

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 2690-15

AGENCY REF. NO. 2015 22262

K.N. AND J.N. ON BEHALF OF J.N.,

Petitioners,

v.

**GLOUCESTER CITY BOARD OF
EDUCATION,**

Respondent.

Catherine Reisman, Esq., appearing for petitioners (Reisman Carolla Gran, LLP, attorneys)

Cameron Morgan, Esq., and **Brett E.J. Gorman**, Esq., appearing for respondent (Parker McCay, LLC, attorneys)

Record Closed: March 6, 2017

Decided: September 8, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioners, K.N. and J.N., on behalf of their child J.N., allege that the respondent, Gloucester City Board of Education (GC or District), committed a substantive violation of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and New Jersey Special Education Laws by failing to provide appropriate supplementary aides and services for the child so he could attend the after-school program (ASP);

failing to include the after-school program in the child's individualized education program (IEP); and failing to provide a free and appropriate public education (FAPE), thereby entitling the petitioners to compensatory education and reimbursement.

PROCEDURAL HISTORY

On January 23, 2015, the petitioners filed a petition for due process. The Office of Special Education Programs (OSEP) transmitted the matter to the Office of Administrative Law, where it was filed on February 24, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On February 12, 2015, the District filed a response.

The hearing was held on September 11, 2015, January 19, 2016, and April 18, 2016.¹ Stipulations were filed on February 3, 2017. Closing statements were submitted on March 2 and March 3, 2017. The record closed on March 6, 2017.

FINDINGS OF FACT

Testimony

Jennifer Williams, a school social worker, was J.N.'s case manager for school years 2013–2014 and 2014–2015.² She met the mother in May 2013 and reviewed J.N.'s records before becoming his case manager. J.N.'s parents were concerned about his exposure to general education.

In school year 2013–2014, J.N. was in the third-grade self-contained autistic class at Cold Springs Elementary School. Williams focused on his IEP for that school year. His teacher was Maria Maiorano and his aide was Anita Haggerty. He attended speech five times per week, and occupational therapy (OT) two times per week, and he was provided a one-to-one aide, a behavior intervention plan, assistive technology, an

¹ Several scheduled hearing dates were adjourned at the request of a party (with consent of the other).

² Williams is no longer employed with the district, having been "rified" in April 2015.

extended-school-year program, and related services. His IEP called for an Applied Behavior Analysis (ABA) format and discrete-trial instruction. Socialization was part of his program, as well as teaching appropriate peer interaction.

In school year 2014–2015, J.N. attended the Costello School. His teacher was Kristen Brennan. There were four students in the class, with a 1:1 staff-to-student ratio. Williams was the case manager for all four; she helped with behavioral needs in the classroom and with staff and teachers.

J.N. has severe autism and has unique needs. In the third grade, he was on a kindergarten to first-grade level. He exhibited problem behaviors such as pinching and biting, and could be self-injurious. Sometimes he hit the wall. He would have perseverations and continue the same behavior or speech over and over. During the 2013–2014 school year, he would sometimes perseverate on Haggerty, his mother, the school bus, or McDonald's. He would have a tantrum and all his behaviors would be exhibited at once.

Dr. McCabe-Odri, J.N.'s behavioral analyst, prepared his behavior intervention plan (BIP). A token system was used to motivate J.N. to get things he wanted in class and to reward good behavior. He had a calm area where he could go if he became upset. All of this was part of his IEP as part of the behavior intervention plan to redirect him from task avoidance, denial of preferred activities, and attention seeking. Williams thought the plan developed in J.N.'s IEP provided him with meaningful educational benefit and FAPE.

J.N. attended the ASP held at the Cold Springs School during school year 2013–2014. The ASP was held from approximately 3:00 p.m. to 6:00 p.m. A grant funded the program, which provided snacks, free time, readings, group activities, gym, movies, and games. Approximately 100–150 children attended the program; they were in different classrooms with mixed groups of special education and general education students. All students were permitted to attend the ASP on an equal-opportunity basis. The District did not fund the program, and the program no longer exists.

