

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 12116-18

AGENCY DKT. NO. 2015 28360

P.N. ON BEHALF OF J.N.,

Petitioners,

v.

NEWARK BOARD OF EDUCATION,

Respondent.

V. R., advocate, for petitioners¹

Sabrina Styza, Esq., and **Arsen Zartarian**, Esq., for respondent

Record Closed: July 11, 2019

Decided: August 29, 2019

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner P.N. (petitioner or P.N.) on behalf of her son J.N. requested a due-process hearing seeking an out-of-district placement, extended school year, compensatory education, a learning disabilities teacher consultant, a change in his classification to “multiply disabled,” and an aide that petitioner will help select. Petitioner alleges that the respondent, Newark Board of Education (respondent, Board or Newark), failed to comply with J.N.’s individualized educational program (IEP) and has failed to provide J.N. with a free and appropriate public education (FAPE). The Board asserts that

¹ V. R. is married to P.N. References to “J.N.’s parents” in the Decision, refer to P.N. and V. R.

it can provide, and has provided, FAPE in the least restrictive environment pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415 et seq.

PROCEDURAL HISTORY

The contested case was transmitted to the Office of Administrative Law (OAL), where it was received on August 23, 2018. After unsuccessful settlement discussions, the case was scheduled for hearing on January 11, 2019, and February 1, 2019, but adjourned at the request of the parties to allow petitioner time to apply to several high schools and attempt to resolve the matter. The hearing was conducted on June 10 and 11, 2019. The record closed on July 11, 2019.

FINDINGS OF FACT

General Background Facts

The following background facts are uncontroverted, and I **FIND**:

At the time of the hearing, J.N. was a fourteen-year-old eighth-grade student at the Dr. William H. Horton Elementary School (Horton School) in the Newark school district (the District). He is currently classified under “other health impaired” (OHI) and, at the time of the hearing, received support and services in the general-education setting, with pull-out support for Language Arts (ELA).

On March 20, 2018, an eligibility meeting was held with the child study team (CST) and petitioner. At the time, J.N. was in the seventh grade. At the meeting, it was agreed that J.N. would be eligible for special-education services under the category of OHI. (J-1.) He had been diagnosed with attention deficit hyperactivity disorder (ADHD) years earlier, and prior to March 2018 had received supports through a 504 Plan.

J.N.’s eligibility for special-education services was determined upon considering, at least in part, a psychological assessment conducted on or around March 14, 2018, and an educational assessment conducted on or around February 27, 2018. An IEP was

signed by the parties, including P.N., on March 20, 2018, wherein it was agreed that J.N. would remain in the general-education setting and receive 100 minutes of push-in resource services (RCI) for Math, and 100 minutes of pull-out resource services (RCO) for ELA on a daily basis by a special-education teacher. (J-2.) Behavioral interventions were also put in place to assist with organizational skills, completion of work, and following directives. J.N. was provided a personal one-to-one aide. It was also determined that an extended-school-year (ESY) program was not required, as J.N. did not present with concerns about regression beyond recoupment. According to the IEP, more restrictive options were considered and rejected because J.N. “has a baseline of academic skills that can be supported within a less restrictive environment.”

An IEP meeting was held on May 22, 2019, with the child study team to determine the next year’s programming. (J-3.) Petitioner did not attend the meeting. The proposed IEP developed at the time called for 100 minutes of RCO in ELA and 50 minutes of RCI in Math for the remainder of that school year (i.e., between May 23, 2019, and June 20, 2019). (J-3.) For the 2019–2020 school year, J.N. would remain in the general-education setting with RCI for both Math and ELA, for 40 minutes daily. An aide was to be assigned “to provide additional structure and support within the general education setting because [J.N.] . . . is easily distracted and require[s] prompting to become refocused, especially as he . . . [transitions] to high school as a freshman.” (J-3.) It was also determined by the child study team that J.N. did not require ESY services. His primary disability continued to be listed as OHI, with ADHD.

Testimony

Respondent’s Witnesses

Dr. Margaret O’Donoghue (O’Donoghue):

O’Donoghue is a special assistant in the Office of Special Education for the Newark School District. She is also the District’s 504 coordinator. She supervises child study teams at the District’s high schools and provides support for parents, students and the District in addressing special-education needs.

