

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 04039-16

AGENCY DKT. NO. 2016-23983

J.D. AND B.D. ON BEHALF OF W.D.,

Petitioners,

v.

SUMMIT CITY SCHOOL BOARD

OF EDUCATION,

Respondent.

Lori M. Gaines, Esq., for petitioners (Barger and Gaines, attorneys)

John B. Comegno, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: March 24, 2017

Decided: July 6, 2017

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

J.D. and B.D., on behalf of their son W.D., (herein after petitioners), filed a petition alleging that their son, a student at the Summit City School District (herein after respondent), was not provided a free and appropriate public education. Petitioners allege in their petition that W.D. was not provided with an appropriate Individual Education Plan (IEP) causing them to unilaterally place W.D. in an out of district school. The parents seek reimbursement of the costs of W.D's unilateral placement, compensatory education, compensatory education for home instruction during the 2015-2016 school year, reimbursement of all costs related to their private evaluations and experts. And, prospectively petitioners seek continued placement of W.D. at the out of

district placement until W.D. achieves significant learning and meaningful educational benefit.

Respondent, presents that it conferred W.D. a free and appropriate public education, a program that provided W.D. with significant learning and meaningful educational benefit in the least restrictive environment.

The petition was filed on or about February 2, 2016, with the New Jersey Department of Special Education. The case was then transmitted to the Office of Administrative Law (OAL) as a contested case on March 15, 2016. The matter underwent mediation and a settlement conference however an amicable resolution was unable to be reached. The case was heard before the undersigned Administrative Law Judge (ALJ) on: November 29, 30, 2016, December 9, 13, 21, 2016, January 10, 26 and 27, 2017.

ISSUES

1. Did the District offer W.D. a free and appropriate public education (FAPE) where he could make meaningful educational progress when it proposed a placement in the District's middle school for the 2016-2017 school year?
2. Did the District provide W.D. with FAPE during the extended school year the Summer of 2016 ?
3. Was the unilateral placement of W.D. at Spectrum 360 reasonable under the circumstances?
4. Is Spectrum 360 an appropriate educational placement for W.D.?

SUMMARY OF TESTIMONY

Jessica Cuskie

Jessica Cuskie was the Special Education teacher for W.D. She started teaching at the Allegro School, a school for Autistic children for approximately for years she was

an aide and then a teacher in total she taught at that school for approximately 10 years. In 2009 she went to the Florham Park school district where she taught grades 3 through 5, she taught there for two years. When she left Florham Park she went to the Summit school district where she has been since 2011. She has taught about 50 Autistic students over her teaching career; she has worked on IEP's and has collected data for each of her students. At Summit she currently teaches 2nd through 5th grade students with language and learning disabilities. She has six students in her class, she is the only teacher with 5 aides. Her teaching consists of implementing her students IEPs, she relates and coordinates with the specialist for each of her students and she shadows her students into their general education classes and collects behavior data.

W.D. started in her class when he was in 1st grade in the 2011-2012 academic year. He was in her class when he was in 2nd grade in 2012-2013, 3rd grade 2013-2014, 4th grade 2014-2015, 5th grade 2015-2016. During the 2015-2016 school year W.D. was not in school because he was on home instruction after being diagnosed with Leukemia.

By way of background Cuskie testified that in 1st grade W.D. presented as happy, compliant, student that interacted with his peers, built relationships with everyone including the adults in his class. He had some academic skills however he had some hand flapping, vocal stereopathy (saying words or phrases out of context) and at times he would say words or phrases that were functional but irrelevant at the time. She opined that W.D. made behavioral progress that year in that he would attend and sit still for longer periods of time.

In 2nd grade W.D. made academic progress even though he did not attend an ESY program and that there was no regression. She said behaviorally he continued hand flapping, vocal stereopathy and was non-compliant when demands were placed on him and he lacked the ability to focus. She opined that in spite of these behaviors W.D. made academic progress.

In 3rd grade W.D. did not have ESY that summer however he maintained his academic gains and transitioned well into the school year. His behavior was similar to

that of 2nd grade. In April 2014 (3rd grade) W.D. continued to make academic progress but his behaviors were inconsistent. There were times when he was able to learn and work on academics but at time his behavior interfered with class work.

In April 2014 a new IEP was developed for him for the end of 3rd grade and the beginning of the 4th grade. W.D. was receiving Math and Reading instruction on a pull out basis. In Math pull out it was W.D. and another student. In Reading pull out it was a total of 4 students including W.D. She opined that W.D. was maintaining the skills he learned but he had some difficulty generalizing his skills. His IEP included individual and group speech therapy.

W.D. worked with Rachel Wohl, a behaviorist, 4 hours a month. The behaviorist was in her classroom almost every day, training students and taking data. Wohl helped her with programming and behaviors. Wohl incorporated the behavior program into the academics.

W.D. went to his general education classes with his aide.

Cuskie opined that W.D. made academic progress because he was able to obtain and retain new skills and generalize them.

Cuskie testified that W.D. was never removed from her classroom because of behaviors in 2013-2014. W.D. eloped from her classroom but his aide was right there. W.D. did not elope often perhaps once a week. However, Cuskie furthered that his elopement did not impact his ability to learn. She said W.D.'s elopement was not always out of her classroom sometimes he would elope out of the gym or other classrooms.

She testified that W.D.'s "meltdowns" consisted of crying, dropping to the floor and screaming. During the 2013-2014 school year he had a "meltdown" about once a week. W.D.'s meltdowns were addressed by getting him off the floor taking him to his work area and calming him down to ultimately redirecting him back to work. Some meltdowns lasted longer than others the length of time varied from one minute to ten minutes.

Cuskie stated that the behaviors W.D. exhibited during 2013-2014 school year did not affect his academic progress. With W.D. if he was required to do what he did not want to do he would exhibit a bad behavior.

During the 2014-2015 school year 5th grade W.D.'s behaviors increased, it started in September. He exhibited tantrums, self-injurious behaviors by banging his head against a wall. Data was taking to track the frequency and type of behaviors W.D. exhibited. See Exhibit Book 3 tab 78.

