



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 10756-23

AGENCY DKT. NO. 2024-36454

J.O. AND K.O. ON BEHALF OF L.O.,

Petitioners,

v.

HARRISON TOWNSHIP BOARD OF EDUCATION,

Respondent.

Katherine “Kat” G. McKay, Esq., for petitioners (Brain Injury Rights Group, attorneys)

Brett E.J. Gorman, Esq., for respondent (Gorman D’Anella & Morlok, attorneys)

Record closed: June 4, 2024

Decided: June 28, 2024

BEFORE ELAINE B. FRICK, ALJ:

STATEMENT OF THE CASE

Petitioners, J.O. and K.O., parents on behalf of their minor child, L.O., submitted a due process petition seeking relief under the Individuals with Disabilities Education Act (IDEA), asserting that respondent, Harrison Township Board of Education (the BOE or the District), failed to provide a free and appropriate public education (FAPE) to L.O. by placing the student in a special education multiple disabilities self-contained classroom, pursuant to the student’s Individualized Educational Program (IEP) instead of a general education inclusion classroom. The District opposes the petition, asserting it has

provided a FAPE in the least restrictive environment.

PROCEDURAL HISTORY

Petitioner parents submitted their due process petition to the Department of Education (DOE) Office of Special Education (OSE) on August 30, 2023. The petition was transmitted to the Office of Administrative Law (OAL) and filed on October 16, 2023, to be heard as a contested case. N.J.S.A. 52:14B-1 to 14B-15; N.J.S.A. 52:14F-1 to 14F-13. During a telephonic conference with counsel on October 31, 2023, the hearing date of March 12, 2024, was scheduled, as requested and agreed upon by the parties.

On November 14, 2023, petitioners submitted an emergent request for relief, seeking to remove L.O. from her classroom placement and move her to the general education inclusion classroom, which is part of the specific relief sought in the underlying due process petition. The request was based upon an asserted safety issue, due to the New Jersey Department of Children and Families, Division of Child Protection and Permanency (DCP&P) having advised the parents on September 29, 2023, that it received an anonymous tip that someone believed to be a staff member in L.O.'s classroom took inappropriate action and used unkind and harsh words toward L.O. The District opposed the application. Oral argument on the emergent application was heard via Zoom on November 28, 2023. An order was entered on November 29, 2024, dismissing the emergent relief application and denying the emergent relief sought, as the emergent application was asserted by petitioners inappropriately as if it were related to the underlying due process petition.

Petitioner parents issued a subpoena to compel the District to produce school personnel to testify at the hearing. Petitioners also issued a Notice in Lieu of Subpoena Duces Tecum demanding the appearance of a school representative for a deposition and production of documentation related to an anonymous tip made to DCP&P after the filing of the petition. The District submitted a motion to quash the subpoenas and also sought an order in limine to prohibit the introduction of evidence or information pertaining to the DCP&P tip and investigation at the hearing. The parents opposed the motions. On March 6, 2024, an order was entered granting the District's motion to quash and motion in limine.

The parties were directed that the testimony and evidence presented at the hearing shall be focused on the claims asserted in the due process petition.

The hearing was conducted in person on March 12, 2023. The parties confirmed they would submit written summations. The parties' joint request to extend the time for the submission of their summations was granted. The summations were submitted and subsequent letter briefs addressing each opposing party's summation were received. The record closed on June 4, 2024.

FACTUAL DISCUSSION AND FINDINGS

The following information was determined to be undisputed based upon the testimony of the witnesses and the documentary evidence. I **FIND** as **FACTS** the following:

L.O. is a seven-year-old student enrolled in second grade in the District, for the 2023-2024 school year. L.O. is diagnosed with Down Syndrome. Her classification is "Multiple Disabilities" with mild intellectual disability, other health impairment. (R-22.) The child has an IEP implemented May 11, 2023, and is placed in the special education multiple disabilities (MD) classroom pursuant to that IEP from the end of the 2022-2023 first grade school year and for the 2023-2024 second grade school year. (R-22.)

For the child's kindergarten year, 2021-2022, she was in the inclusion general education in-class resource room (ICR) program with an aide. (R-7.) For the child's first grade year, 2022-2023, she was continued in a general education ICR classroom, with academic instruction in the self-contained room for English language arts and math. (P-A, R-9.)

In January 2023, in the midst of L.O.'s first grade school year, following litigation between the parties, an interim IEP was implemented by consent in February, placing L.O. in the self-contained MD classroom, with inclusion in special area classes such as art and music and during lunch, recess, classroom parties, and field trips, with the general education inclusion class students. (R-12, P-B, P-C.) The IEP noted that due to the

nature and severity of L.O.'s disability, she could not achieve a satisfactory education in the general education ICR room without the use of supplementary aids and services which were available in the MD classroom. (R-12 at 207.)

L.O.'s placement in the MD self-contained classroom was confirmed in the IEP effective May 11, 2023, for the remaining portion of the 2023 first grade school year and for the 2023-2024 second grade school year. (R-12; P-J.) That placement has inclusion for L.O. with general education students for special area classes of physical education, art, library, music, innovation and design, and inclusion in lunch, recess, class parties, and field trips. (R-12; P-J at Petitioner 0162-0163; 0158; 0166-0167.) The related services of occupational therapy (OT), speech therapy, physical therapy (PT), and a one-on-one aide are outlined in the IEP for L.O. (R-12; P-J at Petitioner 0162-0163; 0166-0167.) Transportation by bus, curb to curb, with a five-point harness, is included in the IEP. (R-12; P-J at 0163, 0167.) ESY for the summer of 2023 is outlined in the IEP for L.O. (R-12; P-J at 0164.)

The parents verbally rejected the proposed placement during the IEP meeting on April 12, 2023. (P-J at 0168.) They submitted written objections on April 23, 2023, which are included in the IEP. (P-J at 0168-0169.) The District rejected the parental concerns as detailed in the IEP. (P-J at 0169-0170.) The parents refused to sign the IEP.

The parents sent another communication to the District on May 8, 2023, indicating they rejected the IEP. (P-H.) The parents' communication was inserted into the IEP with the District's response, and the parents were advised that the fifteen-day IEP review period had expired and thus the IEP was finalized. (P-I; P-J at 0170.) The IEP was implemented without the modifications as requested by the parents. (R-22; P-J.)

