

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00269-15

AGENCY DKT. NO. 2015 22072

D.L. AND C.L. ON BEHALF OF C.L.,

Petitioners,

v.

NUTLEY BOARD OF EDUCATION,

Respondent.

Teri Quirk, Advocate, appearing pursuant to N.J.A.C. 1:1-5.4(a)7, for petitioners

Joanne L. Butler, Esq., for respondent (Schenck Price Smith & King, attorneys)

Record Closed: July 13, 2015

Decided: August 20, 2015

BEFORE **RICHARD McGILL**, ALJ:

This matter concerns a request for a due process hearing by D.L. and C.L. (hereinafter "petitioners") on behalf of their son, C.L., who is classified as eligible for special education and related services based upon the criteria for other health impaired. Petitioners contend that the Nutley Board of Education (hereinafter "respondent" or "District") denied C.L. a free appropriate public education (hereinafter sometimes "FAPE") by failing to comply with various procedural requirements and by reducing his occupational therapy from direct services to a consult. As relief, petitioners seek revision of C.L.'s individualized education program (IEP) in the form of restoration of direct occupational therapy services and compensatory education.

Respondent denies that it committed any procedural violations with respect to C.L. and maintains that it developed an IEP that would provide him with a free appropriate public education. Respondent seeks dismissal of the due process petition and denial of the requested relief. Respondent also counterclaims for an award of attorney fees and costs for frivolous litigation.

PROCEDURAL HISTORY

Petitioners filed a request for a due process hearing on behalf of C.L. with the Office of Special Education on December 4, 2014. The matter was transmitted to the Office of Administrative Law on January 7, 2015, for a hearing in accordance with 20 U.S.C.A. § 1415 and 34 C.F.R. § 300.511. Two days of hearings commencing on April 10, 2015, were conducted at the Office of Administrative Law in Newark, New Jersey.

ISSUES

The first issue in this proceeding is whether there were procedural violations in regard to a revision of C.L.'s IEP on October 15, 2013, such as to amount to a denial of a free appropriate public education. Petitioners claim that: (1) on October 12, 2013, the District conducted an occupational therapy evaluation of C.L. without notice to or consent from petitioners; (2) on October 15, 2013, the District conducted an IEP meeting without notice to or participation by petitioners; (3) the occupational therapist did not participate in, and was not excused from, the IEP meeting on October 15, 2013; (4) the IEP attendance sheet contains a signature that appears to be D.L.'s but is not in fact hers; and (5) the IEP from October 15, 2013, contains altercations.

The second issue concerns an IEP revision which involved a reduction in occupational therapy from individual direct services for thirty minutes once per week and in a small group for thirty minutes once per week to consult for thirty minutes once per month. The issue is whether the reduction in occupational therapy for C.L. resulted in the denial of a free appropriate public education.

If petitioners' contentions are meritorious, the third issue is whether the relief requested by petitioners should be granted. The fourth issue is whether respondent's counterclaim for attorneys fees and costs should be granted.

FACTS

The underlying facts as to the general course of events are essentially undisputed, and I **FIND** as follows: C.L. was born on November 27, 2003, and as of June 2013, he was completing the third grade at respondent's Yantacaw Elementary School. C.L. was classified as eligible for special education and related services based upon the criteria for other health impaired. C.L.'s eligibility was based on his diagnosis of attention deficit hyperactivity disorder (ADHD). C.L. also suffers from a tic disorder and anxiety.

An IEP dated June 20, 2013, sets forth C.L.'s program of special education and related services for the 2013-2014 school year. C.L. was in mainstream classes with modifications for social studies, science, art, music, library and gym. For reading/language arts, C.L. had forty minutes of instruction five days per week in the mainstream classroom with modifications and eighty minutes of out-of-class replacement. For mathematics, C.L. had twenty minutes of instruction five days per week in the mainstream classroom with modifications and sixty minutes of out-of-class replacement. With respect to related services, C.L. received occupational therapy individually for thirty minutes once per week and in a small group for thirty minutes once per week.

According to the section of the IEP entitled "Present Levels of Academic Achievement & Functional Performance," occupational therapy services have focused on C.L.'s graphomotor skills, fine motor skills, visual perceptual skills and sensory processing. In regard to handwriting, C.L. tended to lean on the desk, and he did not sit properly in his chair. C.L. displayed an awkward grasp, and he had difficulty with letter formation, sizing and spacing. C.L. required some cues to stabilize the paper with his non-dominant hand and to check his letter formation and sizing.

In the area of visual perceptual skills, C.L. was able to cut various shapes, but he had some difficulty maintaining the line. C.L. required increased time for word finds and hidden picture activities. C.L. benefits from doing sensory diet exercises prior to fine motor tasks.

The IEP contains goals and objectives for various subjects and occupational therapy. The goals and objectives for occupational therapy include the following: “To Improve Visual Motor Coordination and Integration Skills,” “To Improve Manipulation and Dexterity Skills,” “To Increase Body Awareness and Improve Motor Planning Skills” and “To Improve Proximal Stability.”

A section of the IEP lists implementation responsibilities including those of the occupational therapist. Her responsibilities are to provide occupational therapy as mandated by the IEP, to measure progress and to provide consultation in occupational therapy.