J.N. was in a mixed class. He exhibited behavioral problems such as aggression, self-injurious behavior, and tantrums. In the fall of 2013 he had a one-to-one aide (Jane Heitman), but she could not control him, and his mother was called a couple of times per week. The mother was concerned about Heitman not having enough training. Staff needed to become involved to control him. Heitman resigned in October because of J.N.'s aggressive behaviors and because she could not control him. A planning meeting, including the mother, was held in November to determine what to do. After that the BOE tried to find another aide. The ASP was not part of J.N.'s IEP and was not necessary for FAPE. She heard Rafferty distinguish between FAPE and equal access to the ASP.

The District developed another plan to permit J.N. to attend the ASP that provided him with a special education teacher and two aides. The greater intensity of supervision was to ensure the safety of J.N. as well as staff and other students. Williams did not think three staff members were necessary, but three were assigned to him in January 2014: Maiorano, Kerina Pennock (an aide in the autism classroom), and Williams. The plan was that Williams would become an aide in the ASP for a six-week period and then "fade" from this additional supervision. This plan to reduce the supervision to one teacher and one aide seemed to work.

Based on her training and experience, Williams believed that J.N.'s IEP provided him with FAPE. The ASP was not in the IEP and never had been. Williams felt that the ASP was detrimental to J.N. because his anxiety would rise during the day, and then his behaviors would increase. It seemed he wanted to rush through the day. When Haggerty, his aide, left, his anxiety increased. J.N. was averse to the ASP and fearful of it.

It was difficult for J.N. to transition to the ASP because he had to take a bus. Three other staff members would have to help him get on the bus to go to the ASP. By the time he got off the bus, he would be exhibiting behavior issues. He did not interact significantly with other students in the ASP. Even though the ASP was difficult for J.N., the District did not deny him access to it.

Numerous times, J.N. was picked up early (5:00 to 5:15 p.m.) from the program by his mother, and frequently it was before the social period when J.N. would have had the opportunity to interact with peers. This made socialization more difficult. In addition, socialization was more difficult because of him having so much adult supervision. The mother was thrilled with the program, although she did not seem to be concerned with the social contact provided to J.N. By the end of the school year, J.N. would go home from school and his mother would bring him back to the program.

J.N.'s 2013–2014 academic school year had started out well, but his behaviors deteriorated. At that time he was attending school during the day, and then the ASP. In the fall of 2013 he would start to perseverate at the end of the school day, with tantrums and outbursts, and would want to go with “mommy” or to go home. Self-stimulating behaviors increased in October and decreased in December. The uptick was noted when J.N. started to attend the ASP. He did not necessarily enjoy the program: he had just had a long school day; he was fatigued; and he just wanted to go home.

In January and February 2014, despite having three staff members to try to maintain his behavior, J.N. was still aggressive. He pinched two students. Williams was called anytime J.N. exhibited bad behaviors. She did not make an incident report each time because this was part of his illness. She felt that J.N. did not enjoy the ASP, as they had trouble getting him on the bus. She was at the ASP every day in January and February and saw J.N. in his class every day. In the classroom, the teachers could manage him with his BIP and techniques. He made significant academic progress. His regular school program was made harder because of his behaviors from the ASP.

For the 2014–2015 academic school year, J.N.'s program was the same. It included OT, physical therapy, speech and language therapy, ABA principles, and discrete trial. There were six students in his class, and the personnel in the classroom were the same. Williams thought that J.N. had been making significant progress in the program that year, although she left in May for maternity leave.

In October 2014, Marinelli resigned. In November 2014, Nick Orsino and Fitzpatrick were bitten by J.N. An emergency IEP meeting was called with a possible

out-of-district placement discussed. J.N. was placed on a half-day schedule pending a neurology examination. Although a new IEP was prepared in November, it was withdrawn. The mother removed J.N. from the ASP. J.N. was undergoing some additional assessments, including OT, speech and language, and functional behavior. From November 25 through December 9, observations of J.N. showed perseveration, outbursts and tantrums, aggression, and injurious behavior. His behaviors increased if his aide was not there, such as when the aide went to lunch. The aide collected antecedent, behavior, and consequence data. Haggerty worked during the school year. They thought J.N. was becoming anxious at the end of the school day when he was going to the ASP. He would say “Mommy, Mommy, home, McDonald’s.”

