State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION

K.L. AND F.C. ON BEHALF OF M.L.,
Petitioners,
v.
NEW PROVIDENCE BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 07895-13
AGENCY DKT. NO. 2013-19645

NEW PROVIDENCE BOARD OF EDUCATION,
Petitioner,
v.
K.L. AND F.C. ON BEHALF OF M.L.,
Respondents.

OAL DKT. NO. EDS 11834-13
AGENCY DKT. NO. 2014-20166

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Record Closed: May 4, 2015 Decided: May 28, 2015

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

New Providence placed M.L. in Biological Science for ninth-grade science instead of Biology because Biological Science met her unique needs and benefited her educational progress. Her mother, however, disagreed. Is New Providence entitled to summary decision on its determination? Yes. Under case law, a school district's proposed placement is considered appropriate if it meets the student's unique needs and benefits the student's educational progress, even if a parent disagrees.

PROCEDURAL HISTORY

I.

On June 14, 2012, the parties convened a meeting to develop an Individualized Educational Plan (IEP) for M.L. During that meeting, the Child Study Team proposed that M.L. be placed in Biological Science for ninth-grade science, but her mother, F.C., disagreed, asserting her preference for Biology, a higher-level biology class. The IEP meeting lasted ninety minutes and the parties reconvened the meeting later that summer.

On August 23, 2012, the parties reconvened the IEP meeting and the parties continued their discussion about the proposed placement in Biological Science for ninth-grade science. That IEP meeting lasted ninety minutes as well. Given the amount of time spent at these meetings, the Child Study Team did not have the opportunity to review or discuss the proposed goals and objectives for the 2012-13 school year.

II.

On September 7, 2012, petitioners filed a petition for due process. Petitioners allege that the proposed placement in Biological Science for ninth-grade science constituted a unilateral change in placement. Petitioners also allege that New Providence proposed the placement and then implemented it with discriminatory intent.

New Providence denies the allegations.

III.

On August 7, 2013, New Providence filed a cross-petition, seeking an order that the goals and objectives in the IEP were appropriate and that it fulfilled its obligations to M.L. under the Individuals with Disabilities Education Act (IDEA).

IV.

October 31, 2014, New Providence filed this motion for summary decision. On January 20, 2015, petitioners filed their opposition, and on February 17, 2015, New Providence filed its response. On May 4, I held oral argument.

FINDINGS OF FACT

Based on the papers the parties submitted in support of and in opposition to the motion for summary decision, together with the arguments the parties made on the return date for oral argument, I **FIND** the following as **FACT**:

I.

M.L. is currently in eleventh grade at New Providence High School. She participates in all general education classes but is eligible for special education and related services because she is classified as having a specific learning disability due to a discrepancy between her academic achievement and her intellectual potential in her reading fluency and reading comprehension. The dispute in this case arises from the proposed IEP for ninth grade, the 2012-13 school year.

A.

On June 14, 2012, the parties convened an IEP meeting. During that meeting, the Child Study Team proposed that M.L. be placed in Biological Science for ninth-grade science, but her mother, F.C., disagreed, asserting her preference for placement in Biology, a higher-level biology class. The IEP meeting lasted ninety minutes and the parties reconvened the meeting later that summer.

1.

Biology and Biological Science mirror one another in course content and proficiency. Both classes are recognized as general education preparatory classes and the distinction between the two classes lies solely in the manner in which the material is delivered. The Department of Education codes both courses as level "G," which is "[a] course providing instruction in a given subject area that focuses primarily on general concepts appropriate for the grade level" and "typically meet the State's or district's expectations for scope and difficulty," and the NCAA accepts Biological Science as a general education college preparatory course for athletic eligibility.

2.

M.L. had difficulty understanding subject matter and terminology, struggled to synthesize and apply scientific data, and had difficulty engaging in higher-order thinking in eighth-grade science.

3.

The Child Study Team proposed that M.L. be placed in Biological Science for ninth-grade science instead of Biology because the pace of instruction was slower in Biological Science than in Biology so students such as M.L. could have more opportunities for review and could gain more meaning from the material as it was presented. The instruction is also "chunked," that is, broken down into more manageable pieces, so students like M.L. do not become overwhelmed. Finally,

students in Biological Science are quizzed on smaller amounts of material to ensure such understanding.

B.

On August 23, 2012, the parties reconvened the IEP meeting and the parties continued their discussion about the proposed placement in Biological Science for ninth-grade science. That IEP meeting lasted ninety minutes as well. Given the amount of time spent at these meetings, the Child Study Team did not have the opportunity to review or discuss the proposed goals and objectives for the 2012-13 school year.

II.

A.

