



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 01022-20

AGENCY DKT. NO. 2020-31057

G.H. AND M.H. ON BEHALF OF D.H.,

Petitioner,

v.

MONTCLAIR TOWN BOARD OF EDUCATION,

Respondent.

Beth A. Callahan, Esq., for Petitioners (Callahan & Fusco, LLC, attorneys)

Katherine A. Gilfillan, Esq., for Respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: July 15, 2021

Decided: September 17, 2021

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a due process petition dated December 20, 2019, with the Office of Special Education Policy and Dispute Resolution in the Department of Education.

The matter was transferred to the Office of Administrative Law (OAL) as a contested matter on January 22, 2020.

Pursuant to N.J.A.C. 1:1-13.1 et seq., a telephone prehearing conference was held in the above-entitled matters on February 24, 2020, and a prehearing Order was issued the same date.

The hearing was held on September 21, 2020, September 22, 2020, September 30, 2020, October 21, 2020, and February 9, 2021.

The record remained open to permit the parties to submit closing briefs.

Closing arguments were made on July 15, 2021, whereupon the record closed.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Ruby Campbell testified as an expert in school social work, IEP development, case management for pre-school students and programming for educationally disabled students, as follows:

Ms. Campbell is employed by Montclair Public Schools (Respondent or District). She is familiar with D.H. She is his case manager. He was referred to the Child Study Team (CST) on March 4, 2019 for an evaluation. The evaluation planning meeting occurred on March 14, 2019. In attendance at the meeting were the school psychologist, learning consultant, speech and language therapist, the parents and the Early Intervention service coordinator.

Ms. Campbell was responsible for developing an Individualized Educational Plan (IEP) for D.H. Petitioners provided records for the evaluation planning meeting. D.H. was found eligible for Early Intervention. The initial IEP was updated to increase speech services at the request of the parents.

The assessment of D.H. was done by a review of the records provided and through observation. D.H. attended Mothers Morning Out (MMO), a private pre-school. D.H. was observed at MMO by the school psychologist, the learning consultant and the

behavioral specialist. Also at MMO were the speech and language therapist, the physical therapist and the occupational therapist. D.H. attended MMO for two hours per day, two days per week. At MMO D.H. had the support of an aide. Ms. Campbell did not observe D.H. at MMO.

Ms. Campbell learned that D.H. was autistic and had significant needs and behavioral challenges. His parents decided to place him in private therapy and not accept early intervention.

She decided to have D.H. observed at MMO and at home. His home program consisted of a one on one ABA for thirty hours per week. He also received private speech therapy three times per week for thirty minutes; Occupational Therapy for forty-five minutes a week and ABA instruction privately for thirty hours per week.

The evaluations provided by the parents were discussed at the June 2019 IEP meeting. D.H. was found eligible to receive special education and related services. The IEP proposed that D.H. be placed at the Nishuane Elementary School. The program here provided for more support than other pre-school programs. This was discussed with the parents.

The parents visited the program the day after the IEP meeting. Ms. Campbell was not present. Ms. Balsamo and Ms. Soun were present.

The parents were concerned about D.H. moving to a larger building and away from his private therapy.

Ms. Campbell stated that the IEP goals were created to address the educational and functional needs with very specific objectives that the therapists and teachers try to ensure are met in order to achieve the goal.

Ms. Campbell stated the evaluation information utilized at the IEP meeting was provided by the parents.

The parents were very cooperative during the valuation and planning process, and shared relevant documents with the CST. They consented to have an evaluation done by the team. They consented to observations at home and at MMO.

The team did not see D.H. without an ABA trained aide. The CST did not perform any standardized evaluations. Ms. Campbell admitted that a standardized evaluation would have given the CST a look at D.H.'s behavior when he did not have ABA support, and get a better idea of what his significant behaviors were.

The IEP does not indicate how many hours the BCBA would supervise the program proposed for D.H. There is no reference in the IEP to parent training or home programming. The IEP has no behavior plan.

The parents advised that D.H. was receiving intensive ABA services in his home program. A VB-MAPP assessment had been conducted on D.H. in 2018.

The IEP does not state how many hours of direct ABA instruction D.H. would receive had he entered the District in July 1, 2019. There was no behavior plan or reinforcement plan.

It is not often that the District uses evaluations provided by the parents and not do their own. The District used the information provided as well as the communication with the therapist. The District did not think it was in D.H.'s best interest to do a standardized test.