The parents submitted their due process petition of August 30, 2023, which resulted in the hearing conducted in this matter. (P-O.)

Petitioner parents seek a determination that the District failed to provide FAPE to L.O. in the LRE and want L.O.'s classroom placement moved from the MD classroom back to the general education inclusion classroom. They contend it is critical for L.O. to

be able to model her speech after her peers and she does not get that in the MD classroom. They further assert that she performs best in her preferred environment, and she prefers the inclusion of the general education classroom. Petitioners also asserted in their petition that they wanted additional related services to be provided to L.O. for speech and language, occupational therapy, and physical therapy; compensatory education; use of a designated I-pad for communication; and revisions to L.O.'s behavioral intervention plan. (Petition at pages 4–5.) Petitioners did not present any testimony or documentary evidence regarding these additional claims asserted in their petition. The only evidence presented during the hearing on behalf of petitioners was related to their request to return L.O. to the general education inclusion classroom for purposes of developing her speech and language skills. Petitioners assert L.O. is being deprived of educational opportunities by the District by the program placement in the IEP, so the District has not delivered a FAPE to L.O. Arguments presented by petitioners in their summation brief unrelated to the claim in the due process petition are not considered herein, as they are outside the scope of the petition, having occurred after the petition was filed and their arguments are not properly addressed in this forum.

The District asserts that the MD classroom is the LRE environment for L.O. to meet her educational needs and provides a FAPE. The District relies upon its witness' testimony, including the expert witness' opinion and the documentary evidence of the data and information gathered regarding L.O. to support the student's placement in the MD self-contained classroom.

Testimony:

Jeffrey Pisacreta testified on behalf of the District. He was found to be qualified and admitted as an expert in Board Certified Behavior Analyst (BCBA), without objection.

Pisacreta is currently working in two districts. He is contracted out to Harrison Township for two and a half days per week providing services as a BCBA. He received his bachelor's degree in psychology in 1995 with a focus in applied behavior analysis (ABA) and a Master of Science in education in 2009. (R-33.) He became a certified BCBA in 2010. He has been employed in the field of behavioral analysis, since having

obtained his bachelor's degree in 1995, working in public schools and in homes to support families, specializing in children with disabilities and severe behaviors. He worked in a residential facility which had a school with individuals ranging in age from six to twenty-one years old, who had severe behaviors. He was a behavior analyst and a member of the child study team. He also provided consultant services for several school districts. He thereafter worked with students and staff in the Trenton area schools, with a program focusing on keeping students in school.

He returned to the public school system as a BCBA and worked as a behavior consultant for a private company. He thereafter was hired for the public-school districts where he is currently employed and serves as the BCBA for the District. He has spent thousands of hours observing children with behaviors. He has performed Functional Behavioral Assessments (FBAs) of children and trained staff, aides, and parents throughout his career as to how to handle children with behavioral challenges. In his current role as BCBA for the District he works with children with special needs, specifically regarding student behaviors in the self-contained and ICR classrooms. He works with students who have problem behaviors in the classroom and non-classroom environments, such as during recess, and tries to make their day successful. He trains staff members and aides.

Pisacreta explained that an FBA is conducted by a behavior analyst to identify and define problem behaviors and their triggers, and then outlines what may reinforce bad behaviors and what may be done to reduce their frequency. A behavior analyst will collect data which drives their strategies and everything in the program for students. He has attended hundreds of IEP meetings throughout his career and written hundreds of behavioral plans for IEPs.

Pisacreta has worked with L.O. since kindergarten, where he first began to study and observe her behavior and assist teachers in attempting to decrease her challenging behaviors. He was aware through review of her psychological evaluation from 2021 that her cognitive abilities were very poor so her academic levels were poor. (R-5.) He implemented her kindergarten IEP as the BCBA, providing behavioral consultation and training staff and working with L.O. in the classroom. (R-7.) Pisacreta would spend six

to eight hours a week with L.O. providing services, which was a significant amount of BCBA support relative to some of the other students with whom he works.

Pisacreta observed L.O. in kindergarten frequently hitting, kicking, screaming, flopping (falling to the ground and refusing to move), climbing on tables, not complying when asked to do assignments, spitting, and eloping. He observed such behaviors on a daily basis, ranging from moderate to high intensity every day. Due to these challenging behaviors in the kindergarten year, the District had to contract in a registered behavior technician (RBT) to serve as a one-on-one aide to L.O., supplanting the general aide that was provided by the district. L.O. needed more support and the RBT was more well versed in behavioral strategies.

Pisacreta explained that the data he collected during L.O.'s kindergarten year reflected that L.O. worked much more effectively when there was a teacher working one-on-one with her, but she struggled to focus in a large group setting. (R-10.) Pisacreta also acknowledged that it is extremely difficult to truly get one-on-one work done in a large inclusion classroom, because the teacher, special education teacher, and aide are handling different children across the room. Pisacreta testified that because of a desire to receive attention from the aide, the teachers, and her classmates, L.O. would demonstrate hundreds of the challenging behaviors week to week. (R-10.) His data collection over a three-week period while L.O. was in kindergarten in the spring 2022 added up to hundreds of challenging high intensity behaviors observed, such as twenty instances in one day of hitting a student peer or staff member. (R-10 at 109.) The behaviors when L.O. had low attention to her. This occurred in the general education setting, which is a large group learning environment, not during the one-on-one focused attention teaching. The general education inclusion room was not an appropriate setting for L.O.

He confirmed that the kindergarten IEP, under the "rationale for removal from general education" heading, identified that the benefit of L.O. being in the general education in class resource is that she would be participating with her non-disabled peers. (R-9 at 094; P-A at 0021.) He explained that she exhibited both loving behavior and disruptive behavior towards her peers in kindergarten. She would walk over to a peer and hug them then leave the embrace and slap the peer. Her behavior on a daily basis

in kindergarten depended upon the day. Some occasions she would not want to leave the bus and fought the staff the entire way to the classroom and other days when she would arrive she would be laughing, smiling, and following directions. She was a student described in the kindergarten IEP as having “a big heart” and being hard working, coming to school eager to learn and excited to see her classmates.