At the Horton School, O'Donoghue met with the 504 coordinator and P.N. concerning J.N., and she attended the March 20, 2018, eligibility and IEP meetings as the 504 coordinator. At the March 2018 eligibility meeting, where J.N.'s psychological and educational evaluations were discussed, it was determined that J.N. qualified for special-education services, mostly due to his ADHD, and that he would be eligible under the condition of OHI. They discussed J.N.'s struggles in ELA and implementing a pull-out program. Math was considered to be more of a strength, and it was determined that in-class support would be provided. The participants discussed guiding J.N. towards more independence, and they ultimately decided not to include an aide in the IEP.

O'Donoghue testified that the District high schools provide RCI, but not RCO. Aides are sometimes maintained at the start of the ninth grade to assist with transitioning into high school, but then usually phased out.

O'Donoghue participated in the May 22, 2019, IEP meeting. She testified that the proposed forty minutes of resource support for Math and ELA, a reduction from the 100 minutes received in the 2018–2019 school year, is appropriate in light of the progress made by J.N., as demonstrated by his assessments, grades, and input from his teachers. When J.N. was classified, an abundance of services was provided, and he is now almost at grade level. Continuing with RCO and RCI for 100 minutes a day would no longer be needed based on his demonstrated progress.

Dimitry Doirin (Doirin):

Doirin is a special-education teacher who provided J.N. with RCI and RCO in eighth grade, beginning in January 2019. He provided J.N. with 100 minutes (i.e., two periods) of RCI in Math and RCO in ELA every day, with the exception of four days during State testing week because he was asked to assist with the testing of other classified students.

Doirin testified that he uses diagnostic tests every semester to assess progress in ELA, including reading comprehension. The Reading Inventory (RI) assessments, which

test vocabulary and comprehension, were taken on September 11, 2018, December 5, 2018, and March 11, 2019, to track J.N.'s progress. (R-1.) He scored an 843 on the RI on September 11, and 933 on December 5. On March 11, 2019, he scored 972. While eighth-grade students should score 1010 to be considered proficient and high-school-ready, J.N.'s most recent score of 972 comes very close. Doirin testified that it is rare to see a student make such significant progress in such a short period of time as J.N. did. He stressed that J.N. is making substantial progress in ELA, and that he is ready to move on to ninth-grade ELA.

For Math, Doirin typically works with J.N. in a small group, where he collaborates with the other classroom teacher. J.N.'s progress in Math is tested every semester using i-Ready, a diagnostic test administered in the classroom. J.N. was performing at a seventh-grade level according to the assessment conducted in December 2018. The test, in his opinion, does not "tell the whole story." While J.N. has made progress in numbers and operations, other skills are harder for him due to his difficulty with organization. J.N.'s math skills improved in part because he is now better able to understand word problems in Math as a result of the progress he has made in reading comprehension since January 2019. It is Doirin's opinion that J.N. will be prepared for ninth-grade Math with RCI in the classroom.

Florence Igbinovia (Igbinovia):

Igbinovia is a learning disabilities teacher consultant with the District. She conducts assessments, including educational components of assessments, prepares IEPs, and works as a case manager. She served as J.N.'s case manager at the Horton School. She has observed him in the classroom during Math instruction and during pull-out in ELA, and speaks to his teacher and aide concerning his progress. She also attended a meeting with J.N.'s parents and the Horton School principal at the beginning of the year, and she addressed concerns that petitioner had earlier in the year.

Igbinovia participated in the May IEP meeting to address J.N.'s program for the 2019–2020 school year. After considering the progress J.N. made this year, the child study team determined that J.N. would receive forty minutes of in-class support for ELA

and forty minutes for Math in the ninth grade. The team determined that J.N. had made progress based on the data available to them. In his reading assessment, J.N. improved by about 129 points, and his report card for the year reflected that he was making good progress. (J-6.) It was also determined that by providing push-in, as opposed to pull-out, support, his flow of learning in the classroom would not be disturbed. The child study team also discussed providing J.N. with a shared aide to help him transition into the high school. His continued need for the aide would be revisited during the school year.

Igbinovia testified that prior to Doirin being assigned to J.N., Ms. Washington provided support to J.N. from September 2018 to January 2019, including 100 minutes daily of ELA RCO and 100 minutes of Math RCI. Also, while the proposed IEP calls for 50, not 100, minutes of Math RCI for the remainder of the 2018–2019 school year, Igbinovia testified that the District was providing the full 100 minutes through the end of the school year. Igbinovia also explained that while middle school schedules classes in 50-minute blocks, high-school classes are scheduled in 40-minute blocks, which also explains why the District proposed the reduction to 40 minutes of push-in support.