The District had the report of Erica Tober prior to the IEP meeting. It contained goals and objectives. The District did not put a significant number of them in the IEP. Ms. Campbell stated the report was a year old and were dated.

Jill Soun testified as an expert in psychological assessments, special education programming and educational programming for students with autism, as follows:

Ms. Soun is a school psychologist for District. She is also a case manager. She has done so for eleven years. Ms. Soun is assigned to the ABA program and she works at both Bradford and Nishuane schools.

Ms. Soun's current responsibilities are at Nishuane and Bradford schools. She case manages the students in the ABA program. She is responsible for monitoring all IEP related tasks. She works very closely with the District behaviorist and the teachers.

She has administered psychological evaluations to students with autism. She does approximately fifteen per year on average. She is familiar with applied behavioral analysis (ABA).

There are two pre-school autism programs in the District. Both are at the Nishuane school. The classroom operates all the time on ABA principles. Sometimes that means discrete trial. Other times it means incidental learning, facilitation of social skills. Ms. Soun went on to describe the program. She also described the role of the para professional in the classroom and what training they receive.

The parents had sent an email with questions after the IEP meeting. She responded to the parents. She spoke with them via telephone. She was unsure if she had seen the proposed IEP at this point. She has since reviewed it.

A VB-MAPP assessment would show the current levels a child is functioning at and would help guide the goals and objectives. The goals and objectives should be in the IEP. If a student is not making progress the teaching approach is shifted. The behaviorist and teacher work together.

When she spoke with the parents they discussed the method of transportation to the school. They discussed a full day versus a half day. There was another email where the father asked about behavioral intervention, which was discussed. Ms. Soun did not recall that she was told that D.H. had a behavioral intervention program with his home program. At the time she was not aware that D.H. had an ABA home program.

Parent training is available upon request.

She was present when Dr. Fiorile, the parents' expert, visited the program. Dr. Fiorile observed the program for one hour. Sharon Balsamo, the behaviorist, was also present. Dr. Fiorile, in her report, took exception that no evaluations of D.H. were performed. Ms. Soun, in her opinion, did not think there was anything wrong with the evaluators conducting their assessment of D.H. by record review and observation.

Dr. Fiorile also noted in her report that she did not see any data being taken by the teacher or the aide. Ms. Soun stated this is not true, that data is being taking all day.

Ms. Soun never met D.H., or did an evaluation. The proposed IEP appears appropriate based upon the documents she reviewed.

If there is no goal stated in an IEP the District has no obligation to work on it.

She did not discuss clinic meetings with Dr. Fiorile during her visit.

The IEP does not specify what instruction would be delivered in a discrete trial program. The IEP does not state how much time D.H. would spend in a group. The IEP has no reference to parent training. The IEP does not state a specific number of hours for BCBA supervision of the program.

Sharon Balsamo testified as an expert in applied behavior analysis in autism, as follows:

Ms. Balsamo is a behavior specialist for the District. She has certifications as Teacher of the Handicapped and Elementary School Teacher. She is a board-certified behavior analyst. Ms. Balsamo has worked in the District for sixteen years.

Ms. Balsamo's responsibilities include: working with teachers in the classroom; consulting with teachers; monitoring students' progress; monitoring students' behavior

plans; data collection; assisting with IEP development with the case manager for goals and behavioral goals; and parent training. She is also required to attend clinic meetings with parents. These are monthly meetings to update parents on the child's progress. She also trains the para professionals in consultation with the teacher.

Ms. Balsamo is currently assigned to the ABA classrooms at Bradford School, the ABA preschool classrooms at Nishuane School, and one classroom at the developmental learning center, totaling seven classrooms. All seven classrooms are autism classrooms. The program at the Nishuane School is preschool. She trains the para professionals that work in the autism programs.

Ms. Balsamo stated that discrete trial instruction is not the only ABA based methodologies used. She went on to describe the other methodologies. She described the block scheduling utilized.

Ms. Balsamo observed D.H. at home as part of an evaluation for the initial IEP. She participated in this IEP meeting.

There is a program book for D.H. that contains all of the programs they teach him, based on the goals in his IEP. The program book lists specific teaching strategies, teaching procedures, reinforcement schedules, error-correction procedures, and graph data on his performance. The assessment used in the program that was proposed for D.H. is VB-MAPP. The VB-MAPP is typically administered to a new student upon entry.

This is to see how the student is functioning in the classroom. If a student is comfortable and compliant administration of the VB-MAPP could take a couple of days. If the student has challenging behaviors it could take several weeks.

