



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

**FINAL DECISION**

OAL DKT. NO. EDS 06076-21

AGENCY DKT. NO. 2021-33021

**K.P. ON BEHALF OF A.P.,**

Petitioner,

v.

**MANVILLE BORO BOARD OF**

**EDUCATION,**

Respondent.

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**K.P.**, on behalf of A.P., petitioner, pro se

**David B. Rubin**, Esq., for respondent (David B. Rubin, attorneys)

Record Closed: November 17, 2021

Decided: December 8, 2021

BEFORE **MARY ANN BOGAN**, ALJ:

**STATEMENT OF THE CASE**

Petitioner K.P. (petitioner or parent), on behalf of her son A.P., a twelve-year-old, seventh-grade student when the petition was filed, alleges that the June 14, 2021, individualized education program (IEP) proposed by respondent Manville Boro Board of Education's (Board or District) child study team (CST) is not appropriate. Although the petition seeks to maintain A.P.'s current program and placement in general education, at the hearing the petitioner sought an out-of-district placement in a different district's

general-education classroom. The District contends that the proposed IEP presented to the petitioner at the June 14, 2021, meeting was based on the results of current educational and psychological evaluations and the supplemental updated social history from the board-certified behavior analyst (BCBA) who visited the home. In addition, the District reviewed A.P.'s records of academic achievement and progress toward accomplishment of the goals and objectives of his previous IEP. The District asserts that the proposed IEP does continue A.P.'s current educational program, modifying instruction from virtual learning to in-person learning, plus four hours of extended-school-year programming (ESY) over the summer of 2021 to help A.P. transition back to in-person learning after attending remote instruction since March 2020.

### **PROCEDURAL HISTORY**

On or about June 21, 2021, petitioner's due-process complaint was filed with the New Jersey Department of Education, Office of Special Education Policy and Dispute Resolution, challenging the adequacy of the proposed IEP presented at the June 14, 2021, CST meeting. On or about June 29, 2021, petitioner filed a request for emergent relief seeking an immediate stay-put of the current program and placement in general education. On the same date, the emergent petition was transmitted to the Office of Administrative Law (OAL). The Honorable Susan L. Olgiati conducted oral argument on July 1, 2021 and granted the requested relief in an order issued on July 2, 2021. The due-process hearing was conducted on October 6, 2021. Thereafter, the respondent filed a request for emergent relief seeking an order authorizing the District to proceed with a functional behavioral analysis (FBA) and directing A.P.'s parents to cooperate in any aspect of the FBA requiring their involvement. Oral argument was conducted on November 15, 2021, and I granted the requested relief in an Order issued on November 17, 2021.

## **FACTUAL DISCUSSION**

### **For Respondent**

Sandra Peckhardt (Peckhardt) is a learning consultant and a case manager. She has been employed by the District for nineteen years. Peckhardt is also certified as an elementary-school teacher, teacher of the handicapped, and learning disabilities teacher-consultant (LDTC). She serves as A.P.'s case manager for the 2021–2022 school year. Even though she was not A.P.'s case manager during the 2020–2021 school year she worked with A.P. as an LDTC and has been a member of the CST since A.P. enrolled in the District in third grade after being home-schooled since kindergarten. She interacted with A.P. and A.P.'s mother multiple times per week and pointed to the 280 pages of emails between A.P.'s mother and the school staff during the 2020–2021 school year. (R-12.) She also attended the annual review meeting in October 2020.

A.P. is classified as autistic. The IEP presented at the June 14, 2021, CST meeting was based on the results of the triennial evaluations that Peckhardt conducted, in addition to an updated social history<sup>1</sup>. (R-10.) The BCBA provided input after visiting A.P. at home. Academic records of achievement and progress were also reviewed and considered when the IEP was drafted. (R-5; R-6; R-7.)