Karisa DeSantis (DeSantis):

DeSantis is the Horton School principal. Prior to the start of the 2018–2019 school year, DeSantis was under the impression that J.N. might transfer out of the Horton School. In September 2018, when she became aware that J.N. was in fact returning to the school for eighth grade, staffing was not in place to provide him with the 100 minutes of ELA and Math provided for in his IEP. She testified that while they implemented J.N.'s IEP as best they could at the start of the school year, they were unable to provide the full 100 minutes of each subject in September and October, until DeSantis was able to rearrange schedules, reclassify a position, and hire a new teacher. In September and October 2018, they were only able to provide J.N. with 50 of the 100 minutes of support in each subject, and they assigned him an aide.

Since October 2018, J.N. has received the 100 minutes daily for both subjects, with the exception of the few days during State testing week because the school had to utilize Doirin to provide support to other classified students during testing. DeSantis

testified that J.N. has been receiving, and will continue to receive, 100 minutes of ELA and Math through the end of the 2018–2019 school year. J.N. was placed in Eagle Academy for the 2019–2020 school year.

The RCI and RCO was initially provided by Ms. Washington, and later by Doirin, in response to J.N.’s parents’ request in or around October 2018. In January 2019, when DeSantis became aware that Ms. Washington had again started to work with J.N., they again accommodated the parents’ request and re-assigned Doirin to work with J.N.

DeSantis participated in at least two meetings with the parents to ensure that services were being provided and to address any complaints that they had. They also had multiple email exchanges concerning J.N. The parents requested that they receive all assignments at the beginning of each week so that J.N. would have ample time to complete his assignments, and this request was also accommodated.

DeSantis testified that J.N. made progress in both Math and ELA this year. J.N. made honor roll these past two quarters and his report card now has A’s and B’s.

While petitioner raised concerns about the stability of the classroom in the 2017–2018 school year, DeSantis testified that they did the best they could to address staffing changes and to facilitate J.N.’s IEP. J.N. was given an aide when it was not provided for in the IEP, the school accommodated the parents’ requests for particular aides, and the school promptly responded to petitioner’s concerns and requests for accommodations.

Petitioner’s Witnesses

Siddharth Sharma (Sharma):

Sharma has been J.N.’s Social Studies and ELA teacher since the seventh grade. He described J.N. as a “very bright kid.” Although his literacy score last year was in the 700’s, Sharma still considered J.N. to be in the top 25 percent of the class, with those performing at or above grade level. He testified that J.N. required redirection at times,

and that although his organizational skills were poor, his aide assisted him with that. He was given additional time on assignments and he took as much time as he required.

K.S.:

K.S. attends the Horton School with J.N. and has been a classmate of J.N.'s since fifth grade. K.S. testified as to his observations in the classroom, and specifically his personal observations that J.N. does not always receive the full 100 minutes of RCI and RCO.

Dr. Geneva Roberts (Roberts):

Roberts has been J.N.'s tutor for the past two years. She assists him with homework and provides personal counseling. She is a former District teacher and administrator. Roberts testified that J.N. needs extra help with reading comprehension, and that he can do very well with the right help. His reading comprehension "could be better" and he does "okay" in math. She agreed that J.N. has been making some progress in literacy over the past two years.

P.N.:

P.N. is J.N.'s mother. She has had concerns concerning J.N.'s ability to perform in school since kindergarten. He has had a 504 plan in place since the second grade.

In March 2018, when he was classified due to his ADHD and behavioral concerns, J.N. was behind in literacy. Last year, he had a certified literacy teacher from September through December, and then substitutes from January through the second week of April 2018.

P.N. was unhappy with Ms. Washington, the resource teacher assigned to J.N., who she believes never provided J.N. with pull-out support for ELA. P.N. reached out to DeSantis and the assistant superintendent regarding her concerns with Ms. Washington. A meeting took place in October and Doirin was pulled in. P.N. later learned that J.N.

was only getting 50 minutes of support for ELA and Math in the beginning of the year, and she was told that the school was addressing the issue.

P.N. testified that she was satisfied with the services provided by the District because she did see some improvement in J.N., especially in literacy; however, he was only receiving 50, instead of 100, minutes a day of support that he was entitled to receive. She agreed that DeSantis was responsive when P.N. would request meetings, and she responded to emails and concerns “the majority of the time.”

P.N. has been very engaged in J.N.’s education and spends a great deal of time at the Horton School meeting with teachers and administrators. She is requesting an out-of-district placement because she feels that she has to “fight” to get the services J.N. should be receiving, and she is concerned about the quality of education being offered at Eagle Academy, as reflected in the State test scores. J.N. deserves to have “the best of the best.”

