



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 11395-19

AGENCY DKT. NO. 2020-30386

N.B. AND M.K. ON BEHALF OF I.K.,

Petitioners,

v.

BAYONNE BOARD OF EDUCATION,

Respondent.

Lenore Boyarin, Esq., for petitioners (Sussan Greenwald & Wesler, attorneys)

Robert Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: October 27, 2020

Decided: December 3, 2020

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Petitioners N.B. and M.K. (the parents) on behalf of I.K., filed a Petition for Due Process against the Bayonne Board of Education (the Board or District), alleging that the District's proposed in-District program for I.K. for the 2019-19 school year was not appropriate, did not provide FAPE, and an out of district placement at the Banyan School should be made.

Petitioners seek eleven (11) forms of relief, including but not limited to a finding that the District failed to meet its educational obligations to I.K. under FAPE and IDEA for the 2018-19 school year; that the proposed IEP was not appropriate and amounted to a reduction of services, a reformation of the IEP, an Order for Compensatory Education and placement at the Banyan School as an appropriate placement for to meet his special educational needs.

PROCEDURAL HISTORY

On or about August 19,2019, the parents filed a Petition for Due Process against the District, seeking placement at the Banyan School, reimbursement for all fees and compensatory education. The parties agreed to mediate. The matter was transmitted to the Office of Administrative Law, and a settlement conference was scheduled for August 22, 2019. The matter did not resolve. The District filed an Answer and Affirmative Defenses.

Hearing dates were conducted on November 12, 2019, and February 3, 6 and 11, 2020 respectively. With the onset of Covid-19 and the declaration of a State of Emergency, the next hearing date of March 17th had to be postponed, until an alternative method of continuing the hearings was established. The hearings continued via Zoom on April 28, May 5, May 26 and June 12, 2020. Following receipt of final submissions and oral argument, a final conference was conducted on October 27,2020 to review Exhibits and close the record.

TESTIMONY AND DISCUSSION

Five witnesses testified for Respondent, including Mary Harrington, a multi-sensory reading specialist, Alicia Rosario a teacher with eighteen years of experience, the last six years of which she taught students in a self-contained, LLD class. Also testifying for the District was Mary Wise, a speech pathologist, Lucy Hackler, a Learning Disabilities Teacher Consultant and Jerilyn Montague, a School Psychologist and

member of the Child Study Team. All but Ms. Rosario were qualified as experts in their respective fields.

Testifying for petitioners was Marcie Fountaine, an expert in speech pathology and literacy, and Edna Barenbaum, Ph.D.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

By way of background, at the time this matter commenced, I.K. was a sixth-grade student. During his early years, I.K. evidenced signs of multiple language and learning disabilities that were visible to his pre-school teachers. Following the recommendation of those teachers I.K. was diagnosed with multiple learning challenges, including but not limited to autism, auditory processing disorder and dyslexia. A behavioral challenge, which led in part to the assignment of a one-to-one aide, was also part of his diagnosis and school placement.

According to his mother who testified towards the end of the case, I.K.'s academic challenges carried over to home, where it would take him several hours to complete homework with a tremendous amount of assistance. And, I.K. also experienced severe stress and anxiety.

The first witness called by the District was Jerilyn Montagne a certified school psychologist who was also admitted as an expert. She had been I.K.'s case manager since he was in first grade and was familiar with his multiple learning challenges.

During her testimony, she addressed the results of several of I.K.'s scores on testing, including but not limited to an IQ score of eighty-five, and a Behavioral Assessment score which showed evidence of significant anxiety and depression.

Under his IEP for 2017-18, when I.K. was in Fourth grade, the District provided an in-class resource program for his academic subjects in Language Arts, Math, Science

and Social Studies. He was in general education classes for everything else, received speech once a month, and a one-to-one aid in the classroom.

Her testimony also included a discussion of the team's knowledge of his auditory processing challenges, which resulted in a reevaluation and new assessments to determine if I.K. required additional services, or adjustments in his learning program. The reevaluation also included an educational evaluation and a speech assessment.

Following these reviews, it was recommended that the in-class resource program continue, which was approved by I.K.'s parents.

Ms. Montagne also discussed the results of a report submitted by the parents from the Princeton Dyslexia Center. It was not disputed that one of I.K.'s learning challenges was overcoming Dyslexia. Initially, petitioners asked the District to pay for one on one lessons at the Dyslexia Center. But when the District proposed in-District Orton-Gillingham instruction two days a week, petitioners agreed to this alternate proposal and signed off on it.