During her kindergarten year, Pisacreta did not believe that L.O. successfully modeled behaviors of her peers in the general education inclusion room. He saw very little, if any successful modeling by L.O., even during play time at the end of the kindergarten day. He acknowledged that the IEP for kindergarten noted that by L.O. using the FCT and modeling in small group settings, her social and academic skills had improved. (P-A at 008; R-9 at 081.) He testified that L.O. was modeling the staff and the RBT, not her peers. He confirmed that one form of successful instructional strategy for L.O. is to have her model skills she needs to master.

Pisacreta wrote the behavior plan for L.O.’s first grade IEP. (R-9 at 086.) Initially, the IEP that was drafted was that L.O. would be in the self-contained classroom for the four major classes and then in the inclusion classroom for specials, lunch, and recess so that she could be with her peers. The parents did not agree to this recommendation, and the final IEP for L.O.’s first grade year provided that L.O. would be in the general education setting, supplemented, for all but English Language Arts (ELA) and math done in the in-class resource program and the self-contained classroom as a resource to use for ELA and math. (R-9.) There were two teachers in the general education inclusion room who were the general education teacher and the special education teacher.

The behavioral plan for the first grade IEP outlined L.O.’s targeted behavior, which was inappropriate social behavior such as slapping, kicking, and throwing materials towards others, often serving as an attention seeking function, done when L.O. did not get attention from the staff or her peers. She also engaged in flopping and refusing to stand after prompts from staff, typically occurring during transition to another room or moving from a preferred activity to a non-preferred activity. She engaged in disrupted behaviors of yelling, walking around the room, touching items without permission, crying and whining. This was typically done when L.O. was denied access to preferred activities

or asked to complete non-preferred activities. (R-9 at 086.)

Pisacreta did more than an FBA by observing and collecting data on L.O.'s behaviors six to eight hours per week over multiple weeks of her kindergarten year. He used that information to determine her environment and what triggered behaviors and the consequences. He used that information as the driving force to develop behavioral strategies to use with L.O. and to draft the behavioral plan for the first grade IEP. As a behavior analyst, he tries to prevent behaviors from occurring as opposed to being reactive by doing something after the challenging behavior occurs. He provided numerous amounts of proactive strategies such as modifying academic requirements, shortening lessons, using small group settings, a consistent route, and clear simple language when giving directions. He outlined functional communication training with the use of an iPad to facilitate L.O.'s communication, since she was only speaking with one or two words while her peers were speaking in sentences. This would assist with her communication when transitioning from one activity to another. Added support from an aide during episodes of flopping was in the behavioral plan, as L.O. would become aggressive with kicking and hitting when staff attempted to redirect her.

Strategies were drafted in the behavioral plan as to how to prompt with verbal instruction and gesturing and how the staff should handle L.O. during large group instruction. A time-out procedure was outlined. (R-9 at 087.) Pisacreta explained that when L.O. started in first grade, a common large group instruction procedure in the general education class would be to have all students seated on the carpet while one teacher was instructing the class. The students would then transition to smaller groups, some seated at their desks, and then rotate groupings. L.O. had difficulty sitting next to a peer and would hit, kick, push, or kick a peer or staff member as a means of attention seeking. None of the other students in the general education class exhibited such behavior.

During her first-grade year, L.O. targeted two to three other girls in the class with her hitting and kicking behaviors. The peers were upset and afraid and the staff needed to ensure the girls were far away from L.O. especially in the large group classroom teaching session. Some peers had to go to the nurse's office due to L.O.'s behaviors.

Sometimes redirection or time out worked to get L.O. back on task and other times the behaviors lasted from five minutes to two hours in the ICR general education classroom. The other students would be moved to other areas of the classroom while the challenging behavior continued, or the other students would leave the classroom. L.O. could be positioned into a corner to keep her at a distance with no physical contact of hitting and hurting others, but her screaming and running around would be continuous challenging behavior lasting for more than a few minutes.

It was not an advantageous learning environment, because the teacher would talk above L.O.'s vocalizations and then needed to assist the aide because L.O. was being unsafe climbing on the table or desks. L.O. would take things, like scissors, requiring constant staff rotation with L.O. to gain her compliance. The teacher would be prevented from assisting other students in the classroom who also had IEPs, by tending to L.O. and addressing her challenging behaviors.

During the first part of her first-grade year, L.O.'s aide and Pisacreta filled in daily charts marking frequency counts of L.O.'s behaviors, where they occurred, and the antecedent to the behavior. (R-11.) Pisacreta utilized this data collection to graph charts every few weeks. This was done to determine when and why her challenging behaviors were occurring and how he could help L.O. and provide strategies to the staff to support her.

Pisacreta's data collection during the 2022-2023 first grade year was charted for daily frequency of exhibited hitting/slapping, kicking, screaming, biting, and flopping. (R-10 at 110; R-11.) The behaviors doubled, if not tripled from September through December 2022. In September, L.O. was hitting someone, such as a peer or staff member, approximately seven times per day and by December she was hitting someone fifteen times per day. (R-10 at 112.) This was during L.O.'s placement in the general education inclusion classroom. Most of the challenging behaviors were occurring in the classroom with less frequency during specials and lunch or recess. (R-10 at 113.) The behaviors were described as severe, such as over sixty screaming instances in one day and forty instances of hitting in a day. (R-10 at 110; R-11.) Such behaviors could last over two hours. Pisacreta estimated that L.O. was working thirty to forty percent of the school day.

It was glaringly seen by the data that the classroom was the main environment causing L.O.'s behaviors. He reiterated that the data further demonstrated that the general education inclusion classroom was not appropriate for L.O. (R-10.)

The District determined in the middle of L.O.'s first grade school year that L.O. should be moved to the self-contained MD classroom. Pisacreta agreed with the recommended change in placement to the self-contained setting. The program in the general education inclusion setting was not working. L.O. was not accessing her education as her behaviors were peaking. He reviewed the psychological evaluation of L.O. done on February 21, 2023, which again confirmed L.O.'s cognitive status as being very low. (R-18.) Her IQ was fifty-nine, which Pisacreta indicated was significantly low. (R-18 at 7.) He confirmed that L.O.'s skill deficit in the area of speech contributes to her behavioral difficulties.

