State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 16489-18

AGENCY DKT. NO. 2019-28913

M.M. AND M.K. ON BEHALF OF L.K.,

Petitioners,

v.

EDGEWATER BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 16792-18

AGENCY DKT. NO. 2019-28945

M.M. AND M.K. ON BEHALF OF L.K.,

Petitioners,

v.

EDGEWATER BOARD OF EDUCATION,

Respondent.

M.M. and **M.K.,** petitioners, pro se

Cherie Adams, Esq., for Edgewater Board of Education (Adams, Gutierrez & Lattiboudere, attorneys)

Record Closed: December 13, 2019 Decided: January 27, 2020

BEFORE **ANDREW M. BARON,** ALJ:

STATEMENT OF THE CASE

Petitioners, M.M.. and M.K. (the parents) on behalf of L.K., filed a Petition for Due Process against the Edgewater School District alleging Denial of FAPE under IDEA and Section 504 during the 2018-19 school year. In very general language, the pleadings seek ABA home based therapy beyond what L.K. already receives during a full day out of district placement, reimbursement and continuing payments for door to door transportation in lieu of the school bus offered by the district, or in the alternative permission for one of the parents to ride on the bus with L.K., and payment for a trained ABA aid to accompany L.K. to private after school and weekend extracurricular activities not offered by the district.

PROCEDURAL HISTORY

On or about October 12, 2018, the parents filed a Petition for Due Process against the District, seeking the relief identified above in the Statement of the Case. The parties agreed to mediate, which was unsuccessful. The matter was transmitted to the Office of Administrative Law on November 19, 2018 and a settlement conference was conducted on November 29, 2018. Again, the matter did not resolve. Thereafter, on December 6, 2018, a first conference call was held with the parties. The District filed its answer with defenses on January 15, 2019.

The first day of hearing was held on March 6, 2018, and the second day of testimony was conducted on May 24, 2019. Following receipt of transcripts, post hearing submissions were received on September 17, 2019. Petitioner submitted some post hearing documents and arguments in addition to their regular submission on June 7 and 10 respectively, to which District counsel objected. For purposes of this decision, the additional submissions were considered over the District's objection.

Oral argument was conducted on October 29, 2019, and supplemental argument was conducted on December 13, 2019.

DISCUSSION and TESTIMONY

Petitioner filed a process petition against the Edgewater School District In Count I, petitioner contends that L.K. was denied FAPE under IDEA and Section 504. The relief petitioners seek includes but is not limited to payment for an ABA accredited aide to accompany L.K. to private extracurricular activities, and for reimbursement/payment for private transportation petitioners provide each day for round trip transportation to the out of district Valley program.

Respondents contend that the due process petition should be dismissed, as the relief petitioners are seeking is outside the scope of that the which district is required to provide under IDEA, FAPE and Section 504 of the Rehabilitation Act.

Petitioners M.M. and M.K. are the parents of L.K. who is a seven-year-old boy on the autism spectrum. Under an IEP consented to by petitioners, the district agreed to an all day out of district placement for L.K. at the Valley program. Both parents testified during the hearing, and presented themselves as loving parents, dedicated to pursuing what they believed was the maximum level of services necessary for L.K. to continue to develop.

It is not disputed that no experts or witnesses other than themselves were presented by petitioners in support of the relief they sought in the due process complaint.

Testifying for the district were Jacqueline Adler, a learning disabilities consultant, and Brian Brutzman, an expert and board-certified behavioral analyst, with significant experience working with students on the autism spectrum. Both Ms. Adler and Mr. Brutzman were credible in all aspects of their testimony.

Based on Mr. Brutzman's examination and review, he determined that L.K. needed an all day out of district ABA program. He reached this conclusion after interviewing L.K.'s home-based therapist, the VGB-MAPP behavioral tool, and observation at the JCC program in which petitioners had placed J.K. But since the JCC was not keeping data on L.K. or offering him specific skill development, Mr. Brutzman concluded that was not an appropriate program for L.K. to continue. Among other things, through testing by the district child study team, it was determined that L.K. had difficulty with social skills, inability to respond tom certain stimuli, and difficulty following directions. L.K. also had speech challenges including difficulty with expressive, receptive and pragmatic language.

