

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 08253-14

AGENCY DKT. NO. # 2014/21147

S.B. ON BEHALF OF S.P.,

Petitioners,

v.

SCOTCH PLAINS-FANWOOD

BOARD OF EDUCATION,

Respondent.

S.B., petitioner, pro se

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: August 15, 2014

Decided: September 10, 2014

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, mother of S.P., challenges the appropriateness of the respondent Scotch Plains-Fanwood District's proposed program and placement of her son, a five-year-old, a preschool student. S.P. has been enrolled in the district's preschool program for the 2012-2013 and 2013-2014 school years. Respondent classified S.P. as preschool disabled and eligible for speech and language services pursuant to N.J.A.C. 14-3.6(a). Respondent seeks to advance S.P. into kindergarten in September 2014.

Petitioner disagrees and seeks an order for S.P. to continue placement or in other words be retained in the preschool class for the 2014-2015 academic year.

Petitioner filed a petition with the New Jersey State Department of Education Office of Special Education Programs (OSEP) on May 12, 2014. OSEP transmitted the matter to the Office of Administrative Law (OAL) on July 3, 2014, under the Individual with Disabilities Education Act (IDEA) 20 U.S.C.A. § 1401 et seq. and N.J.S.A. 18A:46-1 et seq. for a final determination by an Administrative Law Judge (ALJ). The undersigned ALJ was assigned the case and the matter was heard on August 15, 2014, at the OAL offices in Newark, New Jersey.

ISSUE

Should S.P. advance into kindergarten? Did the respondent offer S.P. a free and appropriate public education (FAPE)?

THE FACTS

S.P. turned five-years-old in June 2014. S.P. has been enrolled in a pre-kindergarten program in the Scotch Plains-Fanwood School District for the 2012-2013 and 2013-2014 academic years. S.P. was classified as a preschool child with a disability from the date of his admission into respondent's preschool program. S.P. has continued in that classification until he attained the age of five years. S.P. needs speech and language services. It was determined that S.P. continues to need speech and language services when he enters kindergarten.

ARGUMENTS OF THE PARTIES

Petitioner contends that S.P. should be retained in preschool for another year. Petitioner states that although S.P. has attended the District's preschool program and has received speech and language services for the past two years, he is not ready for kindergarten. Petitioner also claims S.P. suffers from an adjustment disorder in that attending preschool is emotionally taxing. According to petitioner, S.P. has night

terrors, regresses with toileting, experiences emotional breakdowns, and withdraws when he attends school. Petitioner says school triggers stress for him and therefore he is not ready to advance into kindergarten.

Petitioner presents that the kindergarten curriculum of the English Language Arts Common Core Standards that focus on conversations, collaborative conversations, and describing activities along with expressing thoughts are all difficult skills for S.P. Petitioner alleges because of S.P.'s expressive language disorder his school anxiety issues will exacerbate resulting in his failure and a total breakdown.

Petitioner has no complaints with the services S.P. receives with respect to his speech and language issues.

Respondent contends that because S.P. has attained the age of five he is no longer eligible to be classified as "preschool disabled" and that that classification is reserved for a child between the ages of three and five. According to respondent there is no statute or regulation that authorizes a school district to adopt a preschool program for a five year old.

Respondent also argues that there is no reason to retain S.P. in preschool. According to respondent, S.P. has met all of the goals set for him in his preschool IEP and he is ready academically and socially to advance into kindergarten. Respondent states that S.P. will continue to receive the speech and language services he needs in kindergarten.

SUMMARY OF THE TESTIMONY

Amber Jarrett

Amber Jarrett is a pre-kindergarten teacher for the respondent District. She is certified as a preschool and elementary teacher. She has taught pre-kindergarten for five years at the District schools. Jarrett taught S.P. last year.