A child would require a behavior intervention plan if behavior was impeding learning, or that of other students in the classroom.

Prior to the IEP meeting Ms. Balsamo was scheduled to observe D.H. at his preschool program. He was absent that date. Ms. Balsamo spoke to his teacher and

asked some questions. Ms. Balsamo also spoke with the parents and reviewed records provided by the parents. She reviewed documentation from an ABA program D.H. was undergoing. Ms. Balsamo observed D.H. in his home ABA program.

D.H.'s mother and his BCBA, Ms. Tober, and another individual visited the Nishuane school. They were concerned about the schedule because D.H. had not yet attended a school program. They also asked about the number of hours.

Ms. Balsamo discussed D.H.'s behaviors with Ms. Tober during her observation at his home program.

D.H. was attending preschool called Mother's Morning Out (MMO). When he attended one of his therapists was with him. His teacher at MMO indicated that he had difficulty staying in the group. The therapist often took him out of the classroom.

Ms. Tober had indicated she wanted D.H. to attend a good ABA school.

Ms. Balsamo reviewed the IEP. The parents had expressed concerns with the goals and objectives contained in the IEP. She addressed the concerns with the parents via email.

Ms. Balsamo opined that the proposed IEP offered D.H. the opportunity to make meaningful educational progress. She stated the goals are age appropriate and address his skill deficits.

Ms. Balsamo was trained at Alpine Learning Group and agreed that Alpine was an intensive one to one ABA based program. Ms. Balsamo is BCBA in charge of the ABA program that D.H. may have attended. She is responsible to make sure it meets ABA standards. She does not work directly with the students. She works with the teachers and para professionals and monitors their progress. She reviewed the process as to how para professionals are trained and what their qualifications are.

Monthly parent clinics are not set forth in the IEP. The clinics are part of the program. Ms. Balsamo did not attend all the monthly clinics. Clinic meetings are usually about thirty minutes.

The IEP did not contain a goal for D.H. to independently unpack and hang up his coat. It did not contain a toileting goal.

Ms. Balsamo agreed that D.H. needs a behaviorally based program to have skill acquisition.

Jennifer Finnerty testified as an expert as a school psychologist, a supervisor of pupil services and special education programming, as follows:

Ms. Finnerty is the supervisor of student services for the Montclair Public Schools. A majority of her role is in the preschool population and students with autism. Ms. Finnerty reviewed her background, training and experience.

As supervisor of the ABA programs in the District she is responsible for observing and evaluating classroom staff. She does unannounced observations of the classrooms and gives feedback to the teachers. She reviews student data collection books and meets with teachers. She also meets with the BCBA and case manager. She attends IEP meetings at times when requested.

She is familiar with D.H. as he was slated to attend Nishuane School. She is generally familiar with the program proposed for D.H. He was to attend an ABA classroom for a full day with one to one instruction. A full day is 9:00 a.m. to 3:00 p.m.

Class size does not exceed six students with one to one instruction. Each student has a program book, which are used to record data regarding student skill acquisition. She explained how the goals and objectives in the IEP are incorporated into the student's program.

The ABA program proposed for D.H. offers the opportunity for instruction in school, home and community setting. Parent training would be provided if needed.

Ms. Finnerty is aware the District did not perform a VB-MAPP prior to the proposed IEP. She thought it best to do the VB-MAPP upon entry into the program.

She is not concerned that the IEP contains no parent training goals and objectives.

When the parents requested an increase in speech services the District agreed. Ms. Finnerty did not learn that D.H. would not attend the District's preschool program until the first day of the 2019/2020 school year.

Ms. Finnerty has never met D.H. The IEP contains no parent training. She stated parent training is part of the ABA program.

The IEP does not reference community based learning. It does not contain a list of services D.H. would receive from the BCBA. Ms. Finnerty is not a BCBA.

The IEP does not identify behaviors based upon the District's evaluations. There is no behavior intervention plan. There is no reinforcement system. There is no plan to transition D.H. from his home program to the school.

Petitioners' Case

Erica Tober testified as an expert in Applied Behavior Analysis, the development of programs for children with autism using Applied Behavior Analysis and special education for students with autism using ABA, in her professional capacity as a consultant, as follows:

Initially Ms. Tober discussed her training and schooling. She maintains her own business that works with children with autism using Applied Behavior Analysis methodology. She is a BCBA.

When she first receives a request for services an evaluation is set up where a VB-Mapp is conducted.

