



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

**FINAL DECISION**

OAL DKT. NO. EDS 02422-19

AGENCY DKT. NO. 2019-29283

**P.F. AND K.F. ON BEHALF OF G.F.,**

Petitioners,

v.

**OCEAN TOWNSHIP BOARD OF**

**EDUCATION,**

Respondent.

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**Paul V. Fernicola**, Esq., for petitioners (Paul V. Fernicola & Associates, LLC,  
attorneys)

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

Record Closed: June 14, 2021

Decided: July 28, 2021

BEFORE **JEFFREY N. RABIN**, ALJ:

**STATEMENT OF THE CASE**

The petitioners, P.F. and K.F., on behalf of their child G.F., allege that the respondent, the Ocean Township Board of Education (District or Board), should have

classified G.F. for special education and related services, asserting that G.F. had been diagnosed with a specific learning disability, that being dyslexia.

### **PROCEDURAL HISTORY**

By letter dated December 4, 2018, the respondent District advised petitioners that G.F. was not eligible for special education and related services.

Mediation was held on January 17, 2019, but the parties were unsuccessful in resolving the dispute. On January 22, 2019, petitioners converted their request for mediation into a petition for due process. The Office of Special Education Policy and Procedure (OSEPP) transmitted petitioners' claim to the Office of Administrative Law, where it was filed on February 19, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Hearings were conducted on October 15 and 16, 2019. At the hearing on October 15, 2019, oral arguments were heard on the parties' cross-motions to exclude testimony and certain documents. Petitioners' motion, seeking to exclude expert testimony for any witness lacking an expert report, was denied. Respondent's motion to exclude testimony from any witness other than Jennifer Manzo, due to petitioners' failure to provide witness summaries was granted with respect to all witness except Lisa Kestler, Ph.D., who was permitted to testify solely as a fact witness concerning the private evaluation she conducted of G.F. in 2018.

After respondent's case was completed on October 16, 2019, petitioners made an oral motion for a directed verdict. The Board filed a written opposition to the motion on October 21, 2019, and the third hearing date scheduled for that day was converted to oral arguments. The motion for a directed verdict was denied. Petitioners subsequently filed a motion to amend the petition for due process on December 3, 2019, to include a claim for reimbursement, which the Board opposed.

The hearing continued on January 29, 2020. On February 12, 2020, petitioners filed another motion seeking to have one of G.F.'s parents testify, to introduce new

evidence, and to offer testimony from Dr. Kestler for purposes of rebuttal. During a telephone hearing on March 16, 2020, the parties agreed that G.F.'s report card from the 2019-2020 school year would be admitted into the record for this matter without testimony. Both of petitioners' outstanding motions were denied.

Having completed the hearings, the parties agreed to procure the transcripts and provide post-hearing submissions by August 21, 2020. There were delays in obtaining complete transcripts of the hearings, due in part to the Covid-19 pandemic. Subsequent to receipt of the final transcripts, the parties proffered numerous post-hearing briefs and correspondence.

The record was closed on February 10, 2021, but was reopened on or about April 14, 2021, subsequent to a motion from petitioners to reopen the record to admit additional documents. That motion to reopen the record was denied on June 4, 2021, and the record was closed again on June 14, 2021.

### **FACTUAL DISCUSSION**

Based upon the parties' briefs and oral arguments, I **FIND** the following:

1. G.F. was born on January 2, 2012, and has attended school in the District since kindergarten in the 2017-2018 school year.
2. On October 5, 2018, shortly after G.F. began first grade, petitioners requested a Child Study Team (CST) evaluation of her. In response, an initial planning meeting was held on October 15, 2018, at which the CST proposed to evaluate G.F. to determine her eligibility for special education services. It was agreed that the initial evaluation would be comprised of educational, psychological, and social history assessments, and petitioners signed consent for the initial CST evaluation on October 15, 2018.
3. On or about November 19, 2018, petitioners submitted to respondent a report from the Dyslexia Center of Princeton (DCP) dated November 1, 2018, by Dr. Lisa Kestler, Ph.D., who diagnosed G.F. with Dyseidetic Dyslexia and Dysphonetic Dyslexia.

4. On December 4, 2018, the District found that G.F. was not eligible for special education and related services. Through Intervention and Referral Services (I&RS), on December 12, 2018, G.F. was provided with general education supports; for the 2018-2019 school year, G.F. received small group decoding and encoding (phonics) instruction up to three times a week, and small group reading fluency support twice a week.
5. In June 2019, petitioners submitted a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) for G.F., and a 504 Plan was developed for her. G.F. was also referred for Basic Skills Instruction at that time.

### **Testimony**

#### **For the respondent Ocean Township Board of Education**

**Rachel Gerstein**, school social worker and case manager for G.F., conducted a social history assessment of G.F. as part of the initial CST evaluation, based on a parent interview, student interview, and student observation. Gerstein observed G.F. during a reading lesson in her general education first grade class and found that G.F. was able to follow along with the class lesson, G.F. was able to work with a partner appropriately during a collaborative assignment, and G.F. did not stand out from her general education peers.