Continuing its review of how best to address I.K.'s learning needs, the 5th grade IEP, called for a self-contained classroom for core academic subjects, and again, general education for electives and physical education. The self-contained classroom had a smaller classroom of fifteen students, as well as a one-to-one aid. His teacher was Ms. Rosario, a teacher with eighteen years of experience, the last six of which was with children like I.K. with extra learning needs and challenges.

The Sixth Grade IEP, which primarily formed the basis of the within dispute, recommended I.K. remain in a self-contained classroom, but his teacher and the team felt he could be moved into general education math, with supplemental support. Also recommended was three hours of continued Orton-Gillingham instruction, twice a week speech therapy, plus a monthly consult, and a monthly consult for occupational therapy.

There is no question that I.K.'s parents are educated, loving caring advocates for his educational well-being. That was evident throughout the proceeding, and in the

documentary evidence, including the time and money spent taking him to the Princeton Dyslexia Center.

But instead of seeing the promotion to general education math as a testament to the efforts and I.K.'s motivation to improve, petitioners blocked this move by not signing the IEP, and all the other recommendations that came with it. And it appears, the recommended promotion to general education math is also what triggered a demand for the District to place I.K. at the Banyan School, a demand that had little if any backup documentation, other than a small and general part of petitioners' expert Dr. Barenbaum's report. The reference to Banyan in her report had no comparison of the advantages and disadvantages of Banyan to what the District offered, which made it difficult to find a clear path to order the District to send I.K. to Banyan.

Ms. Montagne also spoke to some minor progress in I.K.'s PARCC scores over time, as well as his progress on report cards, and reading as part of the team's rejection of the proposed Banyan placement at the last IEP meeting before the within action was filed.

Finally, Ms. Montagne also spoke to some of the findings in Dr. Barenbaum's report, and she was pleased that I.K.'s level of anxiety and depression had been reduced. When Ms. Montagne observed I.K. in class, she saw him raise his hand several times and seemed much more engaged in Ms. Rosario's class.

Ms. Montagne also spoke to the findings in the second Princeton Dyslexic Center report which seemed to indicate that I.K.'s reading comprehension score, after several months of Orton-Gillingham assistance within the District improved by two grade levels, and his word blends also went up. She expressed surprise at the final request and the lack of signing off on the last IEP, as she felt I.K. was getting assistance in the areas needed, while the recommendation to go into mainstream math on top of his electives, would allow more interaction with his non-disabled peers.

Finally, Ms. Montagne emphasized the team was also taken aback by the demand for placement at Banyan, since the prior years IEPs were all signed off, and at no time

during the prior school year did I.K.'s parents raise any concerns about the plan that was in place.

In attempting to discredit Ms. Montagne, petitioners brought out on cross-examination that she had a caseload of eighty to ninety students, and they contend that she has no contact with students unless problems arise.

Petitioners also challenge her title of "case-manager" and say while she attends the IEP meetings, she does not significantly contribute to the formation of the yearly IEP.

While on cross she admitted that the offerings of the Princeton Dyslexic Center were more intense than what the District was providing, the fact remains the parents ultimately agreed to increased in-District Orton-Gillingham services in lieu of out of district funding of attendance at the Princeton Dyslexic Center. (It was later noted that even if the District had agreed to pay for I.K. to receive services at Princeton Dyslexic Center, it would have involved pulling I.K. out of school perhaps during the school day, and transporting him to the Center, which may have caused more of a disruption and more lost time from other school subjects.)

Petitioners also contend through cross examination of Ms. Montagne that the District failed to provide FAPE with the recommendation that I.K. be moved to a general education math class for Sixth Grade with supplemental support. Curiously, petitioners fault Ms. Montagne's reliance on Ms. Rosario's recommendation in this part of the IEP, instead of seeing it as an acknowledgment that I.K.'s academic skills, particularly in the area of math were being rewarded. (There is no indication that the District was trying to save money by moving him).

While petitioners challenged Ms. Montagne's expertise and knowledge, I **FIND** both in her initial testimony and when she was recalled in rebuttal, she presented her self overall as a credible witness, aware of some shortcoming on her part, with a large assignment of 80-90 students, but who cared about I.K.'s overall educational needs.

The next witness called by the District was Mary Harrington, who was employed by the District as a multi-sensory reading specialist for the past sixteen years. She was certified as a teacher of the handicapped, and was trained, although not certified in the use of Orton-Gillingham, a reading tool to assist students with reading comprehension and dyslexia challenges. At the beginning of her testimony, she qualified as an expert in special education instruction and multi-sensory reading.