She became acquainted with D.H. when the parents reached out to her. He was diagnosed with autism. She set up an evaluation and conducted a VB-MAPP in February of 2018. D.H. was twenty months old at the time.

A VB-MAPP assesses a child's abilities from ages zero to four years. There are three sections: zero to eighteen months; eighteen months to thirty months; and, thirty months to four years. She did the VB-MAPP immediately as she wanted to know D.H.'s skill level and what skills he needed to be taught. The VB-MAPP showed D.H. scored 8.5 points out of a possible 105. His level of functioning was zero. He had severe difficulties with expressive and receptive language. He could not speak. His autism impacted D.H. severely in all areas of development. He engaged in behaviors that were dangerous.

She wrote a treatment program for D.H. She continues to run the home program for D.H. He had between thirty and forty hours of ABA programming at the time he was eligible for services from the Montclair Board of Education.

In Spring of 2019 she was working on toilet training, using a fork, language skills, labeling objects. One of D.H.'s main goals was cooperating with new things. When confronted with new things D.H. would have a tantrum.

In the Spring of 2019 Ms. Balsamo, the District BCBA, observed D.H. in his home program. The observation lasted about forty-five minutes. Ms. Tober spoke to Ms. Balsamo about D.H.'s history, current behaviors and his programming. Ms. Balsamo did not request any documents.

Ms. Tober attended the IEP meeting at the parents' request. The District did no evaluations. This concerned her. It is not possible to develop a program for a student with autism without doing evaluations. She stated at the IEP meeting that cooperation

goals and objectives should be in the IEP as D.H. has a history of engaging in tantrum and destructive behaviors when new materials are presented to him.

Ms. Tober stated a BCBA needs constant involvement to remediate destructive behaviors and tantrums. A special education teacher does not have extensive training in trying to figure out why the behavior occurs and the functions of behavior. The BCBA should be in the classroom.

Ms. Tober explained the methods used in toilet training D.H. and the detail it required. D.H. required a systematic approach to toilet training using reinforcement of his favorite things to get him to use the bathroom. In her experience this was an extremely complex process.

Ms. Tober, together with petitioner G.H. and Rachel Marlowe, her assistant director, observed the District program at the Nishuane School. This was in June 2019. The observation lasted thirty minutes.

Ms. Tober reviewed the IEP. She opined that it was not appropriate for D.H. She was concerned that the IEP stated that behavioral interventions were not appropriate at the time. Ms. Tober opined that D.H. did need behavioral interventions. He also needed a reinforcement system, which was not in the IEP. D.H. needs constant supervision. The IEP does not set forth a program of ABA. The objectives in the IEP are not well defined.

Ms. Tober does parent training in the home program. She taught the parents how to do discreet trial training. She went on to describe what that is. Parent training was two times per month. A program without parent training would not be appropriate.

G.H., Petitioner and father of D.H., testified as follows:

He is the father of D.H. He first noticed D.H. was missing virtually all of his key milestones by about sixteen months. The parents consulted with the pediatrician. They went to a developmental neurologist. D.H. was diagnosed with Autism Spectrum

Disorder. It was recommended that D.H. receive significant amounts of ABA and therapy.

The parents decided to forego the early intervention program and chose to do a home ABA program. This home program was run by Ms. Tober. It started as D.H. was approaching two years of age.

G.H. described the difficulties presented by D.H. with his behaviors, such as throwing objects and head banging. Initially there was a large number of parent trainings.

As one problematic area subsides another one surfaces. The training has allowed the parents to try and use ABA techniques in addressing D.H.'s behavior.

The parents contacted the District. They wanted to get D.H. into the right school so he could continue his development in an appropriate setting. He attended an evaluation planning meeting on March 14, 2019. The parents understood that the district would do an adequate analysis to ensure D.H. would have an appropriate education. The parents provided the District with information when requested. The parents did not decline their consent to any evaluation.

He also attended an IEP meeting on June 18, 2019. Erica Tober, Rachel Marlowe and Lori Caplan were in attendance. The parents brought them along to listen and learn. At the meeting the school provided an overview of the program and presented the IEP. D.H.'s weaknesses and strengths, and how the program would address them, was not described at the meeting. Parent training was not discussed. There was no clarity as to how much time the BCBA would spend with D.H. At the meeting he did not raise any concerns about the IEP.