After the evaluation plan had been created and signed, Gerstein received a request from the petitioners for an occupational therapy assessment. The CST conferred with the classroom teacher to see if there were any fine motor concerns in the classroom that might be impacting G.F.'s education. The CST discussed this request at the eligibility meeting on December 3, 2018, and concluded that the occupational therapy assessment was not warranted. Petitioners forwarded a report they had obtained privately from Dr. Kestler at DCP with the District; the DCP report was reviewed and considered by the CST.

The CST, after considering the available evidence, such as an in-class observation of G.F., information from her teachers, report cards, school performance and the results

of the CST and private evaluations, determined that G.F. was not eligible for special education and related services. While G.F. may have had relative weaknesses in some areas, she was still learning new skills and retaining information. Any difficulties G.F. may have had with coding, decoding, and reading comprehension did not adversely affect her educational performance. G.F. was making enough progress in her current general education program to keep up with her peers.

**Jessica Olson**, Learning Disabilities Teacher Consultant, was accepted as an expert in educational testing, learning disabilities, and special education eligibility determinations. She was a member of the CST team evaluating G.F. She conducted the G.F. educational evaluation on October 29, November 2, and November 5, 2018.

Olson testified that, in order for a CST to determine whether a student was eligible for special education and related services, a “three-prong criteria” would be applied: there must be a disability, it had to negatively impact the student educationally in the classroom, and there had to be a need for special education. Olson assessed G.F.’s current achievement level in seven of the eight cluster areas identified in the New Jersey special education regulations that could form the basis for eligibility for special education under the category of specific learning disability (SLD). On the Woodcock-Johnson Tests of Achievement IV, G.F. performed in the average to low-average range in basic reading skills, reading comprehension, oral expression, listening comprehension, mathematical calculation and problem solving, and reading fluency. Olson did not evaluate G.F.’s written expression because a student at first grade level would not be expected to write fluently. On the two writing tests which Olson did administer, G.F. performed in the low-average to average range.

Olson stated that G.F.’s performance for Dr. Kestler on the Wechsler Individual Achievement Test were consistent with her own testing results for G.F. She stated that the Gray Oral Reading Tests–Fifth Edition (GORT-5) administered by Dr. Kestler was a fluency test and therefore not a valid assessment for beginner readers such as G.F., because students at such a young age were not yet fluent because they were still learning to read. G.F.’s Intelligence Quotient (I.Q.) was 91, at the low end of the average range, with a confidence interval of 86-97, that being the range of scores within which her true

score would be likely to fall. The CST's psychological evaluation, as to cognitive ability, was consistent with the intelligence results reported by Dr. Kestler, who found G.F.'s I.Q. to be 89, just below the average range.

For the District's analysis of the first prong for special education, a severe discrepancy would be shown by a twenty-two-point difference between a student's cognitive level/I.Q. score and current results from standardized tests in the eight areas listed in the regulations. Using the Utah Estimator, a computer program which compared the educational evaluation score with the student's I.Q., Olson found a seventy-four percent (74%) confidence that G.F. had a severe discrepancy. The Utah Estimator must have a ninety-three percent (93%) confidence level of a severe discrepancy for a determination that a student has a SLD, and therefore no severe discrepancy was indicated for any of the SLD areas. Looking at G.F.'s I.Q. scores against G.F.'s educational evaluation indicated that G.F.'s academic achievement scores were within the expected confidence interval for her I.Q., and therefore there no was discrepancy in her academic performance and, therefore, no severe discrepancy.

The District's Specific Learning Disabilities Criteria stated that, per federal regulations, the severe discrepancy analysis would not be the sole criteria for determining special education eligibility. The CST considered data from other sources, such as classroom observations, in determining eligibility.

**Brianne Brannigan** was accepted as an expert in reading instruction. She worked as an instructional coach with teachers regarding professional development. She performed dyslexia screenings for the District. She had a Dyslexia Practitioner Certification from Farleigh Dickenson University. She believed she was able to identify and recognize aspects of dyslexia. She stated the criteria for dyslexia were: weakness in oral fluency; word recall; and reading phonology. She had a certification as a Wilson Dyslexia Programmer. She used the New Jersey Handbook for Dyslexia (from the New Jersey Dyslexia Association).

Repeated testing demonstrated G.F.'s growth in phonological awareness, sight word fluency and vocabulary. There was a concern with G.F.'s oral reading fluency in

first grade, but appropriate supports were provided to her for that concern, such as small group instruction. G.F. was able to access the general education curriculum with supports offered through Intervention and Referral Services (I&RS), and was demonstrating progress, and therefore did not need individualized instruction in a specific multisensory reading program to access the curriculum. The District employed the Wilson Program, but G.F. was not receiving the Wilson Program from the District.

Ms. Devinsky discussed with Brannigan the recommendation that G.F. be put into a small group setting on Wednesdays, which would be in addition to the remedial measures she had been receiving up until that point. Brannigan was never provided with a copy of Ms. Devinsky's letter dated January 16, 2019. G.F. had not received any instruction from Ms. Devinsky during the 2019-2020 school year because Ms. Devinsky was assisting in the administration of the DIBBLES screenings of other students.