According to Jacqueline Adler, the district learning disability consultant, Valley was chosen by petitioners over at least two other qualified programs that were much closer to L.K.'s home. The IEP was signed off by petitioners in late June 2018, which was too late to start the Valley ESY program, so L.K. was permitted to continue at the JCC program over the summer of 2018, until he could start a new school year at Valley.

L.K.'s IEP also provides him with related services including occupational therapy, speech therapy, physical therapy and door to door transportation with a bus aide. The IEP does not mandate participation in extracurricular activities, as neither the district itself, nor Valley offer these types of programs other than an occasional class trip, for students in this age bracket. Simply put, there are no sports programs offered for six and seven-year-old students at either place.

Unfortunately, according to the district witnesses, for several weeks starting in September 2018, L.K only attended the Valley program for half a day, even though it was an all-day program. Petitioners testified that they did this so he could transition into his new surroundings, and so he could be home for ABA based therapy. As a result of his limited time in school, his learning and development was further delayed, and L.K. missed opportunities to participate in social skills training, physical education and community based instruction, all of which were part of the Valley program, due in part because petitioners would not sign off on these activities, and because they continued to pull him out of school early.

As of February 2018, district witnesses testified that L.K. had missed twenty-five (25) days of school and had fifteen (15) additional unexcused absences.

Although the district contracted with South Bergen Jointure to transport L.K. to and from Valley in accordance with his IEP, petitioners refused this mode of transportation. Both parents testified that due to a severe anxiety disorder, they strongly believed it was not in L.K.'s best interests to travel an hour each way with only a bus aide and driver. They candidly admitted they feared he would harm himself. A letter was provided by Dr. Fadden, who was treating L.K., but she later denied to school officials that she had diagnosed general anxiety disorder, nor had she stated that L.K. could not ride on a school bus.

In an effort to look into this issue further, the district offered to have L.K. undergo a psychiatric evaluation. This too was refused by petitioners who instead demanded that the district pay for a privately retained evaluation of their choice. There is no legal basis to comply with such a request, especially when the district is offering to do an evaluation for free. Apparently, petitioners were of the belief that such a report would be skewed in favor of the district but had no basis to support this view.

Out of continuing love and concern for L.K.'s safety, petitioners proposed a compromise which involved one of them riding on the bus with L.K., which would also allow them or someone to give him additional education during the ride. This was rejected by the district, due to insurance and other reasons. Mr. Brutzman also testified that it is highly unusual for a six-year-old to get instruction while being transported, and students of that age need some downtime while outside of school.

To this day, petitioners continue to do the transporting to and from school at their own expense. Petitioners were credible in their rationale for not putting L.K. on the bus, but the district did all that was required of it in this regard.

Once L.K. settled into a routine at Valley and was attending more regularly, Mr. Brutzman set out to determine whether he was making progress. He learned L.K. was being taught discrete trial skills. The school was also providing related services and parent training. He was left with the impression that L.K. was slowly progressing and doing well at Valley. He also indicated that the Valley program has staff who are credentialed and properly trained to address L.K.'s needs.

In response to petitioners' request for additional services specifically sports, not only does the Edgewater district nor Valley offer after school sports for this age group, but Mr. Brutzman was of the belief that L.K. didn't have the requisite skills to handle certain type of activities yet.

This was confirmed when the parents indicated they enrolled him in soccer and taekwondo locally, which he was unable to complete, but he was able to participate in gymnastics, with help.

Petitioners came across as credible witnesses, and as loving parents who want the best for their child. But at times, they also came across as wanting certain things for L.K. only on their terms, which does not necessarily coincide with what the district is required to provide under FAPE, IDFEA and Section 504 of the Rehabilitation Act. Of 1973. Starting with the rejection of two out of district placements closer to home, the rejection of the psychiatric evaluation unless privately done, and the demand for instruction on the bus, petitioners who are zealous and tireless advocates for L.K., seem at times to make decisions for him that don't necessarily take into account his level of progress and/or what he is able to tolerate, and which are beyond the scope of what the district is required to provide and pay for.

Prior to the submission of their brief, but post hearing, petitioners also submitted additional documentation which respondent's counsel points out was beyond the time allowed post hearing. Among other things, petitioners submitted out of state court cases and Federal law, emails from L.K.'s ABA and speech therapists. Over the district's objection that these documents were produced out of time, all of the petitioners' post

hearing exhibits were given consideration, albeit with less weight, relevancy and probative value for the reasons set forth more specifically below.