During school year 2014–2015, Marinelli went to the ASP at Cold Springs. J.N. was bused there from the Costello School, which he attended from 7:50 a.m. to 2:50 p.m. daily. He had to go to a different classroom. After he left the program, he never returned. But in June 2015, the ASP grant was terminated and the program lapsed for everyone.

Williams prepared graphs to chart his progress. She noted the report cards, assessment of basic skills and language, communication log, and emails between Brennan and the mother that showed his progress.

Williams felt that J.N. received meaningful educational benefit from his program. J.N. also had the opportunity to participate in the ASP with his peers.

J.N.’s progress report for the first marking period of school year 2013–2014 showed no incidents of behaviors, nor was there data collection of behaviors. During the second marking period, his behaviors increased, and Dr. McCabe-Odri handled that. But there was no functional behavioral assessment (FBA), no team meeting, and no data collection.

During the second marking period, J.N. became sick and his behaviors increased, but there was no data collection to see if his behaviors were caused by illness or something else. From the end of January 2014 to the end of the school year,

J.N.'s behavior was maintained with a special education teacher and a one-to-one aide. In the spring, from January to June, with the addition of the teacher and the aide, J.N. could access the ASP, and his aggressive behaviors decreased.

In the third and fourth marking periods he was making progress, showing less aggressive behavior, initiating conversations, and using his calming techniques. His progress report showed improvements with socialization.

In June 2014, the 2011 BIP was still being used because there had not been enough concern about his behaviors, which his teachers said had decreased during the school year.

In the fall of 2014 the parent temporarily removed J.N. from the ASP. The proposed IEP from November 2014 said J.N. needed stabilization in school before extra-curriculars were considered. She never considered the ASP as an extracurricular activity since it was funded by a grant, not the District.

A new IEP was drafted in December 2014. It included annual goals, but the Present Level of Academic Achievement and Functional Performance had no numerical criteria or data. It did not say how often J.N. could match words, or whether he could already perform 80 percent of the time. There was no report of progress or goals to show mastery in terms of the percent of goals and objectives.

During progress-report time, Williams would sit in meetings with the mother, the teacher, and Brennan. She helped prepare J.N.'s IEP for the 2014–2015 school year.

The progress report for the first marking period of the 2014–2015 school year showed improvement in aggressive behaviors, but did not include criteria for mastery. Formal data collection did not start until the end of November.

From November 25 to December 9, 2014, J.N. was not in the ASP, and no data collection was done while he attended the ASP. His behaviors had increased in the fall, but the District increased staffing and J.N. was able to be maintained in the ASP.

Brennan and Haggerty and she shared their concerns that the ASP program caused J.N. anxiety, which exacerbated his behaviors.

She never heard anyone say that the District would shut the program down before they let J.N. back into it. The staff knew J.N. and many had worked with him for years. The classroom staff can handle his program. His behaviors decreased, except toward the end of the school year, when his anxiety was high and he was not aware of his schedule.

Kristen Brennan testified that she is employed by GC as a special education teacher. She has a bachelor's degree in special education, elementary education, and a master's degree in special education and reading. She has been teaching in various districts since 2006. She has three certifications in general education: K-5; special education K-12; and reading specialist. She has training in the Orton-Gillingham Reading Program.

In 2012-2013 she was a general education teacher in the fifth grade. In 2013 she switched to the special education self-contained autism class. She has taught J.N. since then in the third, fourth, and fifth grades. This year she has the fifth, sixth, and seventh grades, as it is beneficial to stay with the students and provide continuity.

She first met and observed J.N. in June 2013 when he was in the second grade in Maiorano's class. J.N. attended the third grade in the Cold Springs School in 2013-2014. The program had four students on the moderate to severe autism spectrum. J.N. was the most severe. The class had three paraprofessionals, plus her. There were four teachers and four students; two of the students had 1:1 aides, including Haggerty and Marinelli, and there was one class aide, Orsino. The many aides were necessary for redirection, data collecting, and 1:1 direct instruction.

For the fourth-grade school year, J.N. was in Costello School. There were six students, five paraprofessionals, and one teacher. Three students had 1:1 aides, including Marinelli, Haggerty, and Dagney, plus two for the class, Orsino and Jen G.