Brannigan never reviewed any written reports from Children's Hospital. Brannigan had not considered G.F.'s May 16, 2019, evaluation. Brannigan had not been provided a copy of or reviewed the DCP report. She never observed G.F. in either her first or second grade classrooms.

**Jennifer A. Zona**, Assistant Superintendent for Special Services, was accepted as an expert in special education, learning disabilities (but not the diagnosis of dyslexia), and eligibility for special education. She had reviewed G.F.'s student records, including the CST evaluations.

G.F. was functioning in the average to low-average range in reading, writing, math, and oral language. G.F. did not demonstrate any severe discrepancy between her academic achievement and intellectual potential. While age-equivalency scores are typically included in an educational evaluation, only standard scores and percentile ranks are valid because those scores indicate how a student is performing compared to similarly-aged peers.

Regarding the three-prong test, if a student met all three prongs of the criteria, the District would be obligated to classify the student for special education. The Utah

Estimator was a software program that the District used to determine if there was a significant discrepancy between the child's functioning and the child's capability. The CST did not do an analysis of the second or third prong because the first prong, having a disability, had not been established.

Despite Dr. Kestler having diagnosed G.F. with dyslexia, a diagnosis of dyslexia would not automatically make a student eligible for special education. Needing extra help in certain areas did not dictate that the student required special education. Since the December 2018 eligibility determination, nobody at the District had referred G.F. to special services or raised any concern regarding G.F.'s functioning so as to indicate that G.F. would require special education services. The 504 accommodations in place for G.F. were sufficient to address any ADHD diagnosis. Whenever accommodations were not working, teachers' evaluations would be provided to Zona to address any deficiencies.

**For the petitioners P.F. and K.F. o/b/o/ G.F.**

**Dr. Lisa Kestler** had a B.S. from Princeton in Psychology, a New Jersey psychology license, and accreditation from the National Institute for Mental Health. She was certified by the American Psychology Association. She was currently in private practice, and served as an independent contractor to DCP.

Dr. Kestler was permitted to testify solely as a fact witness concerning the private evaluation she conducted of G.F. in 2018. She issued a report on behalf of DCP dated November 1, 2018. (R-9). She diagnosed G.F. with Dyseidetic Dyslexia and Dysphonetic Dyslexia.

She was not deemed an expert in dyslexia. During the approximately three-and-a-half-hour assessment session, G.F. was very cooperative and not distracted. In discussing the recommendations she made for G.F., Dr. Kestler testified that an Orton Gillingham-based approach was "the gold standard" in terms of interventions.

There was a family history of dyslexia. G.F.'s tutor and first grade teacher had concerns regarding G.F.'s reading skills and issues with vowel sounds. Dr. Kestler



considered G.F.'s medical history, spoke with G.F.'s parents, and performed an I.Q. exam using the Wechsler Test, which came back as 89 (average).

Dr. Kestler discussed "decoding" vs "incoding" skills as well as "phonological awareness." She discussed oral reading tests and oral reading comprehension, "visual motor integration" and "immediate sequential recall." G.F.'s oral skills were very strong, and written skills were strong.

Dr. Kestler recommended an Orton-Gillingham-based methodology to address dyslexia, including 200 minutes per week of individualized instruction. G.F. required research-based, data driven dyslexia remediation. Dr. Kestler recommended educational accommodations and modifications, such as how information would be presented to G.F.: i.e., provide G.F. written materials instead of having her read from a blackboard. G.F. needed fluency instruction; she could read individual words but needed help to put them all together. G.F. would benefit from accommodations for testing; there should be no penalties for poor spelling, and she should be given additional time.

#### Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject

testimony as “inherently incredible” when “it is inconsistent with other testimony or with common experience” or “overborne” by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep’t of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

**For respondent:**

**Rachel Gerstein** was an unsettled witness, who at times seemed defensive and evasive, and often looked to respondent counsel for help answering questions. She did not have the qualifications to address Dr. Kestler’s report on a technical basis, but was credible when discussing G.F.’s academic background in the District based on her observations as a school social worker and case manager for G.F.

**Jessica Olson** was a highly-qualified and knowledgeable witness, who answered questions calmly, skillfully and with great detail. She fluently described the tests administered to G.F., and I found her to be a highly credible witness.

**Brianne Brannigan** was not a credible witness. She was a nervous witness who often lost her train of thought or had a hard time gathering her thoughts. She often giggled, and seemed unsure of her answers. For those areas she seemed more sure of, she offered only technical, non-explanatory answers. She had not been asked by the District to review the DCP report. Further, Brannigan was not an expert in dyslexia. She was not a doctor, had never issued a report diagnosing dyslexia or performed an educational evaluation for special education eligibility, or ever performed a psychological evaluation or done a comprehensive assessment. She did not have any certification from the State of New Jersey allowing her to diagnose dyslexia.