Ms. Harrington was extremely familiar and comfortable discussing I.K., as she had been working with him since Second Grade. He started working with her using the Orton-Gillingham reading program in Fourth Grade, which she said increased his ability to decode words, and increased his vocabulary.

As an indication of the need to coordinate with other educators who teach I.K., Ms. Harrington indicated that she communicates with his classroom teacher Ms. Rosario three times a week to identify areas that she needs to focus on, and to learn which books he is reading in class.

During her testimony, Ms. Harrington indicated that to test I.K.'s comprehension, she regularly asks him questions about the material he is reading in order for him to explain what he is reading. Since she started working with him, she sees growth, and has not seen him display frustration as he reads. Ms. Harrington also addressed better standardized PARCC scores, in fact going from "did not meet expectations" with a 698 score in Fourth Grade, to a 717 in Fifth Grade for Language Arts, considered a Level 2 partially met expectations. According to Ms. Harrington, the PARCC Language Arts, tests comprehension, grammar and writing, areas where she has seen a progression as I.K. has gotten older and more mature.

Ms. Harrington assesses each of her students at the beginning of a school year. At the beginning of Sixth Grade, she determined that I.K. was at 90 percent accuracy for Fifth Grade words. While she does not dispute I.K. has multiple educational challenges, she continued her work with him as the year progressed on his comprehension, and how

to find evidence in the texts he was reading to answer questions being asked by the classroom teacher. She stated when he sees an unfamiliar word, he knows to look it up and is able to have a discussion with her about what the word means.

As for I.K.'s auditory processing challenges and the dyslexia, Ms. Harrington advised that she used trackers to have I.K. go back and read part of a story over, and she uses coding skills to break up unfamiliar words together with sounding skills and repetition to help him to overcome these challenges.

On cross-examination, petitioners attempted to portray Ms. Harrington as essentially a fact witness. Not questioning her kindness and dedication, counsel emphasized virtually an entirely negative picture of I.K., and a lack of training in Ms. Harrington's background, and overlooked much of the positive accomplishments that were testified to by Ms Montagne and Ms. Harrington. Though a lot of technical terms were used in the questions posed to Ms. Harrington, the substantive portion of the questioning ended up suggesting I.K. is in a "circle of learning helplessness."

In her testimony, Ms. Harrington came across as a credible witness, who cared about all of her students, and wanted to do her best to help them succeed.

The next witness, and perhaps the individual with the most information to share about I.K. was his classroom teacher, Alicia Rosario. In the autism program, Ms. Rosario has worked with many non-verbal students with behavioral issues. She has worked for years with students in small groups with a wide range of educational challenges.

Ms. Rosario had been his classroom teacher over two prior school years, 2018-19 and 2019-20. The class I.K. was in had fifteen students, which Ms. Rosario testified was a comfortable number for her to work with. She also acknowledged the existence of a classroom aide, and a one-to-one aide assigned to I.K. She strongly believed I.K. would thrive in mainstream math, a recommendation which triggered the rejection of the IEP that led to the within litigation.

She discussed I.K.'s progress, from the time he first started with her. Initially shy and quiet, he was dependent on his one-to-one aide for organizing himself, his books and his assignments. By using a rewards system, she encouraged I.K. to work harder.

Overall, Ms. Rosario stated that I.K. was doing well in Sixth Grade. She said he was motivated and was earning good grades. One indication of his motivation to do well was that at least once he asked to make corrections on a test so he could improve his grade.

Some of the accommodations she put in place dating back to I.K.'s time with her in Fifth Grade include, having all of his books on audio, the ability to re-take tests, charts and videos, and the use of an FM system. Even though the class is small, Ms. Rosario likes to put her students in small groups, which facilitates the skill of working together with peers.

I.K. is allowed to use sticky notes to write down and remember important facts, he is allowed to use a story map when reading a book. After working with him for more than two years, Ms. Rosario stated that with the use of READ charts, and the FM system, I.K. understands how to restate a question and find evidence. Finally, to further make sure he can hear and concentrate on the material being presented, I.K. is seated in the front of the classroom.

Ms. Rosario also discussed how she coordinates I.K.'s assignments with other professionals in the District. One example is that her class reads the same novels as the general education class. To encourage socialization with his mainstream peers, her class always goes on field trips with the general education class.