The BCBA who oversees L.K.'s school programs, indicates in a letter that L.K. has difficulty generalizing the skills he learns at school in the home and community environments. (P2). Petitioner argue that he requires additional services at home beyond the out of district environment to increase his generalization skills; that is, to demonstrate skills learned in one environment in a different environment.

It is noted however, that the author of the letter was not produced as a witness subject to cross-examination by respondent's counsel, and petitioners did not produce expert testimony on this subject. Therefore, while this item was considered over objection by the district, it had less weight and probative value than the documents presented by the district which were addressed through live testimony.

Next, petitioners present through (P-5), a 2013 memo from the U.S. Department of Education, which provides an overview of the obligations of public and elementary schools under Section 504 of the Rehabilitation Act of 1973, regarding separate or different athletic opportunities.

The relevant part of this memo cited by petitioners comes within Section IV wherein:

> when the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district's existing extracurricular athletic program, the school district should create additional opportunities for those students with disabilities that are separate or different from those offered to students without disabilities." In further support of this position, petitioners cite N.J.A.C. 6A;14-3.7 (e) which discusses how a district will ensure that a disabled student will participate with their nondisabled peers in extracurricular and non-academic activities. They suggest that this regulation requires the sending district to provide and pay for an ABA aide to accompany their son to gymnastics and other activities because it enables L.K. to productively participate in an activity with non-disabled peers.

Petitioners do not offer expert testimony in support of this contention, and if this regulation were construed in this way, it would be unduly burdensome for this or any other district to comply. Simply put, while petitioners love and devotion to their child is admirable, the regulation they cite is not construed or interpreted in the manner they represent.

Petitioners are not arguing that L.K. is being excluded from an existing program due to his disabilities. It is undisputed that due to the age of L.K. and his peers, no extracurricular activities are offered such as sports from this age group, including for students without disabilities. Instead, petitioners argue that the district should create additional opportunities for L.K. that are 'separate but different,", and/or reimburse the family or pay for an ABA aide, to accompany him to programs such as gymnastics outside of school that petitioners have chosen for him.

Just as I do not agree with petitioners' interpretation of the application of N.J.A.C. 6A 14-3.7, I also do not agree with their interpretation of the Department of Education memo, and find this request to be beyond the scope of the district's obligations under IDEA and FAPE, especially where no such program is offered to students such as teams or individual sports programs for students who are not disabled. There is no contention here that L.K. was denied access to a team or activity that was only offered to students who are not disabled, since no such program exists for students in this age group.

Next, petitioners present a scientific study (P11) that discusses how participation by students with intellectual and developmental disabilities in extracurricular activities is essential to obtaining a meaningful educational benefit. Again here, even accepting the information in the article, there is no expert testimony as it pertains to L.K. to suggest he would benefit, even if the district offered such programs to all students, which it does not. The same premise applies to the other articles referenced by petitioners written by Chung, Carter and Sisco, Wagner, Cadwallader Garza, and McDonnell and Hunt.

Petitioners next argue that the District failed to fulfill its obligations to L.K. under IDEA, FAPE and Section 504 of the Rehabilitation Act through the transportation mechanism offered to the family. More specifically, the out of district placement to which petitioners ultimately agreed, after rejecting two other placements significantly closer to home, is approximately one hour away from L.K.'s home.

In accordance with statutory and regulatory requirements, the district arranged free transportation on a bus with two other students, and an aide. Concerned for L.K.'s safety and welfare during the daily trips, petitioners sought and were denied permission to travel on the bus with L.K. They also sought instruction for L.K. while traveling. For insurance and other reasons, the request to accompany L.K. was denied. To this day, petitioners have transported L.K. to and from school on their own, and instead of the bus, seek reimbursement for making the daily trip.

In further support of their position, petitioners provided in (P-7) some daily status reports from L.K.'s classroom teacher that confirms he frequently shows signs of self-injurious behavior, including but not limited to excessive licking of hands and fingers. They also showed a short video on their laptop of the same behavior and confirmed that L.K. takes Zoloft and Sertraline to help with a chronic anxiety condition. Also offered as (P-7) is a letter from Charline Veytsman, L.K.'s speech and language pathologist which contends that the busing arrangement is not appropriate for L.K.'s health and well-being. Again, here, while the document is reviewed, it can only be given limited weight, since the author of the letter was not produced during the proceeding, leaving the district without an opportunity to cross-examine.