**Jennifer Zona** was a credible witness. She was careful with her answers. She took her time reviewing the documents she was being questioned about. She appeared very knowledgeable and experienced. Her job was to run the District special education programs and oversee the approximately 800 District special education students. She had worked on the eligibility for special education in over 1,000 cases, and displayed intimate knowledge of the various educational tests employed in such eligibility analyses. She calmly addressed persistent questioning in asserting that the Utah Estimator did not impose an arbitrary cap as to the number of students eligible for special education in the District.

**For petitioners:**

Dr. Lisa Kestler appeared to be an intelligent woman, who displayed an even temperament despite many interruptions during her testimony. Dr. Kestler was not deemed to be an expert in dyslexia; she was only a fact witness, and therefore one might only give weight to her testimony with regard to the facts in her report. She spent a great deal of time merely reading her report. She answered technical questions with technical, non-explanatory answers.

Regarding her credibility, it must be noted that Dr. Kestler was not trained in Orton-Gallagher. She never worked at a school. She was not a certified reading specialist. She had never served on a CST. She testified that there was a family history of dyslexia, but later revealed that the affected family members were great-uncles and second cousins, which were not immediate family. She never witnessed G.F. in a class situation. Dr. Kestler had no data from which to compare G.F. to her non-dyslexic peers.

It was questionable as to why Dr. Kestler administered the Wechsler Abbreviated Test, when she had testified that you should not employ the Wechsler Abbreviated Test to determine a disability such as dyslexia. She testified that Wechsler only gave an estimate of one's I.Q.

Most contradictory to her relevance to the within matter was that her report included no conclusion or recommendation that G.F. should be found eligible for special education and related services or that G.F. required a special education program.

As a result, I did not find Dr. Kestler to be a credible witness.

Accordingly, after carefully considering the testimonial and documentary evidence presented, I **FIND** the following to be the relevant and credible **FACTS** in addition to the above-referenced stipulated facts:

G.F. was able to follow along with her first grade class lessons; G.F. was able to work with a partner appropriately during a collaborative assignment; G.F. did not stand out from her general education peers and was making sufficient progress in her general education program to keep up with her peers; while G.F. may have had relative weaknesses in some areas, she was still learning new skills and retaining information; any difficulties G.F. may have had with coding, decoding, and reading comprehension did not adversely affect her educational performance.

On the Woodcock-Johnson Tests of Achievement IV, G.F. performed in the average to low-average range in basic reading skills, reading comprehension, oral expression, listening comprehension, mathematical calculation and problem solving, and reading fluency; on the two writing tests which Olson administered, G.F. performed in the low-average to average range; G.F.'s I.Q. was 91, at the low end of the average range, with a confidence interval of 86-97, that being the range of scores within which her true score would be likely to fall; the CST's psychological evaluation, as to cognitive ability, was consistent with the intelligence results reported by Dr. Kestler, who found G.F.'s IQ to be 89, just below the average range.

A severe discrepancy would be shown by a twenty-two point difference between a student's cognitive level/I.Q. score and current results from standardized tests in the eight areas listed in the regulations; there was a seventy-four percent (74%) confidence level that G.F. had a severe discrepancy, below the Utah Estimator requirement of ninety-three percent (93%) confidence level of a severe discrepancy for a determination that a student

has a SLD, and therefore there was no severe discrepancy for any of the SLD areas; the District's Specific Learning Disabilities Criteria stated that, per federal regulations, the severe discrepancy analysis would not be the sole criteria for determining special education eligibility; the CST considered data from sources in addition to the Utah Estimator, such as classroom observations, in determining eligibility.

G.F. was functioning in the average to low-average range in reading, writing, math, and oral language; a diagnosis of dyslexia would not automatically make a student eligible for special education; needing extra help in certain areas did not dictate that the student required special education; the 504 accommodations in place for G.F. were sufficient to address any ADHD diagnosis.

### **LEGAL ANALYSIS**

The issue is whether the District met its burden of proving that it substantially complied with all statutory and regulatory requirements when it determined that G.F. was not eligible for special education, or whether the decision that G.F. was ineligible resulted in the District failing to provide her with a free appropriate public education (FAPE).

When considering FAPE, the starting point is the Individuals with Disabilities Education Act (IDEA). IDEA was enacted to assist states in educating disabled children. It requires states receiving federal funding under the Act, such as New Jersey, to have a policy in place that ensures that local school districts provide disabled students with FAPE designed to meet their unique needs. See 20 U.S.C. § 1412; N.J. Const. art. VIII, IV, 1; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1 et seq., Hendrick Hudson Cent. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A 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, or secondary school education in the State involved; and d) are provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C. § 1401(9).

The issue herein is a threshold issue to be determined before considering whether FAPE has been provided. If G.F. was not eligible for special education and related services, IDEA would not be applicable, and the question of FAPE would be moot.

N.J.A.C. 6A:14-3.5 sets forth a three-prong test to determine whether a student qualifies for special education and related services. It states:

A student shall be determined eligible and classified “eligible for special education and related services” . . . when it is determined that the student has one or more of the disabilities defined in (c)1 through 14 below; the disability adversely affects the student’s educational performance and the student is in need of special education and related services. Classification shall be based on all assessments conducted including assessment by the child study team members and assessment by other specialists as specified below.