In Fifth Grade, I.K. did well in all of his academic subjects, she felt because in her class, the material is presented at a slower pace, and she relies on small group instruction. The novels her class reads, and the textbooks used are the same ones as used in the general education class. One of the differences between what she works on with her students and the mainstream class, is that she is still teaching grammar.

She said I.K. has no trouble reading social studies and science books, and she assigns him extra work to reinforce the work he does in class. She proudly discussed a 100 score I.K. earned on a vocabulary test from a Sixth-Grade novel the class was reading, and an 86 on a Social Studies test. From Fourth Grade to Fifth Grade, his PARCC standardized test score went up nineteen points. She testified that he was a motivated student, and she no longer has to remind him of what he has to do to get ready for class.

Although the use of a one-to-one aide was criticized during the hearing, Ms. Rosario explained that she did not see this as a bad thing as its intent was to help I.K. make up academic work which he may have missed while working with the reading teacher Ms. Harrington. She was of the belief he is doing grade level Sixth Grade work, and was so confident with his math skills, she recommended he go into a general education class for math in the next school year, which petitioners rejected.

On cross-examination, petitioners' advocate attempted to discredit Ms. Rosario's background, her lack of training in certain areas, and subtly insulted her skills and dedication by accusing her of "... Not showing initiative for supporting the population she teaches appropriately, as much has changed in the world of education in the eighteen years she started teaching.

But Ms. Rosario never attempted to hide I.K.'s shortcomings, nor did she attempt to portray him as someone no longer in need of special education services. What she emphasized instead was the improvements she saw over more than two years in his level of confidence and ability to understand materials, and his motivation to do better.

Another line of questioning on cross questioned Ms. Rosario's integration of the aide assigned to I.K., and her lack of ability to properly answer him when he asked why the aide was needed. This is not necessarily seen as a negative, if anything, it shows awareness by I.K. and his surroundings.

Ms. Rosario never suggested that I.K. was not still working through his comprehension challenges. It was suggested during her testimony that Ms. Rosario's

accent or dialect was a bar to I.K.'s learning, and that Bayonne has a "low bar" for students in these types of classes.

I reject these arguments and implied statements, and I **FIND** just the opposite. Ms. Rosario came across as a pleasant, dedicated and caring teacher, who is loyal to her students, especially I.K. The subtle suggestion that teaching has changed over the last eighteen years, and she has not kept up with the times does not fit the picture of all of the time and efforts spent to help I.K. improve. For these reasons and others, she was a very credible witness, invested in wanting to help I.K. improve.

Also testifying for the district were Mary Wise, the Speech Pathologist, and Lucy Hackler, the Learning Disabilities Teacher Consultant, (LDTC)

Ms. Wise, who was also qualified as an expert in her field, saw him once a month under the prior IEP. She agreed with the petitioners' expert in this area that more services were needed, which led to the recommendation in the IEP in dispute that he be seen twice a week, with a once a month consult. She believes that I.K. benefits from working in small groups, and says she saw improvement in his ability to follow directions, and independence in completing tasks and having conversations.

The fact that she was willing to implement a recommendation by the parents' expert, which was not necessarily the District's view is a testament to her willingness to recommend more services to her employer in the best interest of I.K.

As for his auditory processing challenges, she admitted the FM system which was being utilized did not eliminate the problem of discriminating speech sounds and words in the face of background noise. Though Ms. Wise saw little improvement in the area of speech for I.K. in First through Fourth Grades, she did see improvement in Fifth Grade, which is closer in time to the IEP in question. Again here, her willingness to adopt and accept the recommendation made by petitioners' expert in this area is an indication of her candor and professionalism to act in the best interest of I.K.

Lucy Hackler, the LDTC, talked about some of the tests and assessments she conducted, and also the program that was offered and rejected for Sixth Grade. She pointed out that although initially I.K.'s scores were low on the well-known Woodcock-Johnson test, that was before the Orton-Gillingham reading program was introduced, through the reading teacher.

Ms. Hackler said she did not believe I.K. was a candidate for an out-of-district placement, because the child study team remained convinced that they could meet I.K.'s needs and make adjustments when necessary. She noted the second Princeton Dyslexia Center evaluation, which showed marked improvement on the student's part.

Also offered to petitioners was participation in the summer extended year program, (ESY), which she felt would prevent regression, and exposure to some non-disabled peers. She concluded her testimony with remarks drawn out during cross-examination that a comparison of standardized test scores was not a truly accurate way to assess whether a student was improving, as grade equivalent test scores are less objective, and vary widely between districts.