After the meeting Ms. Tober and Ms. Marlowe expressed very significant concerns that this was not appropriate for D.H. It was not specifically tailored towards him. The next day his wife observed the program. The parents did not sign off on the IEP. A number of questions regarding the IEP were submitted. This was done with the

assistance of Ms. Tober. The responses were that the District would address them when D.H. starts school. The parents decided to continue with the home ABA program and not enter D.H. in the Extended School Year (ESY) at this time. It was in a different location than the ABA program proposed in the IEP. He advised the CST of this decision.

The parents spoke with other individuals, including Carrie Kahana, the executive director of SEARCH Learning Group. The parents did not place at SEARCH as they could not afford it.

He addressed concerns with a safe space for D.H. He also expressed concern about transportation to school on a bus, taking off his coat and going to the restroom. Everything is a significant challenge for D.H.

After meeting with Ms. Kahana the parents informed the District that D.H. would not be attending the program at Nishuane. They kept D.H. in his home ABA program.

The parents biggest concerns were lack of specific behavior intervention reinforcer and the lack of specificity; the lack of direct BCBA supervision.

Carol Fiorile, Ph.D., BCBA-D, testified as an expert in applied behavior analysis, the development of IEP's for children with autism, and special education of children with autism using applied behavior analysis, as follows:

Dr. Fiorile set forth her credentials, education and experience. She then described applied behavior analysis and its relationship to children with autism.

She became involved with petitioners in November of 2019. Dr. Fiorile was asked by the parents to observe D.H., review his program book, meet with his home programmers, and to observe the recommended program at the school. Dr. Fiorile observed two classes in the Montclair program. Dr. Fiorile prepared a report (P-13, dated 2/5/20) as to the same. She also reviewed the proposed IEP for D.H. Dr. Fiorile recommended that D.H. attend an intensive program that implements with procedural

integrity, under the daily supervision of a BCBA, in order to supervise the program, develop programming, and monitor his progress. She also recommended a ten hour home program and a thirty day, full-day extended school year program. She recommended BCBA supervision for five hours per week in the school program. The home program would also require BCBA supervision. Her recommendations were made as D.H. presented with significant challenging behaviors, including elopement. D.H. had to be carefully monitored.

Dr. Fiorile opined that the program proposed in the IEP did not meet the criteria of an intensive ABA program. It did not have a behavior intervention plan, which Dr. Fiorile termed “ridiculous”, as D.H. had documented behavior problems, which are mentioned in the IEP and were observed during the observations conducted by the District. The IEP did not guarantee how much time the District BCBA would spend working with D.H. It did not specify how much one-to-one instruction D.H. would receive.

Dr. Fiorile described what is needed to develop and IEP for a child with autism, which would include a battery of standardized evaluations and observations.

Dr. Fiorile opined that it would be “impossible” for D.J. to make meaningful educational progress should the proposed IEP been implemented.

Prior to testifying, Dr. Fiorile reviewed documents generated by Ms. Tober. She did not look at Ms. Tober’s graphs as the data contained therein was inaccurate. She did not review the actual VB-MAPP administered by Ms. Tober. She relied upon the report generated by Ms. Tober.

Dr. Fiorile testified that the development of an IEP using previous evaluations depended upon how close in time they were to when the IEP was developed.

Eric Rozenblat, Ph.D., BCBA-D, testified as follows:

Dr. Rozenblat has a doctorate degree in applied behavior analysis from Caldwell University. He has been working with students with autism for about twenty years.

He has worked at the Institute for Educational Achievement (IEA) since 2009. He has been the executive director since 2015. IEA uses a ABA program. IEA is accredited by the New Jersey Department of Education as an approved school with students with disabilities. IEA applies a one-to-one ratio of instructor to student. Each classroom has a teacher certified as a special education teacher.

Petitioners visited IEA as they were interested in the program. An intake was conducted with the family. Dr. Rozenblat went on to describe the intake process. Part of that is him observing the child working with IEA trainers. This is videotaped.

It would not be possible to develop a program without observing the child.

The IEA program is five and three quarter hours per day, from 9:00 a.m. to 2:45 p.m., totaling twenty-eight and three quarter hours per week. The program also includes parent training, which Dr. Rozenblat went on to describe. He did not believe a program without parent training would be appropriate.

IEA rarely uses the VB-MAPP as over their twenty-five year history they have developed their own level of assessment individualized to meet the needs of the student they are assessing.

M.H., Petitioner and mother of D.H., testified as follows:

She is the mother of D.H. At the time he was turning three years of age the parents noticed he was missing milestones and had out of control behavior. D.H. was significantly impaired in all aspects of his development. He had, and continues to have, elopement behavior. Some of his behaviors have improved. A majority are the same.