For the fifth-grade school year, there were the same six students as the previous year, and five paraprofessionals, including three who were 1:1, Haggerty, Dagney, and Bermudez. The two class aides were Orsino and Jen G. Haggerty had been with J.N. for nine years since preschool. There was a benefit to the continuity, plus they knew the IEP and the protocols for him. When all staff were combined, there was a total of twenty-two years of experience with J.N.

Brennan worked in the extended-school-year (ESY) program for 2012–2015. J.N. was in the program two years. She has been with him more than 3,000 hours.

The autism program is an ABA program and applies interventions. It uses discrete-trial experiences, BIPs, token economy, instructional calendar, iPad, and positive-behavior rewards. Sensory breaks are provided every ten minutes or so. She works with three grade levels in the classroom and exposes her students to as much of the general education curriculum as possible.

J.N. has been making slow and steady progress. In math, he has been using Dynamic Learning, which tries to expose him to general education work; he is working on counting out of order.

J.N. has social skills during recess and at lunch, where he has the opportunity to act with peers. He has behaviors such as perseverations. He has demonstrated aggression to the staff with pinches, bruises, wounds, and scratching. He has struck the staff. When trying to get him into social activities, Haggerty had blood running down her arm. He also bit Orsino and Roe Fitzpatrick, his special education teacher. Not every incident of aggression resulting in injury was reported. Brennan has scars from some of the scratches from J.N.

Brennan felt the program provided him with FAPE, and conferred a meaningful educational benefit to him. The self-contained autism class is the least restrictive environment in which he can be educated. His parents were present at the IEP meetings and agreed to the self-contained autism class. While the parents may have

requested an ASP for J.N., the funding grant for the program ran out and the program ceased.

The ASP started at 3:00 p.m. and ended at 5:45 p.m. It started with homework class; then students had a snack; then they broke into small groups. The program was academically based for twenty-first-century skills. There was a computer class, test-preparation skills, and a cooking class, and clubs ran two times per week. There were eight to ten classrooms with certified instructors in class; in some cases, there were aides. It was a mix of 130 to 150 students from both general and special education. Brennan worked in the ASP as a teacher but did not work with J.N.

In 2013–2014, J.N. attended Cold Springs School. ASP was where his third-grade peers were. He had a 1:1 aide, and eventually two aides in January 2014. In the 2014–2015 school year he attended with a 1:1 aide. J.N. was provided access to the program.

Any time J.N.'s aides left the room, he would become angry and upset, and start perseverating. Each paraprofessional had a break, and he would try to run after her. Brennan believed that there was a link between Haggerty leaving and J.N.'s anxiety over ASP. At any mention of ASP, he would become anxious.

J.N.'s parent chose not to send him to the ASP after he bit teachers twice. She said she would just pull him from the ASP. Marinelli retired in October, but J.N. would be able to return as soon as a replacement could be found. But as soon as the ASP stopped, his behavior improved. It was a long day for J.N. He started school at 7:45 a.m. and ended at 2:50 p.m. The ASP then commenced and lasted until 5:45 p.m. This is a long day for any student, but especially for a child such as J.N. His maladaptive behaviors increased when he attended the program. The ASP was not a component of his IEP, and he was receiving FAPE. There was a detrimental effect to going to ASP, but the District felt an obligation to give equal opportunity to everyone to attend the program.

During school year 2013–2014, when J.N. attended Cold Springs and the ASP, his aide resigned in the fall. Discussions led to two aides and one teacher in the ASP when he returned in January 2014, and then they faded to one teacher and one aide. In the spring of 2014, J.N.'s behaviors improved in school and in the ASP. This may also have been due to medication he was taking for his illness.

Brennan provided data on academic goals, but numerical data is not on progress reports. Anecdotal feedback was provided, even though the goals set forth 80 percent mastery. Behavioral data was reported to Williams, and she made the graphs in spring 2015.

The parents requested an ASP in the IEP of December 2014, and they added the provision of art club, assemblies, and basketball. Brennan communicates daily with J.N.'s mother. J.N. was successful in her classroom program, and she saw changes in his behavior as the year progressed. One thing that went into an increase or decrease in behaviors was the medication; other things may have been three people assisting him, and his participation or not in the ASP.