Cuskie said W.D. was in and out of school a lot in February and March of 2015 because of illness due to his leukemia he left school on March 20, 2015. W.D. was on home instruction for the remainder of the school year and the summer of 2015. His programs were worked on by the home instructors.

An IEP was drawn up for W.D. for the 2015-2016 school year this was the last IEP the district made for him. This IEP was never actually signed by the parents nor was it implemented because W.D. never returned to school. This IEP proposed that W.D. leave the elementary school and go to middle school, W.D. had to transition from elementary school to middle school. Cuskie opined that the program proposed in this IEP addressed W.D.'s needs and were appropriate for him. She furthered that she taught W.D. for 1st, 2nd, 3rd, and 4th grades and that the services she provided him were appropriate and he made academic progress.

Cuskie opined that in spite of W.D.'s behaviors that occurred almost daily, she was able to redirect him return him to the task and ultimately he achieved educational progress. She stated that an increase in behaviors does not mean a child is not making progress. W.D. was redirected by keeping him quiet, having him do jumping jacks or allow him to drink some water. Redirection would take her anywhere from a few seconds to ten minutes.

Under cross-examination Cuskie acknowledged that since W.D.'s first IEP going into 1st grade, W.D. had a behavior intervention program and that he had contextual speech problems since 1st grade. Exhibit Book I tab 37, his first IEP.

Cuskie acknowledged that from 1st grade W.D. was having "meltdowns", screaming, crying and dropping to the floor episodes and his behaviors increased in group settings. Cuskie testified that when initially introducing a new skill W.D. would have a behavior event. And, that W.D. exhibited self-injurious behaviors from 1st grade. W.D. would bang his head on anything. His IEP in 1st grade said he was to get 4 hours a month with a behaviorist, W.D.'s behavioral intervention plan did not change from his first IEP to the last IEP.

Cuskie acknowledged that in W.D.'s IEP of September 20, 2012, see Book 2, Exhibit #43 behavioral techniques are not included. Although W.D.'s behaviors did not improve from 1st grade to 5th grade no changes were made in the district's behavioral intervention plans. She said the strategies and techniques that were being used were not working with W.D.

In September 2014, the start of 4th grade W.D. needed to be restrained, and numerous times he exhibited such severe self-injurious behaviors that he needed to be restrained especially because other students were around.

Jens Madsen

Jens Madsen testified on behalf of the petitioners. Madsen is a certified health and physical education teacher. He is no longer employed by the respondent district. At the time of his testimony he was employed by the Plainfield Public Schools as an elementary health and physical education teacher. At the time he was an aide to W.D. he was a certified teacher with a Bachelor's Degree in Elementary School Education, graduated in 2012.

Madsen was W.D.'s 1:1 aid from the end of W.D.'s first grade until the end of the fourth grade., from 2012 until the 2014-2015 school year. Madsen stated that in the

beginning W.D. exhibited behavior such as verbal outbursts, laughing when there was nothing funny going on, dropping himself to the floor, he would elope or run away out of nowhere. W.D. needed constant prompting, assistance and direction to complete his morning routines, however there were days when W.D. did not need as much prompting and assistance. But, W.D. was never able to do any of his routines completely independent of assistance. He was with W.D. his entire school day.

He found W.D.'s behavior to be disruptive to his own learning and to other students.

When W.D.'s behavior became so disruptive he would take him out of the classroom to correct the behavior but sometimes he was not able to return W.D. to the classroom. Madsen furthered that sometimes, depending on W.D.'s mood he would be able to bring him back and return him to the class but if not he would have to be removed from the class and he would have to go somewhere else and do something else. He felt that as the school year went on and the curriculum became more challenging it became more difficult for W.D. He opined that as the curriculum became more difficult W. D. became frustrated and his disruptive behavior increased. Madsen thought as far back as 2012, that W.D.'s disruptive behavior was escalating in quantity and severity. W.D. was experiencing behaviors on a daily basis. Madsen worked with the same behavior plan that was used for W.D. since his pre-school days.

Madsen stated he would ask the classroom teacher to ask W.D.'s behaviorist for help or a different behavior plan and sometimes the behaviorist would come in and sit with him while he was working with W.D. and give him suggestions or how to make adjustments to the behavior plan to suite W.D. for the moment but there were never any huge changes to anything. Madsen said many times he would come up with his own techniques to try to respond to W.D.'s behaviors. It was trial and error, if it worked great if it didn't he would try something else. Madsen said that if nothing worked he would remove W.D. from the classroom, this was his last resort. Madsen stated he did not receive enough behavioral support.

Madsen collected data on W.D.'s behaviors at five minute intervals graphed it and put it in W.D.'s binder, he did this on a weekly basis. District's behaviorist did not discuss the graph or the data he collected with him, no changes were made to the strategies based on the data he collected. He testified that the behaviorist added more behaviors for him to track.

W.D. started exhibiting self-injurious behaviors in second grade. Madsen testified he discussed this behavior with the behaviorist but he was not given any strategies to help him and W.D. deal with such behavior. W.D.'s behaviors increased in second grade and they continued into third grade. Madsen continued to ask for new strategies to respond to W.D.'s behaviors but he was not given anything new.

There were days during W.D.'s third grade that he exhibited fifty-nine (59) verbal outburst, had nine tantrums, seven self-injurious episodes and had to be removed from the classroom seven times. There were days that W.D. engaged in behaviors 96 per cent of his school day.

Madsen furthered that some of W.D.'s self-injurious behavior consisted of hitting, punching and banging his head on the wall, scratching his arm, hitting his foot with his hands, hitting his hand on the desk and hitting his leg with his hand. Madsen had to use a restraint called a "basket hold" on W.D. in September of 2014, W.D. was in the fourth grade, because W.D. was hitting his head on his desk. Madsen stated that W.D.'s classroom teacher told him to watch out for W.D.'s behaviors because he was exhibiting more and more severe self-injurious behaviors and she did not want W.D. to seriously hurt himself.