Jarrett stated that S.P. falls within the age-appropriate skills set. Jarrett referred to exhibit R-1, S.P.'s progress report for the 2013-2014 school year. The progress report shows that S.P. either met the goals and objectives or has made sufficient progress of the skills outlined in his Individual Education Program (IEP). Specifically, she said S.P. can count from 1 to 12 accurately, and he can count up to 25 but he occasionally skips a number. He can identify twelve out of the twenty-six letters of the alphabet and he recognizes ten to twenty letters, which is within the normal range of letter recognition. Academically S.P. falls within and above the average range. She opines that S.P. is ready for kindergarten.

Jarrett testified that S.P.'s weakness is only in his speech so retaining him in preschool will not help him. He should be exposed to age-appropriate peers and keeping him in preschool with three and four year olds will not help him.

Jarrett said S.P. socializes well and is age appropriate. He has no health issues at school. Jarrett said only once did he complain about a stomach ache but he did not want to go to the nurse or home he wanted to stay in class until after music lesson. Once or twice he expressed his dislike for being in school but she said that is not unusual. S.P. was absent a total of thirty-one days this past school year.

Jarrett said she participated in S.P.'s IEP meeting. She discussed with his case manager and the principal as to whether or not S.P. be retained or advanced and they all agreed that he should advance into kindergarten.

Jarrett said she had no performance issues with S.P. in the classroom. She said even though S.P. knows he has a speech problem he takes on leadership roles and initiates activities and play.

Jarrett testified that she did not see S.P. exhibiting any of the anxiety issues in the classroom that petitioner talks about.

Under cross-examination by the petitioner, Jarrett stated that typically preschoolers are not retained in preschool but such decisions are made on a case-by-case basis. Jarrett said she was aware of petitioner-mother's concerns.

Jarrett said that although S.P.'s speech can sometimes be unintelligible she understands the majority of what S.P. says.

Jennifer Allen

Jennifer Allen is a teacher of elementary education and has a graduate degree and is certified in Speech and Language. She has been teaching for five years. She is S.P.'s speech and language specialist. She started working with S.P. in November 2013. She does pull-out session in a group to work with S.P.

Allen testified that she evaluated S.P. on January 24 and February 11, 2014. Exhibit R-2 is her report. Allen said S.P. was referred for a speech and language evaluation in order to determine his eligibility for speech and language services as part of the re-evaluation process that occurs when a preschool child turns five years of age. S.P. was found eligible for speech and language services. Allen opines that S.P. only needs speech and language services.

Allen said S.P. has all of the structural elements needed to speak—in other words his cheeks, jaw, lips, and tongue are normal. S.P.'s speech issues come from his inability to coordinate the various elements needed to speak intelligibly. The result of this lack of coordination is that S.P.'s speech tends to be unintelligible to the point

that if you do not know the context of what he is talking about you cannot understand what he is saying.

Allen stated that the test results show that S.P. should be classified as communicative impaired because he never tested below 10%.

Allen pointed out in her report that she observed S.P. in the classroom and she noted that his receptive-language skills are comparable to those of his peers. He attends to the teacher, his peers, and follows directions easily. S.P. sometimes uses a wrong word to name something; however, the wrong word is in the same semantic category, example, he might say “comb” for “brush” or “table” for “chair”.

Allen opines that S.P. is up for the task of tackling kindergarten as long as he is supported with the speech and language services.

She has never seen S.P. be anxious or have any gastro-intestinal issues during her pull-out sessions. She said S.P. has no trouble repeating his statements when asked to; appears to be comfortable with his speech impediment; and he is not self conscious about it. He readily repeats his statements all the while trying to correct his speech. She has not seen him frustrated with his speech.

Under cross-examination Allen acknowledged that although formalized testing indicates S.P. has average expressive-language skills, a functional observation indicates that S.P. has a significant expressive-language disorder. She also acknowledged that there is a significant discrepancy in his receptive- and expressive-language abilities with his receptive skills being more advanced than his expressive language abilities.

Allen also said under cross-examination that although S.P.’s speech and language is not perfect, compared to his peers, for the most part he can get his thoughts across. S.P. does not appear to be bothered by his speech issues at school. She said he works hard and attends well for the thirty-minute pull-out sessions.

