

**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

OAL DKT. NO. EDS 16797-14

AGENCY DKT. NO. 2015 21978

**W.K. and A.K. o/b/o L.K.,**

Petitioners,

v.

**SOUTH PLAINFIELD BOARD**

**OF EDUCATION,**

Respondent.

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**Beth A. Callahan**, Esq., for petitioners (Callahan & Fusco, attorneys)

**Robin S. Ballard**, Esq., for respondent (Schenck Price Smith & King,  
attorneys)

Record closed: November 30, 2015

Decided: November 30, 2015

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioners, W.K. and A.K., parents of L.K., filed a request for a due process hearing, in accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, seeking an Individualized Education Program (IEP) with objective measurable goals and services, out-of-district placement, and compensatory education for the 2011-2012, 2012-2013, and 2013-2014 school years, as a result of the District's alleged failure to provide an appropriate program to L.K. L.K.

was determined to be eligible for special education and related services under the category of Cognitive Impairment-Mild.

The Department of Education, Office of Special Education, transmitted the matter to the Office of Administrative Law (OAL) on December 19, 2014. Hearings were held on February 25, 2015, April 20, 2015, June 1, 2015, July 20, 2015, and July 28, 2015. As requested by the parties, written summations were submitted and the record closed upon their receipt.

### **FACTUAL DISCUSSION**

L.K. was placed with W.K. and A.K. as a foster child when L.K. was two weeks old. Less than three years later, petitioners adopted him. L.K. has attended special education programming in South Plainfield since the age of three.

L.K. was evaluated by the child study team (CST) in the 2012-2013 school year, with the parties agreeing on January 22, 2013, to complete psychological and educational testing of L.K. A psychological evaluation, including cognitive testing, was completed of L.K. on February 14, 2013, by Amy Gallagher, South Plainfield school psychologist. Utilizing the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), L.K.'s full-scale intelligence quotient (FSIQ) was determined to be 61. When comparing this figure to same age peers, it ranks in the first percentile falling in the extremely low range. An educational evaluation, utilizing the Woodcock-Johnson III Tests of Achievement was completed on February 14, 2013. A speech-language evaluation was conducted of L.K. on March 6, 2013. In addition, the Test of Language Development (TOLD) and the Test of Auditory Processing Skills (TAPS) were administered to L.K. The TOLD placed L.K.'s overall spoken language at the fifth percentile and based on his performance on the TAPS, the evaluator found L.K. had significant problems with his memory skills. From the data obtained through the reevaluation process, L.K. was found eligible for special education and related services under the category of Cognitively Impaired-Mild.

On May 1, 2014, the petitioners attended an IEP meeting for L.K. regarding the 2014-2015 school year. Through this IEP, L.K. was placed in the Multiply Disabled (MD) program in South Plainfield Middle School, where he would receive instruction in math, English/language arts, social studies in a self-contained setting, and science instruction in the school's resource center. L.K.'s education program also included speech therapy three times per month, consultative speech, and occupational therapy services once a month. A behavioral program, supported through monthly consultation by a board certified behavior analyst (BCBA), would be part of the MD program.

Jennifer Horne, supervisor of special services since 2014, testified on behalf of respondent. Horne was qualified as an expert in educational testing, special education, and programming for students with disabilities. Horne stated that she saw L.K. one to two times per month and that no significant changes in L.K.'s functioning had been reported to her since she started working with him in September 2014.

Horne indicated that L.K. was administered a partial Assessment of Basic Language and Learning Skills (ABLIS) in November 2013, a full ABLIS in August 2014, and a full ABLIS in February 2015. Based on the ABLIS assessments, Horne concluded that L.K. possesses various basic prerequisite skills. When questioned about how the ABLIS assessment was administered, Horne stated,

I have done it through going through knowing the student, and then I pull aside the objectives that I'm not necessarily familiar with the criterion. There is various criterion for different objectives, and then, if need be, I observed that individually.

Horne added that the ABLIS was completed "based on observation and based on speaking to the teachers."