Pisacreta also reviewed the FBA completed by a certified school psychologist, who observed L.O. on March 16, 2023. (R-20.) The evaluation was in the self-contained setting for her academics. According to the data reported in the psychological report, L.O. continued to exhibit interfering behavior throughout the day, with an overall decline towards the end of the day. Her interfering behaviors occurred approximately sixty-three percent of the time over a five-day period. They occurred during her morning class time demands and during transitional times, or when shifting from a preferred activity to a non-preferred activity, and social interactions. (R-20.) This data aligned with Pisacreta's observations. He could not confirm if the positive interactions the FBA evaluator noted to have been done by L.O. had occurred, since Pisacreta was not present in the District on the day of the FBA evaluator's observations.

He confirmed that the FBA evaluator's recommendations for L.O. were not much different from his own recommendations. Whatever additional recommendations were made by the FBA evaluator, such as being proactive and adding a cozy corner for L.O., were added by Pisacreta to his recommendations for the IEP that was modified during the second portion of L.O.'s first grade year in 2023. (R-20; R-12.) The FBA evaluator recommended that L.O. work with a teacher and one-on-one aide and be in a two to one

learning environment, which is not what occurs in the general education inclusion classroom. That type of servicing occurs in the self-contained classroom.

Pisacreta testified that it is not advantageous for L.O. to be in the large group and small group instruction that occurs in the general education inclusion classroom, with multiple students. She verbally preferred the smaller classroom. She expressed that to Pisacreta earlier in the first-grade year, when she would go to the self-contained classroom for the resource ELA math program.

Pisacreta attended the IEP meeting that resulted in the revised placement to that program for the remaining portion of L.O.'s first grade year. He presented the charts and data information gathered regarding L.O. at the meeting. The parents did not respond nor acknowledge the behavioral information Pisacreta presented during the meeting. When L.O. was moved into the MD self-contained room as of approximately February of 2023, Pisacreta continued to provide BCBA services for her. Overall, he was providing help and support to L.O. ninety percent of the time when in that room, when he had other students in the room to service as well.

Pisacreta was involved with the development of the IEP implemented for L.O.'s second grade year, 2023-2024 school year. (R-22.) He completed the behavioral plan in the IEP, which is almost identical to the prior IEP's behavioral plan which he had done. (R-22 at 367-369.) He incorporated the FBA evaluator's additional recommendations in the behavioral plan, as he intended to do, and as requested by the parents. (R-22.) Pisacreta testified that when he works with L.O. in the self-contained setting, it is a two to one setting, with him and another staff member close by to help support L.O.'s learning. The second grade IEP did not substantially change what was implemented by the IEP for the remaining portion of the first-grade year.

During L.O.'s second grade year, 2023-2024, within the self-contained MD class for academics and inclusion with her peers for special classes and lunch and recess, Pisacreta noted there was a decrease in all of the target behaviors. He acknowledged there are a few days where her behaviors are relatively high, but overall L.O. has a decreasing trend in challenging behaviors.

The environment in the self-contained room is quieter, with five to seven students, and has one on one and two to one instruction, in a class where the staff can control more of the variables for L.O. to access her education. They are able to position L.O. in an area or use divider blockers to block the vision of others to L.O. when she is screaming or engaging in other target behaviors to minimize reactions from class peers which provides attention to L.O. and increases the likelihood of her challenging behavior. The staff had attempted to engage in one-on-one instruction in the general education inclusion setting previously, but they were unsuccessful due to the nature of that type of classroom. It is something that is done in the self-contained classroom which Pisacreta indicated is improving for L.O. They are able to give frequent breaks and follow a reinforcement schedule. They can accommodate certain behaviors and activities in the self-contained room, which cannot be done in the general education inclusion room, such as loud and messy activity with sand or dancing and singing to videos. L.O. has a plastic microphone in the room where she can sing, which is a preferred activity for her. That could not be done in the ICR room.

Pisacreta indicated they are able to do a reverse inclusion, having other students come into the self-contained room and L.O. is able to participate and not exhibit the targeted behaviors she engaged in while in the larger class setting. He candidly noted it does not always work since the past week high school students came in to read to the students in L.O.'s room and L.O. spit at them and told them to leave. She told them "shut up" and then said, "get out."

Data collection has occurred through the end of the first-grade year into L.O.'s second grade year of 2023 through February 2024, the month prior to the hearing in this matter. (R-24.) Pisacreta testified that when L.O. was first moved from the ICR to the self-contained room, they had a difficult time because she had learned behaviors. She still had access to the three other girls during inclusion time at lunch, who were the students she had targeted with challenging behavior while in the inclusion classroom. The data collected demonstrated that from April 2023, through the end of the first-grade year in June 2023, L.O. continued to exhibit inappropriate social behavior, disruption, flopping, and elopement while in the self-contained class. Such behaviors decreased as

she began second grade in the self-contained class. The decrease in behaviors demonstrated that L.O. was accessing her education more in the self-contained room instead of the general education setting, as he witnessed having observed her in both settings. He acknowledged there were spikes in behavior on some days. The trend was decreasing in target behaviors while in the self-contained MD room. (R-24.)

He could not recommend moving L.O. back to the inclusion general education room. Pisacreta opined that the self-contained classroom was the appropriate setting for L.O. Based upon his expertise, he believed that if L.O. were moved back to the general education setting now, you would probably see her targeted behaviors double.

Sarah McCafferty testified for the District. She has worked six years in the District as a first grade special education teacher. (R-32.) She is a special education teacher in the inclusion classroom. She is responsible for accommodating and modifying the curriculum for special education students to ensure their success in the classroom. She is responsible to fully implement each student's IEP in her class and assist each such student in reaching their IEP goals. The number of students in her classroom who have an IEP varies each year, ranging from two to seven, with the balance of students in the class numbering from nineteen to twenty-one. She has worked with dozens of special education students throughout her career.

She is in the classroom with a general education teacher. They co-teach the core subjects, by generally splitting the teaching duties with one teacher handling the topics of social studies and science, while the other teacher handles reading and math class instruction. They both teach in small group instruction in the classroom. The level of functioning for the general education students varies. It is not just low grade level general education students. Some general education students are several levels above the grade. She explained there is a wide range of abilities in an inclusion classroom.

As a special education teacher, McCafferty participates in the IEP process for students. She drafts the section of the IEP commonly referred to as PLAAF, which identifies present levels of academic achievement and functional performance of a student. She has attended dozens of IEP meetings and drafted dozens of IEPs.