Equal access to the ASP was not unduly burdensome. The District made the program available to J.N. with supports, and he was provided access until the program grant expired.

Anita Dalton Haggerty testified that she has a background in special education, working at the Bancroft Residential Program for many years, at Temple University Woodhaven Center, and as a teacher's aide at an autism school. Since 2007 she has worked for GC as a paraprofessional in the classroom to shadow the student and help with his or her needs. In 2007–2008 she was assigned to preschool. Since 2008 she has been J.N.'s 1:1 aide. He is her primary responsibility for his entire school day. She takes data and uses an iPad to assist him. He is good with it, and with discrete instruction.

J.N. has made progress. When he was younger, he was more aggressive, and had anxiety and tantrums. On numerous occasions he caused bruises to her. He talks,

and is no longer so aggressive. She is familiar with Handle with Care techniques, which are restraint procedures used to protect the student and self.

A typical school day for J.N. is like this: the bus arrives at the school between 7:45 and 7:50 a.m. and Haggerty meets him; they go to the classroom; morning room; breakfast; smart board and work; speech every day; discrete trials for forty minutes; lunch with friends; recess or gym to socialize; smart board and work; sensory room; specials such as art and music; and classroom play when the other students join in. The bus comes at 2:50 p.m. J.N. has socialization with his peers during lunch, gym, recess, and at the end of the day. He is a sociable child.

Haggerty never worked in the ASP. J.N. was anxious about the ASP and wanted to go home. They used the “calm cards”—count and breathe—which usually worked, although sometimes he would have a tantrum. J.N. always said, “home, bus.” He was anxious about the ASP during the 2013–2014 school year and it began to affect his school behavior. She did not know whether an IEP meeting had been called. His behaviors were related to the ASP. For school year 2015–2016, the ASP ended and he was much more relaxed and his behavior was better.

In September 2014, Marinelli volunteered to be his aide, but in October she gave notice because of injuries she had sustained. Reports of injuries were made to the nurse.

During the past eight years, J.N. has made progress. He was anxious, had lots of behaviors, and was not verbal. Now he communicates; his frustration level is down; he is more relaxed; and he has made academic progress. He can look at his schedule and can make transitions as long as he knows where he is going. This past year there was an improvement in maladaptive behavior since there was no ASP. He gets an educational benefit in his class.

Haggerty first met J.N. when he was four years old. When he was younger he would pinch and bite, and had many tantrums; this has lessened over time. His behaviors are worse when he is not well. When his ears hurt, he cries. They have ear

drops and throat-pain relievers. She has prepared graphs that demonstrate his progress. She does discrete testing and has maintained the chart since he attended Cold Springs. His verbal communication is much better, and he had far fewer tantrums this past year.

Nicholas G. Orsino testified that he has an associate's degree in elementary education, and is trained in Handle with Care and ABA. He previously volunteered at an early-childhood center and worked for GC from 2009 to 2015 as an aide. In 2013 he became a paraprofessional with GC. His role is to support teachers and students.

Orsino has been assigned to J.N.'s classroom for three years. He first met J.N. in 2010 at the ASP when he was a classroom aide. The program had about 150–200 students in both general and special education and was available to everyone. The children met in the cafeteria for a snack, then did homework or recreational activities. The twin focus was on homework and socialization.

In 2012–2013, he worked with J.N. as his 1:1 aide. J.N. would have his snack, and do homework; they sometimes went outside or to class to play. J.N. exhibited some behaviors, including perseveration, biting, and pinching, at least a few times a week. He has now worked with J.N. for three years, and J.N. has continued to exhibit these behaviors. His behaviors were worse when he went to the ASP; he would be upset just getting off the bus. His behaviors picked up when he was transported from Costello School to Cold Springs School. His behaviors were so bad they had to have a calm area in class. He wanted to go home, and would repeat, "home, home, home." It was a long day, and tiring for J.N. He just wanted to go home. But he did have access to the program.