On September 7, 2012, petitioners filed a petition for due process. Petitioners allege that the proposed placement in Biological Science for ninth-grade science constituted a unilateral change in placement. Petitioners also allege that New Providence proposed the placement and then implemented it with discriminatory intent.

B.

New Providence denies the allegations.

C.

On October 15, 2012, the case was assigned to me for hearing.

III.

A.

On September 13, 2012, New Providence proposed the new IEP for M.L. The proposed IEP reflected, among other things, the ongoing discussions with petitioners about the proposed placement in Biological Science for ninth-grade science, but the proposed placement in Biological Science remained, with the same in-class supports M.L. had in eighth-grade science. Due to the stay put, the IEP also reflected or contained the same goals and objectives from the previous year.

B.

Nevertheless, the proposed IEP contained additional services. In particular, the proposed IEP included one session of individual counseling per month for thirty minutes per session to teach M.L. how to solve social problems, how to develop a positive self-concept, and how to reduce high levels of anxiety. In addition, the proposed IEP included one session of individual speech therapy session each week for forty minutes per session to address language processing, the use of grade-level vocabulary, and verbal reasoning skills. Moreover, the proposed IEP included five individual sessions of Supported Study each week for forty minutes per session to address course load by pre-teaching, reviewing concepts, and making connections to content area concepts.

C.

The proposed IEP also included a whole host of aids and services in her regular education classroom. In practice, New Providence praised M.L. for completing tasks, encouraged M.L. to seek assistance when needed, and employed a variety of visual aids with oral presentations. In addition, New Providence made sure M.L. understood directions and concepts by making M.L. repeat them, strategized with M.L. to "talk around" a word to assist in its retrieval, and taught M.L. to look for key words that highlighted the meaning of the message. Finally, New Providence broke down long-term projects into small steps and assigned interim due dates, provided rubrics for

projects and assignments, and encouraged the linking of new learning with prior knowledge and personal connections.

IV.

On September 25, 2012, petitioners filed an application for emergency relief, seeking immediate placement in Biology. The application was assigned to the Honorable Tiffany M. Williams, ALJ, for disposition. On October 9, 2012, Judge Williams denied the application.

V.

On October 18, 2012, the parties reconvened an IEP meeting, but the recommended placement in Biological Science for ninth-grade science remained.

VI.

A.

On January 21, 2013, petitioners filed a motion to amend to its petition for due process. On February 11, 2013, I granted the motion and the case proceeded to hearing. On March 28, 2013, and April 22, 2013, I held the hearing.

B.

During the hearing on April 22, 2013, petitioners sought to broaden the scope of the hearing to include additional allegations challenging the goals and objectives of the IEP.

When I denied the application, petitioners withdrew their petition, only to re-file it later.

VII.

A.

On May 9, 2013, petitioners re-filed their petition, and on July 25, 2013, the case was assigned to the Honorable Tahesha L. Way, ALJ, for hearing.

B.

Meanwhile, on June 13, 2013, the parties convened still another IEP meeting. During the IEP meeting, the parties agreed to discontinue counseling, a related service. Significantly, petitioners did not challenge the goals and objectives of the IEP.

C.

On July 25, 2013, a settlement conference was held but the parties could not reach an agreement.

VIII.

On August 7, 2013, New Providence filed a cross-petition for due process, seeking an order that the goals and objectives in the IEP were appropriate and that New Providence fulfilled its obligations to M.L. under the IDEA.

IX.

On April 17, 2014, Judge Way left the bench and the case was reassigned to me for hearing. On March 5, 2014, and September 3, 2014, additional settlement conferences were held but the parties could still not reach an agreement. Therefore, on October 31, 2014, New Providence filed this motion for summary decision.

X.

Ultimately, M.L. received an A-minus in Biological Science. In fact, M.L. received A's and B's in all of her general education classes for ninth grade, save one: In Physical Education, M.L. received an A; in Health, M.L. received an A; in Biological Science, M.L. received an A-minus; in Spanish I, M.L. received a B; in Algebra, M.L. received a B-minus; in General World Studies, M.L. received a B-minus; and in World Literature, M.L. received a C.

CONCLUSIONS OF LAW

I.

The Placement in Biological Science

Petitioners allege that New Providence failed to provide M.L. with a Free and Appropriate Public Education (FAPE) because it placed M.L. in Biological Science for ninth-grade science instead of Biology.

A.

Decisions relating to the development and implementation of an IEP rest with the IEP team, which includes the Child Study Team and the parents of the student. A disagreement between the parents of the student and the Child Study Team, however, does not mean that the parents were denied a meaningful opportunity to participate in the development of the IEP. Indeed, Child Study Teams are obligated to recommend or continue only those programs they deem appropriate. Stated otherwise, the Child Study Team cannot recommend an IEP that is inappropriate. If the parents disagree with the proposed IEP, the recourse is to file a petition for due process. See L.G. v. Fair Lawn BOE, 2011 WL 2559547 (DNJ 2011).