McCafferty first came to know L.O. when she reviewed L.O.'s IEP before she began in McCafferty's first grade inclusion classroom. She had not taken part in the drafting of the IEP, but confirmed it was the IEP she implemented for L.O. at the start of the first-grade year. (R-9.) When she reviewed the IEP, she saw that L.O. required a lot of one-on-one instruction and had behaviors that impeded her own learning and the learning of other students in the classroom. It was beneficial for L.O. to work in smaller group settings. This was confirmed to McCafferty when she spoke to L.O.'s kindergarten teacher. That teacher described the most success for L.O. is when they were able to pull her away from whole group instruction and work with her one on one or two on one.

She described L.O. as a sweet student and a silly little girl who liked to be the star of the show. She enjoyed dancing and cheerleading and often wanted to show off her dance and cheerleading moves. She would smile at times but often was not happy when she entered the classroom. She was averse to working. L.O.'s aversion to working would manifest throughout the day. Particularly in the mornings, L.O. frequently flopped when entering the classroom. She would scream "no work" and exhibit such behaviors for as long as the forty-two minute first period, several days per week. She would kick, bite, and slap McCafferty while she was tending to L.O. during the flopping episodes. L.O. would hit other students or throw trash at them or smack them if they came in her vicinity.

L.O. was disruptive to her own learning and to the other students in the room. McCafferty stated that the teacher would often have to speak loudly over L.O.'s screaming to get the rest of the class back on track. They would utilize placing L.O. by the cubbies to distract her behaviors and be away from disrupting the other students. It would not always work because L.O. would engage in taking the jackets off the hooks and throwing them in the room or would throw other items while screaming loudly. They were not successful in curbing the escalating behaviors.

One extreme solution the teachers had to use was to bring all of the other students from the classroom into the hallway to learn, to avoid the distraction from L.O.'s behaviors, and to keep her aside to calm her behaviors. McCafferty would have the other students

seated up against the wall in the hallway and would instruct them in reading. It was not ideal as there were other students traversing the halls to use the bathrooms.

She worked closely with L.O. noting that it was not always possible to service L.O. with one-on-one instruction because she had to tend to other special education students in the room. L.O. was able to focus on her academic work during one-on-one instruction and demonstrated excitement when she was going to transition to the self-contained classroom. McCafferty explained that there were large group lecture sessions in the inclusion general education classroom, and they would break into smaller groups for learning or to work on assignments. She had to be particularly attentive to L.O. in the small group work environment due to L.O.'s disruptive behavior. If L.O. did not have McCafferty's attention for specific one on one instruction, L.O.'s negative attention seeking behaviors would begin. It was not possible to work exclusively one on one with L.O. on a daily basis in the general education inclusion setting.

McCafferty was struck by L.O. several times during their interaction. One time when she was hit by L.O. it caused her to smack her head on the table, resulting in a large lump on McCafferty's forehead. Multiple students have had to go to the nurse after being hit, slapped, or kicked by L.O. The other students in the first-grade class were fearful, and some got counseling services due to their nervousness. McCafferty confirmed, as Pisacreta had testified, that L.O. targeted three little girls in the classroom. The teachers and staff tried to prevent the targeted behavior without success.

The teachers and staff tried multiple methods to keep L.O. on task and focused during group instruction in the first-grade inclusion classroom. They tried to have L.O. participate during the sessions, even recognizing that the pacing was too fast for her. L.O. would refuse to participate in sessions and would vocalize in some instances by saying something like "no video." The teachers tried alternative seating in the room to entice L.O. into group instruction. They tried sensory changes in seating using a rocking chair or squishy chair. The methods did not work and instead L.O. wound up throwing squishies at other students. L.O. had to be seated by the carpeted area so she could still participate but be kept at a safer location for her. Even when seated, L.O. defied participating stating "no" or would not stay on task or attempted elopement. L.O. would

quickly move throughout the classroom, causing disruption to the other students in the room. They would have to chase after her or otherwise McCafferty and L.O.'s aide would often position themselves between L.O. and the other students to make sure everyone stayed safe.

The behaviors would often last throughout the entire first session of the day. L.O. would then stop the behavior if they transitioned to a preferred behavior, such as having snacks, or going to a specials class, or going to lunch. L.O. did attend one period in the self-contained classroom. L.O. enjoyed going there. She would vocalize "like Grieb" with Grieb being the name of the teacher in the self-contained room.

McCafferty observed L.O.'s negative behaviors increase in mid-October of her first-grade year as the course load became more rigorous and focused, given that the first month of first grade instruction is mainly kindergarten review. McCafferty confirmed that L.O.'s hitting behaviors increased along with her elopement. The teachers had difficulty keeping L.O. from running over to other students and hitting them. L.O. continued to target teachers and aides with physical hitting and kicking. McCafferty opined it was probably overwhelming to L.O. to see how quickly the students were working and moving and going from one task to another.

They had to drastically modify L.O.'s curriculum in the general education classroom. She could not fully understand the lesson, such as for example a reading and spelling lesson requiring writing simple sentences. McCafferty would need to stay with L.O. and emphasize writing the first letter of a word that was spoken during the lesson, or to write the sound of the letter. In this manner, McCafferty tried to keep L.O. as part of the lesson. McCafferty estimated that L.O. was only able to attend to her academics for two to three percent of the time.

McCafferty kept the parents informed of L.O.'s status through weekly emails they requested to be sent to them. (R-26.) She would explain what the class was working on academically and how it was modified for L.O.'s needs. She would note the behaviors that were occurring. McCafferty would explain in the weekly email, as she did during the week of September 26 through September 30, 2022, what the class was working on and

how they were working to get L.O. to just sit and participate in the learning activity. (R-26 at 433.) McCafferty explained in that email how L.O. struggled to cooperate in the group and to take turns and use objects appropriately. She struggled to wait patiently for the teacher or aide's attention. McCafferty specified in this email example that L.O.'s behaviors "continue to impede her learning." (R-26 at 433.) She refused to go to the carpet with the group and struggled with group participation. They continued to find she was most successful when provided with two to one support from her aide and a teacher. She was reported to be successful in the self-contained class, enjoying that class and having success with the one-on-one direct instruction she received there. (R-26 at 433.)