Though she also comes across as a candid teaching professional who cares about her students, she was criticized on cross examination as a weak fact witness, who was passive in her lack of advocacy for I.K. I do not share this view of Ms. Hackler, as much of the criticism was based on his academic performance from earlier grade years.

Petitioners' first expert, Marcie Fontaine was offered and admitted as an expert in speech and language pathology. It was not disputed that Ms. Fontaine is not a teacher of special education and has never been a classroom teacher. The in-room classroom observation, which formed the primary basis of her report and recommendations, lasted about two hours, and she did not initiate a request to return for more observation because from prior experience, she felt the district would only allow one visit.

Even though she was offered as a paid professional advocate, she was a credible witness, who presented herself as a knowledgeable advocate in her field. She correctly identified at least one contra indication of what the District was providing, including but

now limited to the high ceilings in Ms. Rosario's classroom in an old building which may limit the effectiveness of the FM system. She criticized Ms. Hackler, the LDTC staff member, for not doing an in-class observation.

Ms. Fontaine also faulted the decision in the prior school year, (which the family consented to) to limit I.K.'s speech sessions to a once a month consult. Even with the recommendation in the next IEP which called for two sessions a week and a once a month consult, she found fault because the sessions were limited to twenty minutes each. (there is no explanation from Ms. Fontaine about how to implement more time into this student's schedule, without interfering with the rest of his schedule. She found another criticism with the FM system in that she believed that all of the students in the class should wear the equipment to hear I.K. better, and so he could hear them better. In her opinion, she felt prior IEP's were not implemented with integrity, and she did not believe there was enough emphasis on having all the members of the team coordinate what they were doing for I.K. She also felt all the members of the staff working with I.K., should be trained in the use of Orton-Gillingham, not just the reading teacher. It was suggested that the time she spend in the classroom doing the observation was irrelevant, and the proposed IEP was inappropriate to meet I.K.'s complex needs.

On cross-examination, however, she admitted that either on the day of her observation or thereafter, she did not seek to interview Ms. Rosario, the classroom teacher with the most knowledge of I.K. Despite faulting some of the past practices of the district and the proposed IEP, Ms. Fontaine admitted that at least some of the recommendations contained in her report, were adopted by the child study team in the most recent IEP which became the subject of this litigation.

Petitioners' second expert was Dr. Barenbaum. While she was admitted as an expert in multiple areas of education, it was not disputed that Dr. Barenbaum does not hold any certification in New Jersey and has never worked as a child study team member in New Jersey. She also has never taught in a New Jersey classroom. But that is not to take away from Dr. Barenbaum's credentials. She did not feel Ms. Rosario was a good fit for Ivan. She too criticized Ms. Rosario's dialect as an impediment to I.K.'s ability to hear listen and learn. She criticized the once a month speech consult in Fifth Grade,

without commenting on the increased speech sessions recommended in the Sixth Grade IEP. She also was critical of the presence of a one-to-one aide, and when asked if some form of compensatory education could overcome some of the shortcomings she found, she responded in the negative, in her words... "I.K. was too far behind for this less intrusive remedy to help, this reaching the conclusion that the only remedy was to place I.K. at the Banyan School. Again here, there was little attempt to specify why the Banyan program was superior to what Bayonne was offering.

Dr. Barenbaum criticized Ms. Montagne, the school psychologist and case manager for not doing more. She did not ask the students parents for samples of his work and did not even have the disputed IEP in her possession until her testimony started.

Though credible and no doubt respected as an expert in her field, I **FIND** that because virtually all of her testimony was critical of the District, and there was little if any favorable comments even in the face of some improvement by the student in certain areas. As he matured and moved on to higher grades, her testimony, which only focused on one remedy which was a private placement at Banyan was somewhat biased towards the outcome being sought by the parents. Essentially, her report and testimony were slanted towards one outcome, a private placement at Banyan. When it was brought to her attention that she had not reviewed the IEP in contention in this case, she had to review it on a break in testimony as it was not referenced in her report. While likely inadvertent, I **FIND** this is a valid reason to give less weight to her findings and testimony.

One of the final witnesses was I.K.'s mother. She recounted the struggles she observed I.K. go through in school, even from the start of kindergarten. She recounted the physical and emotional challenges she observed in I.K. faced as a result of stress and anxiety from being unable to perform her schoolwork. She sought private evaluations which confirmed the existence of dyslexia and auditory processing issues.

