State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 14389-15

AGENCY DKT. NO. 2015 23003

K.G. ON BEHALF OF R.L.,

Petitioner,

v.

CINNAMINSON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Catherine Merino Reisman, Esq., for petitioner (Reisman, Carolla, Gran, attorneys)

Jared S. Shure, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: October 18, 2016 Decided: March 30, 2017

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner K.G. on behalf of her daughter R.L. requested a due-process hearing seeking an appropriate placement to provide R.L. with a free appropriate public education (FAPE) at her present location at the Quaker School at Horsham (QSH). The petition also seeks reimbursement for tuition for school year 2015—2016 and the summer extended school years (ESY) of 2015 and 2016 from the Cinnaminson Township Board of Education (Board or Cinnaminson). The petition also seeks a

determination that the Board violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1400 et seq. and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 et seq., and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12131 et seq., as they apply to R.L. The respondent alleges that it can provide FAPE in the least restrictive environment. It alleges that K.G. has not engaged with the respondent in the Individualized Education Program (IEP) process, and R.L. has not cooperated with her assessment. The New Jersey Department of Education, Office of Special Education Programs, transferred the matter to the Office of Administrative Law (OAL) as a contested case on October 9, 2015. A settlement conference held on December 2, 2015, was unsuccessful. The OAL scheduled the hearing for January 25 and January 29, 2016. Respondent requested an adjournment of the hearing due to its counsel's illness, and the OAL adjourned the hearing dates. The OAL rescheduled the hearing for May 23, June 13, July 22, August 3, August 15, and October 18, 2016, on which dates the hearing was held. On the last hearing date, the parties provided written closing summations and briefs.

FACTUAL DISCUSSION

The parties do not dispute that R.L., age thirteen at the time of the hearing, presents with diagnoses of epilepsy and Landau-Kleffner syndrome resulting in language-function deterioration. She presents with left-hemisphere epileptic-seizure activity known as perisylvian syndrome, or a dysfunctional sylvian fissure of the brain. This results in cognitive and linguistic problems. The nature of the disability creates difficulty in assessing R.L.'s comprehension of instructions. When R.L. is frustrated, she tends to shut down and refuses to continue with the assessment process. In attempting to address the medical concerns, K.G., with a doctor's recommendation, placed R.L. on a ketogenic diet. The diet is high in fat, low in carbohydrates.

The above constitute the main areas of concern for the proper placement of R.L. in the educational setting. There is no outward evidence of a recent epileptic seizure. The occurrence of a seizure could require intervention within an immediate time frame. The petition did question respondent's classification of R.L. as "other health impaired" (OHI), rather than "multiple disabilities" (MD), as an indication of the respondent's failure

to address the severe conditions of R.L. The review of the definition of the classification terms does not support that questioning or suggest any denial of educational opportunity for R.L. OHI encompasses a physical challenge, as well as other educational challenges. R.L. falls within the OHI category.

R.L. is presently attending QSH due to K.G.'s settlement of a due-process petition with R.L.'s prior school district. That settlement involved R.L.'s representation that she intended to move out of the district. Moving into the respondent's district resulted in an interim agreement to continue placement at QSH for the school year ending June 2015. Respondent preserved the right to argue that QSH is not the stay-put placement for R.L. The parties engaged in motion practice as to the status of the stay-put placement, an interlocutory appeal resulted. The United States District Court for New Jersey determined that the relocation out of the prior school district did not create a stay-put location, nor did the untimely issuance of an IEP by the respondent herein. The petitioner no longer seeks determination of the stay-put-placement issue; rather, petitioner seeks reimbursement for the tuition and costs associated with the placement at QSH for the period. The respondent rejected reimbursement.

Petitioner argues that the respondent's IEPs for the school years ending June 2016 and 2017 are unrealistic, as they identify goals of achieving reading and comprehension levels of sixth- and seventh-grade, respectively, when R.L. is not in a position to reach those levels within one year. The respondent counters that the assessment of R.L. at levels substantially below those levels results from her failure to cooperate with the assessment process. Respondent contends that R.L. is capable of work superior to her assessment performance. Respondent desires the opportunity to teach and evaluate R.L. to determine R.L.'s abilities and needs. Respondent argues that K.G. has not actively participated in the IEP process. R.L. told the Cinnaminson caseworker that her mother advised her that she could refuse to answer assessment questions.