[N.J.A.C. 6A:14-3.5(c).]

Section 12 of New Jersey regulations sets forth the definition of “Specific Learning disability” (SLD) as:

“Specific learning disability” corresponds to “perceptually impaired” and means a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities . . . dyslexia . . .”

[N.J.A.C. 6A:14-3.5(c)(12).]

Petitioners asserted that in evaluating a student to determine whether Special Education and related services were necessary, a school district was required to “use a

variety of assessment tools and strategies to gather relevant functional and developmental information, including information . . . provided by the parent that may assist in determining whether a child is a student with a disability . . .” N.J.A.C. 6A:14-2.5. In its evaluation of a student, the school district would be required to assess the student in all areas of suspected disability. N.J.A.C. 6A:14-2.5(b)(3). The regulations further state that a “specific learning disability” can be determined when a “severe discrepancy is found between the student’s current achievement and intellectual ability” in any of several academic areas. N.J.A.C. 6A:14-3.5(c)(12)(i).

Petitioners further asserted that New Jersey regulations permit a school district to include the “Severe Discrepancy approach” amongst the data it considers when making the determination whether a student has a disability as defined by the Code. If a school district uses the “severe discrepancy approach,” it must adopt procedures that utilize a statistical formula and criteria for determining the “severe discrepancy” between the student’s current achievement and intellectual ability. N.J.A.C. 6A:14-3.5(c)(12)(iv).

Petitioners have argued that the respondent District failed to meet its burden of proof that G.F. did not have a SLD. Petitioners set forth that the United States District Court, District of New Jersey had declared it impermissible for a school district to solely rely upon a single statistical formula to arrive at its determination of whether a student was eligible due to a suspected SLD. In two separate decisions, V.M. v. Sparta Township Board of Education, Civ. No. 12-892 (KM) (D.N.J. July 3, 2014) and K.H. o/b/o J.B. v. S. Orange/Maplewood Bd. of Ed., Civ. No. 09-5294 (D.N.J. August 3, 2010 (Chesler, D.J.)), the United States District Court for the District of New Jersey determined a school district’s use of the severe discrepancy model as the sole determining factor violated “the decisional procedures and methods prescribed by the Individuals with Disabilities Education Act (IDEA) and its implementing regulations, both federal and state.” See, Page 1 of V.M. v. Sparta, citing to K.H. o/b/o J.B.

Petitioners have therefore argued that respondent used only one determining factor as to whether G.F. had a SLD, and per these cases, respondent’s eligibility decision was invalid.

Respondent was correct in arguing that neither of these cases are binding on the within tribunal, as these are unpublished decisions from a United States District Court. See R.W. v. Div. of Medical Assistance and Health Services and Ocean Co. Bd. of Social Services, OAL Dkt. No. HMA 06729-09 (2010).

Respondent further argued that the facts of those two unpublished cases were distinguishable from the facts in the within matter.

In K.H. o/b/o J.B., the parents filed for due process to contest the declassification of their child. The District Court concluded that the record did not support the ALJ's finding that the school had considered various factors in determining that the student was no longer eligible for special education, because the "only stated basis for declassifying J.B., according to the June 15, 2007, document declaring her to be ineligible for special education services, was that 'her scores were run through the estimator', which showed she did not meet eligibility criteria." Id. at 15.

Similarly, in V.M. v. Sparta, the parents appealed an OAL decision which upheld the declassification of B.M. based on a lack of a severe discrepancy. In overturning the due process decision, the District Court found that Sparta's documented severe discrepancy procedures mandated that the CST "may not determine that a pupil has a SLD unless the CST finds by a 'statistically sound' formula that there is a 1.5 standard deviation discrepancy between achievement and aptitude in one or more of eight learning categories." Id. at 59.

N.J.A.C. 6A:14-2.5 is clear that in conducting an evaluation, a board of education must use a variety of assessment tools and strategies to gather relevant functional and developmental information, including "information: i. Provided by the parent that may assist in determining whether a child is a student with a disability and in determining the content of the student's IEP. . . and 2. Not use any single procedure as the sole criterion for determining whether a student is a student with a disability or determining an appropriate educational program for the student. . ."



Here, the Ocean Township Board of Education's severe discrepancy procedure explicitly required that "[i]n accordance with federal regulations, the numerical 'severe discrepancy' cut-offs will not be the sole criterion for determining eligibility" (Exhibit R-33), therefore distinguishing the District's procedure from the unlawful procedures of Sparta and South Orange/Maplewood in the above-referenced cases, and putting it in compliance with the New Jersey Administrative Code.

The District utilized the Utah Estimator to calculate whether G.F. had a severe discrepancy. (Exhibit R-13). The Initial Eligibility Determination—Not Eligible notice for G.F. (Exhibit R-12) did not refer to the term "severe discrepancy" or make reference to the Utah Estimator, evidencing that the lack of a significant discrepancy was not the sole criterion used to determine G.F.'s eligibility for special education and related services.