Madsen testified that when W.D. engaged in these behaviors they were disruptive to his learning and that of his classmates. W.D.'s behaviors lasted anywhere from one to five minutes and any behavior lasting over five minutes he would remove W.D. from the class. Madsen furthered that W.D. engaged in these behaviors in both the Applied Behavior Analysis (ABA) and mainstream class settings.

Madsen stated that behaviorally and socially W.D. did not progress and that W.D.'s behavior limited his ability to participate in learning opportunities. W.D.'s behaviors were disruptive to the mainstream environment. Madsen said he never met with the school's behaviorist to provide training on how to respond to W.D.'s behaviors.

Under cross examination Mr. Madsen testified that W.D. made some academic progress every year that he was involved with him. W.D. was using Edmark, a computer based reading program, to learn reading skills, cite words and reading comprehension. W.D. progressed from Edmark program 103 in first grade to 133 at the end of third grade and he was reading at a level equivalent to a first grader. W.D. also achieved a level of success with his math skills. W.D. was able to add two and three digit numbers and count nickels and pennies. W.D. also showed academic progress in science and social studies. Madsen affirmed that W.D. did make some academic progress.

Madsen stated that he received two crisis intervention training and it was given on a yearly basis, his first was during W.D.'s second grade. And, under further cross examination he recalled that he had received four additional training sessions for aides so in total he received six professional training sessions for assist and reinforce his attending to W.D.'s academic needs. None of the training he received was specific to W.D. or individualized for W.D. all of the training was in a group and they were general training session.

Dr. Anita Breslin, Psy.D., BCBA-D

Dr. Anita Breslin testified on behalf of the petitioners. Dr. Breslin testified as an expert in the areas of evaluating children with Autism, ABA program planning for students with Autism, psychology and school psychology. Dr. Breslin is a board certified behavioral analyst (BCBA), with a doctoral degree. Dr. Breslin's qualification in these areas were without objection and with the consent of the District. Dr. Breslin's resume was also admitted into evidence as a joint exhibit in Book 5 Exhibit number 163.

The parents asked her to examine and evaluate the District's proposed program for W.D. as he was about to enter middle school and determine if the program could or could not meet W.D.'s needs. On August 3, 2016, Dr. Breslin wrote a report with the results of her evaluation and findings about W.D.'s education and related needs. The report is marked Exhibit 158 in Book 5, and it is a joint exhibit.

At the time that Breslin did her assessment W.D. was on home instruction due to his medical treatment for leukemia. Breslin stated W.D. has a complicated profile, he has Autism associated with problem behaviors that have been exhibited in school throughout the various school years which have significantly hampered his educational progress. Breslin outlined the problem behaviors that the district identified in the various IEPs, educational history and the data collected. She said W.D. exhibited repetitive motor movements, repetitive non-communicative verbalizations, tantrums by screaming, yelling, falling to the floor and finally self-injurious behaviors.

According to Breslin, a review of W.D.'s school records including his numerous IEPs show that his behaviors were not addressed. Nor was a behavioral intervention plan proposed. A behavioral intervention plan is based on an assessment of the function or functions of problem behaviors and then the application of proven procedures to control and reduce those problem behaviors, this plan is implemented within the context of the student's educational program (IEP). Because of W.D.'s escalating self-injurious behavior, a behavior intervention plan should have been established and implemented specifically addressing that behavior. Such behaviors are treated very much like an emergency situation that must be handled very carefully and comprehensively. Breslin said she didn't see any intervention plan that was specifically developed to target self-injurious behaviors when they were occurring early on in his school years therefore his self-injurious behaviors just escalated.

After a review of W.D.'s records and having conducted two observations of the components of the program proposed by the District Breslin concluded that the proposed program would not provide W.D. with a meaningful educational. She opined that his behaviors interfered with his availability to learn.

Breslin observed the District's proposed program for the 2016-2017 school year. Breslin opined that although the middle school staff used some ABA based procedures she did not observe appropriately planned and documented evidence based intervention. Staff members did not use planned and documented based intervention. Staff members did not use written programs that are required to make sure the programs are being implemented consistently by all teachers and staff across the board. Specifically, and as an example was her observation of a student with the librarian. It appeared to her that the librarian came up with tasks for the student to do in the moment. Breslin stated that this type of random presentation of instructional tasks is not supported by an ABA model of instruction.

Breslin testified that she did not see any motivational systems consistently utilized across a wide range of learning experiences. She did not observe consistent use of choice making opportunities, activity schedules and other procedures proven to be effective in the development of skills and independence. Breslin stated she observed students exhibiting atypical behaviors and staff members failing to monitor such behaviors. She did not see a systematic implementation of behavior analytic procedures shown to control and reduce such behaviors while increasing desired behaviors.

With respect to W.D.'s problem behaviors she concluded that placing W.D. in a setting where problem behaviors are not carefully monitored and dealt with would be detrimental to him at this time. She also furthered that according to W.D.'s proposed IEP W.D. would receive Behavioral Intervention Consultation four times per month in 60-minute session however, she opines that that is insufficient to meet W.D.'s educational needs.

Breslin furthered that the program the district proposed and she observed was very disorganized, it had no clear indications that the educational services were planned in advance and individualized. She observed that instruction was non-intensive. There were times that staff members did not know where students had gone or where they were being instructed. She saw no social skills instruction or social facilitation by the staff of the students.

Breslin also criticized the academic instruction of the program. She opined that the level of academic instruction is inconsistent with W.D.'s level of academic ability and that the instruction that he will be provided will not ensure his mastery of skills taught.

And, W.D.'s IEP does not include any home programming. Breslin opines that W.D. requires this instruction in order to achieve the primary objective of an ABA program, which is to promote skill generalization across all settings in which W.D. is expected to function and actively participate.

In conclusion Breslin opines that W.D. should be placed in a specialized out of district school that can provide him with a full day of ABA based instruction across all content areas. She determined that W.D. needs individualized instruction that is organized and systematic and is applied consistently.