During the 2015–2016 school year, J.N.'s behavior improved, with a lot fewer aggressions. They removed the calm area in the class as it was no longer needed. There are six students in the class with six staff members. J.N. has made progress in the last three years. He is reading better and his attention span is longer. He is afforded a meaningful educational benefit in the program.

Orsino does assignments with J.N. every day. He sees him for about twenty minutes in the morning and then during special periods. This past year his schedule was rotated so he spent less time with him. Orsino met McCabe-Odri in the classroom and she trained him on J.N.'s behavior plan. He also received ABA training with Brennan under the supervision of McCabe-Odri during the 2013–2014 school year.

He did not work with Maiorano, but received tips from her in how to support J.N. He did not tell J.N.'s parents that he had been pinched by J.N. unless it was severe. He never said J.N. should not go to the program.

Lauren Bermudez testified that she is employed by the Gloucester County Board of Education as a paraprofessional. She graduated with a degree in special education and is going for her master's degree. She is certified in elementary education K–6 and special education.

In September 2013, Bermudez became a full-time paraprofessional in special education, working and teaching 1:1 and as a reading tutor. She met J.N. at the end of June/July 2013 at the Building Exceptional Students for Tomorrow (BEST) program, where she had been working. She picked J.N. up after ESY program and took him to BEST from 12:30 to 5:30 each day.

J.N. was then easily agitated. The camp had a lot of children and there were twenty-four students in the large class. She worked with J.N. in his class, and this school year, and he has done exceptionally well. She had worked in the ASP, but J.N. was with his 1:1 aide, Marinelli, during the 2014–2015 school year. Marinelli said J.N. was overwhelming her and was too much for her.

This school year J.N. has been able to socialize better, which he does at lunch, recess and gym. His school day ends at 2:15–2:45. J.N. does not need access to an ASP to have socialization. She feels he is making progress—she does discrete trial, shapes, and math skills, and has seen progress. He is meaningfully benefitting from the education.

No one told her the parents were trying to get more training for Marinelli. She worked with J.N. from December 2014. She never told anyone his program was inappropriate, detrimental, or should be changed. She was concerned with his safety and did not think the program was helping him.

Stipulation of Testimony

The parties stipulated that **K.N.**, the parent of J.N., and **Nina Longer**, the director of Special Services, would testify that at the June 2014 IEP meeting the parents were told that attendance in the ASP would not be included in the IEP because J.N. did not need it to receive FAPE; that J.N. has attended an after-school program with access to typical peers, with dedicated 1:1 support and access to a group aide from July to December 2015, and dedicated 2:1 support from January 2016 to the present, at parental expense; that K.N. agreed that J.N. has been in the same program since the beginning of the 2014–2015 school year, and that the parents have invoked stay-put to maintain this placement, and they have rejected consideration of an out-of-district school.

Findings

I accept the testimony of the witnesses as FACT. Indeed, there is not much dispute as to what occurred here, but whether the evidence, taken as a whole, is sufficient to establish that J.N. received FAPE or whether he was denied due process by the District not incorporating the ASP into his IEP.

J.N. was on the lower end of the autism spectrum. He also had anxiety issues and dysphasia; he could be aggressive to himself and others, and had sensory behavior issues. He attended school in the District's self-contained autistic program. The petitioners never sought to remove him from this program and were opposed to any out-of-district placement. In 2013–2014, J.N. was in third grade at the Cold Springs School, in a class with a teacher-student ratio of one to one, with four students and four staff members. J.N. had an aide assigned to him.

He also utilized the services of a reading specialist in a program developed by a board-certified behavior analyst consultant.

GC received a grant to fund an ASP held at the Cold Springs School, which was open to all students during the 2013–2014 school year. Arrangements were made for J.N. to attend with a 1:1 aide.

For school year 2014–2015, J.N. attended the Costello School in a class with a teacher-student ratio of one to one, with four students and four staff members, and an aide assigned to him. The ASP program was not held at Costello, which meant that J.N. needed to be bused to Cold Springs School each day after class so that he could participate. This was too much for the child, and his behaviors increased to the point where his aide resigned after being injured. J.N. was temporarily removed from the program, as the district looked for a solution. The parties met in late fall/early winter and devised a solution: that J.N. return to the ASP with two aides and a special education teacher, and then gradually fade to one aide. However, J.N. did not return to the program.