In addition to the District's written procedures stating that the severe discrepancy analysis would not be the sole criteria for determining special education eligibility, the Eligibility Determination indicated in general terms what had been considered in making that determination. The Eligibility Determination stated that it was written as the result of an evaluation and an initial determination meeting. It stated that "a complete battery of assessments were administered to measure [G.F.'s] general learning aptitude and current academic achievement." The Eligibility Determination stated that "the team reviewed current work samples, teacher observations, and input from the general education teacher. . . reviewed and considered the evaluation provided from The Dyslexia Center of Princeton," and found that G.F. was "currently demonstrating progress" in her current, general education setting.

I **FIND** that a school district may not rely solely on a single criteria for determining special education eligibility, and **CONCLUDE** that respondent District did not improperly rely on a single criteria for determining special education eligibility in the within matter.

Aside from the “single criteria” argument, petitioners went on to state that an Eligibility Determination report must identify the particular findings in writing, citing N.J.A.C. 6A:14-3.4(h)(4), which states:

When a student is suspected of having a specific learning disability, the documentation of the determination of eligibility shall include a statement of:

- i. Whether the student has a specific learning disability;
- ii. The basis for making the determination;
- iii. The relevant behavior noted during the observation;
- iv. The relationship of the behavior to the student's academic performance;
- v. Educationally relevant medical findings, if any;
- vi. If a severe discrepancy methodology is utilized, whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services;
- vii. The determination concerning the effects of environmental, cultural or economic disadvantage;
- viii. Whether the student achieves commensurate with his or her age;
- ix. If a response to scientifically based interventions methodology is utilized, the instructional strategies utilized, and the student-centered data collected with respect to the student; and
- x. Whether there are strengths and/or weaknesses in performance or achievement relative to intellectual development in one of the following areas that require special education and related services; (1) Oral expression; (2) Listening comprehension; (3) Written expression; (4) Basic reading skill; (5) Reading fluency skills; (6) Reading comprehension; (7) Mathematics calculation; and (8) Mathematics problem solving.

Petitioners accurately referred to the “sparse information” contained in respondent’s Eligibility Determination as failing to comply with the extensive obligations contained in N.J.A.C. 6A:14-3.4 when respondent stated that G.F. “does not have a

disability.” The Eligibility Determination referred to “[a] complete battery of assessments” without specifying any details about those assessments. None of the District’s evaluations—educational evaluation (R-7), psychological (R-8) or Social Assessment (R-10)—had discussed the severe discrepancy methodology employed by the District. The Eligibility Determination did not indicate that the District used the severe discrepancy methodology to determine that G.F. was ineligible for special education services. The Eligibility Determination stated G.F. was not disabled but it provided no particular findings in support of that conclusion as required by N.J.A.C. 6A:14-3.4.

Specifically, if a severe discrepancy methodology was utilized, the Eligibility Determination would have to state whether there was a severe discrepancy between achievement and ability that was not correctable without special education and related services. The District’s Eligibility Letter failed to address this.

Additionally, the Eligibility Determination needed to address the effects of environmental, cultural or economic disadvantage; whether the student achieved commensurate with his or her age; the instructional strategies utilized and the student-centered data collected with respect to the student; and whether there are strengths and/or weaknesses in performance or achievement relative to intellectual development in one of the following areas that required special education and related services; (1) Oral expression; (2) Listening comprehension; (3) Written expression; (4) Basic reading skill; (5) Reading fluency skills; (6) Reading comprehension; (7) Mathematics calculation; and (8) Mathematics problem solving. None of these were specifically addressed in the District’s Eligibility Determination.

Further, N.J.A.C. 6A:14-3.4(h)(5) requires that each child study team member shall certify, in writing, whether his or her report was in accordance with the conclusion of the student’s eligibility; if his or her report did not reflect the conclusion of eligibility, the child study team member was to submit a separate statement presenting his or her conclusions. These requirements were not met by respondent’s Eligibility Determination letter.

I **CONCLUDE** that respondent's Initial Eligibility Determination—Not Eligible notice for G.F. (R-12) did not meet the requirements of N.J.A.C. 6A:14-3.4(h).

The issue then becomes whether the failure of respondent's Initial Eligibility Determination—Not Eligible notice for G.F. to meet the requirements of N.J.A.C. 6A:14-3.4(h) dictated that petitioners' prayer for relief be granted.

Petitioners' primary legal argument in its brief of August 21, 2020, was that respondent failed to meet its statutory burden to show that G.F. did not have a SLD because it simply issued a single-sentence rejection, stating in its Initial Eligibility Determination—Not Eligible from the meeting of December 3, 2018 (Exhibit R-12) that G.F. "does not have a disability" and thus is not eligible for special education and related services. Petitioners claimed that this statement, in addition to being insufficient, was contradicted by the reports of the Dyslexia Center of Princeton (Exhibit R-9). Petitioners asserted that respondent had failed to refute that report with any competent evidence, such as the documented classroom observations from G.F.'s teachers and instructors, but merely relied on the single criteria for determining special education eligibility.