Under cross-examination Dr. Breslin brought out the fact that a behavioral intervention plan is not required for every problem behavior. And, that it may not be a good idea to develop a behavioral intervention plan for every behavior because to implement some plans may take too long. She stated that you don't have to have an intervention plan for self-injurious behaviors. Dr. Breslin specified that problem behaviors have to be addressed and if the behavior is a continuous one a behavioral plan should be established to deal with those behaviors that occur all of the time.

Carol A. Fiorile, Ph.D., BCBA-D, SAS, LBA

Dr. Carol Fiorile (Fiorile) testified on behalf of the petitioners. She was qualified as an expert in Special Education, Applied Behavior Analysis, evaluating students with Autism and in the development of educational programs for students with Autism. Dr. Fiorile's resume was admitted into evidence and it is marked Book 5, exhibit 164.

Fiorile was asked by petitioners to review and assess W.D.'s educational program, she evaluated his proposed program in the Summit School District, she observed him in his home program through multiple videotapes and she reviewed

relevant documents in order to provide a recommendation for his placement.¹ Fiorile was told by the parents that W.D. needed help because he was not making progress academically or socially and that his behavior was impeding on his ability to progress. Upon her review of W.D.'s school records she noted that W.D.'s scores in Reading, Written Expression and Math were all well below grade level. Fiorile noted that W.D. failed to make substantial progress in the District's program up to the 4th grade. According to Fiorile the District did not assess W.D. for more than six years, however she did note that during W.D.'s 5th grade year he was not in school.

After reviewing W.D.'s records, IEPs, and observing the proposed self-contained class that was planned for W.D.'s 6th grade Fiorile opined that: W.D. needed an intensive individualized instruction. She said his last IEP was very rote and there was nothing new in it, it was more of the same-the same that was not working. In her opinion W.D. needs more than once a week for one hour of behavior intervention. She also thinks that the students at the proposed class at the middle school were lower functioning than W.D. She noted that the students were not responding independently the teacher was still prompting and there was no data collection at all.

The classroom teacher did not use behavior specific verbal praise, she said the teacher should use more specific praise statements as reinforcement. She found that the staff did not redirect a student that had eloped. She opines that the staff does not respond appropriately to problem behaviors.

After reviewing a video of W.D. at home with his home instructor she observed that W.D. performed better at home.

She opined that the class proposed for W.D. by the District at the middle school, and the class she observed did not strictly adhere to the basic dimensions of an ABA program. She observed that the students were overly prompted and the prompts were

¹ W.D. was on home instruction when he was in the 4th grade, 2015-16 school year because of his treatment for leukemia.

not geared to produce correct and independent responses. She found the classroom too noisy and had too many transitions and distractions for the students. She found that there was minimal BCBA oversight in the proposed program. She felt the IEP allotted an insufficient amount of behavioral intervention consultations for W.D. given his behaviors, she said four times a month for one hour is not enough.

Fiorile expressed that she also had concerns about the rigors of the District's proposed program at the middle school. She explained that many more demands will be placed on W.D. outside of his special education classroom such as his participation in the general education environment and the exposure to large numbers of students. W.D.'s fragile health and poor stamina all add to his precarious school situation. Dr. Fiorile found that if W.D. were to be placed in the District's 6th grade proposed program he will likely regress. As Dr. Fiorile saw it W.D. needs strict adherence to the basic ABA program and she did not see this at the District.

Fiorile in her report stated that the District's program provided the minimal parental training of eight 45-minute parent training sessions per year. Family training and involvement is key in facilitating generalizing skills across settings. Also, the District's IEP is missing a home program for W.D. Fiorile opines that the lack of a home program for W.D., who needs home programming to promote generalization of skills at home and in the community, is wholly inappropriate.

During cross-examination Fiorile explained that behaviors can be treated in several ways. One way of treating behavior is through a school wide plan that is not specific to the individual child and therefore not necessarily in the student's IEP. The school has a school plan or strategy such as promoting good behavior by awarding a group or class positive reinforcement. She also explained that you don't treat all behaviors at one time, you must prioritize the behaviors, for example you first treat self-injurious behaviors the elopement etc., and those behaviors don't necessarily have to be a documented plan.

Fiorile furthered that when she observed W.D. it was at his current placement at Spectrum 360 (360) but when she observed the District's program W.D. was not there

so she was not able to adequately assess the District's program. She also stated that 360 was dealing with W.D.'s self-injurious behaviors through a general classroom plan and not an individualized plan. Fiorile acknowledged that she did not see a behavior plan at 360. She noted that W.D. had six behavior episodes while she was observing him at 360 and the staff dealt with it quickly and W.D. moved on. At 360 she observed W.D. poised to learn.

Tracey Carlesimo

Tracey Carlesimo testified on behalf of petitioners. At the time of her testimony she was a Special Education teacher for the Westfield, New Jersey, Board of Education. She was hired by Hand over Hand to implement a home program for W.D. She has a B.A., in psychology, a M.A., in Special Education, she is a certified teacher for the handicapped with 10 years being certified, and she primarily teaches Autistic children. She provided W.D. with 6 hours a week of home instruction in 2015-2016 academic year. She started in January 2016 and worked through June 2016. She implemented the programs provided by Summit.

Carlesimo testified that she noticed W.D.'s hand flapping, scripting, non-contextual vocalizations as well as other behaviors and questioned his behavioral programs. She asked for his behavior plan and was told he did not have one. She spoke with W.D.'s behaviorist from the District the one time that the behaviorist went to the home. Carlesimo stated that she asked the behaviorist for a specific behavior plan for W.D. but she never received it. Carlesimo was collecting data but the District's behaviorist said it was variable and too inconsistent. She asked the District for new academic programs for W.D. but the District never provided the new programs.

According to Carlesimo, the District never performed a Functional Behavioral Assessment (FBA) and never created a behavioral intervention plan for W.D.

Under cross-examination Carlesimo acknowledged that sometimes W.D. walked out of the room they were working in.

Tara Sheerin

Tara Sheerin testified on behalf of petitioners. She was qualified as an expert in Applied Behavioral Analysis (ABA) and in the Development of Educational Programming for Autistic children. Her resume was admitted into evidence and marked in Book 5, Exhibit 165.