When presented with the IEP for Sixth Grade, she rejected it outright, the primary reason being she did not think I.K. could perform in a general education math class. It

seemed to the team at the final IEP meeting that the only remedy she would accept was a private placement at the Banyan School.

FINDINGS OF FACT

1. I.K. was a Sixth-Grade student at the Henry School, which is part of the Bayonne School District. Early in his schooling, multiple learning challenges were noted, resulting in an evaluation by the district's child study team., which specializes in meeting the educational needs of students with learning disabilities.
2. I.K. was first evaluated in March 2011, when he was about to turn age three.
3. Three years later in 2014, he was diagnosed with Auditory Processing Disorder due to a history of middle ear infections. Shortly thereafter in the same year, he was also diagnosed with a Pervasive Developmental Disorder and Autism.
4. As a result of these findings, he was placed in a pre-school self-contained classroom, a recognition by the Bayonne School district that I.K. had multiple special needs. Recommended at that time was speech and language therapy, instruction with an Orton-Gillingham tutor, and a social skills group.
5. In May 2016, an IEP meeting took place for Third Grade, which included pull out replacement for Language Arts and Math, with general education for Science, Social Studies and Specials. Speech therapy twice a week was recommended, and a full-time one-to-one aide.
6. In April 2017, prior to starting the next school year, other assessments were performed, and although the need for additional speech therapy was indicated, the speech teacher and the classroom teacher did not agree with this recommendation, as they believed it would take too much time away from classroom instruction.
7. The following year's IEP was delayed by the parents, as they had concerns about I.K.'s perceived lack of academic progress.
8. Before entering Fifth Grade, I.K. struggled with her assignments at home, evidencing symptoms of multiple challenges, including but not limited to autism, auditory processing disorder, behavioral issues and dyslexia.
9. Seeking to address further deficits I.K. was experiencing in school and at home, petitioners engaged the services of two experts Marcie Fountaine, and Dr. Edna

- Barenbaum to support the parents demand for a private placement at the Banyan School. The family also sought an evaluation from the Princeton Dyslexia Center.
10. These reports were presented to the IEP team with the expectation by the parents that some of the recommendations in these outside reports would be adopted as part of is next IEP.
 11. Although the team did agree to some of the recommendations, including 120 hours of Orton-Gillingham instruction (as opposed to the 300 hours recommended by Dr. Barenbaum), and restoration of additional speech sessions, it became evident to the team early in the meeting that the only outcome being sought by the parents was a private placement at the Banyan School.
 12. The IEP team was caught off guard but stood by their position that with some increased services, summer ESY, and trying mainstream math, he would still be getting the necessary education as required by FAPE and IDEA.
 13. No information about the Banyan School was presented by the parents to the team which would have given them a means of comparison to what the district was providing.
 14. While I.K. still has challenges from auditory processing and dyslexia, his skills in reading comprehension and communication improved, to the level where his classroom teacher, who had observed his challenges for at least the past two years, recommended I.K. go into mainstream math, which she and the team felt would be a benefit to him.
 15. The recommendation for mainstream math was the primary basis the parents used to reject the IEP which formed the basis of this litigation. The district witnesses were present at the IEP meeting came away with the belief that the parents at that point would only accept an out-of-district placement, so there was no further discussion about other in district options for I.K...
 16. I **FIND** that the District did not violate FAPE under IDEA and under Section 504. Therefore, I **FIND** the proposed IEP was appropriate and had it been fully enacted, would have permitted I.K. to experience significant learning and meaningful educational benefit.
 17. I also do not **FIND** that the proposed IEP does not violate N.J.A.C, 6A;14-1.1 et. seq, and I also do not **FIND** that the district violated Section 504 of the Rehabilitation Act.

18. I also **FIND** that even if the District was willing to change the IEP to allow I.K. to attend the Banyan School, neither the parents nor the experts provided sufficient information upon which a determination could be made that this was a more appropriate program that was superior to what Bayonne was offering under FAPE and IDEA.

19. No compensatory education and no costs are awarded.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A “child with a disability” means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). I.K. has been diagnosed with autism and classified as a preschool child with a disability.

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a free “appropriate public education.” 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Each district board of education is responsible for providing a system of free, appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A “free appropriate public education” (FAPE) means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, 458 U.S. 176. Subject to certain

limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A), (B).