Peckhardt explained that the proposed IEP that petitioner disputes continues A.P. in the current educational program, in-class resource instruction as set forth in the October 2020 IEP, with components of his existing program that the parent agreed with such as counseling services and occupational therapy. The 2021–2022 IEP added extended school year (ESY) programming to assist A.P.'s transition back to in-person learning for the 2021–2022 school year after being home on remote learning for more than one year. Peckhardt noted that after the District transitioned to a hybrid model in the fall of the 2020–2021 school year, with students attending in-person class on alternate weeks, A.P. did not return for in-person instruction that year because the petitioner chose

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<sup>1</sup> It is uncertain whether the visual impairment observed by the evaluator and noted in the June 4, 2021 psychological evaluation while A.P. wore his eyeglasses, has been addressed.

to keep him home on remote instruction. The summer 2021 ESY program took place for four hours, five days per week. At the request of the parent, the CST shortened the ESY day to just ninety minutes. A.P. did not attend ESY even for the shortened day after petitioner filed an emergent-relief application, activating a “stay-put” for the 2020–2021 IEP.

Consistent with the October 2020 IEP, A.P. was provided with in-class resource instruction for language arts and math, occupational therapy and counseling services, and other supplementary aids and services during remote instruction. (R-7.) Peckhardt recalled remote learning being a challenge. A.P. had numerous distractions at home, and the parent requested changes to his schedule.

Like the October 2020 IEP, the proposed IEP for the 2021-2022 school year presented at the CST meeting on June 14, 2021, placed A.P. in the in-class resource program for math and language arts. A regular-education teacher and a special-education teacher were scheduled to be in the classroom. The support service for science and social studies was originally scheduled to be a teacher assistant. That support service was replaced by a certified special-education teacher for both the science and social studies classes. (R-1.)

The 2021-2022 IEP includes a behavioral intervention plan. The District also arranged for a BCBA from Brett DiNovi Associates to conduct a functional behavioral assessment to collect data for future interventions as needed when behaviors arise and to address any past behavioral concerns, including a police response while at home on remote learning, as well as behaviors that began to escalate after he returned to school. The BCBA recorded in a May 2021 report that A.P. “engaged in physically and verbally aggressive behavior at home towards his parents and one of his siblings.” Peckhardt explained that A.P. had some difficulty transitioning back to in-person learning in September for the 2021–2022 school year. ESY would have eased his transition from remote to in-person learning. By the beginning of October 2021, there was every indication that the proposed IEP offered for the 2021–2022 school year was appropriate. Peckhardt, along with staff, observed A.P. engaging in conversations with teachers and staff, and even expressing an interest in joining clubs and other after-school activities.

### **For Petitioner**

Petitioner, K.P., is the mother of A.P., and she testified that she opposes the proposed IEP for the 2021–2022 school year. K.P. asserts that a different public school district would be more appropriate for A.P. because this District has not adequately responded to A.P.’s behavioral needs. K.P. acknowledges that the District has the capacity to offer the resources her son needs but asserts that the difficulty she has working with the District staff impedes his access to necessary services. K.P. made a request for “one on one [and] in class behavior support for autism and ADHD to mediate school-based frustrations as well as [applied behavior analysis] ABA or another acceptable standard of behavioral functional analysis with the hope of being able to keep him in the gen ed and to be able to leave the district placement for an out of district placement in the gen ed and with behavioral supports and other supports as needed.” K.P. asserts that the District has made appropriate behavioral supports inaccessible and did not provide sufficient support for A.P.’s behavioral needs.

K.P. also expressed concern about the evaluation report (R-10) that indicated behavioral reports from A.P.’s teachers that were concerning and not addressed in a timely manner. She acknowledged that the report contained a note explaining that the results could be inadvertently different because the teacher report was based on “behaviors observed in a virtual format and the scale is intended to be used for in-person assessments of students[,] which may have influenced the results.”

K.P. acknowledges that the District could educate A.P., but that for “unknown reasons” it has been “very difficult to access services in a meaningful way.”

### **Findings**

It is my obligation and responsibility to weigh the credibility of the witnesses in order to make a determination. Credibility is the value that a fact-finder gives to a witness’s testimony. The word contemplates an overall assessment of a witness’s story in light of its rationality, internal consistency, and manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony

has been defined as testimony that must proceed from the mouth of a credible witness, and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives, or bias of a witness is relevant, and a fact-finder is expected to base decisions of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514.

The District witness, Peckhardt, testified credibly as to her knowledge of the District and the education program established for A.P., and the District's consent to parental requests to revise the plan. The District provided testimony and evidence to prove that A.P., after almost eighteen months of attending school remotely, began to acclimate to the school setting even though he did not attend ESY, which was strongly recommended by the District. It remains unclear how a different district's general-education program will be more appropriate for A.P., who began to make progress in the District. The District also referenced a steady stream of inquiries and requests set forth in email exchanges between the District and the parents, which underscores the District's responsiveness to the parents' inquiries and requests concerning A.P.'s education.