QSH is an out-of-state facility available to approximately fifty-five students. It is not a New Jersey Department of Education-approved school for special-education placement. It has a medical nurse available one day a week.

Respondent argues that the absence of a full-time nurse, the lack of State approval, and the religious activities inherent in a Quaker-school placement make placement at QSH inappropriate. Respondent argues that it can offer FAPE in the least-restrictive environment (LRE) and should be afforded the opportunity to provide a meaningful education for R.L. Respondent denies the responsibility to provide anything other than a meaningful education for R.L.

The petitioner claims that LRE is satisfied by R.L.'s family's social contacts, and an LRE obligation of the respondent should not be used to prevent R.L.'s placement at QSH. Petitioner negatively characterizes the opportunity for R.L.'s exposure to the general student population as a risk to maintaining the ketogenic-diet restrictions. Respondent argues that R.L. had successful exposure to the general student population on the few available occasions at QSH, and respondent presents that it deals with students' food restrictions regularly.

Testimony

Jennifer Alexander

Alexander commenced employment with Cinnaminson in 2012. She serves as a school psychologist and R.L.'s case manager. Alexander prepared the IEPs for R.L. Alexander earned her bachelor's degree from the College of New Jersey and a master's degree in counseling from Immaculata University in Pennsylvania. She is a certified school psychologist for the State of New Jersey. She has previously coordinated the preparation of IEPs in the State of Pennsylvania for over 100 students, but has performed fewer in the State of New Jersey. She provided factual testimony, and the Board sought her qualification as an expert in the field of school psychology. The undersigned questioned respondent's application for qualification of Alexander as an expert, due to the absence of a written report and the undersigned rejecting the IEP as her expert report. Respondent's counsel briefed the issue. Ms. Alexander is accepted as an expert in school psychology. However, her limited experience and potential for

bias due to her employment with respondent limits the undersigned's ability to grant much weight to her expert opinion. I found her to be credible in her factual testimony.

Alexander observed R.L. at QSH on portions of three separate days. The observations revealed R.L.'s oppositional defiant disorder and inattentiveness to her teachers, which are consistent with the neuropsychological and psychological evaluations (J-10; J-30). During the January 16, 2015, observation, R.L. was the last to turn in her laptop, and the teacher prompted R.L. to move along. R.L. had no reaction and appeared to pay the teacher no mind. During the March 17, 2015, observation, R.L. asked to read silently in another room. Alexander related that testing R.L. led to difficulties. R.L. frustrated easily, said that she hated testing, and said that she guessed the answers. R.L. appeared to socialize well with her classmates. During the April 21, 2015, observation and testing, Alexander sensed negative body language from R.L. However, then R.L. started to talk, and expressed disappointment with QSH, recognizing her disappointment as at odds with her mother's desire to continue her placement at the school.

Alexander related that on the second day of testing R.L. gave correct answers after working out the problems within five to seven minutes. R.L. could use notes to solve problems. R.L. appeared to give a lot more to the testing.

During the May 6, 2015, observation, Alexander anticipated testing. However, R.L.'s mother had directed no testing for the day, and after Alexander obtained permission to talk with R.L., R.L. informed Alexander that her mother told her there would be no testing that day. Alexander attempted to converse with R.L.; however, R.L. became upset over this proposition, and Alexander abandoned even a conversation with R.L. Alexander could not complete the testing of R.L. The partial testing of R.L. provided sufficient information for Alexander to opine that the previously existing testing did not reflect R.L.'s true abilities. Alexander believed R.L.'s reading skills to be at grade level.

The teachers at QSH did not offer Cinnaminson assistance as the latter attempted to prepare a June 2015 IEP (J-32). The proposed IEP provided the same

services that were provided to R.L. at QSH. Pages eight and nine of Exhibit J-32 reflect proposed strategies for R.L. The May 2016 IEP (J-68) repeats the same strategies and goal. The goal was to bring R.L. to current grade level. This goal may not have been possible. However, it was the appropriate goal that could be formulated at the time of the IEPs, in the absence of assistance from the existing school, the parent's contributions, and the assessment of R.L. at a Cinnaminson setting.