Allen said she has never seen S.P. frustrated in school. He is a joy to be with.

Allen also acknowledged that S.P. may have difficulty with the speech and language curriculum in kindergarten but that is why he would continue with the speech and language pull-out services.

Allen said S.P. made good progress from November through June. He is very cognizant of his speech issues and is ready and willing to correct them. He still needs a lot of repetition. She has no concerns for S.P. going to kindergarten.

Laura Orlando

Laura Orlando is a Learning Disability Teacher Consultant (LDTC) and is S.P.'s case manager for the 2013-2014 school year. She is certified in regular and special education and is in the process of getting a certification as a behavior analyst. She has been employed by the District since October 2010.

Orlando's report is Exhibit R-5. R-5 is a collaborative evaluation that was performed on S.P. on or about January 23, 2014. According to Orlando a child may be classified as a preschool child with a disability only until the age of five. She said the report was done to determine whether or not S.P. should remain eligible for special education and related services. A collaborative evaluation looks at the cognitive and educational abilities of a child.

Orlando said that S.P.'s overall educational and academic functioning is average; however, his cognitive/intellectual ability is above average. She said emotionally S.P. presents well he shows no anxiety during testing. He also presents well in school, takes leadership roles, and did not ever present a problem in working with peers or teachers. He never appeared upset.

Orlando found that S.P. had no significant identified educational disabilities that affected his educational performance. Therefore he does not warrant a classification as eligible for special education and related services. His only issue was with his

articulation and that was being taken care of by his pull-out speech and language services. She said S.P. can continue to receive speech and language services in kindergarten.

Orlando stated that there was a big discrepancy between S.P.'s behavior at home and at school. She said the child at school was easy to work with showed no signs of anxiety or angst. She said S.P. is engaged in the classroom.

During cross-examination by the petitioner-mother, Orlando testified that she has never had anyone retained in preschool. She said that there is a huge difference between the reports and evaluations and what the mother reports.

Scott Bortnick

Scott Bortnick is employed by the respondent school district as the principal of Brunner School where S.P. attends. He is a teacher of biology and has a certification in school supervision.

Bortnick said that his school building houses the preschool and kindergarten classes. He said the kindergarten program is a transitional program geared for kindergarteners to transition to first grade.

He has observed S.P. in his preschool class many times. S.P. is in an integrated preschool program and attends the morning sessions. He is aware S.P. is a student in his school and he has never had S.P. in his office. He has had no concerns with S.P.

He said S.P. can continue to receive speech and language services in kindergarten.

Under cross-examination he stated he had one conversation with S.P.'s mother and it was regarding S.P.'s attendance. He said in the first part of the 2013-2014 school year S.P. missed some school days because he had broken his arm.

He said he has not had a child repeat preschool.

Linda Edwards

Linda Edwards is the Director of Special Services for the respondent. She is not part of the child study team. She oversees case managers.

Edwards testified that she observed S.P. in the classroom. She saw him playing with his peers. She observed him acting normally he appeared to be comfortable and happy. She saw no issues or behavior that concerned her. She observed him for twenty minutes.

Edwards said that there is no policy as to retention in preschool. She said each child is taken individually and they take into consideration the child's reports and evaluations.

Under cross-examination she reiterated that she observed S.P. for twenty minutes and that she read his records after her observation.

S.B.

S.B. is the mother of S.P. and the petitioner. She is a special education teacher and worked in the field ten years. She has supervisor and principal certifications. She is the primary home caregiver for S.P. and his two siblings.

S.B. said S.P. has been in school since the age of three. She describes S.P.'s first year of preschool as a disaster and a horrible experience for S.P. She said S.P. has anxiety issues that will be heightened when he enters a more demanding educational environment such as kindergarten.

Petitioner says there is a huge discrepancy in S.P.'s intellectual abilities and his functional abilities when in school and out of school. She said this is further complicated by his emotional issues.