Having concluded that the respondent District did not improperly rely on a single criteria for determining special education eligibility in the within matter, petitioners have essentially asked this tribunal to substitute its analysis of whether G.F. had a SLD for the analysis of the District, by asking that G.F. be deemed eligible for receive special education and related services and compensatory education "in light of the substantial evidence presented by the petitioners in the form of the November 2018 reports by the Dyslexia Center of Princeton (R-9) and the March & April 2019 reports of Children's Specialized Hospital (R-19)."

Accordingly, the evidence presented by both parties must be reviewed to see if there was a basis for respondent's conclusion that G.F. did not have a SLD which would have qualified her for special education eligibility.

While IDEA addresses those students with educational disabilities, being diagnosed with an educational disability does not automatically qualify that student for

special education. IDEA, in its definition of “child with a disability,” requires a disabling condition and a specific need for special education and services to address that disabling condition. 20 U.S.C. §1401(3); J.Q. v. Wash. Twp. Sch. Dist., 92 F. Supp. 3d 241, 246 (D.N.J. 2015) (quoting D.S. v. Neptune Twp. Bd. of Educ., 264 Fed. Appx. 186, 189 (3d Cir. 2008)). This is where the three-pronged test in N.J.A.C. 6A:14-3.5(c) would be applicable. First, the student in question must have a disability as defined in one of the codified categories. Second, there must be an adverse impact to the student’s educational performance as a result of that disability. Third, there must be a showing that the student needed special education.

Regarding the first prong, the student must have a disability as set forth in N.J.A.C. 6A:14-3.5(c). Though the criteria for a SLD specifically references dyslexia, there is a process for determining the SLD, which is a demonstration of a severe discrepancy between intellectual ability and academic achievement. Here, the CST did not find evidence that G.F. had such a significant discrepancy. Based on that, G.F. did not have a disability for purposes of special education eligibility. In addition to the Utah Estimator, the CST reviewed current work samples, teacher observations, and input from the general education teacher, and reviewed and considered the evaluation provided from DCP, and found that G.F. was “currently demonstrating progress in her current [general education] setting.”

G.F.’s intellectual ability fell between the high end of the low average range and the low end of the average range. Comparing the privately-conducted and CST intelligence testing, it appeared that G.F.’s academic achievement was at the expected level, considering her intellectual ability and her circumstances. As there was no significant discrepancy, the Board’s evaluation of academic achievement and intellectual testing confirmed that G.F. did not have a SLD.

The second prong related to an adverse impact to the student’s educational performance as a result of that disability. Here, G.F.’s 2018-19 report card showed that in her general education program she was performing at least in a satisfactorily manner in all subject areas. As set forth above, G.F. was able to follow along with her first-grade class lessons, she worked with a partner appropriately during a collaborative assignment,

did not stand out from her general education peers, and was making sufficient progress in her general education program to keep up with her peers.

Conversely, petitioners relied on reports from DCP and Children's Hospital. Having received no expert testimony on the veracity of the Children's Hospital reports, petitioners' claim that G.F. was eligible for special education due to a diagnosis of dyslexia was based on the report from DCP.

Petitioners provided no credible testimony or documentary evidence to support their proposition that G.F. met criteria to be classified as eligible for special education and related services. The proofs they put on did not demonstrate that G.F. has a disability under N.J.A.C. 6A:14-3.5 that adversely affected her educational progress and required special education and related services. Therefore, petitioners cannot defeat the expert testimony and documentary evidence from the District which established the propriety of the CST's determination that G.F. was not eligible for special education and related services. Petitioners' entire argument appeared to be based on the incorrect premise that a diagnosis of dyslexia or any documented weakness in reading automatically entitled G.F. to eligibility for special education and an Individualized Education Program (IEP). However, the private evaluation by Dr. Kestler included no conclusion or recommendation that G.F. should be found eligible for special education and related services or that she required a special education program. Rather, Dr. Kestler recommended that G.F. "enroll . . . in a research-based, data-driven dyslexia remediation program", without any suggestion that this remediation program should be provided by the District or that it needed to be delivered through an IEP.

Dr. Kestler's report also set out suggestions for educational accommodations and/or modifications for G.F., which specifically included a recommendation that G.F. should be provided with Orton-Gillingham-based phonics and fluency instruction on a daily basis. Orton-Gillingham was described by Dr. Kestler as the "gold standard" of interventions. Yet nowhere was it shown that Orton-Gillingham instruction could only be provided if G.F. was determined to be eligible for special education or if Orton-Gillingham was set out in an IEP. To the contrary, it was shown that the District provided G.F. with small group instruction in phonics and fluency which incorporated Orton-Gillingham-

based methodology through its general education programs in the 2018-2019 school year, and therefore respondent was correct in arguing that G.F.'s general education program in 2018-2019 provided the educational accommodations/modifications Dr. Kestler recommended.