The IEP reflects use of the resource room, which is limited to a size of ten students. Cinnaminson's size is usually less than eight students. The resource room is staffed with State-approved special-education teachers. The IEP reflects introduction to the general population, both in the homeroom and in the elective courses, to provide the least restrictive environment for R.L. This latter strategy is dependent on the teacher's/child study team's additional evaluations of R.L.'s educational and social advancements by exposure to the general population.

Alexander's main objections to continued placement at QSH are R.L.'s placement with more severely disabled students and the limited availability of a nurse at QSH (only one day a week). The latter circumstance could result in an emergency situation if R.L. is unattended by medical personnel and her parent is forty-five minutes away from the school. Cinnaminson has a full-time nurse every day while school is in session. The ketogenic diet R.L. presently follows would be accommodated at Cinnaminson. Alexander pointed out J-68 at page 647, which indicates QSH's notation that R.L. had no falls, nosebleeds, or seizures through April 2016.

Alexander acknowledged that Cinnaminson used the Orton-Gillingham (OG) reading system and not the Wilson Reading System.

Alexander testified to K.G.'s resistance to placement of R.L. at Cinnaminson, which resulted in K.G.'s failure to participate in the child study team's IEP development. K.G.'s main concern related to the size of the school. Alexander further testified to the practice to review new students thirty days after the IEP implementation, and to her opinion that Cinnaminson offered R.L. an IEP reasonably calculated to provide meaningful educational benefit.

Arlene Goldfarb

Goldfarb is a learning consultant and supervisor of special education employed by Cinnaminson. She matriculated at Temple University, where she obtained a bachelor's degree in speech pathology and audiology, cum laude. She continued her education at the University of Southern Alabama, where she obtained a master's degree in special education, learning disabilities. Thereafter, at Rowan University in New Jersey she obtained a certificate as a learning-disabilities teacher consultant (LDTC). She maintains certification in special education, elementary education, and supervisor, as well as LDTC. She is also a nationally certified education diagnostician. She has no clinical background as a speech-language therapist. She has never testified as an expert. The tribunal accepted her as an expert in general special education and of the learning disabled.

Cinnaminson employed Goldfarb for more than eleven years, the last four as the supervisor. Her case load is sixty students, and she administers tests to approximately forty-five students per year. She has written over 100 IEPs over the years. She did communicate and converse with R.L., and recognized reading and writing difficulties, though age-appropriate reading in context was noted. R.L.'s weakest skill appeared to be testing. Goldfarb recommended the resource room as appropriate for R.L.'s academic program as the LRE. R.L. can engage in age-appropriate conversations. Goldfarb does not question that R.L.'s writing and comprehension skills need work, but disputes the contention that her skills are several levels below grade level. Both QSH and Cinnaminson are offering the same amount of language therapy. Cinnaminson services are all within the same building. R.L. would receive a locker, and she would change classrooms in a sensory-controlled environment, i.e., quiet hallways.

Goldfarb strongly disagrees with speech-language pathologist Jeanne Tighe's opinion that social interaction is inappropriate for R.L. Goldfarb also challenges Tighe's opinion that Cinnaminson would use lecturing to the detriment of R.L. Goldfarb stated that if it becomes apparent that lecturing is inappropriate for R.L., lecturing would not be used. She believes the classification of OHI is appropriate for R.L., as OHI is

appropriate for the circumstance of health issues compounding a student's learning disabilities. Regardless, the IEP is designed for the individual concerns that the student presents, and not the classification. Goldfarb finds limited distinction between the OG reading system and the Wilson Reading System for R.L.'s purposes. Cinnaminson is offering better educational opportunities than those offered by QSH in the scientific and social settings. The size of R.L.'s QSH class is ten. The Cinnaminson class may be slightly smaller or larger at times. However, if necessary for R.L., adjustments would be made. Cinnaminson has had no opportunity to work with R.L. at its location.