I reject respondent's argument that I should not consider these items, they have been reviewed, but I have given them less weight in my deliberations since a live witness did not testify for petitioners to explain the relevancy of the materials, not did petitioners, despite being advised during conference calls and earlier proceedings of the importance of an independent expert, present expert testimony on behalf of their demand for additional services.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). L.K. has been diagnosed with autism and classified as a preschool child with a disability.

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a free "appropriate public education." 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Each district board of education is responsible for providing a system of free, appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A "free appropriate public education" (FAPE) means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, 458 U.S. 176. Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A), (B).

In a due process hearing in New Jersey, the district bears the burden of proof under N.J.S.A. 18A:46-1.1 to demonstrate that it is providing a free, appropriate public

education in the least restrictive environment to a student whose family is pursuing a due process petition.

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(14); 20 U.S.C. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student's educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). Annually, or more often, if necessary, the IEP team shall meet to review and revise the IEP and determine placement. N.J.A.C. 6A:14-3.7(i). FAPE requires that the education offered to the child must be sufficient to "confer some educational benefit upon the handicapped child," but it does not require that the school district maximize the potential of disabled students commensurate with the opportunity provided to non-disabled students. Rowley, 458 U.S. at 200. Hence, a satisfactory IEP must provide "significant learning" and confer "meaningful benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577-78 (3d Cir. 2000).

The Supreme Court discussed Rowley in Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017), noting that Rowley did not "establish any one test for determining the adequacy of educational benefits" and concluding that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Id. at 996, 1001. Endrew F. warns against courts substituting their own notions of sound education policy for those of school authorities and notes that deference is based upon application of expertise and the exercise of judgment by those authorities. Id. at 1001. However, the school authorities are expected to offer "a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." Id. at 1002.

In Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 46 (1989), the New Jersey Supreme Court concluded that "in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined." Further, the New Jersey Supreme Court stated:

> As previously indicated, the purpose of the IEP is to guide teachers and to ensure that the child receives the necessary education. Without an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP. Furthermore, an IEP that is incapable of review denies parents the opportunity to help shape their child's education and hinders their ability to assure that their child will receive the education to which he or she is entitled.
>
> [Id. at 48-9. (citations omitted).]

In accordance with the IDEA, children with disabilities are to be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur 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. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to require that a disabled child be placed in the LRE that will provide the child with a "meaningful educational benefit." T.R., 205 F.3d at 578. Consideration is given to whether the student can be educated in a regular classroom with supplementary aids and services, a comparison of benefits provided in a regular education class versus a special education class, and the potentially beneficial or harmful effects which placement may

have on the student with disabilities or other students in the class. N.J.A.C. 6A:14-4.2(a)(8).

The District contends that it provided FAPE to L.K. in the least restrictive environment, by agreeing to an out of district all day approved program, with round trip transportation. Conversely, petitioners contend that the services provided were not sufficient to meet L.K.'s individualized needs outside of school. More specifically, the lack of extra-curricular activities together with the denial of petitioners' request to provide a behavioralist to accompany L.K. to private outside activities to control behavior and encourage participation did not provide L.K. with a FAPE. They make the same argument as to the district's unwillingness to provide education during L.K.'s almost one hour ride to school, and they seek reimbursement for privately transporting L.K. to the out of district school. They also seek additional ABA based therapy in the home.

The creation of an adequate IEP under the IDEA requires that a school district consider positive behavioral interventions where a student's behavior impedes his learning. See M.H. v. New York City Dept. of Education, 712 F. Supp. 2nd 125 (S.D.N.Y.) and A.C. ex rel. M.C. v. Bd. of Ed. Of Chappaqua School District, 553 F 3rd. 165, (2nd Cir. 2009) wherein an IEP was still deemed adequate even if no behavior management strategies were included. The sufficiency of chosen strategies for dealing with behavioral issues requires deference to the expertise of school officials. Grim v. Rhinebeck Cent. School Dist. 346 F3rd 377 (2nd Cir. 2003).

Petitioners cite several out of state decisions in support of their petition. In L.B. and J.B. o/b/o K.B. v. Nebo School District (U.S. District Ct. of Utah decided August 11, 2004, petitioners successfully sought reimbursement for home-based ABA services. However, there are at least two key distinction from this case and the Nebo case.