Additional Findings of Fact

Based on my review of the testimonial and documentary evidence presented at the hearing, I **FIND** the following additional **FACTS**:

Since J.N. was classified in March 2018, the staff at the Horton School have been responsive to petitioner’s concerns and requests. At the request of J.N.’s parents, the school principal changed the special-education teachers assigned to J.N.; the parents and staff had numerous communications concerning J.N.’s progress and in response to petitioner’s concerns; and J.N. was provided with an aide even though this support was not included in his IEP. At the start of the 2018–2019 school year, despite their efforts, the Horton School did not have special-education teachers in place to provide J.N. with the 100 minutes of resource push-in services for Math and 100 minutes of pull-out resource services for ELA on a daily basis, as provided in the IEP. Due to this staffing shortage, J.N. was only provided with 50 minutes of Math RCI and 50 minutes of ELA RCO in September and October 2018, until a special-education teacher was secured. The full 100 minutes of RCI and RCO has been provided by the District at least up until

the day of the hearing, with the exception of four days during State testing week when Doirin was called to assist with other classified students during testing. This short break in services, however, is negligible, as it was only four days, and likely had no real impact on J.N.'s progress.

Based on the totality of information made available at the hearing, including test scores, J.N.'s grades, and the testimony of J.N.'s teachers and administrators familiar with J.N., J.N. did progress academically since the implementation of the March 2018 IEP. From September 2018 until March 2019, a period of only six months, J.N.'s Reading Inventory score went from 843 to 972, demonstrating significant progress in English reading and writing skills. His improvement in reading comprehension has also improved his ability to answer word problems in Math. The "i-Ready" Math assessment completed by J.N. in May 2019 indicated that he was functioning on a seventh-grade level, which, while not his current eighth-grade level, was still an improvement from the prior year, and he is expected to perform at a ninth-grade level in Math for the 2019–2020 school year, as testified to by Doirin. J.N.'s grades in Math also improved throughout the 2018–2019 academic year, as reflected in his report card. His teachers also testified to his academic progress and the significant improvements made even since January of this year. In light of the strides made by J.N. during the 2018–2019 school year, the child study team determined in May 2019 that for the 2019–2020 school year, J.N. should remain in the general-education setting but with 40 minutes daily of RCI for both Math and ELA, to accommodate the new high-school setting. A shared aide will also be provided at the start of ninth grade to assist with J.N.'s transition into high school.

Finally, petitioner provided no evidence to support her assertion, as it appears in the Petition, that J.N. was being improperly disciplined, that his classification of OHI/ADHD was inappropriate and should be changed, and that he is or was entitled to ESY. Further, petitioner offered insufficient evidence to support her claim that J.N. was in an "unsafe classroom environment not conducive to learning" and that his teachers were not properly certified and failed to provide J.W. with an appropriate education.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Petitioner asserts that the District has failed to provide J.N. with FAPE. Petitioner alleges that the District has not complied with the terms of J.N.'s IEP; is recommending and taking disciplinary action against J.N. instead of accommodating J.N.'s needs; placed J.N. in unsafe classrooms that are not conducive to learning; failed to provide certified literacy and math teachers for the past four years; should have provided ESQ; and has not complied with the push-in and pull-out services as required in the IEP. Petitioner argues that J.N.'s appropriate placement is an out-of-district placement. While the Petitioner also seeks compensatory education, ESY, a learning disabilities consultant five hours per week for the next four years; and a change in his classification, Petitioner offered no evidence that supports these requests. Petitioner asserts that the District is a failing one and that the Horton School is a failing school.

Respondent asserts that since starting his program on March 20, 2018, J.N. has made significant progress, and as such should remain in the same program, not an overly restrictive out-of-district placement. The Board maintains that the school district has complied with the IDEA when it offered a continued placement in the general-education setting with the May 2019 proposed IEP.

As a recipient of federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities will receive 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 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 (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. § 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 (2019); N.J.A.C. 6A:14-4.3. At the hearing, petitioner did not assert that the program provided in the March 2018 IEP was not appropriate, and the petitioner did agree with push-in resource Math support and pull-out resource support in ELA. Doirin, who was specifically requested by petitioner as J.N.'s special-education teacher, confirmed at the hearing that J.N. has progressed significantly in both ELA and Math since the beginning of the year and that J.N. was in the appropriate program at the Horton School. Accordingly, I **CONCLUDE** that the March 2018 IEP meets the requirements of the IDEA; afforded J.N. FAPE; and was consistent with the District's obligation to educate J.N. in the least restrictive environment.