Jeanne Tighe

Tighe is a certified speech-language pathologist. In May 2001, she obtained her bachelor's degree in education of the deaf, and in 2003 a master's degree in speech-language pathology, both from The College of New Jersey. She trained in the OG and Lindamood-Bell methodologies. She is certified on the Wilson Reading System, Level 1. She has a certificate of clinical competence. She does evaluations and provides treatment. Tighe is the owner of Beyond Communication. Ninety percent of her clients are children with learning-based disabilities. She has contracts with four school districts to provide speech-pathology services. Tighe has done IEP goals and present levels. When her company is a provider of service to a district, they are part of the IEP team. She has never taught in New Jersey, but she has taught in Pennsylvania, mainly with the hearing impaired. When retained by a parent, she does not as a matter of course go to the IEP meeting. The tribunal qualified her as an expert in speech-language pathology.

Petitioner contacted Tighe regarding R.L.'s reading comprehension, writing, and keeping up in class. Tighe initially observed R.L. in the spring of 2013. She again observed R.L. on December 17, 2013, May 12, 2015, and August 3 and 29, 2015. The initial consultation occurred while R.L. attended a school different from QSH. In 2013, due to a change in teacher, R.L. reacted negatively at the Orchard Friends School she had attended. Tighe recommended QSH, and the December 2013 evaluation occurred at QSH. Evaluations were prepared as a result of the observations and supportive testing. She reviewed medical records of R.L., which revealed that R.L. suffered from

various seizures as a three-year-old, and her diagnosis included Landau-Kleffner syndrome. These diagnoses indicated neurological, language, speech, psychosocial, motor, memory, and attention deficits. The speech-language evaluation that was previously done by the district revealed that R.L.'s expressive and receptive language scores were lower than age-appropriate levels. Tighe described R.L.'s test results as evidencing a severe language disorder. Tighe observed the proposed Cinnaminson resource-room placement. She opined that R.L. could not handle the expectation of the class, considering R.L.'s low frustration tolerance. Tighe did not observe R.L. at Cinnaminson, as R.L. has never attended Cinnaminson. The class sizes observed were seven and eleven students, respectively. On Tighe's inquiry about a more intensive level of support, Goldfarb responded that the MD-classified students received more intensive support. However, those students were much lower functioning than R.L., and such a placement would be inappropriate for R.L.

K.G.

K.G. is the mother of R.L. She has a bachelor's degree in economics from Lehigh University. She presently performs accounting work for law firms.

K.G. testified that at age forty-two months, R.L. suffered from catatonic seizures. R.L. received medical treatment at various children's hospitals, and eventually came to Children's Hospital of Philadelphia (CHOP) for treatment. During the last two years, due to her condition R.L. has experienced balance issues, i.e., walking into signs, walking into glass, and disruptive sleep. K.G. described R.L.'s diagnosis as one of 300 such cases worldwide. The doctors put R.L. on a ketogenic diet. Even with this diet, R.L., due to medical reasons, lost thirty class days in 2014, and forty-five class days in 2015.

In 2013, R.L. attended Orchard Friends School. When R.L. lost her teacher, she reacted negatively. K.G. then provided home schooling until placement of R.L. at QSH. The determination to place R.L at QSH resulted from the input of Tighe and Gerry A. Stefanatos, Ph.D. K.G. resided in Berlin, N.J., at the time, and the Board had no

participation in this placement. K.G. expressed her concerns that R.L. could not be educated in a larger school setting.

K.G. expressed the concern that the Board had predetermined the 2015 IEP within district and would not consider an out-of-district placement. At the June 3, 2015, IEP meeting, K.G. requested time to submit her concerns in writing. (J-32 at 346.) K.G. provided no submission, upon the advice of counsel.

K.G. expressed the concern that the least restrictive environment proposed by respondent is inappropriate for R.L., and dismissed the recommended availability of extra-curricular activities at Cinnaminson, as R.L. did not participate in them. She also dismissed the respondent's concerns regarding on-site medical personnel, advising that an ambulance could take R.L. to CHOP in forty-five minutes from QSH.

Gerry A. Stefanatos, D.Phil.