To be sure, a school district's proposed placement is considered appropriate if it meets the student's unique needs and benefits the student's educational progress, even

if a parent disagrees. See D.Y. o/b/o M.Y. v. Hopewell Valley Reg'l Bd. of Educ., EDS 8203-04, Initial Decision (Oct. 18, 2005), http://njlaw.rutgers.edu/collections/oal/.

Significantly, "[t]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993); see also M.M. and A.M. o/b/o R.M. v. S. Brunswick Bd. of Educ., EDS 6086-00, Initial Decision (Sept. 5, 2001), http://njlaw.rutgers.edu/collections/oal/ (where the court noted that later factual developments are of little relevance when determining the appropriateness of an IEP).

B.

1.

New Providence argues that it did not fail to provide M.L. with a FAPE because IEP's are designed to include courses that reflect the Core Curriculum Standards, meet graduation requirements, and allow for studies in areas of interest. In support of its argument, New Providence asserts that Biology and Biological Science mirror one another in course content and proficiency, that both classes are recognized as general education preparatory classes, and that the distinction between the two classes lies solely in the manner in which the material is delivered. Indeed, New Providence notes that the Department of Education codes both courses as level "G," which is "[a] course providing instruction in a given subject area that focuses primarily on general concepts appropriate for the grade level" and "typically meet the State's or district's expectations for scope and difficulty," and that the NCAA accepts Biological Science as a general education college preparatory course for athletic eligibility.

2.

In addition, New Providence argues that it did not fail to provide M.L. with a FAPE because the goals and objective in the IEP for M.L. are to follow the general education goals and objectives for the sciences and that to push in services to the extent to which petitioners persist is to modify the general curriculum "beyond recognition" and run counter to the goals and objectives of the IEP.

In support of this argument, New Providence cites Brillion v Klein Independent School District, 100 Fed. App'x 309, 312 (5th Cir. 2004) (where the court upheld the transition of a student from a general education setting to a special education setting rather than requiring the school district to modify the general education curriculum "beyond recognition" as an accommodation).

3.

Finally, New Providence argues that it did not fail to provide M.L. with a FAPE because a dispute relating to a single course placement does not render an entire IEP inappropriate.

In support of its argument, New Providence cites E.B. and J.B. o/b/o R.B. v. Middlesex Borough BOE, EDS 181-03, Initial Decision (February 27, 2003), http://njlaw.rutgers.edu/collections/oal/ (where the administrative law judge reminded that the appropriate standard is whether the IEP offers an opportunity for significant learning and meaningful educational benefit and agreed with the school district that the student could not succeed in the higher-level chemistry class, even with in-class supports and modifications).

C.

More granularly, New Providence argues that it did not fail to provide M.L. with a FAPE because its placement of M.L. in Biological Science was reasonably calculated to provide M.L. with significant learning and meaningful educational benefit and that it did in fact provide M.L. with significant learning and meaningful educational benefit.

In support of its argument, New Providence relies on the testimony of Kelly Hartford and Sebastian de Voogd from the previous proceeding before me. Hartford was M.L.'s teacher for eighth-grade science, and de Voogd was M.L.'s in-class support for that subject. In short, Hartford and de Voogd testified that Biology, even with in-class support, was not appropriate for M.L. because M.L. had difficulty understanding

subject matter and terminology, struggled to synthesize and apply scientific data, and had difficulty engaging in higher-order thinking. Above all, Hartford and de Voogd testified that the pace of instruction was slower in Biological Science than in Biology by design so students such as M.L. could have more opportunities for review and could gain more meaning from the material as it was presented. As both Hartford and de Voogd put it, the instruction is "chunked," that is, broken down into more manageable pieces, so students do not become overwhelmed. Finally, Hartford and de Voogd explained that students in Biological Science are quizzed on smaller amounts of material to ensure such understanding. New Providence asserts that to have placed M.L. in Biology would have been a disservice to her.

D.

Petitioners argue in opposition that New Providence failed to provide M.L. with a FAPE because M.L. was capable of succeeding in Biology with the appropriate modifications and supports and that a genuine issue of material fact exists whether the placement of M.L. in Biological Science for ninth-grade science was appropriate.

E.

1.

New Providence argues in response that it did not fail to provide M.L. with a FAPE because the expert opinions upon which petitioners seek to rely, namely the opinion Kara Schmidt, Ph.D., rendered in February 2013, and the opinion Patricia Murray, LDTC, rendered in March 2013, were offered well after the IEP for the 2012-13 school year was proposed in June 2012 and cannot be considered.

2.