In September 2013, Joan Falch began her employment with the District as an occupational therapist. Input from Ms. Falch led to changes in C.L.’s IEP. The program of special education and related services was modified with respect to occupational therapy to consult once per month for thirty minutes. There are no goals and objectives with respect to occupational therapy. More than a year later, petitioners filed their request for a due process hearing on December 4, 2014.

SUMMARY OF EVIDENCE

A. Respondent's Witnesses

Respondent presented nine witnesses in this proceeding. Eight were District employees, and respondent also called D.L. as a witness.

1. Erin Sheridan

Erin Sheridan is employed by respondent as a school psychologist, and she was C.L.'s case manager from September 2013 through January 2014. In September 2013, Ms. Sheridan reviewed C.L.'s records and his IEP. At the time, C.L.'s most recent IEP was dated June 20, 2013.

In the fall of 2013, all of C.L.'s teachers expressed concern about his inability to attend and focus in class. As a result, Ms. Sheridan scheduled an IEP meeting for October 15, 2013, to address this issue, and a parent invitation was sent to D.L. Ms. Sheridan did not receive a response from the parents that they could not attend the meeting.

Prior to the meeting, Ms. Sheridan spoke with C.L.'s teachers and Joan Falch, the occupational therapist. Ms. Falch advised that C.L. had achieved his goals related to fine motor skills and handwriting. There was a need to support C.L. in the classroom regarding attention and focus. Ms. Falch mentioned various exercises such as chair push-ups and wall push-ups that C.L. can do in the classroom, or right outside, to increase the sensory input with the objective to increase his attention and focus.

The meeting took place on October 15, 2013, as scheduled, and Ms. Sheridan had a draft IEP. Ms. Sheridan and several teachers attended the meeting on behalf of the District. Ms. Falch did not attend the meeting because of instructions from their Director that service providers such as Ms. Falch would continue to work with students.

Ms. Sheridan would obtain information from service providers prior to the meeting and parents could contact them later.

D.L. also attended the meeting, and she signed the sign-in sheet. Toward the end of the meeting, D.L. signed the consent form to implement the IEP.

During the meeting, the teachers discussed their concerns in regard to C.L.'s difficulty with attention and focus in the classroom. There was discussion of a need for greater sensory input and implementation of a sensory diet to increase C.L.'s attention within the classroom. In the draft IEP, Ms. Sheridan added accommodations and modifications in the classroom to support C.L.'s sensory needs as well as attention and focus.

With respect to related services, it was specifically stated that occupational therapy would be changed to a consult. This change would allow C.L. to be in the classroom as much as possible, and Ms. Falch would consult with the teachers to help them give C.L. the tools to assist with his attention and focus. The change was made for the periods from October 16, 2013, to June 30, 2014, and from September 1, 2014, to October 14, 2014.

The copy of the October 15, 2013, IEP presented at the hearing is the same as the one shown to D.L. at the IEP meeting and signed by her, including the consult. After the IEP meeting, Ms. Sheridan was not contacted by petitioners in regard to the change to consult. Later in October 2013, Ms. Sheridan contacted petitioners to increase the number of minutes that C.L. would be in the resource room for mathematics. Petitioners agreed to that change, and they did not raise any question about the revision of the IEP to consult for occupational therapy.

The photocopy of the October 15, 2013, IEP is perfectly clear on every page except two. The page with the signatures of the attendees and the one with D.L.'s signature giving consent to implement the IEP have stray marks that appear to be fragments of lines from the same page. Stated succinctly, Ms. Sheridan explained that

there was a problem with a photocopier. Ms. Sheridan was able to make, in effect, new originals for the other pages, but she had to use the pages with the signatures as they were with the stray marks.

On cross-examination, Ms. Sheridan stated that no evaluations or reports were sent to the parents for the IEP meeting on October 15, 2013. There was no form excusing Ms. Falch from the IEP meeting on October 15, 2013. Petitioners were given contact information if they needed to speak to Ms. Falch after the meeting.

2. Joan Falch

Joan Falch is employed by respondent as an occupational therapist. Ms. Falch was C.L.'s occupational therapist beginning in September 2013, and she provided occupational therapy in accordance with an IEP from June 2013. The occupational therapy included strengthening C.L.'s hands and upper extremities, improving his dexterity and manipulation skills, and working on pen and paper tasks.

By October 2013, C.L. had mastered all of his goals and objectives except attention to task. C.L. was writing legibly, and he had sufficient skills to function in the classroom. C.L. did not need additional goals and objectives.

C.L. was still having difficulty with attention in class. He moved a lot in his chair, fidgeted with his hands and needed redirection to task. At that point, Ms. Falch was considering a sensory diet, which would include activities and strategies to increase attention and focus and functioning in the classroom. Examples would include chair push-ups, water fountain breaks, preferential seating and a squishy ball. C.L. is seeking movement and he loses attention.

Ms. Falch came to the conclusion that C.L. did not need direct occupational therapy. As a result, Ms. Falch recommended a consult such that C.L. would not lose instructional time in the classroom. The teacher would be able to use the sensory diet to increase focus and attention within the classroom rather than taking him out. Ms.

Falch discussed her recommendations with all of C.L.'s classroom teachers and Ms. Sheridan. Ms. Falch's recommendation is reflected in the IEP from the meeting on October 15, 2013. Ms. Falch did not attend the IEP meeting on October 15, 2013, but she provided information in advance. The IEP states that the consult would occur one time per month for thirty minutes.

