



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 14456-19

AGENCY DKT. NO. 2020-30653

A.M. ON BEHALF OF A.M.¹,

Petitioner,

v.

BRIDGEWATER-RARITAN REGIONAL

BOARD OF EDUCATION,

Respondent.

A.M., petitioner, pro se

David B. Rubin, Esq., for respondent (David Rubin, P.C., attorneys)

Record Closed: December 31, 2021

Decided: February 16, 2022

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE

The petitioner, A.M. (father) on behalf of his son A.M. (son or student), allege that the respondent Bridgewater-Raritan Regional Board of Education (Board or District) failed to provide a free and appropriate public education to A.M. in violation of the Individuals with Disabilities Education Act (IDEA) and the New Jersey Special Education Laws. Petitioner sought classification as “autistic”, placement in a general education class and a 1:1 aide. At the time the hearing commenced the Board had conducted additional

¹ Both petitioner and student have the initials “A.M.” The tribunal will take measures necessary to differential the individuals.

evaluation(s) and assessment(s) and made appropriate changes to A.M.'s classification. Thus, the only remaining issue was petitioner's request for a 1:1 aide.

The District contends that A.M. has needs that would not be met in a general education environment and that the proposed IEP required either in class or pull-out resource instruction for A.M.

PROCEDURAL HISTORY

The contested case was transmitted to the Office of Administrative Law (OAL) and filed on October 15, 2019. Hearing dates were scheduled and held on December 11, 2020. As respondent wished to have a transcript prepared for use in his closing submission, the record did not close at that time as the Tribunal waited for another hearing at which the parties would discuss dates for submission of closing documents. During this period an error was discovered in the recording which resulted in the majority of the hearing date of December 11, 2020 not being recorded. This unrecorded portion was the testimony of the Board's final witness and the entirety of petitioner's case. Due to the unusual delay with transcripts, this was not discovered until about July 2021. Also during the wait for the transcript, the IEP for the student was renewed resulting in an additional objection by A.M.'s father to that IEP on the same basis as the original matter.

Rather than having father file for a second due process hearing, the parties agreed that father's concerns about the second IEP would be merged into this action and that the tribunal would schedule an additional hearing date to hear testimony which would not only cure the gap for the missing December 11, 2020 testimony, but also provide any necessary supplement to the Board's case, and petitioner's case, in order to allow for all issues in the "merged" cases to be addressed. Likewise, the tribunal would take testimony or hear witnesses for the petitioner at that time. Testimony was taken on October 20, 2021, and the final day for the hearing was scheduled for December 17, 2021. Closing briefs were due on December 20, 2021 and the record closed on December 31, 2021.

FACTUAL DISCUSSION

Testimony

Kristen Blanchard (Blanchard) is a district learning disabilities teacher consultant (LDTC) and a member of the child study team (CST) who conducted an educational evaluation of A.M. in November 2019 after he enrolled in the district for fourth grade. The evaluation was needed as there was an educational gap in services because the student had been disenrolled from his prior district (not Bridgewater) for an academic year and homeschooled before arriving at Bridgewater and due to this break his case was treated as an “initial referral”. The CST then made assessments to redetermine his eligibility for special education. (R-1).

A.M.’s father requested he be assigned a 1:1 aide at the initial planning meeting in September 2019, but she saw no evidence that a 1:1 aide was warranted. There were no safety concerns during structured classroom settings. A.M. was able to navigate the classroom, the hallway and the cafeteria, and could obtain his own lunch. During informal observations in the classroom, she saw no problems with his behavior, his ability to access his instruction or his ability to participate in the learning process. There also was no negative impact on his classmates from his behavior. Safety and instructional assistance would have been the only reasons for assigning an aide, and she saw no evidence that one was required for these reasons.

Blanchard described the services in the proposed December 2019 IEP. (R-5). Consideration was given to placement in a mainstream setting, as the father requested, but the student was already in a general education setting from the commencement of the school year (with a special education teacher in the room as well), but as the student was struggling so significantly, the special education teacher was modifying the curriculum and the tests and the student was still having difficulty with the instruction.

When A.M.’s father filed the due process petition, the district was blocked from implementing the IEP because, as an initial IEP it required affirmative parental consent.

For the balance of fourth grade the CST proposed various general education intervention supports, but A.M.'s father rejected those as well.

When questioned on cross-examination about the need for an educational aide as opposed to one for safety, Blanchard testified that a 1:1 teaching assistant cannot provide direct instruction, nor was one needed to redirect A.M. because that task was already being handled effectively by the special education teacher. On redirect examination she confirmed that there was no need for the aide and, additionally, for children in that age group an aide's presence can be detrimental because they may feel stigmatized.