She observed the program offered by the District. She met with Ms. Balsamo and was introduced to a teacher.

During the observation she noticed a student having a tantrum. She inquired of Ms. Balsamo if there was a safe place to put D.H. if that situation were to occur. The reply was there was not a safe place, but perhaps a mat could be provided.

M.H. informed Ms. Balsamo about D.H.'s specific eating specifications and problems down to texture, size and temperature of food. Ms. Balsamo was unsure if the school could accommodate this.

M.H. also observed the students go to the gymnasium. The entire visit lasted about one hour.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. D.H. is currently four years of age.
2. D.H. was diagnosed with Autism Spectrum Disorder on February 21, 2018, by Dr. Leonid Topper. (R-3)
3. Petitioners had a home ABA program for D.H. that was administered by Erica Tober, which consisted of 30 hours or more of ABA programming under the supervision of Ms. Tober, a BCBA. (R-8)
4. Petitioners attended an Evaluation Planning Meeting with the District on March 14, 2019. (R-3)
5. Petitioners consented to the following evaluations requested by the District: Social History; Behavioral Observation (Review of Records, Observation); Educational Evaluation (Review of Records, Observation); Psychological Evaluation (Review of records, Observation); Occupational Therapy (Review

- of Records, Observation); Physical Therapy Evaluation; Speech/Language Evaluation (Review of Records, Observation). (R-3)
6. Petitioners provided the District with the following evaluations that they had done for D.H.: Occupational Therapy dated July 6, 2018 (R-4); Pediatric Neurodevelopmental Evaluation dated March 16, 2018 (R-5); Letter dated February 27, 2019 from Kathleen Selvaggi Fadden, MD, with follow up notes (R-6); Pediatric Speech Language Evaluation dated March 25, 2018 (R-7); Treatment and Behavior Plan prepared by Erica Tober dated February 28, 2018 (R-8) ; Summit Medical Group records for D.H. (R-9); Request for Services from Summit Medical Group dated February 21, 2018 (R-10); Comprehensive Report for D.H. from Dattelle Developmental dated February 18, 2019 (R-11).
 7. The District observed D.H. in his home ABA program on May 5, 2019. (R-12 and R-17)
 8. D.H. was observed by the District at Mothers Morning Out (MMO) a preschool program D.H. attended. The observation occurred on March 27, 2019. (R-13)
 9. The District observed D.H. at speech therapy session on May 8, 2019.
 10. The District did not do any evaluations of D.H., but relied upon the evaluations and reports supplied by the petitioners, and the observations of D.H., in the preparation of the proposed IEP.
 11. An IEP meeting was held on June 18, 2019, and a proposed IEP was presented to the petitioners. (R-15 and R-16)
 12. The petitioners had many questions regarding the IEP, and submitted the same to the District via various emails, which were responded to in the same manner. (R-20, R-21, R-22, R-23, R-24, R-25, R-26, R-27 and R-28)
 13. The parents were not satisfied with the responses to their questions and opted not to enroll D.H. in the District but continue him in his home ABA program.

14. On November 11, 2019, Dr. Carol Fiorile, petitioners' expert witness at the hearing, observed the pre-school ABA classes at Nishuane School. (R-19 and P-13)
15. Dr. Fiorile prepared an Independent Educational Review dated February 5, 2020. (P-13)
16. D.H. presents with the following behaviors and needs: impaired sensory processing, impaired direction following, decreased sensory seeking behaviors and inability to sit still (R-4); impairment with social interaction, impairment in the use of non-verbal behavior, impairment of communication including language development, lack of spontaneous imaginative play (R-5); delay in both expressive and receptive language skills (R-7); severely impaired social skills (R-8). The above is not a full comprehensive list of his deficits.
17. The proposed IEP does not specifically address many of D.H.'s behaviors, deficits and needs. It does not have a behavior intervention plan. It does not have a toileting plan. It does not define how much time the BCBA will provide to the classroom. It does not address his eloping behavior. It does not provide a safe place when D.H. has a tantrum. It did not specify how much one-to-one instruction D.H. would receive. (R-16)
18. D.H. requires an intensive ABA program that offers 25 to 30 hours per week of individualized instruction under the supervision of an BCBA. (P-13)
19. The IEP does not offer this. The IEP is a generic document not tailored to the specific needs of D.H.
20. The IEP fails to offer FAPE.
21. Petitioners visited IEA with D.H. as petitioners were interested in the same for D.H. An intake was conducted. IEA is accredited by the New Jersey Department of Education as an approved school with students with disabilities. IEA applies a one-to-one ratio of instructor to student. Each classroom has a teacher certified as a special education teacher. (Tr. 2/9/21, pg. 14, lines 3-6; pg. 16, lines 17-23; pg. 17, lines 16-20)
22. IEA offers an intensive ABA program as recommended by Dr. Fiorile. (P-13)