S.B. said she has no problem with his IEP but she has a problem with his declassification. She feels he was declassified as preschool disabled because he turned five this past June and the school wants him to advance into kindergarten. S.B. states that the District is not taking into consideration that S.P. is not socially and emotionally developed enough to enter into kindergarten.

S.B. testified that S.P. has transition issues because he gets anxious when he knows he has to go to school. She said the anxiety comes out by having night terrors, regression with toileting, gastro-intestinal issues, and general emotional breakdowns. S.B. explained that S.P. can become extremely frustrated with his speech and has a tendency to give up on trying to make his point when he realizes people do not understand what he is saying.

S.B. said since S.P. just turned five he will be five for most of the school year so he should be able to stay in preschool.

S.B. stated that she is the one person that knows S.B. best coupled with the fact that she is a special education teacher. She said she was not considered by the child study team that evaluated S.P.

S.B. particularly bases her opinion on the report of Dr. Margot Kerrigan, the child's pediatrician, marked exhibit P-2. Dr. Kerrigan states that though S.P. is comfortable at school he has significant social and separation anxiety. Dr. Kerrigan says that cognitively he is average to above average, but emotionally and socially S.P. is not at that same level. Dr. Kerrigan opines that advancing S.P. academically when he is not emotionally ready will lead to a worsening of his social anxiety.

S.B. also testified that her opinion was also based on the social assessment report of the District's school social worker, April Chestang, MSW of May 9, 2014.

Review of Ms. Chestang's Report - Exhibit P-4

Ms. Chestang's report indicates that there is a significant difference between what S.P.'s teachers report and what his mother reports. Ms. Chestang clearly states that based on what Mrs. Jarret reports S.P. does not have external or internal learning difficulties nor does he have behavior issues that may interfere with his learning. Ms. Chestang notes that S.B. reports the complete opposite of what the teachers report. Ms. Chestang says that what S.B. says about S.P. indicates that S.P. has a high level of maladjustment and may have a significant problem that may need monitoring.

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 **FACTS**:

1. S.P. is a five-year-old male child that attended the District's preschool program for the 2012-2013 and 2013-2014, academic years. He turned five in June 2014. He was initially classified as pre-school disabled and received speech and language services;
2. S.P. was declassified in June 2014 after his end of school year evaluation and progress report;
3. S.P. has mastered, progressed, or achieved all of the goals and objectives that were outlined in his Individual Education Plan (IEP) during the time he attended preschool;
4. S.P. still has some speech and language issues, but he is ready academically, emotionally and socially to enter a regular kindergarten class of his peers in September 2014;
5. S.P. should continue to receive speech and language services in kindergarten.

CONCLUSIONS OF LAW

To ensure that children with disabilities are provided with educational opportunities, Congress enacted the Individual with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1400 to 1487. The IDEA provides participating states federal funds to educate disabled children. Receipt of the funds is conditioned on the state's compliance with IDEA's goals and requirements. Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690(1982). New Jersey is a participating state and has enacted legislation and regulations codified at N.J.S.A. 18A:46-1 to 46 and N.J.A.C. 6A: 14-1.1 to 10.2, both consistent with IDEA's goals and purpose. Lascari v. Bd. of Educ., of Ramapo-Indian Hills Reg'l Sch. Dist., 116 N.J. 30 (1989).

The Supreme Court in Rowley, supra, authored a two-prong test to decide if a child had been given a free appropriate public education (FAPE). The first prong requires a review of the procedural safeguards required by IDEA and a determination of whether or not they have been complied with. At the time of this hearing, no argument was put forward concerning the fact that the respondent District had not met any of the procedural requirements, although during petitioner's testimony she mentioned that S.P. should not have been declassified. Her argument was centered on her contention that S.P. should not be advanced into kindergarten because in her opinion S.P. is not ready. Petitioner presented no substantive argument on any procedural violations. The District countered that they declassified S.P. because his preschool disabled classification expired when he turned five years and such classification could not continue beyond his fifth birthday and into kindergarten. The District also presented that although S.P. will not have an IEP in kindergarten he will continue to receive speech and language services. But, if needed it will conduct additional evaluations to determine S.P.'s individual educational needs in kindergarten. Therefore, I **CONCLUDE** that the respondent District has met the procedural requirements of IDEA.