Dr. Stefanatos received his bachelor's degree in psychology from McGill University, Montreal, Quebec, Canada, and received a doctorate in philosophy from Oxford University, England. He performed a neuropsychological evaluation of R.L. and participated in the placement of R.L. at QSH, as an appropriate educational setting for R.L. CHOP diagnosed the Landau-Kleffner syndrome. R.L. came to Dr. Stefanatos with a history of epileptiform electroencephalographic abnormalities in December 2013. His report recognized that evaluations of R.L. could underestimate her potential due to periods of less than ideal attention and concentration. Dr. Stefanatos confirmed that R.L. does suffer from deficiencies in receptive and expressive language. He classified the disorder as mild to moderate. His report reflected that the electroencephalograms performed by CHOP did not disclose sufficient duration of electrographic information conclusive of status epilepticus of sleep.

Jennifer Keller

Keller received her bachelor's degree in elementary education from the College of Notre Dame, Maryland, and a master of social service degree from Bryn Mawr

College, Pennsylvania. She maintains certification as a Pennsylvania guidance counselor and certifications in CPR and first aid.

Keller has been employed at QSH since 2009. QSH is approved by the State of Pennsylvania. Keller testified to knowledge of R.L. and the program provided by QSH, and described the program. She testified that R.L. does not participate in the Quaker meeting where general values of citizenship are discussed.

Findings of Fact

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

In this case, petitioner argues that the Board did not provide FAPE, as it was predisposed to provide an in-district program, rather than an out-of-district program, or that R.L.'s medical concerns make her ineligible to attend an in-district school. Those arguments are not accepted by this tribunal. The evidence suggests that it is likely that after R.L. had a tumultuous time on departing Orchard Friends School, and QSH appeared to work for R.L., K.G. did not want to investigate other potential educational settings. K.G.'s objections to a placement at Cinnaminson clearly reflected genuine concern for R.L.'s well-being. Her testimony was influenced by the best educational interests of the child and a desire to avoid change until necessary. However, it is not possible to know whether a district can provide FAPE for a student until it has had an opportunity to do so. There is no question that a change of school may result in some

degree of tumult to R.L., but such changes are sometimes necessitated by the circumstances.

Tighe testified that R.L. could not handle the expectations of the Board class without any consideration of allowing Board exposure to R.L. in the class setting. Tighe also testified that R.L. has a very low frustration tolerance and cannot easily be brought back once she begins to shut down. However, Tighe's expertise is in the speech-language area, not the behavioral/neuropsychological area. Tighe testified to a severe language disorder, but did not note that conclusion in her December 2013 observation of R.L. at QSH. Her report goes beyond her area of expertise, and makes the conclusory opinion that the Board cannot provide a meaningful educational benefit to R.L. Her testimony does not dissuade this tribunal that the Board needs to be afforded the opportunity to educate R.L. Determinations regarding whether meaningful educational benefit can be achieved cannot be made without an educational experience with the Cinnaminson. If after exposure to R.L., modification of the anticipated programs for her individual needs, and an analysis of meaningful educational benefit to R.L. it is determined that the in-district program is not appropriate, other steps may need to be taken.

As to petitioner's other witnesses, Stefanatos's testimony was accepted as it pertained to the neuropsychological area, but he inappropriately made determinations regarding QSH and the Board program without consideration of a visit to the locations, relying predominantly on the improvements observed. He found that R.L. had a mild to moderate language deficiency. Keller provided a small glimpse into R.L.'s personality, but her expertise is in the guidance area.

The testimony of the two Board witnesses is accepted as credible and truthful, this tribunal recognizes they are subject to a bias in supporting their judgments, and the uncertainties of repercussions from testimony that could be adverse to their employer. However, Alexander's testimony regarding the statements made by R.L. and the absence of cooperation from K.G., are consistent with a less than cooperative parent. To reject that testimony, this tribunal would have to view Alexander's testimony as a blatant misrepresentation of the facts. This tribunal does not accept her testimony as a

blatant misrepresentation. K.G. may explain her reticence to cooperate as advice of counsel, such lack of cooperation occurred at K.G.'s risk.

The absence of Wilson-certified personnel in the district does not create a sufficient reason to claim that FAPE is not provided by the Board. Petitioner submitted no evidence that the OG system could not benefit R.L. Petitioner made no showing that the OG system failed to provide educational benefit to R.L.