Sheerin started working at the Summit School District in 2004 and she worked there 6 years, she left Summit in September 2010. While she was there she developed programs for children with Autism in the District's pre-school classes. She has known W.D. for approximately 10 years, she met W.D. in early 2007 when he was not quite 3 years old, she was assigned to W.D. during his pre-school years. She described W.D. at that time as bright, engaged, liked to play, had/has challenges, he can learn, is loving and likes art. W.D. in pre-school had behavior issues such as eloping, frequently opening and closing doors and other types of repetitive behaviors.

Sheerin explained that Applied Behavior Analysis (ABA) is the science of behavior and that an ABA program addresses behavior. She furthered that children with Autism come with many barriers so one has to treat those barriers so they can learn in spite of those barriers. The more barriers a student has the less available the student is for learning. Behavior goes hand in hand to learning a skill. She opines that W.D. needs behaviorally based programming and strategies to teach him.

Sheerin testified that she has reviewed all of W.D.'s IEPs and noticed that his behaviors were increasing in quantity and intensity, behaviorally he regressed. She opines that because his behaviors increased it showed that the District program was not meeting his needs. Sheerin stated that in W.D.'s case there should have been a stabilization of behaviors. And, when behaviors are stabilized then an overall decrease of behaviors occurs this failing to be the case with W.D. is indicative that his program is inappropriate.

Sheerin stated that a Functional Behavior Assessment (FBA) can be done in one to two weeks. And, she furthered that FBA's should be ongoing for a child-like W.D., two years is too long a time to go by before an FBA is done on a student like W.D. She did a FBA on W.D. in May 2009. A behavior assessment would have led to the development of a plan to decrease or at the very least manage the behaviors that were making W.D. unavailable to learning. W.D.'s behaviors were not only limiting to him but to his peers. And, because of W.D.'s self-injurious behaviors an immediate behavior intervention plan should have been installed. Sheerin noted that in W.D.'s IEP of April 1, 2014, 3rd grade there was no behavior intervention plan included.

According to Sheerin, W.D. has acquired some academic skills but not to his level of ability because of his behavioral issues. She believes a focus right now for W.D. should be his educational functioning - he needs to learn. Being with his typical peers at his moment - that is being in middle school should not be a focal point for W.D. right now. She recommends Spectrum 360 school as an appropriate placement for W.D.

Sheerin opines that W.D. is able to learn when learning is fostered. She does not believe W.D. made behavioral progress at the District. She furthered that W.D. should not go to Respondent's middle school, she says such placement is inappropriate. She recommends that W.D. receives a whole system approach to his education. W.D. needs a school that implements a behavior plan all across his education. She finds that a public school is not good for W.D., a private school geared to Autism students with behavioral techniques being applied across the board would be appropriate for W.D. A school such as Spectrum 360 has the expertise and would be wholly involved in his education.

Under cross-examination Sheerin stated that she has not done a formal behavioral evaluation on W.D. since 2009. And, she has not observed W.D. in Summit since 2010. She furthered that W.D. has complex behaviors so he needs many people that can assist in his learning. She believes W.D. needs at least two BCBA and that a private school has more access to BCBA instructors available.

J.D.

Petitioners J.D. and B.D. are W.D.'s parents, J.D. is the father and he testified on behalf of his wife and himself. W.D. is their 3rd child out of 5 they have been concerned about W.D.'s schooling since 2009. W.D.'s behavior worsened from Pre-School to elementary school specifically kindergarten. W.D.'s behaviors were also increasing at home. J.D. stated that he never saw a behavioral intervention plan included in the IEPs. He stated that whenever he asked the District about their plans to address W.D.'s behaviors they responded that they were taking data. He noted that the IEPs had no behavioral goals either. The District did nothing about W.D.'s self-injurious behaviors and such behaviors were increasing both in quantity and severity.

Jens Madsen was W.D.'s aide and when he left a new aide was assigned to W.D. and that aide lasted two days and the other aide was fired after the first day. W.D.'s behaviors worsened over the course of 3rd grade, clearly nothing was working yet the District did not do a FBA. J.D. stated that over a three-year period he asked for a FBA and none was done, he also asked for some sort of a behavior intervention plan but none was provided.

It was in the 2014-2015 school year that W.D. had such a severe self-injurious behavior that he had to be restrained, it was then that he and his wife started to look for an out of district placement for W.D. He said that all of the outside professionals recommended that they look for a private placement for W.D.

Through J.D.'s testimony numerous incident reports were placed in evidence attesting to the W.D.'s self-injurious behaviors and other behaviors necessitating W.D.'s removal from the classroom. See Exhibits: Book 3 Exhibit 58, 59, 60 and 61.

J.D. believes that this District does not have the talent or the resources to handle a child such as W.D.

In September and October of 2014, the District did an FBA said report was sent to him on December 3, 2014, W.D. was in the 4th grade at that time.

J.D. furthered that whatever progress W.D. made academically was made because of the private tutoring he instituted.

J.D. said W.D. cannot communicate with him or his mother.

J.D. stated numerous times throughout his testimony that W.D. had no friends, that he had no social interaction skills.

J.D. furthered that he never saw W.D.'s behavior data until the present hearing. He said had he seen this data or known about the intensity and severity of W.D.'s behavior he would have acted earlier and insisted on W.D. being placed in a new school.

J.D. stated the District never asked him or B.D. for their input when completing an IEP. He testified that each time the District provided an IEP said IEP was handed to him, the program was already established. Neither he nor his wife were ever consulted. The District never gave them a copy of the proposed IEP before the meetings. District never provided them with a home program. And, the home instruction the District provided for W.D. only had six hours of academic instruction. District never provided a behavior intervention plan.

W.D. was diagnosed with cancer/leukemia on March 20, 2015. W.D. takes 13-17 pills a day, he has a spinal tap monthly his chemotherapy is administered through his spine. W.D. also has neuropathy.

He enrolled W.D. at the Spectrum 360 School in July of 2016. W.D. started that school on July 6, 2016. According to J.D., W.D. is doing well and that school has a behavioral plan. W.D.'s behavioral levels are reducing and he has made academic progress. However, socially W.D. still has no friends.