Horne opined that standardized testing is not an accurate reflection of how L.K. functions in school. She specifically indicated that the Woodcock-Johnson III Test of Achievement was not appropriate for a child with cognitive disabilities. She indicated that she did not know why the District utilized the Woodcock-Johnson test on L.K., in light of her view that the test was inappropriate. Nonetheless, the District used the

results of the Woodcock-Johnson as one component of developing L.K.'s IEP, thereby affirming its appropriateness.

Horne concluded that L.K. derived meaningful educational benefit from his educational programming;

As I've gotten to know him and watch him in September to now, he is able to follow his classroom routine. He responds to the prompting that the teachers give him. He navigates the school community successfully. He is developing friendship with the classroom. He is doing very nicely in the classroom right now.

However, Horne was asked;

- Q. Okay. And it's your testimony that with regard to the Woodcock-Johnson, because of his cognitive impairment, it is your expectation no matter what type of educational program he was receiving, no matter what type of services he was getting, that that gap between him and his typically developing peers will continue to grow over time, yes or no?
- A. Yes.

Horne was later questioned regarding her response;

- Q. Is it inappropriate to administer a standardized academic achievement test to a student with cognitive disabilities?
- A. No.
- Q. Can you explain that?
- A. Sure. I guess my point is just that I'm not sure why we would do that, because we do know that the student is not performing on grade level. So it's not always – it's not necessarily going to give me the most accurate information as we look to develop a program for that student.

Mary Ann Mieke, one of L.K.'s special education teachers in the MD program, testified on behalf of respondent. L.K. was one of eight students in her MD class, which consisted of one teacher and two classroom aides. Mieke indicated that she has two

classrooms, one academic and the other a life skills classroom. In addition to participating in a full academic day, pre-vocational skills are also addressed in the MD class through lessons in hygiene, cooking, and running a coffee cart.

Miehe stated that she did not have any input into the goals and objectives in L.K.'s IEP. Miehe responded to the question about how L.K. has improved when he started the class with Miehe in September 2014 until the present;

I think he's made improvement. I think he's progressed in his ability to do those kinds of tasks we've asked him to do with more confidence and with better attention, maybe better endurance to do it. He has built up, you know, the length of time he could attend to a task.

Miehe noted however, that she did not assess L.K. as to his social studies goals in the first marking period with her, "because I was building a foundation of skills that I didn't feel I had covered enough to be able to give him a fair or a clear assessment." Miehe was asked further;

- Q. And for the second marking period?  
A. The second marking period they were, "Partially Proficient."  
Q. And on what did you base that?  
A. Observation, just completion of tasks.

Miehe further noted that she believed that observing and interpreting what L.K. is doing is objective measurement. Miehe added that phrases that she used, such as, "He's doing very well," or "He did wonderfully," or "He's doing great," or "He's doing very nicely," are objective measurements.

Miehe concluded by affirming that L.K. can learn and if given the right program, L.K. could improve his reading. Miehe conceded that she believes L.K. should be able to maintain his skills he currently has based on a standardized measure.

Jason Parenti, Director of Curriculum and Instruction at the Morris-Union Jointure Commission, testified on behalf of respondent. Parenti was qualified as an expert in behavior, assessing students with cognitive impairments, and educating children with

cognitive impairments. However, Parenti admitted that putting “pending certification as a behavior analyst” on his resume was inappropriate since he only completed one of the three components to becoming a board certified behavior analyst (BCBA); a certification that he is no longer pursuing.

Parenti stated that he assessed L.K.’s functional educational skills in August 2014, using the ABLLS. Parenti concluded, based on his administration of the ABLLS, that L.K. was able to generalize the skills he had learned through his IEP program and was able to demonstrate almost the full requirements of the ABLLS assessment in the areas of reading, math, writing, and spelling. When asked specifically about L.K.’s assessment, Parenti admitted that “letter identification” he did with L.K. on the ABLLS is something that is taught in preschool. He also noted that the math skills tested in the ABLLS, one-to-one correspondence, means that there were five blocks and L.K. would have to count those blocks and point to them. Parenti also added that the writing skills tested on the ABLLS were tracing, indicating a simple line, drawing, and maybe the formation of letters of the alphabet. He affirmed that L.K. was basically copying lines and it was the most prerequisite skills to writing. Parenti conceded that he did not know when L.K. mastered the skills in the ABLLS, that it could have been five years ago or even preschool. He stated that when the District conducted the ABLLS later in the year, no progress was indicated because L.K. demonstrated the same things he had already mastered.