McCafferty had to report a difficult week for L.O. in mid-October. As the workload progressed L.O. showed more frustration and escalated behaviors. (R-26 at 438.) McCafferty asked the parents to see if they could work at home with L.O. or if there was a home issue with increased behaviors exhibited by L.O. there as well as in the classroom. In November, McCafferty's detailed email charted the week by each period of the day and the struggles by L.O. and behaviors exhibited. (R-26 at 450-451.) The targeted behaviors had escalated.

By December, the parents requested daily charts as to L.O.'s behaviors. (R-27.) The charts have smiley faces to chart L.O.'s status and comments were written in for every class regarding L.O.'s progress such as good socially in a class and noted her other behaviors, such as flopping, yelling, or elopement. Generally, the daily charts trended with more positive behavior and progress on goals during self-contained class time. The progress comments were usually recorded as the behavior occurred during the period or immediately after the period concluded. If there was something worthy to note, good or bad, McCafferty would do so.

There was a mid-year January IEP meeting when the District was recommending the change in programming placement from the general education inclusion room to the special education self-contained room, or that L.O. needed to go on home bound instruction. McCafferty confirmed the parents vocalized their disagreement with moving L.O. out of her first-grade inclusion classroom. McCafferty was aware there was litigation and thought that that L.O. was on homebound instruction. The parents returned L.O. to

the District under an interim IEP placing her in the self-contained classroom as their request for an FBA and other evaluations was agreed upon. McCafferty confirmed that L.O.'s targeted behaviors had escalated from the start of the first-grade school year through the time when she was no longer in her classroom. She could not speak about whether L.O.'s behaviors increased or decreased after the move to the self-contained class.

McCafferty explained that in March of every year there is a "Rock Your Socks" celebration of World Down Syndrome Day. It is celebrated by students buying mismatched socks through the PTA and then the students watch an instructional video about Down Syndrome in their class. L.O.'s mother expressed displeasure with L.O. not having been in the room to celebrate World Down Syndrome Day. K.O. thought it was a party event, for which L.O. should have been permitted to participate in with her peers in the general education inclusion class. McCafferty confirmed that L.O. did not participate in the first-grade classroom in watching the video because it was after her placement had changed to the self-contained room. She further explained that it is not really a program and is not a party. Class parties throughout the year included Halloween, Thanksgiving, and winter and spring parties. McCafferty assumed Rock Your Socks Day was also done in the self-contained class with a video shown. She was shown the co-teacher's email sent to parents indicating that the District would be celebrating World Down Syndrome Day and the co-teacher was handling the purchase of mismatched socks in lieu of the PTA not doing so. (P-L.) McCafferty's understanding was that the celebration was not just in her classroom, it was taking place in all classrooms.

The first-grade inclusion class has a "mystery reader" program where a parent comes in to read to their child within the room. L.O.'s parents had signed up for the program on dates that occurred after L.O.'s placement was moved to the self-contained room. McCafferty reached out to the parents to reschedule the dates to occur after the next IEP meeting once they knew what L.O.'s schedule would be. (P-K.) The parent expressed her disappointment in an email reply. McCafferty responded and clarified that the activity was not being removed from L.O.'s first grade year, it was being rescheduled so as not to interrupt the student's current schedule and routine. (P-K.)

McCafferty confirmed that L.O. did not participate in the writing celebration scheduled for the beginning of June in the first-grade inclusion room since L.O. was no longer in that room placement. (P-M.) McCafferty noted in an email to the parents in May that she saw the parent signed up for the writing celebration, but it was not a classroom party. It is an educational activity related to the writing instruction occurring in the classroom, where the students have written on a topic and then get to read their favorite pieces and share their writing with family members. (P-M.)

McCafferty confirmed there were inclusion provisions in the IEP drafted when there was a change in L.O.'s placement. She was to have inclusion in special area classes, PE, library, music, innovation design, lunch, recess, and class parties. (P-J.) McCafferty testified that L.O. attended holiday parties in the first-grade inclusion classroom.

In March 2023, McCafferty did complete a survey given to her regarding the Augmentative Communication Evaluation being done for L.O. (P-D.) She denied being part of making any recommendations in the report. Similarly, McCafferty was asked to complete a questionnaire regarding her knowledge of L.O. when she was in her room for the FBA being done in March for L.O. (P-E.) McCafferty's information is charted into the FBA from her responses to a questionnaire. She denied that she participated in formulating recommendations the FBA evaluator made at the end of their report. (P-E.) McCafferty also is charted into the Learning/Educational Evaluation done in February of 2023 for L.O. (P-F.) She believed she likewise completed a questionnaire or form for that evaluator and did not make recommendations.

K.O., mother of L.O., testified. She described her daughter as being very friendly and sociable, with a lot of empathy. She loves her friends and is very loyal to them. She is social and likes to hug people. She has many friends from the inclusion classroom, and they just celebrated four different birthday parties together with those friends within the past month. K.O. described L.O. as being "low verbal" and tries to converse with her parents and peers but can only do very little because of her low verbal level.

K.O. detailed L.O.'s experience in her troop of thirteen girl scouts, where L.O. is the only scout with a disability. She participates in the cookie booth, does presentations,

sits through the hour meetings and does multiple day over the weekend camping trips. There are other troop members who have difficulties, such as with shyness, or need a little more help with projects and L.O. is usually one of the first ones to offer assistance. She adores her girl scout troop friends and gets along with them. K.O. has seen L.O. try very hard to have a conversation with the other girls in the troop. She actively worked with other troop members when they were learning sign language and K.O. saw L.O. watching the others do sign language. She needs time to go over things because Down Syndrome children need a little more time and repetition to learn.

The parents filed for mediation in January of L.O.'s first grade year. They wanted stay put for L.O. to remain in her inclusion class while an FBA was completed. They did not believe she had a correct behavioral plan and wanted an independent evaluation since the District was asserting so many behavioral issues as the need to move L.O.'s program placement. The parents were completely against her going into the MD classroom and opted to keep her home for instruction. K.O. acknowledged that L.O. was kept home from Friday, January 27, 2023, and went back to school on Wednesday, February 1, 2023. K.O. indicated they felt forced into the interim agreement and did not have a lawyer yet then conceded on cross-examination that they did have an advocate working on their behalf who communicated with the school's attorney. She asserted she was led to believe if she did not agree to either homebound instruction or placement in the self-contained classroom, they would not get the FBA evaluation they wanted done. K.O. conceded that they just kept L.O. home, without instruction, from January 27 until February 1, 2023, when K.O. brought L.O. back to school because she did not want her missing out on her specials.