He noted that the last IEP the District prepared for W.D. was on June 6, 2016, and that IEP still had no behavioral intervention plan.

Marie Adam

Marie Adam testified on behalf of the Respondent District. By consent of the parties Adam was qualified as an expert in the areas of Social Assessment, Development of Programs for Special Education, Case Management of Special Education Students and in the oversight in the implementation of programs in Special Education. She is a certified school social worker and has been a case manager since 1994. Under cross-examination it was brought out that Adam did not have any degrees in Education or Special Education and she has attended numerous conferences and workshops on Autism.

Specifically, Adam stated that her job is to gather all of the information and evaluations for the creation of the students' IEP. She makes sure the parents, the principal and the entire IEP team has all of the reports and information so that an IEP can be finalized. She is also responsible for looking at the information and monitoring the progress of the student, she oversees the implementation of the IEPs. She became W.D.'s case manager in the Fall of 2011, when W.D. was in the 1st grade and continued so until his removal from the District in July 2016. In 2015, the District conducted a child study re-evaluation having received documentation that W.D. had an Autism diagnosis.

Adam stated that for the five years that she was W.D.'s case manager he made academic, social and emotional progress. At one point in about February 2011, there was a discussion between herself and the parents about W.D.'s placement into the ABA LLD (Learning Language Disabilities) programs or the non-ABA-LLD programs at W.D.'s age level. The LLD ABA uses Applied Behavior Analysis as the methodology for instruction. The non-ABA LLD class is a class where ABA is not used. The child study team recommended the ABA-LLD class but the parents preferred the non-ABA LLD class but eventually they accepted the ABA based class, this was when W.D. was in first grade.

W.D. learns best in a 1:1 setting in an LLD class. A token reinforcement system was implemented to address W.D.'s non-compliant behaviors; this was the behavior plan made for W.D. She had been involved in at least 12 IEP meetings for W.D.

Adam further explained the parents did not want W.D. stigmatized so the reinforcement system had to be discreet. The role of the Behaviorist is to evaluate and recommend behavior interventions. In this case the behaviorist was Ms. Wohl. According to Adam Wohl was in W.D.'s classroom a lot for she was at W.D.'s school about 2.5 days a week.

Adam said when W.D. was in the first grade she observed him in music class and she saw hand flapping and some meltdowns. She opines that when W.D. was in the first grade he learned best in the LLD-ABA class yet the parents wanted him in the general education class. She found that the non-compliant behaviors were more frequent in the non-ABA setting.

In the second grade W.D. made progress in math when taught in the resource center, the teacher was a special education teacher however she was not an ABA trained teacher. W.D. was in this class with his 1:1 aide.

Adam testified that the District strongly felt that W.D. learned best on a 1:1 basis and that he should be in an LLD-ABA class and not in a resource room. However, it was the parents that continuously requested that W.D. be in a general education and resource room. The teacher in the resource room was not a BCBA/ABA. According to Adam W.D. made the most gains in the LLD-ABA class a specific specialized setting.

W.D.'s last IEP dated June 6, 2016, exhibit 146 recommended that W.D. enter the Lawton C. John Middle School in September of 2016, for his sixth grade. That class had 6 students and all of the students had aides, it is an ABA based 1:1 class. W.D. would have been under the ABA behaviorist there. Adam recommended this class after looking at W.D.'s needs. She explained that the ABA program in the middle school is different than the one at the elementary school because the students are older, ages 10 through 13 and their needs are different. This class provides self-care instruction such

as housekeeping, preparation of meals, there is a refrigerator in the classroom. Adam opined that because W.D. works best with a 1:1 this program would permit him to make progress. She said W.D. has the most disruptive behavior when placed in a large group.

To assist W.D. in transitioning from the home program to the middle school the District would have allowed W.D. a modified day meaning he could come in late and leave early.

She furthered that the parents declined direct services in the home from the District behaviorist.

Adam said W.D. had 12 IEPs that provided behavioral and academic supports. Adam further explained that the last IEP dated June 2016, had a typo. In the section of "Behavioral Interventions," where the question is asked "are behavioral interventions appropriate at this time?" The answer placed on the IEP is "no", however at this hearing Adam said the answer should have been "yes".

Under-cross examination it was brought out that since kindergarten the District was gathering information about W.D.'s non-compliant behaviors. In first grade, it was noted that when new demands or challenging concepts were placed on W.D. he was more apt to engage in behaviors such as crying, screaming, tantrums, hand and vocal stereotype, dropping to the floor and self-injurious actions such as skin picking and banging his body against objects, these behaviors were somewhat different and more severe from when W.D. was in kindergarten. Adam acknowledged that all of these behaviors impacted on W.D.'s ability to be available to learn. W.D.'s behaviors were increasing in quantity and severity mainly when he was in the general education class but the behavioral consultations were not increased they were still kept at the minimum of 4 hours a month. An FBA was thought to be needed sometime in June 2013 but said assessment was not done until April 2014.

Adam stated the W.D.'s behavior was a constant topic of discussion between the District and the parents. After W.D.'s cancer diagnosis his educational plan changed to

home instruction. W.D. was to receive ten hours a week of home instruction however he received nine hours a week.

Adam acknowledged that she was W.D.'s case manager but she had not seen him in over two years.

Mary Jo Reid

Mary Jo Reid testified on behalf of the District. Reid is a behaviorist employed by the Summit School District. She was qualified as an expert in ABA and in the development of programs for students with Autism. She is the full time behaviorist for the District's middle school and High School. She would have been W.D.'s behaviorist had he attended the District's middle school as the District proposed in the June 2016 IEP. The middle school program has five students in the class.

Reid explained that at the middle school consultation hours are four times a month for 60 minutes and this time is in a group and said time would be indicated in the child's IEP.

Reid stated that a goal of a Behavior Intervention Plan is to reduce behaviors because one cannot extinguish behaviors. And, the behaviors that you want to reduce are those behaviors that interfere with learning. Regarding Exhibit 78, which is a graph of W.D.'s behaviors Reid testified that the graph indicates a low percentage of the time W.D. is actually experiencing mal adaptive behaviors. Reid furthered that data collection of behavior every five minutes can over-estimate the behaviors.