Peckhardt provided direct and articulate testimony to show that after completing current assessments and evaluations the District proposed a particularized in-class-resource program and placement tailored to meet A.P.'s needs. The IEP contains necessary individualized and measurable goals and objectives to monitor A.P.'s progress throughout the school year. The IEP also contains a behavior intervention plan, modifications, supplementary aids, and supports.

I accept the District's testimony and **FIND** the testimony as fact.

In contrast to the District's testimony, the testimony from K.P. was less than direct, and did not specifically address the District's fact-driven testimony, and the exhibits that support the District's conclusions. It is clear that the parent believes she is seeking the

best program and placement for her child; however, her ever-changing requests for A.P.'s placement and complaints about the District program were not supported by credible testimony or evidence. To challenge the adequacy of the 2021-2022 school year IEP is not convincing especially when petitioner filed an emergent petition invoking stay-put of an essentially similar placement and program that was forth in the 2020-2021 school year IEP. Accordingly, I **FIND** that K.P.'s testimony was not reliable or convincing and therefore is not credible.

It is undisputed, and I **FIND**, that the IEP created and proposed by the CST on June 14, 2021 (R-1) is appropriate.

### **LEGAL ANALYSIS AND CONCLUSION**

The Individuals with Disabilities Education Act (IDEA) is designed to assure that children with disabilities may access a free and appropriate public education (FAPE) that is tailored to their specific needs. 20 U.S.C. § 1400(c). To further this goal, the State regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to -10.2, make local school districts responsible for “the location, identification, evaluation, determination of eligibility, development of an IEP and the provision of a [FAPE] to students with disabilities.” N.J.A.C. 6A:14-1.3.

An IEP is the primary vehicle for providing students with a FAPE. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010). An IEP is a written statement that explains how a FAPE will be provided to the child. 20 U.S.C. § 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. 20 U.S.C. § 1414(d)(1)(A)(i)(I)–(VII). The school district must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C. § 1414(d)(4)(A)(i).

In developing an IEP, the child study team, which includes district staff members and the child’s parents, shall consider such factors as “the strengths of the student and the concerns of the parents for enhancing the education of their child,” “the academic,

developmental and functional needs of the student,” “the results of the initial evaluation or most recent evaluation of the student,” and, “[i]n the case of a student whose behavior impedes his or her learning or that of others, . . . when appropriate, strategies to address that behavior, including positive behavioral interventions and supports.” N.J.A.C. 6A:14-3.7(c).

The United States Supreme Court has construed the FAPE mandate to require the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley, 458 U.S. at 203. The Rowley standard was questioned by the United States Supreme Court in Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017). The Supreme Court determined that to meet its obligation to deliver FAPE, a school district must show a cogent and responsive explanation for its decisions that shows that the IEP is reasonably calculated to enable the child to make progress that is appropriate considering the particular student’s circumstances. The Court declined to devise a “bright-line rule” for “what ‘appropriate’ progress will look like from case to case,” because “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” Endrew F., 137 S. Ct. at 1001.

In addressing the quantum of educational benefit required, the Third Circuit has always 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. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood, 172 F.3d at 247; Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988), cert. den. sub. nom. Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030 (1989).

In other words, the school district must show that the IEP will provide the student with “a meaningful educational benefit.” S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). This determination must be made in light of the individual potential and educational needs of the student. T.R., 205 F.3d at 578; Ridgewood, 172 F.3d at 247–48. “When students display considerable intellectual potential, IDEA requires ‘a great deal more than a negligible [benefit].’” Ridgewood, 172 F.3d at 247 (quoting Polk,



853 F.2d at 182). The pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

The parent here, who is dissatisfied with A.P.'s IEP, filed for an administrative due-process hearing. 20 U.S.C. § 1415(f). The burden of proof is placed on the school district. N.J.S.A. 18A:46-1.1.