Dr. Kavita Khan (Kahn) is a school psychologist who prepared a psychological evaluation for A.M. in the fall of 2019. (R-3). She testified that school districts need to rely on medical diagnoses to classify students as autistic. The criteria for autism diagnoses had changed from when A.M. was originally diagnosed in Barnegat at the age of two (eight years prior), so the CST requested consent for a neurodevelopmental evaluation to determine the student's current capabilities. The family initially agreed but later withdrew their consent, so the CST recommended a classification based on the information it had at the time. The parties later entered into an agreement for the neurodevelopmental assessment to go forward, and one was conducted which satisfied the CST that an "autistic" classification was appropriate. (R-6, R-7, and R-8).

There were large gaps in A.M.'s academics but no behavioral or safety concerns so there was no need for an aide to be with him through the day. Nor was an aide required for educational purposes as aides cannot provide direct instruction. She stated that A.M. needed a modified curriculum so he could start filling the gaps in his education. At that time, he had two classroom teachers who were both able to manage his inattention and redirect him, so that was not the problem. She further testified that assigning an aide to students A.M.'s age is often stigmatizing and would prevent them from socializing with peers, and should only be done when necessary.

Paula Aichele (Aichele) is a district speech-language specialist who conducted an assessment of A.M. in November 2019. (R-2). A classification of “communication impaired” was appropriate based on the information the district had at that time. Once the neurodevelopmental assessment was conducted, the team was satisfied that an “autistic” classification was appropriate. Aichele saw no evidence that a 1:1 aide was necessary. There were no behavioral concerns during her assessments. A.M. was able to sit and attend and was easily redirected when necessary.

Jennifer Geiger (Geiger) had taught special education in the district for twenty-three years at the time of the hearing and was A.M.’s classroom teacher for the 2019-2020 school year. When A.M. arrived in the district he was not yet classified. Because his family disputed the initial eligibility determination and filed for due process, he remained unclassified and without special education services the entire year.

Geiger testified that when A.M. began attending her class, as is typical with all students at the start of the school year, the teachers assessed the students’ current skill levels. Academically, he presented with some good rote skills, but his overall comprehension was very weak, and he was functioning at a beginning second grade level with a lot of skills. She testified that he needed a lot of academic support that could be provided only through a tailored program of replacement instruction.

Geiger’s class was a general education “inclusion” classroom with some special needs students who received modifications and accommodations to access the fourth-grade curriculum. She was the special education teacher and co-taught the class with a general education teacher. Geiger testified that A.M. did not need a 1:1 aide. He acted appropriately in the classroom when they were in person before the COVID-19 shutdown in March 2020. He was able to follow along with the flow of the classroom, sit appropriately at his desk, and handle transitions well. The academic material was difficult for him, but he was able to follow along with the structure of the day independently, so he did not need an aide to support him.

Instructionally, aides are not assigned for academic support. If needed, that support is provided by a special education teacher as aides do not provide direct instruction. She further explained that assigning an aide unnecessarily could be detrimental because the student may become overly dependent, and other students are sometimes reluctant to approach the student or develop social interactions.

Dr. Daniel Silvia (Silvia) is Assistant Superintendent for Special Services. He confirmed that the district has in place an anti-bullying policy conforming to the New Jersey Anti-Bullying Bill of Rights Act, and that A.M.'s father had reported an alleged bullying incident in October 2019 when A.M. was tripped by another student. The incident was fully investigated and found not to constitute "harassment, intimidation or bullying." A.M.'s father was notified of that determination, and never invoked his right to pursue an appeal to the Board of Education or the Commissioner of Education. (R-9).

Cara Cinquemani (Cinquemani) is a district Learning Disabilities Teacher Consultant (LDTC) and A.M.'s case manager for the 2021-2022 school year. She described an updated IEP proposed to the family in May 2021 for the 2021-2022 school year (R-10), largely reflecting the same educational program and placement that had been proposed previously. Although the district was permitting special education students to return to in-person instruction during the 2020-2021 school year, A.M.'s parents exercised their option to keep him home on remote instruction for the entire school year. In response to father's assertion that A.M. needed an aide because his parents functioned as an aide during that school year and he got good grades, Cinquemani noted the teachers' observations that it was difficult to truly assess A.M.'s academic progress because "there is an adult sitting next to him and we are unsure how much is truly independent." (R-10).

A.M., the student's father, testified that his son required a 1:1 aide not for behavioral or safety reasons, but for educational reasons. In support of his position, he claimed that his son got excellent grades during the 2020-2021 school year, while on remote instruction, because he had a parent sitting with him.

FINDINGS

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, 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). Also, "[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).

In determining credibility, I do not believe that District employees would want to implement a program they developed for A.M. without believing that that program would provide A.M. with FAPE. I am also aware that the father would want the best program for his child.