Petitioners also argued that G.F. met the second prong of the test, that G.F.'s disability has had an adverse effect upon G.F.'s academic progress. Petitioners relied on an October 12, 2018, Student Performance and Observation Report for G.F., drafted by Amy L. Steckhahn, a Special Education Teacher employed by respondent, which identified early academic concerns regarding G.F.'s reading ability. However, Ms. Steckhahn did not testify and her letter regarding G.F. (Exhibit R-5) was not admitted into evidence.

The Social Assessment prepared by Ms. Gerstein for G.F. indicated that G.F. was having difficulties with decoding, reading comprehension, and retention of material. Yet these deficiencies had not been directly correlated to dyslexia. Teachers noted that some of G.F.'s deficiencies appeared similar to dyslexia, but they did not conclude G.F. suffered from dyslexia. G.F.'s most recent report card for the 2019-2020 school year reflected several areas which were "in need of improvement" but nothing presented by petitioners tied these areas to dyslexia. Nothing has been provided which definitively indicated that dyslexia had a negative impact on G.F.'s academic progress. But again, G.F.'s progress in her general education program was further supported in the record by her 2018-2019 report card, which showed that she was performing at least in a satisfactory manner in all subject areas. This was the report card in closest proximity to the December 2018 CST decision that G.F. was not eligible for special education and related services.

Accordingly, it was not clear that G.F. met the second prong of the three-prong test.

Having not met the first two prongs of the test, one need not fully analyze the third prong. However, respondent offered a valid argument that the third prong was not met. The December 10, 2018, eligibility report indicated that G.F. was showing progress in the general education setting offered by the District. (Exhibit R-12). A student with a

diagnosed disability who was demonstrating progress in general education was found to not meet eligibility criteria for special education in the matter of M.S. and D.S. o/b/o N.S. v. Randolph Twp. Bd. of Educ., 2019 U.S. Dist. LEXIS 169184 (D.N.J. 2019); M.S. and D.S. o/b/o N.S. v. Randolph Twp. Bd. of Educ., OAL Dkt. No. EDS 04386-17 (July 16, 2018).

Having not met all three prongs of the test for special education eligibility, I **CONCLUDE** that the CST's determination that G.F. did not meet eligibility criteria for special education and related services as of December 4, 2018, was proper.

### **CONCLUSION**

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the District met its burden of proving that it sufficiently complied with all statutory and regulatory requirements when it determined that G.F. was not eligible for special education as of December 4, 2018, and that the District had been providing G.F. with a free appropriate public education (FAPE).

### **ORDER**


I hereby **ORDER** that respondent's determination that G.F. was not eligible for special education and related costs as of December 4, 2018, is hereby **AFFIRMED**, and that this due process appeal is hereby **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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 (2017). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this



concern should be communicated in writing to the Director, Office of Special Education Programs.

July 28, 2021  
DATE

  
\_\_\_\_\_  
**JEFFREY N. RABIN, ALJ**

Date Received at Agency \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

JNR/dw

**APPENDIX**

**WITNESSES**

**For respondent:**

Rachel Gerstein  
Jessica Olson  
Brianne Brannigan  
Jennifer Zona

**For petitioners:**

Dr. Lisa Kestler

**EXHIBITS**

**Respondent Exhibits (used jointly):**

- R-1 Wonders Phonological Awareness Score Sheet
- R-2 Letter from K.F. to Zona, dated October 4, 2019 [sic]
- R-3 Case Manager Assignment Notice, dated October 5, 2018
- R-4 Initial Identification and Evaluation Planning invite, dated October 5, 2018
- R-6 Initial Identification and Evaluation Planning proposal, dated October 15, 2018
- R-7 Olson Educational Evaluation
- R-8 Chavis Psychological Evaluation on November 7, 2018
- R-9 K.F. letter with Dyslexia Center of Princeton report, dated November 19, 2018
- R-10 Gerstein Social Assessment, dated November 20, 2018
- R-11 Request for additional assessment, dated December 3, 2018
- R-12 Initial Eligibility Determination—Not Eligible, from meeting of December 3,

2018

- R-13 Utah Estimator
- R-14 Email to K.F. dated December 5, 2018
- R-15 Wonders Phonological Score Sheet, dated December 6, 2018
- R-16 I&RS Action Plan, dated December 12, 2018
- R-18 I&RS Action Plan, dated January 17, 2019
- R-20 Sight Words letter, dated May 6, 2019
- R-21 Diagnostic Inventory Record Form, dated May 16, 2019
- R-22 Oral Reading Fluency, dated December 11, 2018, and May 7, 2019
- R-23 Basic Skills Criteria, dated May 17, 2019
- R-24 Math Testing 2018-19 school year
- R-25 Section 504 Accommodation Plan
- R-26 2018-19 report card
- R-27 Student Assessment Sheet, dated October 9, 2018, and June 13, 2019
- R-28 Wonders Phonological Score Sheet, dated June 20, 2019
- R-30 DIBELS 8<sup>th</sup> Booklet for Fall 2019
- R-31 DIBELS 8<sup>th</sup> Cut scores
- R-32 I&RS Action Plan, dated September 17, 2019
- R-33 Specific Learning Disability Criteria for Ocean Township
- R-35 Zona resume
- R-36 Olson resume
- R-37 Gerstein resume