

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 08913-16

AGENCY DKT. NO. 2016-24483

J.A. AND J.A. ON BEHALF OF J.A.,

Petitioners,

v.

MONROE TOWNSHIP

BOARD OF EDUCATION,

Respondent.

J.A. and J.A., petitioners, pro se

John J. Armano, Esq., for respondent (Trimble & Armano, attorneys)

Record Closed: January 17, 2017

Decided: February 14, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

On May 17, 2016, petitioners filed for due process seeking an out-of-district placement for extended school year (ESY) for their daughter. The respondent, Monroe Township Board of Education (District), assert that J.A.'s level of functioning in the classroom suggests that she does not demonstrate the need for ESY. At issue is whether J.A.'s Individualized Education Program (IEP) should have included ESY.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed as a contested case on June 16, 2016. On or about June 27, 2016, the petitioners amended their petition seeking reimbursement for ESY and transportation for both 2016 and 2015. A hearing was conducted in this matter on December 12, 2016, and by telephone on January 17, 2017, after the parties were permitted to supplement the record and determine if additional testimony was necessary. The record closed on January 17, 2017.

FACTUAL DISCUSSION AND FINDINGS

The following facts are undisputed unless stated otherwise. J.A. is a student of the District who is currently in the third grade. J.A. has been found eligible for special education or related services under category Autistic.

At J.A.'s annual review meeting on May 6, 2016, the District proposed an IEP for the 2016-2017 school year, which did not include ESY. The District asserts that J.A.'s level of functioning in the classroom suggests that she does not demonstrate significant academic, behavioral or social regression when away from school for extended periods of time. The parents disagree and assert that J.A.'s functional regression has not been sufficiently documented.

Testimony

Christine Trotter is a regular education teacher at Oak Knoll Elementary School with fifteen years of teaching experience. J.A. has been in her class since September, 2016. Mrs. Trotter described J.A. as a smart student who was pleasant and encouraging to other students and did well academically. J.A. had done as well as, if not better, than her peers based on her classroom monitoring, the data she had compiled, as well as the Measure of Academic Progress (MAP) scores and fluency records. A fluency records test is taken three times a year. In the very first test of the year J.A. had shown 179 words per minute on her fluency test which Mrs. Trotter had indicated was grade level for fluency. J.A. is placed in the mid to higher group of students and she performed academically as well as any other child in the classroom.

Mrs. Trotter indicated she did not believe ESY would have been appropriate for J.A. as she had seen no problems with recoupment from the time J.A. was in her classroom. Socially, J.A. does very well amongst her peers and she had seen no evidence of any social problems in the classroom.

J.A.'s MAP (R-17) testing indicates that J.A. was scoring according to grade level. She was scoring above level in math and reading and all the progress she had made to date was commensurate with her peers. Mrs. Trotter further stated that J.A. has mastered all of the standards that are required under the New Jersey Core Curriculum Standards for her first trimester report card. J.A. is not struggling with anything and had no problems academically. Ms. Trotter had seen no regression at all when J.A. entered the third grade.

Caroline Medlock next testified on behalf of the District. She is the current special education teacher for J.A. Ms. Medlock assists all students in the classroom and she is familiar with J.A. She described J.A. as a sweet little girl who was a joy to have in the classroom. J.A. is on the autistic spectrum and does very well when compared to her peers. Ms. Medlock based this on her observations of J.A. in the classroom, as well as her observations of J.A. in small group settings. J.A. does very well socially and has a core group of friends. Ms. Medlock saw J.A. having no problem going up to others and she is very comfortable socially.

J.A. is doing commensurate work and progressing commensurate with all her peers. She may have had some trouble in certain circumstances but no different than any other student at her grade level. Ms. Medlock found no regression or recoupment issues with J.A. J.A. is very confident and when called on, J.A. grasps the issues and understands what is being taught. Mrs. Medlock has always found J.A. to be engaged with the lesson. She works well independently and is able to stay on task.

Dr. John Bersh is the Supervisor of Special Services at the Monroe Township School District for the last ten years and has experience in various levels of special education for twenty-eight years. He was qualified as an expert in Special Education.