LEGAL ANALYSIS AND CONCLUSION

Individual With Disabilities Act

Federal funding of state special education programs is contingent upon the states providing a “free and appropriate education” (FAPE) to all disabled children. 20 U.S.C.A. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C.A. §§ 1400 et seq. “[T]he IDEA specifies that the education the states provide to these children ‘specially [be] designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.’” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). 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.A. § 1412(a)(1)(A), (B). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district “maximize the potential” of the student but requires a school district to provide a “basic floor of opportunity”. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 3047, 73 L. Ed. 2d 690, 708 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the child’s education plan provides for “significant learning” and confers “meaningful benefit” to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (internal citations omitted).

As noted in D.S., an individual education plan (IEP) is the primary vehicle for providing students with the required FAPE. D.S., supra, 602 F.3d at 557. An IEP is a

written statement developed for each child that explains how FAPE will be provided to the child. 20 U.S.C.A. § 1414(d)(1)(A)(i). The IEP must contain such information as a specific statement of the student's current performance levels, the student's short-term and long-term goals, the proposed educational services, and criteria for evaluating the student's progress. See 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(VII). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and "be measurable" so both parents and educational personnel can be apprised of "the expected level of achievement attendant to each goal." N.J.A.C. 6A:14-3.7(e)(2). Further, such "measurable annual goals shall include benchmarks or short-term objectives" related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The school district must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C.A. § 1414(d)(4)(A)(i).

A due process challenge can allege substantive and/or procedural violations of the IDEA. If a party files a petition on substantive grounds, the Administrative Law Judge (ALJ) must determine whether the student received a FAPE. N.J.A.C. 6A:14-2.7(k). If a party alleges a procedural violation, an ALJ may decide that a student did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) caused a deprivation of educational benefits. Ibid. In the instant matter petitioners allege substantive violations of the IDEA.

This tribunal must determine if the June 18, 2019 IEP afforded FAPE to D.H. in the least restrictive environment. 20 U.S.C.A. § 1412(a)(1). J.T. v. Dumont Public Schools, 438 N.J. Super. 241, 257 (App. Div. 2014)(citing Lascari, supra, at 33).

In Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, 1001 (2017), the United States Supreme Court construed the FAPE mandate to require school districts to provide "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Court's holding in Endrew F. largely mirrored the Third Circuit's long-established FAPE

standard, which requires that school districts provide an educational program that is “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential and individual abilities.” Dunn v. Downingtown Area Sch. Dist. (In re K.D.), 904 F.3d 248, 254 (3rd Cir. 2018) (quoting Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3rd Cir. 2012)). In addressing the quantum of educational benefit, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the IEP provides for “significant learning” and confers “meaningful benefit” to the child. Endrew F., 137 S. Ct. at 1000–01; T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 247 (3d Cir. 1999), superseded by statute on other grounds as recognized by P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988). Hence, an appropriate educational program will likely “produce progress, not regression or trivial educational advancement.” Dunn, 904 F.3d at 254 (quoting Ridley, 680 F.3d at 269).

The IDEA’s FAPE requirement also includes a mainstreaming component, requiring education in the least restrictive environment. S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 265 (3rd Cir. 2003); 20 U.S.C. §1412(a)(5)(A). “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” S.H., 336 F.3d at 265 (quoting Carlisle, 62 F.3d at 535).

The District has failed to carry its burden of proof and burden of production in the instant matter. The competent, credible and relevant evidence in the instant matter abundantly demonstrates that the proposed IEP does not address the many and complex needs of D.H. The District’s approach was clearly “we will address it as we go along”. The District did not do its own evaluations. Rather they relied upon previous evaluations provided by petitioners. Accordingly, the District failed to offer FAPE in the proposed IEP.

The most compelling evidence presented in the instant matter were by Erica Tober, the BCBA who administered the home program for D.H., and the petitioners themselves. All three have first hand knowledge of D.H. and his behaviors. This information was presented to the District in a series of emails, and by M.H. when she observed the program. The District's consistent response was to reply they would deal with behaviors as they occurred. The District, through the witnesses presented, was confident in their ability to address D.H.'s needs. The IEP proposed is generic in nature and not specific to D.H.