They requested other evaluations to be done at that time. They did not agree with either the interim IEP or the IEP developed from the April 12, 2023, IEP meeting. They did not sign them. They did go into effect after time lapses but K.O. made it a point that she was never going to agree to either proposed IEP and would not sign them.

The interim IEP placed L.O. in the MD self-contained classroom and she was moved there after the parents returned her to the District from the days they kept her home. The requested independent evaluations were completed before the April 2023

IEP meeting. K.O. asserted that staff from the District at the meeting said they did not have sufficient time to review the evaluations and neither did K.O. and her husband. She noted this in her parental concerns.

K.O. was completely opposed to the IEP since it did not have L.O. in the inclusion classroom at all. She acknowledged that specials, lunch, recess, field trips, and class parties were inclusion events and classes for L.O. However, the parents wanted to work with a schedule having L.O. in the general education inclusion classroom for some classes and not all academic classes in the self-contained room.

K.O. believes it is incredibly vital for L.O. to be around her own age peers because that is when she learns best. She has seen this countless times with L.O. in other activities, such as in the girl scout troop. L.O. needs to master her speech and language skills and K.O. stressed that L.O. must be with her typical peers to learn how to have a conversation, how to talk to a teacher, and how to ask questions. She will learn better conversation skills, better vocabulary, better understanding of behavioral cues, which K.O. asserted L.O. does not receive in the self-contained classroom. L.O. was being taught behind a gym mat which separated her from the rest of the first-grade class in the fall. She is not learning from others when separated from them. K.O. does not think that L.O. has any give and take conversations with her self-contained classroom classmates.

K.O. recognized that L.O. performs best in preferred activities. She does like interacting with people and belonging is very important to her. K.O. believed that L.O.'s preferred activities happen more often in the inclusion room rather than in the MD room. She asserted that L.O. behaves better in art class because that is a preferred activity, and it is an inclusion class for her. It is her understanding that in the MD classroom, L.O. is pretty much only one on one with a teacher and sectioned off from other students.

L.O. was not included in the District's activities for World Down Syndrome Day in 2023. K.O. never heard anything from L.O.'s self-contained classroom teacher that there was any type of celebration. As far as K.O. knows, L.O. is the only Down Syndrome student in the District and they have been very vocal about celebration of the day. K.O. knew that the day was being celebrated in L.O.'s former first grade inclusion classroom

because of the email the teacher sent out about selling socks for the event. K.O. got a picture through email of a teacher and students in the class with their mismatched socks and L.O. was not in the picture. To her knowledge, K.O. believed the District was going to include L.O. in the 2024 celebration.

K.O. took issue with testimony that the PTA decides classroom parties. She asserted it is up to the teacher to choose if they are going to have a party. For example, she knew that L.O.'s self-contained classroom was not going to have a spring party, which is a party that usually occurs around spring break. Likewise, she asserted it is up to the teacher to have parties like the world reading day. She considered the event like a party, even though parents may not have been sending snacks in, K.O. considered it a break from learning to have an event and the students could enjoy each other in the classroom. They did not get to participate in the mystery reader program from when they signed up for it at the beginning of the first-grade school year. They did not have L.O. participate in the writing celebration day. She is aware that the self-contained classroom does have parties, about the same number of parties as done for any classroom.

J.O., father of L.O., testified. He confirmed that his daughter is a loving, caring, smart, clever person. She loves pretty much anyone, so much so that if it does not seem that someone likes her, she goes out of her to really get them to like her.

He believes it is vital for her to be with typical students. They have seen the need mainly due to her speech. It has helped her speech develop by being around typical peers. Once she was in preschool and kindergarten, she became more verbal and started to develop her language by speaking with two-word sentences and now three- and four-word sentences.

He did not really know what the behavioral intervention plan was in L.O.'s IEP. He thought it was vague and did not set skills or ways to handle them. He did not know of any comprehensive plan to address his daughter's behavior.

Credibility analysis

The fact finder in a contested proceeding must weigh the credibility of witnesses. Credibility is described as the quality of testimony or evidence that makes it worthy of belief. “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances.” In re Estate of Perrone, 5 N.J. 514, 522 (1950). The fact finder should consider the witness’ interest in the outcome, their motive, and any bias, when assessing the credibility of a witness. Credibility findings are “often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.” State v. Locurto, 157 N.J. 463, 474 (1999). “A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony.” Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Here, the District’s expert witness, BCBA Pisacreta, was unchallenged and unimpeached. He testified in a professional, clear, and direct fashion, without any embellishment. Great weight is given to his testimony given his expertise, and that he spends considerable time with L.O. directly observing and interacting with her in the classroom as a BCBA. His testimony consistently matched that of the District’s other witness, first grade teacher McCafferty. She likewise testified in a professional and direct fashion, without bias or animosity towards the parents or student. McCafferty was in the inclusion classroom on a daily basis with L.O. during the first-grade year until L.O. was then placed in the MD self-contained room in February 2023.

Both witnesses were perceived to be genuinely concerned for L.O. and her ability to access her education in a safe manner and concerned for their other students to be afforded the same opportunity. There was no animosity detected by either witness as they described their efforts in employing strategies and methods to decrease or prevent L.O.’s targeted behaviors, and being on the receiving end of getting physically hit or kicked by L.O. Both witnesses described the meticulous daily data gathering and compilation of information regarding their and other staff members’ observations of L.O.

Their testimony consistently aligned with one another. I thus deem their testimony credible and accept their testimony as to their observations and interactions with L.O. as accurate factual information. I deem BCBA Pisacreta's expert testimony to be persuasive and supported by other evidence in the record.

The parents both testified passionately and were not overreaching or aggressive. They are truly concerned for their daughter and heartfelt in their beliefs about what they want for their daughter and her learning ability to communicate effectively with others in the future. Their testimony was certainly appreciated but did not impeach or discredit the expert opinion and factual information provided by the BCBA and the factual information provided by the teacher.