The District has met its burden of establishing that it offered a proposed program and placement sufficient to meet the needs of A.P. and an opportunity for him to make progress in the general-education class with in-class resources, with both a regular-education teacher and a special-education teacher in the classroom. In addition the District included a comprehensive behavior intervention plan. The District has demonstrated that it closely monitors A.P.'s progress with measurable and individualized goals, along with plans and goals to meet his behavioral needs, while at the same time making every effort to respond to the varying and unsubstantiated requests of the parent. The 2021–2022 proposed IEP challenged by K.P. contains essentially the same placement and program as the 2020–2021 stay-put IEP that K.P. insisted upon and invoked in the emergent application.

The parents, along with the educators and experienced professionals who work with the child each day, are part of the CST that can best determine a child's education placement. Here the record is clear. The parent's input and complaints of difficulty in working with the District staff to access services from the District, the challenge to the District's plan to address A.P.'s behavior, and her request to place A.P. in a different, out-of-district public school general-education classroom, is not supported by credible evidence.

I **CONCLUDE** that the placement offered to A.P. by the District in its proposed June 14, 2021 IEP constituted FAPE as that term is defined by law. The District considered and made plans for A.P.'s return to in-person learning, adding in-person extended-school-year programming for the summer of 2021 that was rejected by the parents. The proposed IEP is sufficiently individualized to meet A.P.'s needs and includes

plans to address A.P.'s behavior; indeed, he began to make progress upon his return to in-person learning. <sup>2</sup>

Based on the foregoing, I **CONCLUDE**, by a preponderance of the credible evidence, that the June 14, 2021, IEP provides A.P. with a free and appropriate public education reasonably calculated to provide a meaningful educational benefit to him in the least restrictive environment and sets forth the appropriate placement of A.P. in an in-class resource program.

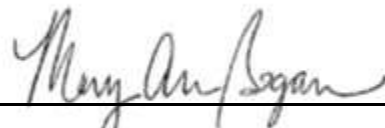
**ORDER**

Based on the foregoing, it is hereby **ORDERED** that the petition for due process be **DISMISSED**. It is further **ORDERED** that the June 14, 2021, Individualized Education Program is appropriate and shall be implemented.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2021) 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 (2021). 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.

December 8, 2021

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

MAB/nmn

<sup>2</sup> By Order of Emergent Relief, dated November 17, 2021, the District is conducting an FBA and the parents are directed to cooperate in any aspect of the FBA requiring their involvement.

**APPENDIX**

**WITNESSES**

**For Petitioner:**

K.P.

**For Respondent:**

Sandra Peckhardt

**EXHIBITS**

**For Petitioner:**

- P-1 Failing grades; Math concerns; Science-asynchronous; Language Arts concerns; Social Studies; Spanish-asynchronous; Music Class-asynchronous; Web Literacy-asynchronous; PE-removed; Student current curriculum; Class time schedule
- P-2 COVID-19; Childcare
- P-3 Asynchronous learning; Science-asynchronous
- P-4 Virtual instruction; Diagnosis/Classification; Special services; Modifications; Accommodations; 1:1 Support ASD/ADHD; Diagnosis/Classification; Technology/Chromebook
- P-5 IEP; Absences, tardies; Paperwork and school records; Access to services; Privacy
- P-6 IEP; Progress notes; Evaluations; Absences, tardies; Paperwork and school records; Technology/Chromebook; Privacy
- P-7 IEP; Absences, tardies; Paperwork and school records; Technology/Chromebook; Privacy
- P-8 Missing assignments
- P-9 Trigger courses;
- P-10 Math concerns; District board meeting notes

**For Respondent:**

- R-1 Proposed IEP, dated June 14, 2021

- R-2 Report of D. Paone, BCBA, dated May 26, 2021
- R-3 Notes of L. Toole, BCA, 2018-2019
- R-4 Letter from V. Cywin, APN, dated March 13, 2021
- R-5 Report Card 2019-2020
- R-6 Report Card 2020-2021
- R-7 IEP, dated October 28, 2020
- R-8 Progress Notes 2019-2020
- R-9 Progress Notes 2020-2021
- R-10 Collaborative Psychological & Educational Evaluations Report of C. Clark, S. Peckhardt and R. Pycior, dated June 4, 2021
- R-11 Speech/Language Evaluation Report of S. McLaughlin, dated December 12, 2019
- R-12 Emails to/from A.P and School Staff