Parenti was asked the following regarding L.K.;

- Q. What objective measurement was the District using to assess whether or not there was skill acquisition?
- A. I do not know.
- Q. Did you review any?
- A. No.
- Q. Okay. So your testimony that L. made progress is based on what the teachers told you?
- A. Correct.
- Q. Okay. So everything you’re saying is essentially his teacher said he’s doing well or L. is doing well and he’s making progress in this area. Yes or No?
- A. Yes.

- Q. Okay. And when you testified that his program was appropriate that's based on not knowing what his reading level is. Correct?
- A. Yes.
- Q. And that's based on not knowing what his math level is. Correct?
- A. Yes.
- Q. Do you think reading and math are important for L. to have the basic skills in?
- A. Yes.

Parenti noted in his testimony that he did not review any documentation that showed L.K. was making progress in his educational program.

Linda Auld, a learning disabilities teacher consultant, testified on behalf of petitioner. Auld was qualified as an expert in the educational evaluation of students, evaluation of programs for students with disabilities, and the development of educational programs for students with disabilities. Auld indicated that she was asked by the parents to determine if L.K. had made progress and what his current levels of functioning were. Utilizing the Woodcock-Johnson tests administered by the District in 2010 and 2013, and L.K.'s performance on the 2014 administration of the same test, Auld opined that L.K.'s performance declined in the areas of reading, math, and written language, finding that L.K.'s performance levels were in the very low range.

Auld noted that using the District's own testing as a baseline, and based on grade norms, L.K. had declined considerably in the area of reading and not as considerably in the areas of math and written language. Auld added that she did not see any level of progress and only decline in his performance.

Auld stated that she would use the results of the Woodcock-Johnson test to develop a program for L.K. Auld elaborated;

- A. Okay. Looking at these, I would use it to say there are significant issues particularly with his word identification which is basically sight vocabulary. The ability to fluently and automatically recognize words on sight. That declined by 20 points and he would need to have goals and objectives within his program

that specifically dealt with how to improve his sight vocabulary for reading.

Auld also noted that L.K. had a twelve-point decline in math fluency; however, she did not think it would be an appropriate area to work on with him at this point. While acknowledging the need for L.K. to be able to use basic math skills, the area of math fluency would be problematic. Auld reasoned; "Particularly when I went in and took a look at the 2013 psychological evaluation which showed his working memory to be below the first percentile, that it would be extremely difficult for him to memorize math facts." Auld reiterated her concern regarding L.K.'s IEP, noting that there were no appropriate reading goals. Auld opined that L.K. needs direct intensive systematic teaching to develop basic skills, so that in the area of reading, he could develop sight words and develop functional reading skills so that he can read signs and directions at an appropriate level.

Carol Fiorile, testifying for petitioner, was qualified as an expert in special education, development of special education programs, and expertise in behavior analysis along with the development of goals and objectives for special education students.

Fiorile indicated that she was asked by the parents to observe L.K. in the District program, review documents related to L.K., and provide any recommendations. Fiorile noted that she observed L.K. for approximately forty to forty-five minutes. She requested to speak with L.K.'s reading teacher to no avail. She added that she requested additional time to see his program and the proposed program but that request was also denied.

Fiorile testified that the instruction that she observed in the classroom in sixth grade was not appropriate to address L.K.'s areas of deficits. Fiorile opined that L.K. needed more individualized instruction with an individualized plan that would be developed by a behavior analyst, noting that L.K. was functioning on about a second- or third-grade level.