The New Jersey Supreme Court stated the following in Liscari v. Board of Education, supra at 46: "We also conclude 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."

As the Supreme Court stated in Andrew F., supra at 12: "an IEP is not a form document. It is constructed only after consideration of a child's present levels of achievement, disability, and potential for growth."

The District failed to meet this standard. The District did not perform any evaluations. The District did not address the petitioners concerns that were raised after the IEP meeting. D.H.'s specific needs are not addressed in the IEP. It is clear to the undersigned that the IEP was not designed to meet his needs. Again, it seems rather generic in nature. It does not seem to the undersigned, based upon the District's own witnesses, that they would be able to meet the needs of D.H. at the present time.

The appropriate placement for D.H. presently would be in an intensive ABA program under daily supervision of a BCBA. Again, it is clear from the District's own witness that they cannot accomplish this. The appropriate program is found at IEA. It provides the type of ABA program that D.H. requires.

Based upon the foregoing, I **CONCLUDE** that Petitioners' due process petition should be **GRANTED** and that D.H. be placed at IEA at the expense of the District.

ORDER

It is hereby **ORDERED** that Petitioners' due process petition is **GRANTED**, as follows:

1. Respondent failed to offer FAPE in the LRE;
2. D.H. be placed at the Institute for Educational Achievement;
3. The District shall amend the IEP to provide for placement at IEA and to provide for transportation to and from the same.

It is noted that petitioners waived any claim for reimbursement for the costs of the home program. Said waiver was placed upon the record by petitioners' counsel.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019). 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 Policy and Dispute Resolution.



September 17, 2021

 DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

Witnesses

For Petitioners:

Erica Tober
Carol Febrile
G.H., Petitioner
Eric Rozenblat
M.H., Petitioner

For Respondent:

Ruby Campbell
Jill Soun
Sharon Balsamo
Jennifer Finnerty

Exhibits

For Petitioners:

P-12 Carol Fiorile C.V.
P-13 Carol Fiorile Independent Educational Review, 2/5/20
P-18 Erica Tober C.V.
P-30 ReThink Progress Report, December 2019
P-31 ReThink Progress Report, June 2020

For Respondent:

R-1 Montclair Public Schools Student Registration Paperwork
R-2 Process Tracking Log
R-3 Evaluation Planning Meeting documents, dated 3/14/19 with consent for Evaluations
R-4 Documents provided by parents: O.T. eval 7/16/18
R-5 Documents provided by parents: Neurodevelop. Eval. 3/16/18

- R-6 Documents provided by parents: Neurodevelop. Report 2/27/19 with diagnosis of ASD and Balance Disorder & 10/26/18 follow up notes
- R-7 Documents provided by parents: S/L Eval 3/25/18
- R-8 Documents provided by parents: Erica Tober Treatment and Behavior Plan 2/28/18
- R-9 Documents provided by parents: Summit Med. Gp. 2/21/18
- R-10 Documents provided by parents: Request for Services 2/21/18
- R-11 Documents provided by parents: Battelle Developmental Inventory 2/18/19
- R-12 Collaborative Psycho/Educ. Evaluation 6/3/19
- R-13 Speech Language Evaluation 5/18/19
- R-14 Collaborative OT/PT Evaluation 5/21/19
- R-15 Invitation to initial Eligibility/IEP meeting, 5/13/19 with parent acknowledgment
- R-16 IEP 6/18/19
- R-17 S. Balsamo notes from observation 5/5/19
- R-19 S. Balsamo notes from observation 11/22/19
- R-20 Email: Campbell to parents: 6/9/19 – 6/18/19
- R-21 Email: Balsamo and parents, 5/8/19-5/9/19
- R-22 Email: Balsamo and parents, 6/26/19 and Balsamo's notes
- R-23 Email: parents and Campbell, 6/24/19-6/25/19
- R-24 Email: parents and Finnerty, 7/18/19, 7/29/19, 7/30/19
- R-25 Email: parent to Sohn/Finnerty, 8/1/19
- R-26 Email: parent and Sohn, 8/8/19
- R-27 Email parent and Balsamo, 6/26/19
- R-28 Email: Sohn to parent, 9/5/19
- R-29 Email: Vinpa and Campbell, 6/25/19
- R-30 NJ DOE Autism Program Quality Indicators
- R-31 Ruby Campbell resume
- R-32 Jill Sohn resume
- R-34 Sharon Balsamo resume
- R-36 Jennifer Finnerty resume