In addition, New Providence argues that it did not fail to provide M.L. with a FAPE because the opinion Schmidt rendered in May 2012 did not address whether M.L.

should have been placed in Biology for ninth-grade science rather than Biological Science.

3.

Moreover, New Providence argues that it did not fail to provide M.L. with a FAPE because Schmidt merely opined that M.L. required exposure to grade-appropriate content, with accommodations as needed, which the IEP provided when it proposed placement in Biological Science with individualized accommodations.

4.

Finally, New Providence argues that it did not fail to provide M.L with a FAPE because Murray misidentified Biological Science as an "introductory" high school course and not a college preparatory course when it is, in fact, a college preparatory course and would not have prevented M.L. from taking other higher-level science courses as she progressed in high school.

F.

1.

Summary decision shall be rendered if the papers and discovery, which have been filed, together with the affidavits, show no genuine issue as to any material fact exists, and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b).

2.

In this case, no genuine issue of material fact exists whether New Providence provided M.L. with a FAPE when it placed M.L. in Biological Science for ninth-grade science instead of Biology. It did. As Hartford and de Voogd testified, Biology, even with in-class support, was not appropriate for M.L. because M.L. had difficulty

understanding subject matter and terminology, struggled to synthesize and apply scientific data, and had difficulty engaging in higher-order thinking. As the administrative law judge who heard their testimony when they provided it, I found both Hartford and de Voogd to be credible witnesses, and as New Providence notes, no contrary expert opinion existed at the time the IEP was proposed, and none has been provided since. Indeed, Child Study Teams are obligated to recommend or continue only those programs they deem appropriate. Moreover, a dispute relating to a single course placement does not render an entire IEP in appropriate. Therefore, I **CONCLUDE** that no genuine issue of material fact exists whether New Providence provided M.L. with a FAPE when it placed M.L. in Biological Science for ninth-grade science instead of Biology, that New Providence did not fail to provide M.L. with a FAPE when it placed M.L. in Biological Science instead of Biology, and that New Providence is entitled to summary decision on this issue as a matter of law.

II.

The Provision of an Alternative Assistant Technology Device

Petitioners allege that New Providence failed to provide M.L. with a FAPE because it did not provide M.L. with an alternative assistant technology device.

A.

School districts are required to obtain parental consent to conduct initial evaluations and re-evaluations. N.J.A.C. 6A:14-2.3(a)(1) and (3). If a parent refuses special education and related services on behalf of a student, the school district shall not be determined to have denied the student a FAPE. N.J.A.C. 6A:14-2.3(c). Thus, the regulation expressly alleviates a school district with the responsibility to provide a FAPE if a parent refuses the implementation of an IEP.

B.

1.

New Providence argues that it did not fail to provide M.L. with a FAPE because it provided M.L. with a personal frequency modulation system (FM system) but M.L. refused to use it.

2.

Similarly, New Providence argues that it did not fail to provide M.L. with a FAPE because it repeatedly asked petitioners for their consent to conduct an evaluation for an alternative assistant technology device so it could determine which alternative to the FM system it should provide but petitioners refused to provide New Providence with their consent.

3.

Finally, New Providence argues that it did not fail to provide M.L. with a FAPE because petitioners' own audiologist, Jay Lucker, Ed.D., opined that M.L. did not even have an auditory processing deficit and did not even need an alternative assistant technology device.

C.

Petitioners argue in opposition that New Providence failed to provide M.L. with a FAPE because it was still obligated to provide M.L. with an alternative to the FM system.

D.

1.

New Providence argues in response that did not fail to provide M.L. with a FAPE because the failure to provide an alternative to the FM system would only constitute a procedural violation of the IDEA and no evidence exists that any alleged failure to provide M.L. with an alternative to the FM system caused M.L. to lose any educational opportunity.

In support of its argument, New Providence relies on M.H. and L.H. o/b/o N.H. v. Milltown Board of Education, EDS 8411-03, Initial Decision (August 2, 2004), http://njlaw.rutgers.edu/collections/oal/ (where the administrative law judge noted that the procedural violation must be serious and cause the student to lose educational opportunity).

2.

In addition, New Providence repeats its argument that it did not fail to provide M.L. with a FAPE because Lucker opined M.L. did not even have an auditory processing deficit and did not even need an alternative assistant technology device.

3.

Finally, New Providence repeats its argument that it did not fail to provide M.L. with a FAPE because it remained committed to providing M.L. with an alternative to the FM system but petitioners refused to provide their consent for an evaluation so it could determine which alternative to the FM system it should provide M.L.

E.

No genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because it did not provide M.L. with an alternative assistant

technology device. It did not. More pointedly, no genuine issue of material fact exists whether petitioners refused to provide their consent for an evaluation so New Providence could determine which alternative to the FM system it should provide. They did. Likewise, no genuine issue of material fact exists whether M.L. had an auditory processing deficit. She did not. Finally, no genuine issue of material fact exists whether the failure to provide M.L. with an alternative assistant technology device caused M.L. to lose any educational opportunity. It did not. Therefore, I **CONCLUDE** that no genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because it did not provide M.L. with an alternative assistant technology device, that N.P. did not fail to provide M.L. with a FAPE because it did not provide M.L. with an alternative assistant technology device, and that New Providence is entitled to summary decision on this issue as a matter of law.

III.

The Substitution of Supported Study

Petitioners allege that New Providence failed to provide M.L. with a FAPE because the Child Study Team failed to discuss the substitution of Supported Study for an elective course or to discuss another alternative.

A.

A school district is not obligated to provide every hour of education a parent would like as the IDEA does not require a school district to maximize the potential of its students. S.N. and P.M. o/b/o I.N. v. N. Brunswick Bd. of Educ., EDS 05684-09, Initial Decision (Oct. 7, 2010), http://njlaw.rutgers.edu/collections/oal/. The inquiry is still whether the IEP was reasonably calculated to provide significant learning and meaningful educational benefit. See, e.g., Rosinksy v. Green Bay Area Sch. Dist., 667 F. Supp. 2d 964, 980-82 (E.D. Wis. 2009) (where the district court focused on the communication between the parties concerning the school's recommendation, the student's preference, and the parents' input). Thus, a difference of opinion between a parent and a Child Study Team does not by itself constitute a denial of a FAPE.

1.

New Providence argues that it did not fail to provide M.L. with a FAPE because the Child Study Team specifically discussed the substitution of Supported Study for an elective course and recommended placement in Supported Study. New Providence continues that the Child Study Team recommended such a placement because M.L. needed it. New Providence specifies that Supported Study was a daily, one-to-one session with a special education teacher who provided the pre-teaching, the review of concepts, and the help M.L. needed to make connections to content-area concepts. New Providence further specifies that such pre-teaching, review of concepts, and help to make connections to content-area concepts is specifically referenced by petitioners in their petition for due process. Moreover, New Providence asserts that petitioners wanted an elective in addition to Supported Study but the Child Study Team concluded that an additional class would have been overwhelming to M.L. and that this determination constituted a difference of opinion between petitioners and the Child Study Team and not the denial of a FAPE.

2.

New Providence also argues that it did not fail to provide M.L. with a FAPE because an elective was only available to M.L. if M.L. was placed in physical education before school started and it does not recommend this to any incoming freshman—let alone a student with special needs like M.L. New Providence reiterates that this explanation was given to petitioners at the IEP meetings. Thus, New Providence asserts that the demand for an elective outside the school day was unreasonable and did not constitute the denial of a FAPE.

B.

Petitioners argue in opposition that New Providence failed to provide M.L. with a FAPE because this issue was never discussed with them and that New Providence unilaterally placed M.L. in Supported Study.

C.

New Providence argues in response that it did not unilaterally place M.L. in Supported Study, which petitioners are arguing for the first time; that M.L. needed Supported Study, which petitioners concede; and that the only period potentially available to M.L. would have been period zero, which was before school and entirely inappropriate for an incoming freshman let alone M.L.

D.

No genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because the Child Study Team failed to discuss the substitution of Supported Study for an elective course or to discuss another alternative. It did not. Likewise, no genuine issue of material facts exists whether New Providence recommends an elective outside the school day for incoming freshman. It does not. Moreover, no genuine issue of material fact exists whether M.L. needed Supported Study more. She did. In short, petitioners cannot have it both ways. They cannot claim on the one hand that New Providence must provide M.L. with specific support so she can have a FAPE and then claim on the other hand that New Providence failed to provide M.L. with a FAPE when it provided her with those supports at the expense of an elective. Therefore, I **CONCLUDE** that no genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because the Child Study Team failed to discuss the substitution of Supported Study for an elective course or to discuss another alternative, that New Providence did not fail to provide M.L. with a FAPE because the Child Study Team discussed the substitution of Supported Study for an elective course or another alternative, and that New Providence is entitled to summary decision on this issue as a matter of law.

IV.

The Determination of Biological Science

Petitioners allege that New Providence failed to provide M.L. with a FAPE because New Providence predetermined the placement of M.L. in Biological Science for ninth-grade science.

A.

An IEP is a written plan that sets forth present levels of academic achievement and functional performance together with measurable annual goals and short-term objectives or benchmarks. N.J.A.C. 6A:14-1.3. The written plan should describe an integrated, sequential program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives. Ibid. As such, the written plan establishes the rationale for the educational placement and serves as the basis for the implementation of the program. Ibid.

B.