First, in Nebo, petitioners unilaterally placed their child in a private mainstream school. Here, Valley is an out of district placement that primarily addresses the needs of students like L.K.

Second, and perhaps more important, the petitioners in Nebo presented expert testimony on why the ABA home-based therapy should be a part of the student's plan. Here, while the testimony of L.K.'s parents, whose zealous advocacy for their child was given due consideration, they provided no witnesses or experts to explain why the district was not meeting its obligations under FAPE, IDEA and Section 504 of the Rehabilitation Act as it relates to the forms of relief they were seeking, specifically and ABA aide to go with L.K. to private recreation activities, and reimbursement for private transportation, after the district transportation was rejected.

Petitioners also rely on a Minnesota supreme Court case entitled Independent School District No. 12 v. Minnesota Dept. of Education cited only as A)*-1600, Decided October 7, 2010. Petitioner rely on this case for the premise that supplemental services such as an ABA aide are not specifically limited to the hours while a student is in school.

Again, however, this case can be distinguished, since it specifically states: "….. Section 300.320 (a)(4) requires that supplementary aids and services be provided to the maximum extent possible, and in accordance with what has been determined appropriate and necessary by the IEP team."

There is nothing in the IEP that indicates L.K. should have additional ABA services while participating in a private activity chosen for him by petitioners. Nor is there any indication that L.K. is being deprived of participation in an extra-curricular activity with his non-disabled peers, since Valley, nor the district itself offers any such programs for students of L.K.'s age.

Finally, the U.S. Department of Education Memo of January 13, 2013 (Exhibit 5), addresses equal opportunity for participation in existing extra-curricular activities. Nowhere does the memo say that a district that does not currently offer an extra curricular sports or activity program, (in this case due to the age of the students) must create one

to accommodate the needs of a special education student who is placed in an out of district program.

Based on the testimony of the witnesses, and the record of evidence presented, I **FIND** the following **FACTS** in this case:

1. By way of background, L.K. is a six-year-old boy, classified as developmentally disabled, having been diagnosed with Autism Spectrum Disorder at a very young age.
2. Among other conditions related to his diagnosis, L.K. suffers from cognitive delays, difficulty communicating, challenges with socialization and behavioral issues.
3. In 2015, M.M. requested that L.K. be evaluated for special education and related services based on reports from a developmental pediatrician and a speech therapist.
4. Following the determination that L.K. was eligible for special education services, the District proposed he be placed at the Shaler Academy, which was the closest program to L.K.'s home that it believed would provide FAPE.
5. Among other things, Shaler was housed in a public school which would offer the flexibility to "mainstream" L.K. as he developed skills and matured. Shaler also offered a full day program which would have allowed L.K. to continue there through high school if necessary.
6. After viewing Shaler and another ABA program called Washington South, petitioners rejected both placement options.
7. Instead, petitioners requested the District pay for L.K.'s continued enrollment in a private preschool program in Fort Lee called the Greenhouse. Greenhouse is not an ABA program.
8. In an attempt to accommodate petitioners, the District entered into an agreement with them wherein the District agreed to reimburse petitioners from the cost of related services for L.K. including but not limited to home based speech and language therapy and physical therapy while he was attending the

Greenhouse School until the end of March 2017, and then a half day program at the Kaplan JCC on the Palisades through August 31, 2017.

9. A condition in the Agreement required the parties to meet at the end of January 2018 for an evaluation planning meeting. And by the end of May 2018, the parties were also to meet for an IEP eligibility meeting to discuss L.K.'s placement for September 2018.
10. Consistent with the Agreement, L.K. was re-evaluated starting in April 2018.
11. The District's board-certified behavioral analyst Brian Brutzman recommended that L.K. enter a full day ABA program.
12. Among other things, the evaluations completed for the 2018 IEP identified several needs for L.K. including the need for assistance with social skills, conversational skills, and difficulty following directions. As for L.K.'s speech, it was determined that he had difficulty with expressive, receptive and pragmatic language, reading, identifying letters and math.
13. The 2018 evaluations led the District to conclude that L.K. should remain eligible for special education and related services under the classification, Autistic. Petitioners gave their consent.
14. Respondents provided several possible placements to petitioners, none of which were acceptable to them.
15. Eventually, as June 2018 approached, L.K. was accepted into the Valley program for the 2018-19 school year based on L.K.'s IEP. The program is some distance from petitioner's home, but as required under the law, the District also offered to provide transportation.
16. The Valley program is ABA based with discrete trial acquisition skills training.
17. Staff at the Valley program are credentialled and properly trained.
18. Valley offers the ability to adjust programming on an individual basis for each of its students.
19. In addition to the in-school offerings, Valley offers parent training including workshops for parents. There is a home component to this parent training as well, where a behaviorist goes to the student's home for five hours and trains the parents on how to manage the child's challenges.