W.K., L.K.'s father, stated that he and his wife began to see developmental issues in the early years that L.K. was with them. L.K. has been in the South Plainfield Public Schools his entire life. W.K. noted that L.K. has not made progress academically over the last year.

W.K. indicated that L.K.'s goals expected him to achieve 70 or 80 percent proficiency and he and his wife would receive reports that stated that L.K. was only "partially proficient." W.K. was questioned further regarding this;

- Q. Okay. So if we look at the first objective it says, "L. will subtract two or more digit numbers with regrouping, masterly 80 percent of the time," and it's reporting that he's "partially proficient." So does that tell you what he's achieved?
- A. No.
- Q. Okay. And so the goal is, "80 percent," so what is your understanding of "partially proficient," compared to that 80 percent?
- A. It's something less than 80 percent obviously.
- Q. Okay. And do you have any idea how much less that is?
- A. No.
- Q. And would that be the same for all of the goals and objectives in here?
- A. Yeah. Very few of them have comments that give any explanation of what, you know, what that means.

W.K. stated that he attended IEP meetings and participated in meetings regarding L.K. and planning for his program in the past two years. W.K. reiterated that he was shown no documentation from the District that L.K. was progressing.

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** that L.K.'s educational programming goals and objectives contained in the IEP for the 2013-2014 school year were not specific to his individual needs and were not subject to objective measurement. I also **FIND** that L.K. has not made meaningful educational progress since the 2013-2014 school year.

**LEGAL ANALYSIS AND CONCLUSIONS OF LAW**

As a recipient of federal funds under the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education (FAPE). 20 U.S.C.A. § 1412. The IDEA defines FAPE as special education and related services that are provided at public expense, under public supervision and direction, and 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 are provided in conformity with an IEP. 34 C.F.R. § 300.17; 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.

The responsibility to provide a free appropriate public education 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 receive 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 Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). Only after the program offered by the District is found to not 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., 557 U.S. 230, 246 129 S. Ct. 2484, 2496, 174 L. Ed. 2d 168, 183 (2009).

In New Jersey, state regulations track the requirement that a local school district provide “a free, appropriate public education” as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey follows the federal standard requiring such entitlement to be “sufficient to confer some educational benefit,” although the state is not required “to maximize the maximum potential of handicapped children.” Lascari v. Ramapo Indian Hills Reg. Sch. Dist., 116 N.J. 30 (1989). Although a State is not required to maximize the potential of a child with a disability, the Third Circuit has made clear that the educational benefit must be “meaningful,” “achieve significant learning,” and confer “more than merely trivial benefit.” T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood B. of Educ. v. N.E. for M.E., 172 F.3d 238 (3d Cir. 1999); Polk v.

Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-84 (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). It has stressed that in the injury into whether the proposed placement will provide the student with “meaningful educational benefit,” the amount of educational benefit necessary to comply with the IDEA will vary with the potential of each student. I.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003); N.E., supra, 172 F.3d at 247.

In this case, respondent has not provided FAPE to L.K. The testimony of the District’s witnesses was troubling. Jennifer Horne, supervisor of special services, stated that because of L.K.’s cognitive impairment, the gap between L.K. and his typically developing peers would continue to grow over time no matter what type of educational program or service he was receiving. Mary Ann Mieke, one of L.K.’s special education teachers in the MD program, stated that she had no input into the goals and objectives in L.K.’s IEP. Although she testified that she believed L.K. had improved and progressed, she stated that this conclusion was based on observation, which she believed, is an objective measurement. Jason Parenti, Director of Curriculum and Instruction at the Morris-Union Jointure Commission, stated that he did not review any documentation that showed L.K. was making progress in his educational program. In fact, Parenti added that he did not review any objective measurement that the District utilized to determine L.K.’s skills acquisition. Any “progress” Parenti noted regarding L.K. was based on what the teachers told him. I therefore **CONCLUDE**, that respondent has failed to provide L.K. with a meaningful educational benefit.