New Providence argues that it did no fail to provide M.L. with a FAPE because the Child Study Team made recommendations about M.L. at the IEP meetings for M.L., as it does at every IEP meeting for every student, and that they spent ninety minutes at the IEP meeting on June 14, 2012, for M.L. alone. In addition, New Providence argues that that the Child Study Team considered the input petitioners provided but did not believe their demands were appropriate. Once again, New Providence argues that the placement in Biological Science for ninth-grade science rather than Biology constituted a difference of opinion between petitioners and the Child Study Team, and that this difference of opinion did not constitute the denial of a FAPE or a predetermination on its part. Indeed, New Providence asserts this was not a predetermination in the legal sense but a sound determination in the educational sense.

C.

Petitioners argue in opposition that New Providence failed to provide M.L. with a FAPE because the Child Study Team had made its determination about placement before it had determined the goals and objectives.

D.

1.

New Providence argues in response that it did not fail to provide M.L. with a FAPE because school officials are permitted to form such opinions before IEP meetings.

In support of its argument, New Providence relies on S.K. o/b/o N.K. v. Parsippany-Troy Hills Township Board of Education, EDS 0951-06, Initial Decision (August 31, 2007), http://njlaw.rutgers.edu/collections/oal/ (where the administrative law judge wrote that school officials are permitted to form opinions and compile reports before IEP meetings as long as various options are considered and discussed at the IEP meeting).

2.

In addition, New Providence argues that it did not fail to provide M.L. with a FAPE because petitioners ignore the testimony of de Voogd and Hartford who explained why they believed it was appropriate to place M.L. in Biological Science and why it would have been inappropriate to have placed M.L. in Biology.

3.

Finally, New Providence argues that it did not fail to provide M.L. with a FAPE because petitioners also ignore the fact that the rationale and explanation for the proposal to place M.L. in Biological Science for ninth-grade science rather than Biology

was given to petitioners time and again at the IEP meetings, which does not constitute a predetermination.

E.

No genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because it predetermined the placement of M.L. in Biological Science for ninth-grade science. It did not. Similarly, no genuine issue of material fact exists whether the Child Study Team made a recommendation about placement in Biological Science for ninth-grade science. It did. Moreover, no genuine issue of material fact exists whether petitioners disagreed and stated their preference for Biology. They certainly did. That New Providence made this recommendation before the IEP team finalized the goals and objectives of the IEP for ninth grade is a red herring. The whole point of the IEP meeting was to discuss these issues together.

It was not as if this recommendation was made out of context. New Providence was familiar with M.L., knew her then-present levels of academic achievement and functional performance, and was aware of the goals and objectives of the IEP for eighth grade. Indeed, New Providence considered the input petitioners provided. This much is certain.

That petitioners disagreed with the continued recommended placement in Biological Science does not render the determination for placement in Biological Science a predetermination. To conclude otherwise would render every disagreement a parent has with a child study team a predetermination. Therefore, I **CONCLUDE** that no genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because it predetermined the placement of M.L. in Biological Science for ninth-grade science, that New Providence did not fail to provide M.L. with a FAPE because it did not predetermine the placement of M.L. in Biological Science for ninth-grade science, and that New Providence is entitled to summary decision on this issue as a matter of law.

V.

The Goals and Objectives for Ninth Grade

Petitioners allege that New Providence failed to provide M.L. with a FAPE because the goals and objectives for ninth grade were inappropriate.

A.

A student may still be denied a FAPE despite the fact that the student received passing grades and advanced to the next grade. Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 399 (5th Cir. 2012). In Board of Education of Henry Hedrick School District v. Rowley, 458 U.S. 176, 203, n.25 (1982), the United States Supreme Court expressly declined to hold that "every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving [FAPE]." Thus, the inquiry remains whether the IEP was reasonably calculated to provide significant learning and meaningful educational benefit.

B.

New Providence argues that it did not fail to provide M.L. with a FAPE because M.L. was placed in general education classes and only needed goals and objectives for the academic content areas—which it provided. In addition, New Providence argues that petitioners failed to allege that M.L. did not make meaningful educational progress in these content areas. Moreover, New Providence argues that this allegation is moot because M.L. did make meaningful educational progress in these content areas—so much so that petitioners agreed to discontinue counseling for tenth grade. Finally, New Providence argues that even if the goals and objectives were not objectively measurable, no remedy exists at law for such a failure in this case.

C.

Petitioners argue in opposition that New Providence failed to provide M.L. with a FAPE because M.L. had a writing disability and New Providence failed to address it in formulating the goals and objectives for ninth grade.

In support of their argument, petitioners rely upon the expert report Schmidt provided.

D.

1.

New Providence argues in response that it did not fail to provide M.L. with a FAPE because the educational evaluation from June 2012 demonstrated that M.L. fell within the average range of functioning in her overall written language performance on the Woodcock Johnson III, including all the subtests, and that no objective measures whatsoever supported the assertion that M.L. had a writing disability.