20. Since petitioners did not sign off on the IEP until late June 2018, there was no longer room for L.K. to start in the Valley Summer ESY program. Since the District agreed services should not wait until the fall, the parties entered an arrangement whereby L.K. would continue attending the JCC program during the summer of 2018.
21. When L.K. started the Valley program in the fall of 2018, petitioners removed him from school at 12:30 each day, even though he was supposed to be there for the all-day program.
22. The time out of the classroom was noticeable and had an impact on his educational and skills development. Also, petitioner had not authorized L.K.'s participation in certain activities at the school and removed him from school early so L.K. could be home for his home-based ABA program.
23. As of February 2019, L.K. missed twenty-five (25) full days of school, and an additional fifteen (15) half days of unexcused absences were reported. As such, the Director of the Valley program informed petitioners that consistent attendance is critical in order to maximize development of deficient skills. A schedule accommodating petitioners' request was prepared, but he still missed several hours and days from school. However, L.K. did not always arrive on time for school and leaves fifteen (15) minutes early each day before regular dismissal.
24. The late arrivals and the early departures is connected to the transportation arrangements made by petitioners for L.K.
25. As required by Federal and State law, the District made arrangements for L.K. to be transported each day, door to door, together with two other students.
26. The bus includes an aide who speaks English and who is trained on how to address children who have special education needs.
27. Out of love and concern for L.K., petitioners asked the District if one of them could travel with L.K. on the bus each day so he would feel more comfortable, and if any issues occurred while traveling that they felt they were better equipped to handle.
28. For various reasons, the request to accompany L.K. on the bus was denied, and as a result, petitioners made a unilateral decision that because of certain

behaviors by L.K. which they deemed dangerous, they would transport him each day instead.

29. When asked to produce medical proof as to why L.K. could not tolerate public transportation, petitioners produced a doctor's note, but the doctor later declined to confirm that L.K. suffered from a general anxiety disorder. No expert was produced by petitioners at the hearing in support of the request for private transportation reimbursement due to petitioners' belief that L.K. could not tolerate the bus.
30. L.K. did not demonstrate signs of anxiety while on school trips.
31. A District funded psychiatric evaluation to rule out anxiety disorder was offered and rejected by petitioners. Instead, petitioners demanded a private evaluation which the District declined.
32. In an effort to justify their decision to do their own transportation, besides L.K.'s anxiety, petitioners are of the belief that due to the long ride, L.K. should also receive instruction while he is enroute to school.
33. No evidence or expert testimony was offered to support this contention, and even if bus instruction was available, it might pose a safety concern.
34. Neither Edgewater nor Valley offer much by way of extracurricular activities such as sports, recreation or other social programs outside of regular school hours for children of elementary school age.
35. Valley offers occasional school trips to museums and other locations in which L.K. has participated, but these trips are infrequent.
36. Seeking to stimulate L.K.'s development outside of school, petitioners enrolled him in a gymnastics class which he enjoyed.
37. Petitioners paid privately for an ABA therapist to accompany L.K. to these classes, as a means of stimulation and encouragement. `
38. L.K. has benefited from the outside activities in which he was enrolled.

I therefore **FIND** that giving every favorable inference to petitioners under IDEA, FAPE and Section 504 of the Rehabilitation Act, petitioners, the District has met its burden of demonstrating that it is providing FAPE to L.K. under its IEP and out of district placement.

CONCLUSION

Based on a review of the pleadings, the submissions, the replies and the documents attached by both sides, and giving every favorable inference to petitioners, for the reasons set forth herein, I **CONCLUDE** that the Edgewater School District, under an IEP for L.K. and the agreed upon placement of L.K. at the Valley School, has fulfilled its responsibility to provide FAPE to L.K. in a least restrictive environment under IDEA and Section 504 of the Rehabilitation Act of 1973.