In this case, therefore, I do not find that there is an issue of credibility as much as an issue of experience and knowledge. Therefore, I accept the testimony of the District's witnesses as credible as to the extent of implementing the proposed IEP. In particular, Cinquemani's statement that the teachers' observation that it was difficult to truly assess A.M.'s academic progress because "there is an adult sitting next to him and we are unsure how much is truly independent." (R-10). There has been a "gap" in the ability of A.M.'s teachers to make an accurate observation of his capabilities due to his home schooling and the presence of a parent during that schooling.

The proposed IEP would allow for the greatest benefit to A.M. and in this vacuum, I cannot accept the position of A.M. that his son needs a 1:1 aide and continue in general education classes in order to maintain his grades.

Blanchard testified she saw no evidence that a 1:1 aide was warranted as there were no safety concerns during structured classroom settings; he was able to navigate the classroom, the hallway and the cafeteria, and he could obtain his own lunch. Further in the classroom setting she saw no problems with his behavior, his ability to access his instruction or his ability to participate in the learning process. She saw no safety or other concern for which an aid would be needed.

Geiger testified that assigning an aide unnecessarily could be detrimental because the student may become overly dependent, and other students are sometimes reluctant to approach the student or develop social interactions.

These concerns expressed by the District's witnesses, particularly the inability to accurately assess the student's progress while being taught virtually, are the overriding factors here and as such I find them as FACT.

LEGAL ANALYSIS AND CONCLUSION

The petitioner seeks a finding that A.M. is entitled to a 1:1 aide for academic purposes.

The District contends that implementation of the proposed IEP from September 2019 and proposed amendment from May 2019 will provide A.M. with a free and appropriate public education in the least restrictive environment and is reasonably calculated to enable A.M. to make progress in light of his diagnosis as autistic.

The Individuals with Disabilities Education Act (IDEA) provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982). One of the purposes of the IDEA is "to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.

§ 1400(d)(1)(A). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

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. New Jersey followed the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” The Rowley standard was recently amplified by the United States Supreme Court in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____, 137 S. Ct. 988 (2017), which Court remanded for further proceedings consistent with its decision. The Supreme Court determined that 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 New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit cases require similar inquiry into the educational proposal of the district in compliance with the requirements of Lascari v. Board of Education of Ramapo Indian Hills Regional High School District, 116 N.J. 30, 47 (1989) (citing Rowley, 458 U.S. at 200). The IDEA does not require that a school district “maximize the potential” of the student, Rowley, 458 U.S. at 200, but requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995).

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 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 Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); 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. 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.

Toward this end, an IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C. § 1414(d)(2) and (4); N.J.A.C. 6A:14-3.7. A complete IEP must contain a detailed statement of annual goals and objectives. N.J.A.C. 6A:14-3.7(e)(2). 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.” Ibid. 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 New Jersey Supreme Court has recognized that “[w]ithout an adequately drafted IEP, it would be difficult, if not impossible, to measure a child’s progress, a measurement that is necessary to determine changes to be made in the next IEP.” Lascari, 116 N.J. at 48.

In this matter, the student had an IEP from his prior school district (Barnegat) and has been home-schooled for the year prior to his enrollment at Bridgewater-Raritan. An evaluation was necessary to provide the best planning to implement the program which would best provide FAPE. The District conducted appropriate evaluations which, not only corrected earlier misconceptions, but more importantly laid out a program though it’s proposed IEP that would afford A.M. his best opportunity for FAPE. A.M.’s father disagrees and contends that a 1:1 aide will provide A.M. with his best opportunity for

FAPE. In light of the facts, circumstances and testimony provided I **FIND** that the District has proven, by clear and convincing evidence that the proposed IEP will provide A.M. with his best opportunity to be given FAPE by the District. A.M.'s father has not proven with any objective evidence or information that providing A.M. with a 1:1 aide will award this benefit. Therefore, at this time, provision of a 1:1 aide is not warranted.

ORDER

I **ORDER** that the petitioners' complaint seeking a 1:1 aide for A.M. be **DISMISSED**.

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.

February 16, 2022

DATE



CARL V. BUCK III, ALJ

Date Received at Agency:

Date Mailed to Parties:

CVB/lam

APPENDIX

WITNESSES

For petitioner:

A.M., father

For respondent:

Kristen Blanchard

Kavita Kahn

Paula Aichele

Jennifer Geiger

Dan Silvia

Cara Cinquemani

EXHIBITS

For the Parent:

None

For the Board:

- R-1 Educational Evaluation 11/4/19
- R-2 Speech and Language Evaluation 11/11/19
- R-3 Psychological Evaluation 11/21/19
- R-4 Initial Eligibility Determination 12/5/19
- R-5 Proposed IEP 12/5/19
- R-6 Letter 2/10/20
- R-7 Letter 2/10/20
- R-8 Neurological/ Neurodevelopmental Evaluation 2/29/20
- R-9 HIB Documentation 10/10/19
- R-10 Proposed 2021-2022 IEP