Reid said that a common and good practice of ABA principles requires a rotation of para-professionals and teachers.

Reid reviewed the goals and objectives of the 360 School for W.D. and noted that there were no BIP for vocal stereotypy and self-injurious behaviors.

Reid stated that she reviewed W.D.'s current and proposed IEP as submitted by the District for the S016-2017 school year at the middle school and noted that it did not have a BIP. However she explained that W.D. would have a BIP although such plan was not specified in his June 2016 IEP. The middle school follows ABA standards and core curriculum.

Under cross examination she said she has never assessed W.D. and has never had anything to do with W.D. And, she has not ever worked with W.D. although she has seen him in the hallway. She was involved in W.D.'s June 6, 2016 IEP. Reid acknowledged that she did not know much about W.D. She was not aware that Wohl asked for a FBA at the end of W.D.'s 2nd and 3rd grad. She was also not aware of any pertinent information about W.D. She stated that with a behavioral strategy in place behaviors should decrease. She agrees with Wohl's statement that W.D.'s behaviors have impeded his social and academic progress.

Reid testified that a FBA is not necessary for every student with behaviors because an FBA is done when you don't know why certain behaviors are occurring.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following:

1. W.D. is a student at the Respondent district school the district where he is a resident. The Respondent has provided him with an educational program that started when W.D. was three years old and in pre-school. At age three the District found him eligible for Special Education. W.D. has attended the District school from pre-school through the fourth grade. I make this **FINDING** because residency and attendance was not disputed.
2. W.D. has a diagnosis of Autism Spectrum Disorder. He was diagnosed with Leukemia in March 2015, he receives chemotherapy. Pursuant to his

doctor's instructions W.D. was not permitted to attend school while in treatment. He was scheduled to return to school in the Fall/Winter of the 2015-2016 school year his fifth grade year. I make this **FINDING** because this was not a disputed fact.

3. W.D. is currently in the sixth grade attending The Spectrum 360 School. His parents unilaterally placed him there in the Summer of 2016 for the extended school year program and they continued him there in the Fall of 2016 for his sixth grade. The testimony and extensive documentary evidence found in all 12 of W.D.'s IEPs; the data collected when he was in school showing that he engaged in problem behaviors such as verbal outbursts, tantrums, meltdowns, elopements, and self-injurious behaviors such as, head banging, hitting/punching his head, hitting head with hand, scraping elbows, throwing his body into wall, opening a paper clip and slamming his hand on it, all of these actions continued and progressed. See joint exhibits marked Book 2, # 48, 52. The data that was collected shows the high frequency of these behaviors, at times up to 93% of W.D.'s day was spent in these disruptive behaviors. I **FIND** it clear that the District's strategies and attempts to control and redirect W.D. were not working.

I **FIND** that W.D.'s problem behaviors escalated from first grade right through to fourth grade. I **FIND** that W.D. failed to progress academically and socially. I **FIND** the District continued with basically the same IEPs year after year. I **FIND** the District continued with the same four hours a month of behavioral consultation with the ABA teacher/consultant. I **FIND** the IEPs did not have a behavioral intervention plan or a strategy or a technique as to how to deal with W.D.'s behaviors. I **FIND** that the District failed to perform a Functional Behavioral Assessment in a timely manner. See Joint Exhibit Book 2 # 49.

I **FIND** that the District compiled 12 IEPs on W.D. from September 2011 through to June 2016, and I **FIND** that those 12 IEPs were almost identical and contained no meaningful additions or modifications addressing W.D.'s academic, social and behavioral needs as those needs were developing and escalating. I **FIND** those IEPs

were improperly drafted because they did not have appropriate behavioral intervention plans. Both Dr. Fiorile and Breslin testified as to what behavioral techniques and strategies should have been applied when teaching W.D., making him more available to learning.

I **FIND** Madsen's testimony credible when he testified that during the time he was W.D.'s aide and especially when W.D. was in 3rd grade, the District did not provide him with any new behavioral techniques to use with W.D. Madsen said at times he made up and used techniques that he discovered worked in an effort to redirect and work with W.D. About the only technique, the District gave Madsen was how to restrain W.D. and remove him from the classroom. I **FIND** that this is a procedural violation of IDEA and N.J.A.C. 6A:14-2.7(k).

I **FIND** W.D. showed behavioral difficulties from as early as kindergarten and such behaviors increased in quantity and severity until he left the District school.

I **FIND** that in the IEP at the end of second grade the District noted that it would conduct a functional behavioral assessment because of his increased behaviors. See Book 2, Joint Exhibit 45. The District completed this assessment 17 months later. I make this **FINDING** based largely on the joint documentary evidence submitted by the parties.

I **FIND** after hearing the testimony of W.D.'s father J.D., Dr. Fiorile, Dr. Breslin, Marie Adam, Tracey Calesimo and Tara Sheerin, that W.D.'s home programming for the last part of his fourth grade and early fifth grade was inappropriate in that it did not provide the requisite 10 hours of home instruction as per N.J.A.C. 6A:14-4.8.

I **FIND** that due to the nature, severity and frequency of W.D.'s behaviors educating him in a middle school in a mainstream environment alongside nondisabled peers even with supports would not provide him with a meaningful education, at least at this time.

I **FIND** that W.D.'s behaviors interfered with his learning.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

New Jersey as a recipient of Federal funds under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. must have a policy that assures all children with disabilities the right to a free appropriate public education (FAPE), 20 U.S.C. § 1412. IDEA defines FAPE as special education and related services that are provided at public expense, under public supervision and direction, without charge; that meet the standards of the state educational agency that include an appropriate preschool, elementary school or secondary school education in the state involved; and that it is provided in conformity with an IEP. 34 C.F.R. § 300.17; 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.