I further **CONCLUDE** that district, by arranging and offering round trip transportation with a bus aide for L.K., which was rejected by petitioners in favor of private transportation, the district has met its obligation to offer transportation for an out of district placement, and petitioners are not entitled to reimbursement for the expenses they incurred and continue to incur as a result of this decision. I also **CONCLUDE** that becaue of the decision by petitioners to reject two out of district placements significantly closer to home, the district should not be compelled to offer instruction to L.K. while being transported, in essence a form of compensatory education which was specifically addressed through Mr. Butzman's testimony.

For all the foregoing reasons, I **CONCLUDE** the district has met its burden in all respects, and the due process petition should be dismissed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioners is **DENIED, and the petition is hereby 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).

January 27, 2020 _____

DATE **ANDREW M. BARON**, ALJ

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APPENDIX

Witnesses

For Petitioners:

Jacqueline Adler

Brian Brutzman

For Respondent:

M. K.

M. M.

Exhibits

For Petitioners:

P-1 New Milford Board of Education v. C.R.

P-2 Letter from L.K.'s BCBA.

P-3 L.B. and J.B. on behalf of R.E.B. Board of Education

P-4 Ind. School District v. Minnesota

P-5 U.S. Dept. of Ed. Guidance to District

P-6 N.J.A.C. CA:14-3.7

P-7 L.K. Status Reports

P-8 Email from L.K. teacher

P-9 C.D. Photos and Video (Observed on Laptop in Court)

P-10 Medication List

P-11 Scientific Research

P-12 Veytsman's Letter

For Respondent:

R-1 Eligibility Determinant

R-2 Settlement Agreement

R-3 Request for Additional Assessment

R-4 Psychological Exam, Sheila Dales

R-5 Behavioral Observation-Brian Brutzman

R-6 IEP Invitation

R-7 Kathy Vuocino Correspondence, dated June 12, 2018

R-8 Dinah Braude email, dated June 18, 2018

R-9 M.M./Braude/Adler email dated, June 19, 2018

R-10 Adler letter with IEP, dated June 28, 2018

R-11 Schlobach Bus Information, dated July 5, 2018

R-12 Adler/Braude email, dated August 26, 2018

R-13 Adler/Braude email, dated August 28, 2018

R-14 Annual Review Invoice, dated September 7, 2018

R-15 Adler/Braude email, dated August 28, 2018

R-16 Vuoncino email, dated September 13, 2018

R-17 Vuoncino email, dated September 13, 2018

R-18 Adler email, dated September 13, 2018

R-19 Fadden email, dated September 14, 2018

R-20 Braude email, dated September 17, 2018

R-21 Braude email, dated September 25, 2018

R-22 Braude email, dated September 25, 2018

R-23 Fadden letter, dated September 27, 2018

R-24 Averbach letter, dated September 27, 2018

R-25 IEP agenda, dated September 28, 2018

R-26 Brutzman Observation, dated October 8, 2018

R-27 VB-MAPP Language Milestones, Barrier and EESA Assessment by Lisa Ficucello, Special Education Teacher, dated October 23, 2018

R-28 E-mail Chain Between Kathy Vuocino and Petitioners, dated November 8, 2018

R-29 Invitation to Assess Progress and Review or Revise IEP, dated November 13, 2018 and November 26, 2018 meeting

R-30 Skill Acquisition Review dated by Brian Brutzman, M.A. BCBA, with skill acquisition tracking form, dated November 26, 2018

R-31 IEP, dated November 30, 2018

R-32 E-mail Chain Between Kathy Vuocino and M.M. dated December 2, 2018

R-33 Attendance List, dated December 5, 2018

R-34 E-mail Chain Between Jacalyn Adler and Lisa Ficucello, dated with Attachment, dated February 14, 2019

R-35 Invitation for Annual Review of IEP dated for meeting, dated February 8, 2019 and June 4, 2019

R-36 Skill Acquisition Review dated by Brian Brutzman, M.A., BCBA, with Skill Acquisition Tracking Forms, dated February 14, 2019

R-37 Skill Acquisition Review dated by Brian Brutzman, M.A., BCBA, dated February 25, 2019

R-38 Credentials of Dinah Braude, Ph.D.

R-39 Credentials of Jacalyn Adler, LDT-C

R-40 Credentials of Kathy Vuocino, M.Ed., BCBA

R-41 Credentials of Brian Brutzman, M.A., BCBA