Petitioner also asserts that the Board procedurally failed to timely provide an IEP. However, R.L. was a student with unique medical and educational concerns, and particular analysis was required. R.L. enrolled in QSH in late 2013, and in the first half of 2015 the Board conducted three on-site evaluations of R.L. R.L. had missed thirty class days in 2014 and forty-five class days in 2015 due to health issues. The IEP meeting occurred in June 2015. The Board prepared the IEP in a timely manner, from the best available information provided to it, providing compensation for R.L.'s education and transportation pending completion of the IEP.

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

1. K.G.'s daughter R.L., age thirteen, presents with a learning disability, occasioned by her diagnoses of epilepsy and Landau-Kleffner syndrome. Her classification of "other health impaired" entitles her to special-education services.

2. In 2013, K.G. placed R.L. at QSH prior to moving into Cinnaminson Township.

3. Toward the end of 2014, K.G. moved into Cinnaminson Township. The parties entered a settlement agreement, with the Board preserving the right to contest that QSH qualified as the stay-put placement.

4. Representatives of the Board observed R.L. at QSH on three occasions in the first half of 2015, and attempted to test her educational abilities.

5. The interim agreement and these observations were done consistently within the procedural parameters of obtaining the necessary information to complete an appropriate IEP. Petitioner received compensation for R.L.'s education and transportation during the time the Board was conducting its evaluations and assessment.

6. One of R.L.'s disabilities is manifested in her test taking. She performs poorly due to her disabilities and behavioral reticence to take tests. This fact was confirmed by her own neuropsychologist.

7. The Board formed the same conclusion, i.e., R.L. did not test to her abilities.

8. Representatives of the Board testified that R.L. said that her mother advised her that she could refuse to answer assessment questions.

9. In June 2015 the parties met to work on an IEP for the 2015–2016 school year.

10. The Board prepared a proposed IEP in advance of the meeting.

12. K.G. met with the child study team for the IEP meeting, but did not provide input at the meeting and requested that she be allowed to submit comment after the meeting. K.G. did not provide comment.

13. The Board provided an IEP with services similar to the services R.L. had received at QSH, but within district, for school year 2015–2016.

14. K.G. rejected the Board's suggested placement and continued R.L.'s education at QSH.

15. Due to medical reasons, R.L. lost thirty class days in 2014 and forty-five class days in 2015.

16. K.G. failed to cooperate with the Board in working on an IEP.

LEGAL ANALYSIS AND CONCLUSIONS

The IDEA provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 695 (1982). One of purposes of the IDEA is "to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.A. § 1400(d)(1)(A). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C.A. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court has construed the FAPE mandate to require the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, supra, 458 U.S. at 203, 102 S. Ct. at 3049, 73 L. Ed. 2d at 710. New Jersey follows the federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." The Rowley standard the United States Supreme Court recently questioned in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____ (2017), March 22, 2017, 15-287 cert. from 10th Circ. Ct. of Appeals, the Supreme Court remanded the case for further proceedings consistent with its decision. The Supreme Court determined that a school district must show a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make

progress appropriate in light of his (the student's) circumstances. This standard does not appear applicable here, as the IEP proposed sets forth a comparative educational experience to the one R.L. is presently receiving. The parent has not afforded the district the opportunity to provide a more appropriate IEP as the petitioner did not allow the district any attempt to educate R.L. The New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit cases appear to require similar inquiry into the educational proposal of the district in compliance with the requirements of Endrew F. Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). The IDEA does not require that a school district "maximize the potential" of the student, Rowley, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708, but requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the IEP provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988), cert. den. sub. nom., Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). In other words, the school district must show that the IEP will provide the student with "a meaningful educational benefit." S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). This determination must be made in light of the individual potential and educational needs of the student. T.R., supra, 205 F.3d at 578; Ridgewood, supra, 172 F.3d at 247–48. The appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H., supra, 336 F.3d at 271. Rather, the pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

Toward this end, an IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C.A. § 1414(d)(2) and (4); N.J.A.C. 6A:14-3.7. A complete IEP must contain a detailed statement of annual goals and objectives.

N.J.A.C. 6A:14-3.7(e)(2). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general-education curriculum and "be measurable" so both parents and educational personnel can be apprised of "the expected level of achievement attendant to each goal." Ibid. Further, such "measurable annual goals shall include benchmarks or short-term objectives" related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The New Jersey Supreme Court has recognized that "[w]ithout an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP." Lascari, supra, 116 N.J. at 48.