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(14); 20 U.S.C. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student's educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). Annually, or more often, if necessary, the IEP team shall meet to review and revise the IEP and determine placement. N.J.A.C. 6A:14-3.7(i). FAPE requires that the education offered to the child must be sufficient to "confer some educational benefit upon the handicapped child," but it does not require that the school district maximize the potential of disabled students commensurate with the opportunity provided to non-disabled students. Rowley, 458 U.S. at 200. Hence, a satisfactory IEP must provide "significant learning" and confer "meaningful benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577-78 (3d Cir. 2000).

The Supreme Court discussed Rowley in Endrew F. v. Douglas County School District RE-1, __ U.S. __, 137 S. Ct. 988 (2017), noting that Rowley did not "establish any one test for determining the adequacy of educational benefits" and concluding that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Id. at 996, 1001. Endrew F. warns against courts substituting their own notions of sound education policy for those of school authorities and notes that deference is based upon application of expertise and the exercise of judgment by those authorities. Id. at 1001. However, the school authorities are expected to offer "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 circumstances." Id. at 1002.

In Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 46 (1989), the New Jersey Supreme Court concluded that "in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined." Further, the New Jersey Supreme Court stated:

As previously indicated, the purpose of the IEP is to guide teachers and to insure that the child receives the necessary education. Without 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. Furthermore, an IEP that is incapable of review denies parents the opportunity to help shape their child's education and hinders their ability to assure that their child will receive the education to which he or she is entitled.

[Id. at 48-9. (citations omitted).]

In accordance with the IDEA, children with disabilities are to be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to require that a disabled child be placed in the LRE that will provide the child with a “meaningful educational benefit.” T.R., 205 F.3d at 578. Consideration is given to whether the student can be educated in a regular classroom with supplementary aids and services, a comparison of benefits provided in a regular education class versus a special education class, and the potentially beneficial or harmful effects which placement may have on the student with disabilities or other students in the class. N.J.A.C. 6A:14-4.2(a)(8).

The District contends that it provided FAPE to I.K. in the least restrictive environment. Conversely, petitioners contend that the District's proposed program was not appropriate to meet I.K.'s individualized needs and would not provide I.K. with a FAPE. The District bears the burden of proof and the burden of production whenever a due process hearing is held pursuant to the provisions of the IDEA. N.J.S.A. 18A:46-1.1.

As would be expected the witnesses from both sides significantly disagree on I.K.'s present levels of achievement and functional performance. Yet, there are several overriding factors that I.K. is receiving FAPE.

The record is replete with evidence that I.K.'s academic performance was improving as he matured

and spent more time with Ms. Rosario and Ms. Harrington. I further **CONCLUDE** that with these and other issues discussed above not included in the second IEP, petitioners were not within their rights to make the demand that I.K. should be enrolled at the Banyan School when there was no evidence or testimony presented about the school itself, and its programs which petitioners believe would be in I.K.'s best interests instead of remaining in Bayonne.

The alternative of requesting an out-of-school placement after determining a District did not provide a student with FAPE is well-established: see M.F. and L.F. o/b/o N.F. v. Secaucus Board of Education EDS 10762-06 (2007) see also: D.B. and C.B. o/b/o D.B v Windsor Twp. Board of Education EDS 933-11 (2011). Each of these cases resulted in an award of reimbursement to petitioners for all charges and expenses related to the unilateral placement of a student in another school.

I **CONCLUDE** that the Petitioners were well represented by Ms. Boyarin who presented a thorough case and was a zealous advocate for her client. But after consideration of all the testimony and evidence, I **CONCLUDE** that the District did sustain its burden that I.K. was receiving FAPE in the Least Restrictive Environment, and that I.K.'s. rights under Section 504 were not violated. I therefore **CONCLUDE** that the District, who also was represented by Mr. Merryman in a thorough and professional manner, is the prevailing party in this matter.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioners is **DENIED**. Dr. Barenbaum opined that she felt I.K. should receive 200 hours

of compensatory relief, including but not limited to Dyslexia training offered by the Princeton Dyslexia Center. That issue was addressed in an alternate manner with the implementation of 120 hours of Orton-Gillingham instruction.

No compensation is Ordered for compensatory education as there is no way for the undersigned to evaluate the need for same, and when asked at the conclusion of the proceeding, if short of an outside placement to Banyan, petitioners could identify some other form of relief they felt I.K. was entitled to, there was no other specific means of relief they wanted other than the placement, as it was indicated that extra hours of home tutoring or other outside training would be too intrusive to I.K.'s daily schedule and other outside activities.