Thereafter, Ms. Falch provided consultation services. Ms. Falch worked with the teachers and others within the school setting to help with any problems that C.L. may have within the classroom. This would include the sensory diet, adaptive equipment and environmental modifications. This arrangement continued through the end of the school year. Ms. Falch observed C.L. in the classroom and took consultation notes. The teachers reported that C.L. had increased focus and attention. By the end of the school year, Ms. Falch felt that consultative services were appropriate for C.L. The only concerns were focus and attention, and that was what they were working on and what they would continue working on in the next year.

On cross-examination, Ms. Falch stated that in September 2013 she was giving C.L. direct service. She observed how C.L. was doing, but she did not perform a formal evaluation. At the beginning of the school year, occupational therapists received a directive stating that they should remain in the classroom rather than attend IEP meetings.

3. Katherine Franks

Katherine Franks is employed by respondent currently as a third grade general education teacher. Previously, she was a fourth grade teacher. C.L. was in Ms. Franks' fourth grade class for the 2013-2014 school year for social studies, science and health. Special education teacher, Janice Sousa, was also in the classroom. Ms. Sousa would keep C.L. on task and attentive to the directions and help to keep him organized.

Ms. Franks discussed C.L. with his case manager and expressed concern about him being unfocused, inattentive and disorganized. She did not raise any issues regarding occupational therapy.

Ms. Franks attended an IEP meeting for C.L. on October 15, 2013, and signed the attendance sheet. D.L. also attended that IEP meeting. D.L. did not disagree with anything in the IEP or refuse to sign the IEP.

Ms. Franks has discussed the sensory diet with Ms. Falch, who came into Ms. Franks classroom to observe C.L. Ms. Franks has observed C.L. using the sensory diet and sensory strategies implemented by Ms. Falch. These strategies improved C.L.'s ability to focus. Ms. Franks did not observe any problems with C.L.'s handwriting or ability to attend to make her think that he needed more direct services. There was no decline in C.L.'s handwriting or his ability to progress in classroom after the change to consultation. On cross-examination, Ms. Franks acknowledged that C.L. is not now in her classes and that she does not currently have any input for his current IEP.

4. Janice Sousa

Janice Sousa is employed by respondent as a special education teacher. C.L. was in a class for which Ms. Sousa provided in-class support during the 2013-2014 school year.

Ms. Sousa attended an IEP meeting for C.L. in October 2013, and she signed the attendance sheet. D.L. was also present at the IEP meeting.

In the classroom, Ms. Sousa redirected C.L. and made sure that he was on task. Ms. Sousa also implemented the sensory diet such as taking him for a walk so that he could do wall push-ups. Ms. Sousa did not have any concerns about the occupational therapy that C.L. received from October 2013 to the end of the school year. Her only concern with respect to C.L. related to focus. C.L. attended better with the sensory diet breaks.

5. Sara Drappi

Sara Drappi is employed by respondent as a special education teacher. Ms. Drappi provided C.L. with mathematics instruction for sixty minutes in a resource pull-out setting during the 2013-2014 school year.

Ms. Drappi attended an IEP meeting for C.L. in October 2013 and signed the attendance sheet. D.L. also attended that IEP meeting. A major concern at the meeting was C.L.'s attention and focus. During the meeting, D.L. commented in regard to a neurological examination.

C.L. had a sensory diet and strategies that were used in Ms. Drappi's class. Ms. Falch checked on C.L. regularly, and she discussed his progress with Ms. Drappi throughout the school year. Ms. Drappi saw C.L. improve academically. There was also improvement in his handwriting. C.L. showed some improvement with respect to attention and focus.

On cross-examination, Ms. Drappi acknowledged that C.L. had a visual motor tracking problem in the resource room. C.L. had days when it was difficult for him to stay engaged with the instruction.

6. D.L.

When asked about a meeting on October 15, 2013, D.L. testified that she had no recollection of attending a meeting in October to reduce C.L.'s services. On cross-examination, D.L. stated that she did not receive an invitation to the meeting on October 15, 2013, by email, regular mail or phone call.

7. Janice Schoem

Janice Schoem testified that she is employed by respondent as a special education teacher. Ms. Schoem was C.L.'s resource room teacher for math in the third grade, language arts in fourth grade and math and language arts in fifth grade. C.L. had difficulty focusing and attending, and this led to frustration. Ms. Schoem discussed the situation with Ms. Falch, who recommended a sensory diet and various strategies.

Ms. Schoem attended an IEP meeting for C.L. on October 15, 2013, and she signed the attendance sheet. D.L. was also present at the meeting. Ms. Schoem provided input for the present levels of academic achievement and functional performance in the IEP. C.L. has difficulty getting the thoughts in his head onto paper. As of October 2013, C.L.'s handwriting was legible.

After the meeting, C.L.'s occupational therapy services changed to a consult. Ms. Falch came into the classroom very frequently and provided strategies to use with C.L. Ms. Schoem did not have any concerns with the change from direct occupational therapy services to a consult.

For C.L.'s fifth grade year, Cindy Palley was his occupational therapist. Ms. Palley came into the classroom every week to observe C.L. The sensory diet helps to keep C.L. alert and to focus when he sits down again. C.L.'s handwriting is legible.