Parents who withdraw their child from public school and unilaterally place the child in a private placement while challenging the IEP may be entitled to reimbursement if the administrative law judge (ALJ) finds that the school district's proposed IEP was inappropriate and that the parents' unilateral placement was proper. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 365, 126 L. Ed. 2d 284, 292 (1993); Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359, 370, 105 S. Ct. 1996, 2002–03, 85 L. Ed. 2d 385, 395 (1985). More particularly, an ALJ may require the district to reimburse the parents for the cost of that enrollment if "the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and . . . the private placement is appropriate." N.J.A.C. 6A:14-2.10(b); see 20 U.S.C.A. § 1412(a)(10)(C)(ii). However, parents who unilaterally withdraw their child from public school and place the child in a private school without consent from the school district "do so at their own financial risk." Burlington, supra, 471 U.S. at 374, 105 S. Ct. at 2004, 85 L. Ed. 2d at 397. If it is ultimately determined that the program proposed by the district affords the child with a FAPE, then the parents are barred from recovering reimbursement of tuition and related expenses. Ibid. A court may reduce or deny reimbursement costs based on the parent's unreasonable behavior during the IEP process. 20 U.S.C.A. § 1412(a)(10)(C)(iii).

The issue here is whether the Board provided R.L. with FAPE. I **CONCLUDE** that the Board attempted to provide FAPE to R.L. in the LRE. This attempt was thwarted by the parent, who refused to consider placement within the district. While

K.G.'s reservations about a change of placement are understandable, she has presented an insufficient legal basis upon which to direct the school district to maintain R.L.'s program at QSH.

The question of whether R.L. was provided with FAPE by the district covers the 2015–2016 school year and the 2016–2017 school year.

I **CONCLUDE** that the Board did provide FAPE in the LRE to R.L. in the June 2015 IEP and the May 2016 IEP because those IEPs had the capacity to address R.L.'s educational needs. The petitioner prevented the Board from addressing R.L.'s needs or adjusting the IEP to meet her needs by depriving it of the opportunity to demonstrate the education available to R.L. at Cinnaminson.

R.L. went to QSH in the summers of 2015 and 2016. The Board agreed to reimburse petitioner through June 30, 2015, and provided an IEP for the 2015–2016 school year. Thereafter this due-process hearing commenced. There was not sufficient proof that R.L. regressed during the months of July and August 2015. I **CONCLUDE** that petitioner is not entitled to reimbursement for sending R.L. to QSH in July–August 2015.

The parties stipulated that the Board would compensate K.G. for placement of R.L. at QSH for school year 2014–2015, without conceding that it was the stay-put placement of R.L. Having concluded that the Board provided FAPE in the LRE in its 2015 and 2016 IEPs, I further **CONCLUDE** that petitioner is not entitled to reimbursement for amounts expended except as previously negotiated between the parties.

As to the question of whether the Board denied FAPE to R.L. during the 2016 extended school year, I **CONCLUDE** that the parent denied the Board the ability to determine if services for the 2016 extended school year were appropriate. Accordingly, the Board attempted to provide FAPE in the LRE for the 2016 extended school year, and K.G. is not entitled to reimbursement for those expenditures.

ORDER

It is hereby **ORDERED** that petitioner's claim for private placement for R.L. at QSH is **DENIED**.

It is further **ORDERED** that petitioner's claim for reimbursement for tuition at QSH for the 2015 and 2016 extended school years and school year 2015–2016 is **DENIED**.

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.

March 30, 2017

DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency March 30, 2017

Date Mailed to Parties:

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WITNESSES

For Petitioner:

K.G.
Jeanne Tighe
Gerry Stefanatos, D.Phil.
Jennifer Keller

For Respondent:

Jennifer Alexander
Arlene Goldfarb

LIST OF EXHIBITS

Joint:

J-1 Petition for Due Process
J-2 Answer
J-3 Speech-Language Re-evaluation (Berlin Borough), dated January 23, 2013
J-4 Learning Evaluation (Berlin Borough), dated January 25, 2013
J-5 Social re-assessment (Berlin Borough), dated January 28, 2013
J-6 Berlin Borough School Dystric IEP, dated March 18, 2013
J-7 Independent Comprehensive Communication Evaluation, dated May 20, 2013
J-8 OAL decision in K.L. o/b/o R/L. v. Berlin Borough Bd. of Educ., dated July 2, 2013
J-9 U.S. District Court decision in K.L. o/b/o R/L. v. Berlin Borough Bd. of Educ., dated August 7, 2013
J-10 Neuropsychological Evaluation, dated December 12, 2013
J-11 Independent Written Language Re-evaluation and Observation of In-District Proposed Programs, dated January 2014
J-12 Berlin Borough School District 2014–2015 IEP
J-13 Quaker School Occupational Therapy Progress Update, dated July 26, 2014

J-14 Quaker School Speech-Language Therapy Progress Update, dated July 26, 2014

J-15 Order approving settlement agreement in K.L. and R.L. o/b/o R.L. v. Berlin Borough Bd. of Educ., dated November 21, 2014, with attached Settlement Agreement

J-16 Settlement Agreement, dated February 25, 2015

J-17 Email chains regarding PARCC testing, dated February 23–26, 2015

J-18 CHOP letter regarding NJ PARCC testing, dated March 27, 2015

J-19 Learning Re-evaluation, dated March 2015

J-20 Social Assessment Update, dated March 2015

J-21 CHOP developmental behavioral follow-up, dated March 12, 2015

J-22 CHOP report, dated March 20, 2015

J-23 Speech and Language Evaluation (Quaker School), dated April 2015

J-24 Occupational Therapy Evaluation (Quaker School), dated April 2015

J-25 Email chain regarding testing, dated April 2915

J-26 Correspondence from Cameron Morgan, Esq., to Catherine Reisman, Esq., regarding breach of Settlement Agreement, dated April 21, 2015

J-27 Speech-Language Therapy Mid-year Progress Report (Quaker School), dated May 2015

J-28 Independent Observation of Current Educational Program, dated May 2015

J-29 Email chains between C. Morgan, Esq., and C. Reisman, Esq., regarding testing an IEP meeting, dated May 2015

J-30 Psychological Evaluation, dated May 26, 2015

J-31 Invitation to June 3, 2015, IEP meeting, dated May 26, 2015

J-32 IEP, dated June 3, 2015

J-33 Emails regarding testing delays, dated 2014–2015 school year

J-34 CV, Jennifer Alexander

J-35 Not introduced

J-36 Not introduced

J-37 CV, Arlene Goldfarb

J-38 Not introduced

J-39 CV, Jennifer Keller

J-40 Not introduced

J-41 Not introduced
J-42 CV, Jeanne Tighe
J-43 CV, Gerry A. Stefanatos
J-44 CHOP note, dated February 5, 2015
J-45 CHOP note, dated February 10, 2015
J-46 CHOP note, dated February 18, 2015
J-47 CHOP note, dated February 23, 2015
J-48 CHOP note, dated March 2, 2015
J-49 CHOP note, dated March 18, 2015
J-50 CHOP note, dated March 31, 2015
J-51 Correspondence from C. Reisman to C. Morgan, dated April 27, 2015
J-52 Quaker School attendance records, dated 2014–2015
J-53 Quaker School 2014–2015 enrollment contract, executed June 12, 2015
J-54 Correspondence from E. Harrison to C. Reisman, dated July 20, 205
J-55 Correspondence from C. Reisman to E. Harrison, dated July 20, 2015
J-56 Quaker School Summer Enrichment Program 2015 Report
J-57 Quaker School Summer 2015 Speech/Language Progress Report
J-58 Quaker School September 2015 OT Progress Report
J-59 Quaker School October 2015 OT Progress Report
J-60 Quaker School November 2015 Speech/Language Progress Report
J-61 Independent Neuropsychological Evaluation, dated November 2015
J-62 Quaker School OT Report, dated November 2015–January 2016
J-63 Quaker School 2015–2016 Academic Report, 1st trimester
J-64 Tighe Report
J-65 Email chain between counsel, dated January 22, 2016
J-66 Verified Petition for due process, dated December 2014
J-67 Writing samples used in A. Goldfarb Educational Evaluation
J-68 2015–2016 documents