2.

In the alternative, New Providence argues it did not fail to provide M.L. with a FAPE because such a mistake would only constitute a procedural violation of the IDEA and would not render the entire IEP inappropriate. In support of its argument, New Providence relies on Rodrigues v. Fort Lee Board of Education, 458 Fed. App'x 124, 127 (3rd Cir. 2011) (where the Third Circuit wrote that the parents must show that the procedural inadequacy impeded a FAPE for the child, significantly impeded the parents' opportunity to participate in the decision-making process, or deprived educational benefits for the child). New Providence also relies on Coleman v. Pottstown School District, 983 F. Supp. 2d 543 (E.D. Pa. 2013), aff'd, 581 Fed. App'x 141 (3d Cir. 2014) (where the court confirmed that the IDEA does not require a distinct and measureable goal for each and every need of a disabled child in order to provide a FAPE).

E.

No genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because the goals and objectives for ninth grade were inappropriate. They were not. Likewise, no genuine issue of material facts exists whether M.L. had a writing disability at the time the parties met to develop the IEP for ninth grade. She did not. In particular, the Woodcock Johnson did not indicate M.L. had a writing disability at the time the parties met to develop the IEP, and Schmidt's report is well after the fact. Moreover, M.L. made meaningful progress in all of her academic content areas as M.L. received A's and B's in all of her classes, save one. Therefore, I **CONCLUDE** that no genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because goals and objectives for ninth grade were appropriate, that New Providence did not fail to provide M.L. with a FAPE because the goals and objectives for ninth grade were appropriate, and that New Providence is entitled to summary decision on this issue as a matter of law.

VI.

The Claim for Compensatory Education for Supported Study

Petitioners allege that they are entitled to compensatory education for the time the teacher for Supported Study was absent from class.

A.

Compensatory education is a remedy for past deprivations of a FAPE. Feren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712 (3d Cir. 2010).

B.

New Providence argues that petitioners are not entitled to compensatory education for the time the teacher for Supported Study was absent from class because M.L. completed and passed the courses the teacher supported.

C.

Petitioners argue in opposition that they are entitled to compensatory education for the time the teacher for Supported Study was absent from class, even if a finding of fact is made that M.L. did not need the Supported Study, because Supported Study was still contained in the IEP.

D.

1.

New Providence argues in response that petitioners are not entitled to compensatory education for the time the teacher for Supported Study was absent from class because the petition for due process only challenges the goals and objectives related to counseling, not for Supported Study, and that petitioners' expert, Mark Cooperberg, Ph.D., opined that the goals and objectives related to counseling were appropriate.

2.

In addition, New Providence argues that petitioners are not entitled to compensatory education for the time the teacher for Supported Study was absent from class because Cooperberg only made recommendations about updating the IEP.

3.

Moreover, New Providence argues that petitioners are not entitled to compensatory education for the time the teacher for Supported Study was absent from class because the expert opinion Cooperberg rendered in March 2013 was offered well after the IEP for the 2012-13 school year was proposed in June 2012 and cannot be considered.

4.

In the alternative, New Providence argues that petitioners are not entitled to compensatory education for the time the teacher for Supported Study was absent from class because failure to comply with an IEP only constitutes a procedural violation of the IDEA for which compensatory education is not a remedy.

E.

No genuine issue of material fact exists whether petitioners are entitled to compensatory education for the time the teacher for Supported Study was absent from class. They are not. Indeed, no genuine issue of material facts exists that M.L. completed the courses the teacher supported. She did. That this allegation is not a genuine issue to be resolved is also revealed by the fact that the petition for due process does not even challenge this alleged deprivation of due process. Therefore, I **CONCLUDE** that no genuine issue of material fact exists whether petitioner is entitled to compensatory education for the time the teacher for Supported Study was absent from class, that petitioners are not entitled to compensatory education for the time the teacher for Supported Study was absent from class, and that New Providence is entitled to summary decision on this issue as a matter of law.

VII.

Related Services

Petitioners allege that New Providence failed to provide M.L. with a FAPE because it failed to provide M.L. with the appropriate related services in the areas of executive functioning, language processing, social skills, and self-concept.

A.

1.

New Providence argues that it did not fail to provide M.L. with a FAPE because it did not fail to provide M.L. with the appropriate related services. In particular, New Providence argues that it provided M.L. with one session of individual counseling per month for thirty minutes per session to teach M.L. how to solve social problems, how to develop a positive self-concept, and how to reduce high levels of anxiety. In support of its argument, New Providence asserts that M.L.'s counselor reported that M.L. made meaningful progress in all of these areas—so much so that M.L. requested that her counseling sessions be discontinued so she could spend more time socializing with friends and that the parties did in fact agree to discontinue those services. Indeed, New Providence exclaims that all of the progress reports and summary reports reflect meaningful progress in these areas of executive functioning, language processing, social skills, and self-concept.

