, 2019

Date Mailed to Parties:
sej

APPENDIX

Witnesses

For Petitioners:

Sandra Blumenreich

E.M.

Barbara Battaglia

For Respondent:

Laura Robinson

Jessica Amaral

Exhibits

For Petitioners:

P-1 Resume of Sandra Blumenreich

P-2 Report of Sandra Blumenreich

P-3 Brochure of Sandra Blumenreich and record review

For Respondent:

R-1 Reevaluation planning meeting notice

R-2 Not admitted

R-3 Psychological Evaluation

R-4 Educational Evaluation

R-5 Acknowledgment Form

R-6 Eligibility meeting invitation

R-7 Eligibility Form

R-8 IEP dated April 21, 2017

R-9 IEP dated June 23, 2017

- R-10 Not admitted
- R-11 IEP meeting invitation
- R-12 IEP dated April 6, 2018
- R-13 Summary of Performance
- R-14 Letter to parents
- R-15 Summit House Brochure
- R-16 Summit House Curriculum
- R-17 List of prospective field trips
- R-18 BOCES program overview
- R-19 Workplace scenarios worksheet and PowerPoint
- R-20 Financial literacy worksheets
- R-21 Comments and worksheets
- R-22 Worksheets
- R-23 Letter
- R-24 Letter
- R-25 Not admitted
- R-26 Curriculum vitae of Barbara Battaglia
- R-27 Not admitted
- R-28 Amaral response
- R-29 Final transcript

Court's Exhibits:

- C-1 Letter from Cherie Adams dated March 22, 2019, together with reply