The responsibility to provide a free appropriate public education (FAPE) rests with the local public school district. N.J.A.C. 6A:14-1.1(d). The local district satisfies the requirement that a child with disabilities receives a free appropriate public education by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. Of Education v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L.Ed. 2d 690, 710 (1982). It is only after the program offered by the District is found not to provide a FAPE can an appropriate alternative program selected by the parents be evaluated and reimbursement ordered. See Forest Grove Sch. Dist. V. T.A. 129 S. Ct 2484, 2496, 174 L.Ed. 2d 168, 183 (2009).

In order to provide a FAPE, a school district must develop and implement an IEP N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. Of Burlington v. Dept. of Education of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985).

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. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry. In this case because and as I **FOUND**, that W.D.'s IEPs did not have a behavioral intervention plan to assist in his general education plan he was not able to learn thwarting the entire purpose of his IEP.

In determining where to deliver instruction the District must be guided by the preference as is outlined in 20 U.S.C.A. § 1412 (a)(5) which mandates that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The case law has described numerous placement options from mainstreaming in a regular public school environment as the least restrictive to enrolment in a non-approved residential private school as the most restrictive. 34 C.F. R. § 300.115 (2009); N.J.A.C. 6A:14-4.3.

In Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993), established a two prong test for determining whether a school district has complied with IDEA's mainstreaming mandate: first, whether education in the regular classroom, with use of supplementary aids and services, can be achieved satisfactorily; and second, if placement outside of the regular classroom is necessary for the child's educational benefit, whether the district has included the child in school programs with non-disabled children to the maximum extent appropriate.

Before placing a child outside the district, "the school must consider the whole range of supplemental aids and services, including resource room and itinerant instruction, speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child's particular disabilities." Oberti, supra., at 1216.

In this matter, I must **CONCLUDE** that a majority of the evidence has shown that W.D. is severely impacted by Autism. The evidence shows that in spite of some of the supplemental aids and services, including resource room, a one to one aide W.D. is and was unable to make any meaningful educational progress. It was quite obvious from the testimony of all of the witnesses and the documentary evidence that W.D. engaged in disruptive and self-injurious behavior to the point where he was not able to learn. The lack of a meaningful and consistent behavioral intervention plan further complicates the situation increasing his inability and unavailability to learn.

I **CONCLUDE** that the District wanted to put W.D. into a more general program similar to a one size fits all program however such a program did not and does not fit W.D.'s needs.

I further **FIND and CONCLUDE** that Respondent District failed to offer W.D. a free and appropriate public education for the academic years 2015-2016 and 2016-2017, including the extended school year of 2016. The IEPs for 2015-2016 and 2016-2017 did not confer a meaningful educational benefit on W.D.

I **CONCLUDE** that Petitioner's unilateral placement of W.D. at the Spectrum 360 School was appropriate and reasonable and Petitioners are entitled to reimbursement for that placement. I also **CONCLUDE** that Petitioner's placement of W.D. in the extended school year program in the Summer of 2016 was reasonable and they are entitled to reimbursement for that program.

ORDER

It is hereby **ORDERED** that the district reimburse Petitioners all costs of Will's unilateral placement at Spectrum 360 for the academic years 2015-2016 and 2016-2017, including tuition and transportation expenses.

It is **ORDERED** that the District provide W.D. with an IEP calling for his continued placement at Spectrum 360 and for as long as it is appropriate.

It is **ORDERED** that the District provide W.D. with a home program consistent with the recommendations of Dr. Fiorile and Dr. Breslin through his IEP., and it is further **ORDERED** that the District provide parent training consistent with the recommendations of Dr. Fiorile and Dr. Breslin.

It is **ORDERED** that the District award W.D., compensatory education for the home tutoring or home programming W.D. received during the 2014-2015 and 2015-2016 school years.

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 Programs.

July 6, 2017

DATE

CARIDAD F. RIGO, ALJ

Date Mailed to Agency

July 6, 2017

Date Mailed to Parties:

lr

APPENDIX

WITNESSES:

For Petitioners:

J.D.
Jens Madsen
Anita Breslin, Psy.D., BCBA-D
Carol A. Fiorile, Ph.D., BCBA-D, SAS, LBA.
Tracey Carlesimo
Tara Sheerin

For Respondent:

Jessica Cuskie
Marie Adam
Mary Jo Reid

EXHIBITS

Joint Exhibits

Binder 1 exhibits number 26, 29, 31, 33, 34, 35, 39, 37.
Binder 2 exhibits number 42, 44, 49, 51, 52.
Binder 3 exhibits number 58, 59, 60, 62, 64, 65, 70, 71, 79.
Binder 5 exhibit 164, 165, 146, 117, 152.

List of D.A.'s IEPs and proposed IEPs

Preschool (2006-2007)

Exhibit 7, February 2, 2007 (Initial IEP)
Exhibit 8, May 30, 2007
Exhibit 9, June 15, 2007 (Proposal to Amend Provision in IEP)

Preschool (2007-2008)

Exhibit 10, September 31, 2007 (Proposal to Amend Provision in IEP)
Exhibit 11, January 11, 2008 (Proposal to Amend Provision in IEP)
Exhibit 12, May 30, 2008

Preschool (2008-2009)

Exhibit 14, December 23, 2008

Exhibit 19, June 2, 2009

Preschool (2009-2010)

Exhibit 26, April 29, 2010

Kindergarten (2010-2011)

Exhibit 33, February 25, 2011

Exhibit 37, June 7, 2011

First Grade (2011-2012)

Exhibit 40, November 15, 2011

Exhibit 42, May 24, 2012

Second Grade (2012-2013)

Exhibit 43, September 20, 2012

Exhibit 44, January 8, 2013

Exhibit 45, June 14, 2013

Third Grade (2013-2014)

Exhibit 48, April 1, 2014

Fourth Grade (2014-2015)

Exhibit 79, January 20, 2015

Exhibit 87, March 19, 2015

Exhibit 94, May 18, 2015

Fifth Grade (2015-2016)

Exhibit 107, September 30, 2015

Exhibit 124, January 22, 2016

Proposed IEP for Sixth Grade (2016-2017)

Exhibit 146, June 6, 2016