IEP meetings for C.L. were conducted on September 4 and October 21, 2014. C.L.'s main weaknesses were focusing and recalling information. These weaknesses impeded his progress in language arts and math. In Ms. Schoem's opinion, C.L. does not need direct occupational therapy services rather than consult.

C.L.'s primary difficulty is still maintaining focus. C.L. also has difficulty recalling information. C.L. becomes frustrated with himself easily, and he needs a break to bring himself back into focus. These difficulties do not stem from a need for direct

occupational therapy services. C.L.'s performance in the classroom would not improve if he received direct individual pullout occupational therapy rather than consult. On cross-examination, Ms. Schoem acknowledged that she is not an occupational therapist.

8. Jenna Maffucci

Jenna Maffucci is employed by respondent as a school social worker. Ms. Maffucci was C.L.'s case manager for the first grade and then again beginning in January 2014. Ms. Maffucci spoke with C.L.'s former case manager, Ms. Sheridan, who advised that there were no concerns or issues at that point that needed to be brought to her attention.

Toward the end of February 2014, Ms. Maffucci received an email from C.L.'s parents requesting occupational therapy progress reports. Ms. Maffucci responded by email, stating that because C.L. was on consultation and did not have goals and objectives, there were no progress reports at that time. Ms. Maffucci was advised by her director to invite the parents to an IEP meeting and add goals and objectives for the consultation so that progress reports could be generated formally four times a year. Unable to reach C.L.'s parents by telephone, Ms. Maffucci sent them a letter. Ms. Maffucci did not receive a response to her letter. Months later, the parents sent a letter to the school superintendent, who was also the director of special services between the time that the previous director left the school district and the hiring of a new director.

While C.L.'s case manager, Ms. Maffucci observed C.L. in the classroom including the resource room. C.L. was fidgety, and the teacher needed to redirect him frequently.

Ms. Maffucci sent a letter dated June 12, 2014, to C.L.'s parents inviting them to a reevaluation planning meeting on June 17, 2014. The meeting took place as scheduled, and the result was an agreement to do a reevaluation of C.L. including a cognitive evaluation, an educational evaluation, a neurological evaluation, a central

auditory processing evaluation and an occupational therapy evaluation. The evaluations were conducted in accordance with the agreement.

The occupational therapy evaluation was performed by Alicia Nunziato, who is an occupational therapist employed by respondent. Ms. Nunziato indicated that C.L. did not qualify for services based on the standardized testing report but that he demonstrated notable sensory processing difficulties, and she recommended that he be placed on consultation. In her report, Ms. Nunziato recommended that in the fall C.L.'s teacher complete an updated sensory profile.

After the evaluations were completed, an IEP meeting was scheduled for August 18, 2014. In the eligibility conference report, the summary of the neurological evaluation by Dr. Lara Morse stated that C.L. is a child with developmental delay of unclear etiology. The delay manifests as a primary language disorder with accompanying ADHD inattentive type and anxiety which is leading to tics. Dr. Morse recommended placement in an intensive school environment that supports C.L. academically with additional speech/language therapy to help with articulation and auditory processing. There was nothing about occupational therapy in Dr. Morse's report. C.L. was found to be eligible for special education and related services under the category other health impaired. Petitioners consented to the eligibility determination.

The participants proceeded with the IEP meeting. The draft IEP provided for occupational therapy for thirty minutes once per month as consult. Petitioners did not agree with this provision. The parents were not in agreement with the occupational therapy evaluation and recommendations, and they requested an independent evaluation.

Another IEP meeting was scheduled for September 4, 2014. A revised IEP contained a notation that upon completion of the independent evaluation, a revision to the IEP may be made in regard to occupational therapy. With the notation, petitioners consented to this IEP.

The independent occupational therapy evaluation was completed by Jennifer Strasnick, who is an occupational therapist. Another IEP meeting was scheduled for October 21, 2014, to consider, among other things, the independent occupational therapy evaluation. Ms. Strasnick was not present at this IEP meeting. District occupational therapist Cindy Palley was present and discussed the independent evaluation by Ms. Strasnick.

The eligibility conference report dated October 21, 2014, stated the classification category as communication impaired. In contrast, the IEP stated the classification category as other health impaired. Ms. Maffucci explained that the draft IEP had not been updated to reflect the change agreed upon during the eligibility conference. The draft IEP also reflects the name of the new case manager who would be taking one responsibility of C.L. This IEP contains goals and objectives for occupational therapy to address C.L.'s sensory difficulties and also concerns about his handwriting. C.L.'s program included occupational therapy which would be provided on a consult basis once per week for ten minutes. The purpose for the change from a monthly consultation was to give the occupational therapist better and more consistent access to the teachers and C.L. The District members of the IEP team did not agree to direct occupational therapy services, because C.L. continued to exhibit average to above average fine motor and visual motor skills. C.L.'s sensory issues required only consultation. Petitioners were not in agreement with the views of the District members of the IEP team.

During Ms. Maffucci's tenure as case manager for C.L. from January 2014 to October 2014, the District increased his reading, language arts and math instruction in the resource room significantly. The District also added counseling, speech/language therapy and an FM system.

On cross-examination, Ms. Maffucci acknowledged that she is not an occupational therapist and that she did not attend the IEP meeting on October 15, 2013. Ms. Maffucci also acknowledged that C.L. has significant academic weaknesses.