Dr. Bersh discussed what ESY is and explained that the school district uses a regression or recoupment model in accordance with the New Jersey Administrative Code. In order to determine whether or not ESY is necessary the district obtains input from teachers and related service providers, as well as the parent and reviews available test data and other verifiable data. Based on this review, the child study team determines if, in accordance with a student's IEP, an interruption in educational programming may cause the student's performance to revert to a lower level of functioning such that recoupment cannot be expected in a reasonable amount of time. In that situation, ESY would be recommended by the IEP team. Dr. Bersh has been familiar with J.A. since she entered the district through Early Intervention. He sees J.A. at least once a day. Dr. Bersh opined that based upon his knowledge of the student and his review of the student's files and input received, that ESY was not appropriate for the 2014-2015 or 2015-2016 school year. Academically the district members of the IEP team agreed that J.A. had experienced success to such an extent that ESY services would not be warranted for either the 2014-2015 or 2015-2016 school year. Based on J.A.'s report card (R-7) and her present level, academic achievement and functional performance statement within her IEP (R-3 and R-6), she presented no evidence for the need for the ESY program.

J.A.'s mother presented concerns with regard to speech and social skills in the 2014-2015 school year. J.A. is able to demonstrate satisfactory progress in both of those areas. J.A.'s progress reports suggest that J.A. made progress throughout the year and fully achieved and mastered here objectives. There were no reports of regression of skills over prolonged breaks.

J.A.'s speech and language skills continue to develop and her skills have not demonstrated any regression beyond which could not be recouped by any peer group. J.A.'s social skills were observed by her teacher and school personnel to be progressing in accordance with grade level. Based upon his review, Dr. Bersh opined there is absolutely no evidence to support ESY either for the social skills for the 2014-2015 school year or for academic reasons for the 2015-2016 school year.

J.A.'s mother, J.A. testified that a daily log is used as a means to communicate between parent and teachers. This daily log indicates that J.A. needs greater assistance than she did in previously years. (P-J.) Her second grade report card indicates that she was receiving instruction below grade level. (P-D.) In the summer of 2015, J.A. struggled achieving her goals focused on her ability to interact with non-disabled peers. She has no problem approaching non-disabled students but she is typically rejected by them. Her IEP goals are transferred each year into a new IEP but the goals do not change. They are only modified. In the summer of 2015, J.A.'s parents unilaterally placed her in a summer program offered at the Circle of Friends which is run by Gloucester County. (P-M.) This program offered social and emotional learning four-days-a-week for five-hours-each-day. The program ran for five weeks and cost \$1,600 including transportation.

The district, according to J.A.'s mother, did not take into consideration the rate of progress or peer interaction when considering that ESY was not necessary. She admits that there was no regression issue after the summer of 2015. J.A.'s mother has a teaching degree and works with J.A. at home. The progress J.A. has made is mostly due to mom's efforts. While J.A. has been making progress this year, her mother is unsure if she regressed as a result of not attending ESY in 2016 because the District has not properly documented J.A.'s progress.

Having had an opportunity to observe the appearance and demeanor of the witnesses, and consider the testimonial and documentary evidence, I further **FIND** as **FACT**:

1. J.A. had done as well as, if not better, than her peers in third grade based on classroom monitoring, the data compiled by the district, and her MAP scores and fluency records.
2. The school district uses a regression or recoupment model in accordance with the New Jersey Administrative Code to determine if a student is in need of ESY.

3. Academically the District members of the IEP team agreed that J.A. had experienced success to such an extent that ESY services would not be warranted for either the 2014-2015 or 2015-2016 school year.
4. In the summer of 2015, J.A.'s parents unilaterally placed her in a summer program offered at the Circle of Friends which is run by Gloucester County. (P-M.) This program offered social and emotional learning four days a week for five hours each day. The program ran for five weeks and cost \$1,600 including transportation.