“Compensatory education is an award of certain educational services intended to redress a previous deprivation of educational services to which a child is entitled.” R.P. v. Ramsey Bd. of Educ., 2008 U.S. Dist. LEXIS 70884 (D.N.J. 2008). A student is entitled to compensatory services only when he has been denied an appropriate education. See N.E., supra, 172 F.3d at 249-250. This standard was established by the United States Court of Appeals for the Third Circuit in M.C. and G.C. o/b/o J.C. v. Central Regional School District, 81 F.3d 389 (1996). In that case, the Court found that “the right to compensatory education . . . accrue[s] from the point that the school district knows or should know of the IEP’s failure.” Id. at 396. Moreover, in creating this

standard, the Court expressed its understanding that not all problems can be instantaneously remedied. Thus, when it is found that a student was deprived an appropriate education, the student is entitled to compensatory services only “for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” Id. at 397.

In this case, respondent’s witnesses admitted that there was no objective measurement that L.K. made progress in his District program. Jennifer Horne opined that the Woodcock-Johnson test was inappropriate for L.K. despite the District having administered the test to L.K. in 2010 and 2013 for purposes of his educational programming. Despite Horne’s opinion, the District nonetheless had the results from the Woodcock-Johnson tests starting in 2010, 2013, and 2014, and ignored the fact that L.K. was regressing in most categories. Absent any objective measurements, I **CONCLUDE** that L.K.’s period of deprivation of educational services, as evidenced at the hearing, commenced with the 2013-2014 school year, the first school term after the second administration by the District of the Woodcock-Johnson test. I also **CONCLUDE** that the District was clearly on notice of L.K.’s educational concerns starting with the 2011-2012 school year.

### **ORDER**

Based on the above, the following is **ORDERED**:

1. L.K.’s IEP should include all of the recommendations of Carol Fiorile and Linda Auld as set forth in this record.
2. An out-of-District program capable of implementing such IEP should be identified.
3. Petitioners are awarded compensatory education for the school years, 2013-2014, and 2014-2015.

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.

November 30, 2015

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DATE

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**IMRE KARASZEGI, JR., ALJ**

Date Received at Agency

11/30/15

Date Mailed to Parties:

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**APPENDIX**

**LIST OF WITNESSES**

**For Petitioners:**

Linda Auld  
Carol Fiorile  
W.K.

**For Respondent:**

Jennifer Horne  
MaryAnn Miehle  
Jason Parenti

**LIST OF EXHIBITS IN EVIDENCE**

**For Petitioners:**

- P-1 Carol Fiorile CV
- P-2 Report of Carol Fiorile, dated April 10, 2014
- P-3 Linda Auld CV
- P-4 Academic Assessment, date of evaluation: August 29, 2014
- P-5 Addendum to Academic Assessment
- P-6 Observation/IEP Analysis, date of report: October 13, 2014
- P-11 Progress report, 1<sup>st</sup> Assessment period 2014-2015, dated December 2014

**For Respondent:**

- R-1 Social Assessment of L.K., dated January 15, 2010
- R-2 Parental Notice, dated January 22, 2013
- R-3 Psychological Evaluation of L.K. by Amy Gallagher, February 14, 2013
- R-4 Learning Disabilities Teacher Report for L.K. (February 19, 2013)
- R-5 Speech/Language Evaluation of L.K. (March 6, 2013)
- R-6 Re-determination of Eligibility (March 11, 2013)

- R-7 Letter from petitioners, dated November 14, 2013
- R-8 E-mail Correspondence between January 22, 2014, and January 23, 2014
- R-9 Annual Review IEP for L.K., dated May 1, 2014
- R-10 Letter from Case Manager to petitioners, dated May 7, 2014
- R-11a Jason Parenti Resume
- R-11b Jason Parenti CV
- R-12 ABLLS-R Assessment report for L.K., dated September 2, 2014
- R-13 Observation report of L.K., dated February 13, 2015
- R-14 ABLLS-R Assessment Report for L.K., dated February 13, 2015
- R-16 Progress Reports for L.K. for IEP dated May 1, 2014