The uptick in behaviors in the fall also coincided with some health problems which may have contributed to his increased behaviors during the prior months. Once the health problems were under control, the behaviors were substantially reduced, and J.N. was able to complete the school year. The grant for the ASP ended in June 2015 and the program was discontinued.

The IEP did not incorporate the ASP as a component of FAPE because it was not part of the school curriculum, but rather was funded by a grant not under the District's control. In addition, the District sought stabilization of J.N.'s behavior before any other extra-curriculars could be considered.

The IEP incorporated all the strategies recommended by Dr. McCabe-Odri in J.N.'s BIP, including the token system and a calm area, and the staff was trained accordingly. Counseling was provided, and access to peers was encouraged through social activities. Discrete instruction methods were used. Antecedent behavior-

collection data was used, but not extensively. The numerical data collection was haphazard and missing, although it was improving by 2015.

LEGAL ANALYSIS AND CONCLUSION

The gravamen of the petition lies with the after-school program that was attended by J.N.

The District argues that J.N. exhibits problem behaviors which are a symptom of his condition and which were exacerbated by his participation in the ASP during the 2014–2015 school year. The District assigned additional staff to attend the ASP with J.N., including a special education teacher and two aides. Once these supports were provided, the petitioners saw the program as an entitlement, but the program is no longer in existence.

The District further argues that J.N.'s case is unusual in that the petitioners have not disagreed that his IEP program is appropriate; it is that they want a special education teacher and an aide in an ASP that no longer exists. The ASP is not the standard for FAPE. But the petitioners contend that they must have an ASP with a special education teacher or there is no FAPE. The staff knew J.N.'s needs, and he was provided what was appropriate for his condition. He received FAPE and equal access to the ASP when it was running.

The petitioners contend that they are supportive of J.N.'s program and his IEP and do not disagree that J.N. has made progress in his educational program, but they want supplementary aides and extra-curriculars, including an after-school program, included in his IEP. They contend that the staff needed more training, because when J.N. had to transfer to the ASP from the Costello School, the program did not have appropriate personnel in place to address his behaviors. As a result, he was forced to leave, and thus was denied FAPE. They want the IEP to include an after-school program; they also seek compensatory education for the time when he did not attend the program.

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482. One purpose of the Act, among others, is to ensure 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.” 20 U.S.C.A. § 1400(d)(1)(A). This “free appropriate public education” is known as FAPE. In short, the Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C.A. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, supra, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701.

The Act did not, however, impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. In support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (DC 1972). Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043-44, 73 L. Ed. 2d at 703. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, supra, 458 U.S. at 192–93, 102 S. Ct. at 3043–44, 73 L. Ed. 2d at 703–04.

In addition, the Court noted that available funds need only be expended “equitably” so that no child is entirely excluded. Rowley, supra, 458 U.S. at 193, 102

S. Ct. at 3044, 73 L. Ed. 2d at 704, n.15. Indeed, the Court commented that “the furnishing of every special service necessary to maximize each handicapped child’s potential is . . . further than Congress intended to go.” Rowley, supra, 458 U.S. at 199, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. Therefore, the inquiry is whether the IEP is “reasonably calculated” to enable the child to receive educational benefits. Rowley, supra, 458 U.S. at 206–07, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

The Board will have satisfied the requirements of law by providing J.N. with personalized instruction and sufficient support services “as are necessary to permit [him] ‘to benefit’ from the instruction.” G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671 (D.N.J. Feb. 27, 2009) (citing Rowley, supra, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701). The IDEA does not require the Board to maximize J.N.’s potential or provide him the best education possible. Instead, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). But an IEP must provide meaningful access to education, and confer some educational benefit upon the child. Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703.

The educational opportunities provided by a public-school system will differ from student to student, based upon the “myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.” Rowley, supra, 458 U.S. at 198, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry, and that “[i]t is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variation in between.” Rowley, supra, 458 U.S. at 202, 102 S. Ct. at 3049, 73 L. Ed. 2d at 709.