While the District did afford J.N. FAPE pursuant to the March 2018 IEP, despite the District's efforts it failed to fully comply with the terms of the IEP by only providing J.N. with 50 of the 100 minutes daily of push-in support for Math and only 50 of the 100 minutes of pull-out support for ELA in September and October of 2018. This is confirmed by the school principal's testimony. I therefore **CONCLUDE** that the District has not fully complied with the terms of J.N.'s March 2018 IEP and that petitioner is entitled to compensatory education to compensate for the resource support in Math and ELA that J.N. did not receive in September and October of 2018. I further **CONCLUDE** that compensatory education should be provided in the form of tutoring in Math and ELA for the hours of support not received during that two-month period.

With respect to the May 2019 proposed IEP that addresses J.N.'s placement and supports for the 2019–2020 school year, the District has proposed maintaining push-in

services for both Math and ELA for the 40-minute class periods at a District high school. Petitioner does not dispute that her son has made some progress this year, but argues that he can do better and that J.N. would be able to reach his potential in an out-of-district placement, not in the Newark School District, which petitioner described, with no evidentiary support, as a failing district.

Case law recognizes 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. 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).

J.N. has always been educated in the general-education setting, with some pull-out support in ELA only since March 2018. The overwhelming evidence presented at the hearing demonstrates the significant progress J.N. has made in ELA and Math in the eighth grade as a result of the intensive supports received in those areas. His own special-education teacher confirmed that as a result of J.N.’s notable progress, he will be prepared for ninth-grade math and ELA with the push-in support proposed. Supports are not being abruptly stopped here but adjusted to accommodate J.N.’s growth and the new high school environment. J.N. will continue to receive support in these areas—with 40 minutes of push-in resource support in Math and ELA, and an aide will assist him with his organization and transition. P.N.’s concern for her son’s ability to continue to progress is understandable. She only wants what is best for her son. However, petitioner has provided an insufficient legal basis upon which to direct the District to provide J.N. with an out-of-district placement or other services not already provided in the May 2019 proposed IEP. P.N. presented insufficient evidence to convincingly rebut the opinions of the District’s professionals, including Doirin, who have worked with J.N., have witnessed his development this year, are familiar with his ability, and have testified convincingly that J.N. made considerable academic progress in the eighth grade to prepare him to continue with the program provided in the May 2019 proposed IEP.

Given J.N.'s academic record and the progress made since he was classified in March 2018, an out-of-district placement would be overly restrictive and inappropriate. Accordingly, I **CONCLUDE** that the program provided in the May 2019 proposed IEP, whereby J.N. would receive, in part, push-in resource support for 40 minutes in ELA and Math, affords J.N. FAPE, as that term is defined by law; meets the requirements of the IDEA; and constitutes the appropriate placement in the least restrictive environment. The IDEA encourages maintaining children, when feasible, in their neighborhood schools, and the uncontroverted testimony here reflects that all components of J.N.'s IEP can be delivered in his neighborhood high school.

The remaining claims asserted in the Petition will not be addressed here as petitioner has presented an insufficient legal basis upon which to require the District to change J.N.'s classification to multiply disabled, to pay for a learning disabilities teacher consultant for the next four years, to provide ESY, and to assign an aide selected by petitioner.

ORDER

Based on the foregoing, together with the record as whole, it is **ORDERED** as follows:

The request for compensatory education is **GRANTED** and it is **ORDERED** that the District provide J.N. with tutoring services in Math and ELA to compensate for those hours of push-in and pull-out resource services that the District was unable to provide J.N. in September and October of 2018. Petitioner's request for an out-of-district placement is **DENIED**, and all remaining claims of the petition for due process are **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019). 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.

August 29, 2019

DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency

8/29/19

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Petitioners:

Margaret O'Donoghue
Dimitry Doirin
Florence Igbinovia
Karisa DeSantis

For Respondent:

Siddharth Sharma
Sarah Chabak
K.S.
Generva Roberts
P.N.

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

J-1 2018 Eligibility Conference Report
J-2 March 20, 2018, IEP
J-3 May 22, 2019, Proposed IEP
J-4 Psychological Assessment, March 14, 2018
J-5 Educational Assessment Report, February 27, 2018
J-6 2018–2019 school year grades

For Petitioners:

P-1 Email exchanges between P.N. and School District
P-2 Video (For identification only)

For Respondent:

R-1 Reading Inventory Assessment

R-2 i-Ready Math Diagnostic Assessment