9. Cindy Palley

Cindy Palley is a self-employed occupational therapist, who has contracted with respondent for twenty-two years. Ms. Palley became the occupational therapist for C.L. beginning in September 2014, and she reviewed his IEP and the occupational therapy evaluations. As of the beginning of September 2014, the IEP dated October 15, 2013, was in effect. The next IEP took effect on September 4, 2014.

Ms. Palley spoke with Ms. Falch at the beginning of the school year about C.L. Ms. Palley also reviewed the occupational therapy evaluation by Ms. Nunziato and described it in detail. An occupational therapy evaluation considers a child's fine motor skills, visual perceptual skills and sensory processing skills. Ms. Nunziato found that C.L.'s fine motor skills were developed and that he was performing at an age appropriate level. His handwriting is legible, and his eye tracking skills were also functioning properly. In visual perception, C.L. scored above average. On the Sensory Profile Caregiver Questionnaire, C.L. had notable sensory processing difficulties. To accurately assess how these difficulties affect C.L. in an academic setting, Ms. Nunziato recommended that in the fall C.L.'s teacher complete the Sensory Profile School Companion or similar test.

C.L.'s hand manipulation skills are considered to be good, his visual perceptual skills are actually a bit above average, and he is able to use his eyes and hands together. These are the areas that Ms. Palley would address in direct occupational therapy if they were weak, but these skills are at least average for C.L. The sensory issues would not warrant direct occupational therapy.

In evaluating a child's performance in the classroom from the perspective of occupational therapy, Ms. Palley would consider whether he is able to sit at a desk appropriately, write in the setting and keep up with the type of work. This would include copying from the blackboard and taking notes. C.L. could perform all of these tasks satisfactorily.

In the classroom, C.L. sits in place and tries very hard to do his work. C.L.'s difficulty in class is not the result of a lack of handwriting skills. Rather, C.L. has difficulty coming up with the words that he needs to put on paper.

In providing consult service, Ms. Palley goes into C.L.'s class every week for ten to fifteen minutes and makes suggestions to the teacher. Ms. Palley observed that C.L. writes slowly, because he cannot think of what to write. When C.L. is copying and he does not have to think of what to say, his writing is pretty much at the speed that it should be. C.L.'s difficulty in thinking of what to write is not an occupational therapy issue.

Ms. Palley also reviewed an independent occupational therapy evaluation by Jennifer Strasnick, who used tests similar to those chosen by Ms. Nunziato. The only difference was that Ms. Strasnick used the Sensory Profile School Companion Questionnaire, which is completed by the teacher, rather than the Sensory Profile Caregiver Questionnaire, which is done by the parents and was used by Ms. Nunziato. The results of the two tests can be quite different, but for C.L. they were similar. The results from Ms. Strasnick's testing were similar to those for Ms. Nunziato. C.L. was having difficulty with his sensory system integrating all of the incoming sensations. For example, C.L. might be distracted by noises. This could contribute to his difficulty focusing, staying on task and his frustration level. This type of difficulty would be addressed by a sensory diet.

Ms. Nunziato found that C.L. does not have delays in fine motor skills or visual motor skills. C.L. has sensory processing issues that can affect his attention in class and possibly his handwriting.

Ms. Palley could not recall Ms. Straswick's recommendation. Parenthetically, according to Ms. Strasnick's report, C.L. should receive individual occupational therapy twice per month for thirty minutes. In addition, the teacher should work with C.L. to adapt the environment to meet his sensory needs. C.L. does not need weekly direct

occupational therapy, because he tested within the normal range for visual motor and fine motor skills.

The evaluations by Ms. Nunziato and Ms. Strasnick both indicated that C.L. did not have fine motor delays. Similarly, both reports indicate that C.L. did not have visual perceptual delays. Both evaluations indicate that C.L. has sensory issues.

A child with sensory issues has difficulty determining what input from the senses is important and what should be disregarded. The child needs to learn to self-regulate himself so that unimportant things do not bother him or interfere with his ability to learn. There are different strategies that can be learned to deal with this type of problem. Ms. Palley described the sensory diet as a strategy to deal with this problem.

Ms. Palley would not recommend individual pullout occupational therapy based upon Ms. Strasnick's findings, because C.L. does not have visual motor or fine motor deficits. C.L. has sensory processing deficits, which do not warrant pullout therapy. This type of deficit can be better dealt with in the classroom, because he needs to learn to self-regulate himself in that setting. Pullout would disorganize C.L., and then he would have to go back to the classroom and reorganize himself. C.L. is better off with the sensory diet in the classroom, and he is making progress in that area. Ms. Palley concluded that C.L. should receive consult as opposed to individual occupational therapy.

Ms. Palley attended the IEP meeting on October 21, 2014, and she prepared goals and objectives for the IEP. C.L. needs to learn how to use the sensory tools himself. This could be addressed in the classroom. Ms. Palley recommended continued consultation but with a change from thirty minutes per month to ten minutes per week. Ms. Palley believes that it is important for her to see C.L. every week. Having observed C.L. extensively in class, Ms. Palley believes that the testing is accurate and that C.L. does not have fine motor or visual perceptual deficits. C.L. does not have the types of deficits that could best be addressed with individual occupational therapy.