LEGAL ANALYSIS AND CONCLUSIONS

The IDEA, New Jersey statutes, and their respective implementing regulations, require that local boards of education identify and classify children with disabilities and provide them with a free and appropriate public education (FAPE) designed to meet their unique needs. See 20 U.S.C.A. § 1412; N.J. Const. Art. VIII, § IV, P 1; N.J.S.A. 18A:46-8, 9; N.J.A.C. 6A:14-1.1 et seq.

A school district satisfies its requirement to provide a FAPE to a disabled child "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 203 (1982). The IDEA does not require a school district to maximize a student's potential or provide the best possible education at public expense. The appropriate standard is whether the IEP offers the opportunity for "significant learning" and "meaningful educational benefit." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d. Cir. 1999). See also T.R. v. Kingwood Tp. Bd. of Educ., 205 F.3d 572, 577, 32 IDELR P 30, 80 (3d Cir. 2000). Therefore, the ultimate inquiry in a matter such as this is whether a school district has offered the child an education designed to allow her to obtain meaningful educational benefit with significant learning, individualized to meet her specific needs. Petitioners argue that their child, as an autistic child, requires ESY at the Circle of Friends program.

In this matter, the petitioners are challenging the refusal of the respondent school district to place their child, J.A. in an ESY program. Whether an ESY is appropriate is governed by N.J.A.C. 6A:14-4.3(c). This regulation provides that the IEP team shall make an individual determination regarding the need for an extended school year program. An extended school year program is required to be provided in accordance with the student's IEP when an interruption in educational programming causes the student's performance to revert to a lower level of functioning, and recoupment cannot be expected in a reasonable length of time. The IEP team is required to consider all relevant factors in determining the need for an extended school year program.

The record reflects that the IEP, signed by petitioners, and indicative of the fact that considerations were given to the petitioners' concerns against the recommendations of the child study team, states that J.A. is not eligible for ESY. Furthermore, none of the educational professionals involved in the development of the IEP recommended ESY for J.A., and all of the District's witnesses testified that they had no fear that J.A. would regress or revert beyond the reach of reasonable recoupment if she were not given an ESY.

J.W. v. Atlantic City Board of Education, 91 N.J.A.R. 2d (EDS) 4, held that if it is unlikely or impossible that the child would be able to recoup these skills as measured against the goals in his IEP within approximately six to eight weeks, an ESY is appropriate. The record is devoid of competent evidence that an interruption in J.A.'s educational programming during the summer of 2015 or 2016 would have caused her performance to revert to a lower level of functioning and that recoupment cannot be expected in a reasonable length of time. Petitioners argue that J.A. has regressed without an ESY program, and would have regressed even more so but for her attendance at the Circle of Friends ESY program. Although petitioners are clearly well-meaning and sincere in their arguments, no documentary or supporting evidence was introduced in support of their position, only the lay opinion testimony of J.A.'s mother was offered.

On the other hand, the District has introduced evidence that J.A. has done well during the school year and does not require an ESY program. All three of the district's witnesses appeared to be credible witnesses and testified that J.A. has progressed both

socially and educationally and does not need an ESY program for social or educational issues. Additional evidence was introduced as the level of achievement and progress made during the 2015-2016 school year.

The regulations provide that an ESY must be produced in accordance with the IEP, and no agreed-to IEP for J.A. has ever provided that J.A. was eligible for an ESY. While it is possible that attendance Circle of Friends may further the goals included in J.A.'s IEP, that does not by itself show that an ESY was required.

The IDEA requires a board of education to provide the educational equivalent of a "serviceable Chevrolet" to special education students; it does not require provision of a "Cadillac." DOE v. Board of Educ. of Tullahoma City Sch., 9 F.3d 455, [27] 459-460 (6th Cir 1993); see also J.C. and E.C. o/b/o K.C. v. Warren Hills Reg'l High Sch. Bd. of Educ., OAL Dkt. No. EDS 11048-02 (OAL August 12, 2003). In other words, the fact that all students have the right to receive a free and appropriate public education does not mean that they are entitled to their own Cadillac of education. A showing that J.A. benefitted from participation in Circle of Friends is not proof that the IEP was inappropriate for a lack of an ESY.