2.

New Providence also argues that it provided M.L. with one session of individual speech therapy each week for forty minutes to improve her language processing.

In support of its argument, New Providence asserts that M.L.'s therapist reported that M.L. made meaningful progress in this area as well.

3.

New Providence further argues that it provided M.L. with five individual sessions of Supported Study each week for forty minutes per session with a special education teacher to pre-teach, review, and make connections to concepts.

4.

Not to be outdone, New Providence argues that it provided M.L. with a whole host of aids and services in her regular education classroom to address her needs. In practice, New Providence asserts that it praised M.L. for completing tasks, encouraged M.L. to seek assistance when needed, employed a variety of visual aids with oral presentations. In addition, New Providence asserts that it made sure M.L. understood directions and concepts by making M.L. repeat them, strategized with M.L. to "talk around" a word to assist in its retrieval, and taught M.L. to look for key words that highlighted the meaning of the message. Moreover, New Providence asserts that it broke down long-term projects into small steps and assigned interim due dates, provided rubrics for projects and assignments, and encouraged the linking of new learning with prior knowledge and personal connections.

5.

Finally, New Providence argues that M.L. obtained passing grades in all of her classes.

B.

Petitioners argue in opposition that that New Providence failed to provide M.L. with a FAPE because these assertions are not accurate, that New Providence did not provide M.L. with the appropriate related services, and that M.L. did not make meaningful progress.

In support of their argument, petitioners rely on the report Cooperberg provided.

C.

New Providence argues in response that it did not fail to provide M.L. with a FAPE because the expert opinion Cooperberg rendered in March 2013 was offered well after the IEP was proposed and cannot be considered.

D.

No genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because it failed to provide M.L. with appropriate related services in the areas of executive functioning, language processing, social skills, and self-concept. It did not. To be sure, no genuine issue of material fact exists whether New Providence provided M.L. with one session of individual counseling per month for thirty minutes per session, one session of individual speech therapy each week for forty minutes, five individual sessions of Supported Study each week for forty minutes per session, and a whole host of other aides and services in her regular education classroom. It did. Moreover, no genuine issue of material facts exists whether M.L. made meaningful progress in the areas of executive functioning, language processing, social skills, and self-concept. She did. Therefore, I **CONCLUDE** that no genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because it failed to provide M.L. with appropriate related services in the areas of executive functioning, language processing, social skills, and self-concept, that New Providence did provide M.L. with the appropriate related services in the areas of executive functioning, language processing, social skills, and self-concept, and that New Providence is entitled to summary decision on this issue as a matter of law.

VIII.

Interventions for Pragmatic Language

Petitioners allege that New Providence failed to provide M.L. with a FAPE because New Provided failed to provide M.L. with the appropriate related services in the area of pragmatic language.

A.

New Providence argues in opposition that it did not fail to provide M.L. with a FAPE because the speech and language evaluation indicated no intervention was

needed for pragmatic language and that any concern about pragmatic language was more appropriately identified as social problem solving and emotional management issues—which were addressed during counseling sessions.

B.

Petitioners argue that New Providence failed to provide M.L. with a FAPE because Cooperberg opined that New Providence did not provide M.L. with the appropriate related service in this area and that M.L. did not make meaningful progress.

C.

New Providence argues in response that it did not fail to provide M.L. with a FAPE because the opinion Cooperberg rendered in March 2013 was offered well after the IEP was proposed and cannot be considered.

D.

No genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because it failed it failed to provide M.L. with the appropriate related services in the area of pragmatic language. It did not. Toward this end, no genuine issue of material fact exists whether New Providence provided M.L. with the counseling sessions. It did. Likewise, no genuine issue of material fact exists that petitioners discontinued the counseling sessions. They did. Moreover, no genuine issue of material facts exists whether M.L. obtained passing grades in all of her classes. She did. Therefore, I **CONCLUDE** that no genuine issue of material fact exists whether New Providence failed to provide M.L. with a FAPE because it failed to provide M.L. with the appropriate related services in the area of pragmatic language, that New Providence provided M.L. with the appropriate related services in the area of pragmatic language, and that New Providence is entitled to summary decision on this issue as a matter of law.

This decision is final under 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 in the Law Division of the Superior Court of New Jersey or in a district court of the United States. See 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2012). If the parent or adult student believes that this decision is not being fully implemented with respect to a program or services, this concern should be communicated in writing to the Director of the Office of Special Education.

May 28, 2015
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency

May 28, 2015

Date Mailed to Parties:

dr