C.L.'s difficulty with writing relates to content and spelling rather than fine motor or visual perceptual issues. C.L. still needs very frequent refocusing, but he has learned strategies to help himself refocus. C.L. uses these strategies throughout the day. Ms. Palley expressed the opinion that consultative occupational therapy has helped C.L.'s educational performance. Further, pullout direct individual occupational therapy sessions could hinder C.L., because he would be missing class. C.L. does not have deficits in the areas that would be worked on in a pullout setting such as fine motor or visual perceptual work. The work on sensory issues has to be done consistently all the time rather than once per week.

B. Petitioners' Witness

Jason Campbell is an occupational therapist, who conducted an evaluation of C.L. for petitioners. Mr. Campbell found that C.L. had mild to moderate sensory processing difficulties. C.L. has deficits in postural control, wrist stability and endurance with writing tasks. Tests indicate that C.L. has below average fine motor precision and fine motor integration for a child his age. Another assessment indicated that C.L. has significant deficits in visual perceptual and visual motor skills for a child his age. Another test indicated that C.L. has below average copying speed for a student in his grade. C.L. has difficulty copying shapes and designs accurately. C.L. also has difficulty with handwriting in that the letters are large and not closed properly, and he substitutes uppercase for lowercase letters. C.L. has difficulty staying within visual boundaries when writing on grade appropriate paper, and there are inconsistencies with spacing. Keyboarding skills are a relative strength. There are inconsistencies with respect to C.L.'s organization skills.

Ms. Strasnich's evaluation was similar to Mr. Campbell's in that both identified sensory processing difficulties. Her report differed in that she identified no deficits in fine motor or visual motor integration skills. Mr. Campbell found deficits in both of those areas.

Mr. Campbell recommended occupational therapy one time per week in individual sessions of thirty to forty-five minutes based on the number and significance of the deficits. The testing indicated that C.L. needs skilled intervention to improve those skill areas.

On cross-examination, Mr. Campbell acknowledged that he did not observe C.L. in the school setting and that he did not interview any of C.L.'s teachers or occupational therapists. The two testing sessions were forty-five to sixty minutes each with a total of ninety minutes of testing.

The assessment tools chosen by Mr. Campbell were different from those used by Ms. Strasnick with the result that a direct comparison cannot be made. Mr. Campbell's evaluation was done in an outpatient clinic and was not a school-based assessment.

LAW AND ANALYSIS

As a recipient of Federal funds under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C.A. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education. 20 U.S.C.A. § 1412(a)(1). A free appropriate public education includes special education and related services. 20 U.S.C.A. § 1401(9). The requirement of a free appropriate public education is implemented in New Jersey through regulations codified at N.J.A.C. 6A:14-1.1 et seq. The responsibility to provide a free appropriate public education is specifically placed on the district board of education. N.J.A.C. 6A:14-1.1(d). In an administrative hearing in regard to the provision of a free appropriate public education, the burden of proof is on the school district. N.J.S.A. 18A:46-1.1.

A. Procedural Requirements

A school district must comply with procedural requirements in the Act. Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1034 (3d Cir. 1993). When a parent alleges procedural violations, the applicable regulation is N.J.A.C. 6A:14-2.7(k), which provides in pertinent part as follows:

an administrative law judge may decide that a child did not receive a FAPE only if the procedural inadequacies:

1. Impeded the child's right to a FAPE;
2. Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or
3. Caused a deprivation of educational benefits.

As set forth in the request for due process hearing, the first alleged procedural violation is that the District conducted an occupational therapy assessment of C.L. on October 12, 2013, without prior notice to or consent from petitioners. Written notice shall be provided to the parents when a district board of education proposes to initiate an evaluation. N.J.A.C. 6A:14-2.3(f)1. Parental consent shall be obtained prior to conducting any assessment as part of a reevaluation. N.J.A.C. 6A:14-2.3(a)3. The allegation relates to a time prior to the IEP meeting on October 15, 2013, when Ms. Falch was C.L.'s occupational therapist.

Based upon the evidence presented at the hearing, I **FIND** as follows: Ms. Falch observed C.L. during the course of her work as his occupational therapist. Ms. Falch did not conduct any assessment or evaluation of C.L.

In view of these findings, the allegation is without factual support. It follows that there was no procedural violation involving an assessment or evaluation of C.L. on or about October 12, 2013.

The second alleged procedural violation is that D.L. was not present for the IEP meeting on October 15, 2013, and that the IEP from that meeting was created without petitioners' involvement. Any eligibility meeting shall include various participants including the parents. N.J.A.C. 6A:14-2.3(k)1i. Similarly, a meeting of the IEP team shall include the parent. N.J.A.C. 6A:14-2.3(k)2i.

Respondent presented several witnesses who testified that D.L. was present at the IEP meeting on October 15, 2013. D.L. could only say that she did not remember being present at the IEP meeting. She did not explicitly deny that she was present at the IEP meeting on October 15, 2013.

Based upon the evidence presented at the hearing, I **FIND** that D.L. was present for the IEP meeting on October 15, 2013.

Here, D.L. was present for the eligibility and IEP meetings on October 15, 2013. It follows that there were no procedural violations of N.J.A.C. 6A:14-2.3(k)1i and - 2.3(k)2i relative to D.L.'s presence at the meeting on October 15, 2013.

The third alleged procedural violation relates to the absence of the occupational therapist, Ms. Falch, from the IEP meeting on October 15, 2013. Petitioners maintain that Ms. Falch was not present for the meeting and that she was not excused from participation. It is undisputed that Ms. Falch was not present for that meeting.