The second prong states that each district board of education shall provide FAPE and related services for educationally handicapped pupils in the least restrictive environment. N.J.A.C. 6A:14-4.2(a). Therefore, the only issue of pertinence in this

matter is whether or not S.P. should advance to the kindergarten class or remain in the preschool disabled class. Petitioner wants me to conclude that the District failed to offer S.P. FAPE in the least restrictive environment.

All of the District's witnesses testified that S.P. showed that he is ready for kindergarten. The District witnesses stated that S.P. will continue to receive speech and language services in kindergarten although he no longer has an IEP. The only person to testify that he is not ready is his mother. The evaluations and tests that were performed on S.P. to determine his academic and emotional readiness for kindergarten show results based on who is providing the information. The tests or evaluations based on the information provided by the teachers indicate there are no issues impeding S.P. from advancing into kindergarten. However, the same tests and evaluations completed and based on information provided by his mother indicate that S.P. may have some emotional issues or is suffering from some emotional maladjustment.

In this particular matter, as in most, the credibility and persuasiveness of the testimony is of paramount concern. While I found all of the witnesses who testified credible, I was most persuaded by the testimony of S.P.'s teachers. Their testimony was clear, precise and consistent. I did not detect any bias or a hidden agenda. They had nothing to gain or lose by testifying truthfully about their observations. I therefore **FIND** them more credible and factually persuasive than the petitioner.

N.J.S.A. 18A:38-1 provides that public schools shall be free to a person over five and under twenty years of age who is domiciled within the school district. Those who are between the ages of six and sixteen are obligated by law to attend a public school or the equivalent thereof. Should the student be in need of special education under IDEA, the district is responsible to insure the student receives a free and appropriate education designed to meet their needs and in the least restrictive environment either in the schools it operates or elsewhere. The boards of education are obligated to provide special education programs and services to students age three through twenty-one. In this case, S.P. is five years of age and is no longer eligible for special education because he was declassified. There is no law that says S.P. is obligated to attend school until he is six.

I **CONCLUDE** that the program and the placement of S.P. into kindergarten as offered by the District is appropriate and in the least restrictive environment. Petitioner does not have to take advantage of the kindergarten program and placement of S.P. if she chooses not to and that can be her decision until such time as S.P. reaches compulsory education age of 6.

ORDER

Based on the evidence in the record, my findings and conclusions of law, the program and placement offered by the Scotch Plains-Fanwood Board of Education to S.P. is appropriate and **IT IS SO ORDERED.**

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2012) 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 (2012). 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 10, 2014
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency:

September 10, 2014

Date Mailed to Parties:

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APPENDIX

WITNESSES

For Petitioner:

S.B.

For Respondent:

Amber Jarrett
Jennifer Allen
Laura Orlando
Scott Bortnick
Linda Edwards

EXHIBITS

For Petitioner:

- P-1 Report of Jennifer Johnson dated February 15, 2014
- P-2 Report of Dr. Kerrigan
- P-3 Initial letter from parent dated January 15, 2014
- P-4 Social Re-Assessment dated April 21, 2014
- P-5 Promotion Acceleration and Retention Policy

For Respondent:

- R-1 Progress Report
- R-2 Speech and Language Report by Jennifer Allen dated January and February 2014
- R-3 Children's Specialized Hospital Evaluation
- R-4 Email from S.B. to Allen
- R-5 Collaborative Evaluation dated January 23, 2014
- R-6 Eligibility Conference Report
- R-7 IEP - 2013

- R-8 Prior IEP
- R-9 Social Worker's Evaluation
- R-10 Psychological Evaluation
- R-11 Educational Evaluation
- R-12 Respondent's Policy for Admission
- R-13 Integrated Preschool Flyer