I **CONCLUDE** that the program offered J.N. by the Board constituted FAPE as that term is defined by law. A review of the evidence reveals that J.N. progressed in his educational program, indeed, to the petitioners’ satisfaction, and that the child study team constantly adjusted his program in an ongoing effort to personalize his instruction and address his educational needs. School personnel testified convincingly to J.N.’s

progress, and the burden of proof and production rests with the Board. N.J.S.A. 18A:46-1.1.

As to access to the ASP, I **CONCLUDE** that the District did provide access to J.N. with supports in place. The fact that his behaviors increased during the fall of 2014 came from several factors: a long school day; a resistance to transferring from one school to another; dislike of the bus; and health problems. The petitioners and the District worked together to come up with a solution to permit him to return to the program once his situation stabilized. That he did not return is not the fault of the petitioners or the District. The ASP was not one of the District's extra-curriculars; it was funded temporarily with a grant that terminated. Attendance at this ASP cannot be equated to a requirement in J.N.'s IEP to attendance at any after-school program. Failure of J.N. to attend during the spring of 2015 was not a denial of FAPE by the District. Nothing in the evidence suggests that the District had the obligation to provide for another ASP as part of an IEP, or as part of J.N.'s specific educational program.

ORDER

Based on the foregoing, it is **ORDERED** that the petition for due process be dismissed.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016) 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 (2016). 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.

September 8, 2017 _____

DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency

Date Mailed to Parties:

SMS/cb

APPENDIX

WITNESSES

For petitioners:

Jennifer Williams
Kristen Brennan
Anita Dalton Haggerty
Nicholas G. Orsino
Lauren Bermudez

For respondent:

None

EXHIBITS³

For petitioners:

P-2 Correspondence from Dr. McCabe-Odri
P-4 IEP
P-8 OT Progress Note
P-10 Home School Communication Notebook
P-12 Re-evaluation chart
P-18 Email from N. Longer to K.N. and attached draft IEP
P-19 Eligibility Conference Report
P-20 IEP (never implemented)
P-23 Prescriptions
P-25 Speech Progress Reporting
P-26 End-of-Year Related Services Summaries
P-33 Kristen Brennan emails re: J.N. (excluding daily communication logs)
P-34 Daily Communication Log emails form Kristen Brennan

³ The parties stipulated to the admission into evidence of the above-numerated documents.

- P-35 Emails with M. Maiorano
- P-36 Emails with N. Longer
- P-37 Emails with J. Williams
- P-38 Emails with J. Gresko
- P-39 Emails with R. Fitzpatrick
- P-40 Emails with H. Rupp
- P-41 Picture of J.N.

For respondent:

- R-3 1st Quarter 2012–2013 progress reporting
- R-4 3rd quarter 2012–2013 progress reporting
- R-5 3/19/13 email
- R-6 4th quarter 2012–2013 progress reporting
- R-7 June 2013 IEP
- R-8 1st marking period (mid) report 2013–2014
- R-9 1st marking period (end) report 2013–2014
- R-10 2nd marking period (mid) report 2013–2014
- R-11 2nd marking period (end) report 2013–2014
- R-12 3rd marking period (mid) report 2013–2014
- R-13 3rd marking period (end) report 2013–2014
- R-14 4th marking period (mid) report 2013–2014
- R-15 June 2014 IEP
- R-17 10/28/14 Beyderman latter with prescription
- R-18 Prescription permission form
- R-19 Data sheet
- R-20 1st marking period (end) report 2014–2015
- R-21 2nd marking period (mid) report 2014–2015
- R-22 2nd marking period (end) report 2014–2015
- R-23 3rd marking period (mid) report 2014–2015
- R-24 3rd marking period (end) report 2014–2015
- R-25 11/14/14 IEP
- R-26 Request for mediation
- R-27 12/5/14 correspondence

- R-28 OT evaluation
- R-29 Speech/Language Evaluation
- R-30 FBA
- R-34 12/22/14 IEP
- R-35 2/4/15 Email
- R-36 2/4/15 Email with response
- R-39 Data
- R-40 Attendance records
- R-41 2014–2015 Report Card
- R-42 2014–2015 Report Card MP3
- R-44 Communication book
- R-45 Emails
- R-46 Timeline
- R-47 Notice of Grant Opportunity