A list of participants in the eligibility meeting is set forth in N.J.A.C. 6A:14-2.3(k)1. The list does not specifically mention providers of related services such as occupational therapy, but other appropriate individuals may be included at the discretion of the parent or the school district. N.J.A.C. 6A:14-2.3(k)1vi.

A list of participants in meetings of the IEP team is set forth in N.J.A.C. 6A:14-2.3(k)2. At the discretion of the parent or school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel, may participate in the IEP meeting. N.J.A.C. 6A:14-2.3(k)2vii. The determination of special knowledge or expertise shall be made by the party (parent or school district) who invited the individual. N.J.A.C. 6A:14-2.3(k)2vii(1).

Based upon the evidence presented at the hearing, I **FIND** as follows: Respondent has a policy that providers of related services will continue to work with pupils rather than attend IEP meetings. Consistent with this policy, the District did not invite Ms. Falch to the eligibility and IEP meetings. There is no indication that petitioners invited Ms. Falch to the eligibility and IEP meetings on October 15, 2013.

In view of these findings, Ms. Falch was not a participant in the eligibility or the IEP meetings on October 15, 2013. It follows that the absence of Ms. Falch from those meetings was not a procedural violation of N.J.A.C. 6A:14-2.3(k)1 or N.J.A.C. 6A:14-2.3(k)2.

Members of the IEP team may be excused from participation in an IEP meeting under various circumstances. N.J.A.C. 6A:14-2.3(k)9 and 10. In view of the fact that Ms. Falch was not a member of C.L.'s IEP team, excusal is not an issue in this proceeding.

As the fourth alleged procedural violation, petitioners maintain that D.L. did not sign the attendance sheet for the meeting on October 15, 2013, or the consent sheet. In effect, petitioners allege that District personnel forged D.L.'s signature on the attendance sheet for the meeting on October 15, 2013, and on the consent sheet for the IEP.

Two witnesses for respondent testified that D.L. signed the attendance sheet for the meeting on October 15, 2013, and the consent sheet. D.L. testified that she did not

recall attending the meeting on October 15, 2013. D.L. did not explicitly deny that she signed the attendance sheet or the consent sheet at the meeting.

Based upon the evidence presented at the hearing, I **FIND** that D.L. signed the attendance sheet and the consent sheet at the IEP meeting on October 15, 2013.

As a related matter, petitioner alleged that there were alterations to the IEP with information superimposed thereon. A District witness explained that the stray marks were the result of a poorly functioning photocopier and that there were no alterations to the IEP. The District's witness was credible, and her testimony is accepted as true. Therefore, I **FIND** that District personnel did not alter the contents of the IEP dated October 15, 2013.

Based upon the above, I **CONCLUDE** that there were no procedural violations in regard to the eligibility determination and the IEP meeting on October 15, 2013. It follows that there was no denial of a free appropriate public education based upon procedural violations.

B. Substantive Requirements

A State satisfies the requirement that it provide a child with disabilities with a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690, 710 (1982). The quantum of educational benefit necessary to satisfy IDEA varies with the potential of each pupil. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). For example, in Rowley, supra, Amy Rowley was classified because she was deaf, but she was otherwise a good student and was being educated in the regular classrooms of the public school system. Her IEP should be reasonably calculated to enable her to achieve passing marks and advance from grade to grade. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. at 204; 73 L.Ed.2d at 710. For a severely retarded pupil, IDEA requires more than a trivial or de minimis

educational benefit but rather mandates meaningful benefit which generally implies progress as opposed to regression. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180-185 (3d Cir. 1988). However, the State is not required by IDEA to maximize the child's potential. Ibid.

The witnesses and evaluators differed on two main points. The first point concerned the question whether C.L. has deficits in regard to fine motor and visual motor integration skills. Mr. Campbell found that C.L. has deficits in both of these areas. In contrast, the evaluations by Ms. Nunziato and Ms. Strasnick indicate that C.L. does not have deficits in those areas. The conclusions of Ms. Nunziato and Ms. Strasnick are supported by the testimony of C.L.'s occupational therapists and teachers who observed that C.L. did not have difficulties with fine motor or visual motor integration skills.

The weight of the evidence supports respondent's position. Two qualified evaluators reached the same conclusion that C.L. does not have difficulty with fine motor or visual motor integration skills. This determination is supported by the testimony of C.L.'s teachers and occupational therapists who had extensive opportunity to observe him in the classroom. This evidence outweighs the testimony of Mr. Campbell on this point. Therefore, I **FIND** that C.L. does not have difficulties with fine motor or visual motor integration skills.

The second difference related to the recommendations as to direct occupational therapy services. Mr. Campbell recommended occupational therapy one time per week in individual sessions from thirty to forty-five minutes. Ms. Strasnick recommended individual occupational therapy twice per month for thirty minutes. In addition, the teacher should work with C.L. in the classroom to meet his sensory needs. Respondent recommended consult for the occupational therapist to advise the teachers as to ways to address C.L.'s sensory processing issues in the classroom.