Based upon consideration of the findings of fact, the testimony and documentary evidence, and the record as whole, I **CONCLUDE** that the district properly considered J.A.'s potential and educational needs and that the IEP for the 2015-2016 school year was reasonably calculated to provide her with meaningful educational benefit in the least restrictive environment.

No conclusions in this decision should be interpreted to conclude petitioners acted irresponsibly in enrolling J.A. in Circle of Friends in the summer of 2015. However, parents who unilaterally change their child's placement, without the consent of local school officials, do so at their own financial risk and are barred from recovering reimbursement if it is ultimately determined that the program proposed by the District affords the child with a FAPE. It was apparent throughout the hearing that petitioners are deeply and thoroughly dedicated to pursuing the best education available for J.A. and are sincerely concerned with her welfare. While every student with a disability is

entitled to an education conferring meaningful educational benefit in the least restrictive environment, the school district is not obligated to provide the best possible educational opportunity. Parents who wish for their child to receive extra service beyond what is available to nondisabled students in the public schools cannot expect the public to pay for the privilege. G.N. and S.N. o/b/o J.N. v. Livingston Bd. of Educ., EDS 3547-04, Final Decision, (January 27, 2005) <<http://lawlibrary.rutgers.edu/oal/search.html>>; M.S. and C.S. o/b/o A.S. v. Bd. of Educ. of Ridgewood, EDS 5814-03, Final Decision, (March 16, 2004) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

ORDER

It is **ORDERED** that the relief requested by petitioners as set forth above, is **DENIED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) 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 (2015). 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.

February 14, 2017
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency

Date Mailed to Parties:

JSK/dm

APPENDIX

WITNESSES

For Petitioner

J.A., mother of J.A.

For Respondent

Christine Trotter J.A.'s third grade general education teacher

Caroline Medlock J.A.'s third grade special education teacher

John Bersh Supervisor of Special Services for District

Exhibits

For Petitioner

P-A not admitted

P-B not admitted

P-C Progress Report for IEP Goals & Objectives, dated June 21, 2016

P-D 2015-2016 report card

P-E Progress Report, dated June 18, 2015

P-F Progress Report for IEP Goals & Objectives, dated June 5, 2014

P-G Not admitted

P-H Not admitted

P-I Examples of school work from 2015

P-J Daily Communication Log

P-K Not admitted

P-L NJ DOE Special Education notification, dated May 24, 1999

P-M Gloucester County ESY program information, dated April 2014

P-N Not admitted

- P-O Not admitted
- P-P Not admitted
- P-Q Not admitted
- P-R Example of school work, dated November 3, 2015
- P-S Writing sample
- P-T Social Skills report card
- P-U Not admitted
- P-V Not admitted
- P-W Not admitted
- P-X Examples of school work

For Respondent

- R-1 John Lee Bersh, Ed.D., letter, dated July 7, 2015, pages 3 thru 5 addresses recoupment model/ESY with attachments
 - 2015 Student Progress Report
 - 2014-2015 Dates of Attendance
 - 2014-2015 Occupational Therapy Service Dates
 - 2014-2015 Physical Therapy Service Dates
 - 2014-2015 Speech/Language Service Dates
- R-2 Progress Report, dated June 18, 2015
- R-3 IEP Annual Review, dated June 22, 2015
- R-4 IEP Access/Progress/Review/Revise, dated August 6, 2015
- R-5 Progress Report for IEP Goals & Objectives, dated June 21, 2016
- R-6 2016-2017 IEP Annual Review, dated May 3, 2016
- R-7 2015-2016 Report Card
- R-8 2015 Educational Evaluation
- R-9 2015 Psychological Evaluation
- R-10 2015 Speech-Language Evaluation
- R-11 2015 Occupational Therapy Evaluation

- R-12 2015 Social History Assessment
- R-13 2015 Central Auditory Processing Evaluation
- R-14 2015 Physical Therapy Evaluation
- R-15 2015 Confidential Collaborative Evaluation
- R-16 2016-2017 IEP Access Progress Meeting, dated November 15, 2016
- R-17 2016 Student Test History
- R-18 2016-2017 Student Progress Report
- R-19 Oral Reading Fluency, dated September 13, 2016