It is further **ORDERED** that if they have not done so already, petitioners and the District should meet within thirty days of this decision or as soon as practical to create an IEP that addresses I.K.'s current situation, if he has been forced into an all virtual learning environment as a result of the pandemic.. This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2018).



December _____ 3,
2020 _____

ANDREW M. BARON, AL

APPENDIX

Witnesses

For Petitioners:

Marcie Fontaine

Edna Barenbaum, Ph.D.

Dr. Marusia Kushnir

For Respondent:

Jerilyn Montagne

Alicia Rosario

Lucy Hackler

Mary Wise

Mary Harrington

EXHIBITS

- J-1 Auditory Processing Screening, dated June 25, 2014
- J-2 MK to CST letter, dated September 9., 2014
- J-3 Delaney Auditory Processing Evaluation, dated June 12, 2015
- J-4 MK letter to Montagne, dated June 27, 2015
- J-5 IEP, dated May 24, 2016
- J-6 IEP, dated April 25, 2017
- J-7 MK letter to Montagne, dated June 23, 2017
- J-8 Delaney Auditory Processing Evaluation, dated June 23, 2017
- J-9 MK letter to Montagne, dated, October 4, 2017
- J-10 Montagne Psych Re Evaluation, dated, December 18, 2017
- J-11 Hackler Ed Evaluation, dated January 11, 2018
- J-12 Thorwarth Speech Re-Evaluation, dated January 12, 2018
- J-13 MK letter to Montagne, dated February 20 ,2018
- J-14 Dyslexia Center Report, dated March 24, 2018
- J-15 Fountaine report, dated December 13, 2018
- J-16 Dr. Barenbaum report, dated February 1, 2019
- J-17 Delaney Auditory Processing report, dated June 20, 2019

PETITIONER

- P-1 - Beckwith neuro report, dated October 3, 2014
- P-2 MK to Montagne letter, dated November 20, 2014
- P-3 Beckwith neuro follow up, June 23, 2015
- P-4 Beckwith follow up, dated September 5, 2017
- P-5 Developmental follow up, dated March 27, 2018
- P-6 Valente occupational report, dated May 25, 2018
- P-7 Fountaine CV
- P-8 Barenbaum CV
- P-9 Boyarin letter, dated April 9, 2019
- P-10 Boyarin letter, dated April 11, 2019

P-11 Boyarin letter to Dept. of Ed., dated June 6, 2019

P-12 Boyarin letter, dated October 28, 2019

P-13 Kestler CV

P-14 Second report Princeton Dyslexic Center, dated October 23, 2019

RESPONDENT

R-1 Social Assessment, dated December 15, 2014

R-2 Psych Re-Evaluation, dated January 20, 2015.

R-3 Educ. Re-Evaluation, dated January 20, 2015

R-4 Report cards, dated April 15, 2016

R-5 Report, dated January 10, 2017

R-6 2016-2017 report cards,

R-7 2016-2017 PARCC report

R-8 Occupational Therapy Re-Evaluation, January 22, 2017

R-9 IEP Goals, dated February 22, 2017

R-10 meeting notes, dated November 15, 2017

R-11 IEP, dated February 8, 2018

R-12 IEP Goals

R-13 IEP Review, dated, June 20, 2018

R-14 2017-2018 Report Cards

R-15 2017-2018 PARCC Results

R-16 IEP Goals, dated September 7, 2018

R-17 IEP Goals, dated December 4, 2018

R-18 IEP Goals, dated April 9, 2019

R-19 IEP Annual Review, dated April 12, 2019

R-20 Meeting notes

R-21 18-19 report cards

R-22-18-19 PARCC results

R-23 IEP Goals, dated July 15, 2019

R-24 Sept-Oct 2017 flow sheets

R-25 Differentiated reading matrices

R-26 Differentiated math matrices

R-27 2018-2019 sample work packet

R-28 2018-2019 ESY

R-29 2018-2019 Multi-sensory tables

R-30 2019 Year end assessments

R-31 2019-2020 September assessments packet

R-32 2019-2020 Packet

R-33 Sept 19 assignments

R-34 Montagne CV

R-35 Steinman CV

R-36 Rosario CV

R-37 Naseem CV

R-38 Hackler CV

R-39 Wise CV

R-40 Castillo CV

R-41 Lee CV

R-42 Harrington CV

R43-47 Email chain

R-48 I.K. assess

R-49 DRA