Respondent's witnesses presented the most cogent analysis to support their recommendation. C.L. does not need individual occupational therapy, because he does

not have deficits in the areas of fine motor and visual motor integration skills. C.L.'s sensory processing issues are best addressed in the classroom by the teachers in consultation with the occupational therapist who develops strategies such as the sensory diet. Mr. Campbell's recommendation is based on occupational therapy for fine motor and visual motor integration skills, but the finding herein is that C.L. does not have those difficulties. Ms. Strasnick also recommended individual occupational therapy, but she did not offer any rationale for her recommendations. Under the circumstances, I **FIND** that the form of occupational therapy recommended by respondent will provide sufficient support for C.L. to receive meaningful educational benefit from his personalized instruction. Therefore, I **CONCLUDE** that the IEPs developed by respondent including occupational therapy in the form of a consult will provide C.L. with a free appropriate public education.

C. Counterclaim

Respondent filed a counterclaim seeking attorneys fees based upon a contention that petitioners filed a frivolous due process petition for the sole purpose of harassing respondent. In accordance with 20 U.S.C.A. § 1415(i)(3)(B)(i)(II), a prevailing school district may seek attorneys fees if the due process action or subsequent court case is "frivolous, unreasonable, or without foundation." Further, under 20 U.S.C.A. § 1415(i)(3)(B)(i)(III), prevailing school districts may seek attorneys fees from the parent or his attorney "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."

Respondent focuses on petitioners' contentions that D.L. did not attend the eligibility and IEP meetings on October 15, 2013, and that she did not sign the attendance sheet or the consent sheet from that meeting. There are several difficulties with respondent's argument. First and foremost, the cited statute, 20 U.S.C.A. § 1415 (i)(3), vests jurisdiction in the district courts of the United States to award attorneys' fees. As additional insight into the circumstances in this case, the testimony concerning D.L.'s attendance at the IEP meeting on October 15, 2013, represented only a very

small portion of the hearing. Further, in regard to occupational therapy, Ms. Strasnick conducted the independent evaluation and recommended individual sessions for C.L. Further, Mr. Campbell also recommended individual sessions for C.L. In the final analysis, respondent's presentation outweighed the evidence supporting petitioners' position. Nonetheless, the fact remains that there was substantial evidence supporting petitioners' position. Under the circumstances, the facts do not support a determination that petitioners' due process action was frivolous, unreasonable, without foundation or for an improper purpose within the meaning of 20 U.S.C.A. §1415(i)(3)(B)(i)(II) or (III). Therefore, I **CONCLUDE** that respondent's counterclaim for attorney fees must be denied.

Accordingly, it is **ORDERED** that:

1. The due process petition in this matter be dismissed and the requested relief be denied.
2. Respondent's counterclaim be denied.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2014) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2014). 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.

August 20, 2015

DATE

RICHARD McGILL, ALJ

Date Received at Agency

August 20, 2015

Date Mailed to Parties:
ljb

APPENDIX

WITNESS LIST

For petitioners:

Jason Campbell

For respondent:

Erin Sheridan

Joan Falch

Katherine Franks

Janice Sousa

Sera Drappi

D.L.

Janice Schoem

Jenna Maffucci

Cindy Palley

EXHIBIT LIST

- R-1 Eligibility Conference Report and IEP dated June 20, 2013
- R-2 Letter dated October 7, 2013, from Erin Sheridan to petitioners
- R-3 Occupational therapy notes of Joan M. Falch, 9/18/13 to 10/16/13
- R-4 Occupational therapy notes of Joan M. Falch, 10/3/13 to 3/12/14
- R-5 Handwriting sample of C.L.
- R-6 Occupational therapy goals for C.L. with handwritten notations
- R-7 IEP dated October 15, 2013
- R-8 Letter dated October 25, 2013, from Erin Sheridan to petitioner C.L.
- R-9 IEP dated November 22, 2013
- R-10 Letter dated June 12, 2014, from Jenna Maffucci to petitioner C.L.

- R-11 Psychological Evaluation dated July 8, 2014, by April Vitiello
- R-12 Auditory Processing Disorder Evaluation dated July 8, 2014, by Lynn Moore
- R-13 Occupational Therapy Evaluation dated July 16, 2014, by Alicia Nunziato
- R-14 Educational Evaluation dated August 13, 2014, by Heather Harris
- R-15 Letter dated August 8, 2014, from Jenna Maffucci to petitioners
- R-16 Neurological Evaluation dated August 14, 2014, by Lara Morse, M.D.
- R-17 Eligibility Conference Report dated August 18, 2014
- R-18 Rejected IEP dated August 18, 2014
- R-19 Letter dated September 3, 2014, from Jenna Maffucci to petitioners
- R-20 Letter dated September 4, 2014, from Jenna Maffucci to petitioner C.L. with attached consent form and procedural safeguards statement
- R-21 IEP dated September 4, 2014
- R-22 Speech and Language Evaluation dated October 2, 2014, by Laura Matthews
- R-23 Occupational Therapy Evaluation dated September 29, 2014, by Jennifer Strasnick
- R-24 Letter dated October 8, 2014, from Jenna Maffucci to petitioners
- R-25 Eligibility Conference Report dated October 21, 2014
- R-26 IEP dated October 21, 2014
- R-27 Student case notes, 9/18/13 to 1/6/15, with lists of student evaluations, documents
- R-28 Progress Report – January 2015
- R-29 Data notes
- R-30 Report Cards
- R-31 New Jersey ASK and NJ PASS Test Results
- R-32 Letter dated March 25, 2015, from Peter B. Fallon, Esq., to petitioners
- R-33 Miscellaneous e-mails