LEGAL ANALYSIS AND CONCLUSIONS

The Federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., was enacted to improve education for disabled students. One of the purposes of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education [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). The responsibility to deliver appropriate services rests with the local public school district. N.J.A.C. 6A:14-1.1(d).

Disabled children are required to be educated in the least restrictive environment (LRE). In general, the federal regulations address LRE as:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A).

Thus, disabled children will be educated in the LRE where the program is suitable to their unique needs and to the greatest extent possible, the student is mainstreamed, or included in the regular education process along with their non-disabled peers. 20 U.S.C. 1412(a)(5)(A); see Oberti v. Board of Education of Collingswood, 995 F.2d 1204, 1213-14 (3rd Cir. 1993). There is a “strong congressional preference” for integrating children with disabilities in regular classrooms. See Devries v. Fairfax County School Board, 882 F.2d 876, 878 (4th Cir. 1989); Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1044 (5th Cir. 1989); and A.W. v. Northwest R-1 School District, 813 F.2d 158, 162 (8th Cir. 1987). A disabled child may only be removed from the regular educational classroom environment or placed in special classes outside of the regular classroom, when the nature or severity of the disability is such that education in the regular class cannot be satisfactorily achieved, even with the use of supplementary aids and services. 20 U.S.C. §1412(a)(5)(A); N.J.A.C. 6A:14-4.2.

The New Jersey regulation addressing LRE, generally parallels the federal code, and confirms that disabled students are to be educated in the LRE environment and to the maximum extent appropriate, educated with peers who are not disabled. N.J.A.C. 6A:14-4.2(a)(1). Placement of the student shall be in accordance with the student’s IEP, based upon the individual needs of the student. N.J.A.C. 6A:14-4.2(a). Consideration shall be given to a comparison of the benefits to the child in the general education classroom and the benefits to the child in the special education classroom, and potential harmful effects which placement may have on the disabled student or the other students in the class. N.J.A.C. 6A:14-4.2(a)(ii) and (iii). The determination of the LRE is to be “based solely on the amount of time a student with disabilities is educated outside the general education setting.” N.J.A.C. 6A:14-4.2(a)(11).

The IDEA leaves the interpretation of a FAPE to the courts. See Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the United States Supreme Court held that a State provides a disabled child with FAPE if it provides “personalized instruction with sufficient support services to permit the child to benefit

educationally from that instruction.” Id. at 203. The Court reasoned that IDEA was intended to bring previously excluded disabled children into the public education systems of the States and to require the States to adopt procedures that would “result in individualized consideration of and instruction for each child.” Rowley, 458 U.S. at 189. IDEA was amended by Congress in 1997, subsequent to Rowley. The amendments focused on ensuring that students with disabilities receive a “quality public education” and not just “some benefit.” Forest Grove School District v. T.A., 557 U.S. 230, 239 (2009).

When a due process hearing is conducted to determine if a FAPE has been provided pursuant to the IDEA, “the school district shall have the burden of proof and the burden of production.” N.J.S.A. 18A:46-1.1. If a change in the student’s IEP is sought, whether by the parents or the school district, the burden to prove whether the IEP is appropriate is upon the school district. Lascari v. Board of Education of the Ramapo Indian Hills Regional High School District, 116 N.J. 30, 44 (1989). The burden of proof is by a preponderance of the credible evidence. N.J.A.C. 1:6A-14.1(d). There is no presumption of correctness on the part of the Board of Education for its proposed action. Ibid.

The primary method of ensuring the delivery of a FAPE is through the IEP. 20 U.S.C. §1414(d)(1)(A). An IEP outlines the student’s present levels of academic achievement and functioning, outlines measurable goals and the services to be provided, and establishes objective criteria for evaluating the child’s progress. 20 U.S.C. §1414(d)(1)(A)(i); C.H. v. Cape Henlopen School District, 606 F.3d 59, 65 (3d Cir. 2010). The IEP is meant to be developed, reviewed, and revised for the individual needs of the child. 20 U.S.C. §1414(d)(1)(A). An IEP must provide meaningful access to education and confer some educational benefits upon the child. Rowley, 458 U.S. at 192. To meet its obligation to deliver FAPE, a school district must offer an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F. v. Douglas County School District RE-1, 580 U.S. 386, 399 (2017).

Here, L.O. is classified as multiply disabled, diagnosed with Down Syndrome and having low cognitive ability. The IEP is detailed and has L.O. placed in the self-contained

classroom for her academic subjects and is included with general education peers for special area classes of physical education, art, music, innovation and design, library, lunch, recess, classroom parties, and field trips. She receives related services of PT, OT, and speech therapy. A comprehensive behavioral plan is outlined in the IEP. L.O.'s academic goals and objectives are tailored to her, including goals focusing on practical skills to increase her independence.

Petitioner parents contend the issue with the IEP is placement in the MD self-contained classroom, rather than in the general education inclusion classroom. Their key focus and argument is that L.O. cannot develop her speech and language skills in the self-contained classroom because she needs to be in the general education inclusion class with typical aged peers to model their speech and language skills. They contend that L.O. does best in preferred activities, and those activities are in the inclusion classroom, where she should be. Petitioners believe L.O. misses out on classroom engagement and socialization opportunities, such as not being able to participate in the mystery reader program, Rock Your Socks Day to recognize World Down Syndrome Day, or the writing celebration when the inclusion general education classroom had parents visit while the students read their written works.

The Federal Third Circuit has adopted a two-part test for assessing compliance with the LRE requirement based upon the federal regulation. Oberti v. Board of Education of the Borough of Clementon School District, 995 F.2d 1204 (3rd Cir. 1993). First, the court must determine whether a satisfactory education can be achieved in the regular classroom with the use of supplementary aids and services. Oberti at 1215. In determining if this prong can be satisfied, the court should consider three factors: (1) the steps that the school district has taken to accommodate the child in a regular classroom; (2) the child's ability to receive an educational benefit from regular education; and (3) the possible negative effects the disabled child may have on the education of other children in the regular classroom. Id. at 1215-1217. If the court determines that the school district was justified in removing the child from the regular classroom, the second prong of the Oberti mainstreaming test requires that the court determine whether the child has been included in school programs with nondisabled children to the maximum extent

appropriate. Id. at 1218; see Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1048-1050 (5th Cir. 1989).

As to the first prong, the District has established that they have taken numerous steps to accommodate L.O. in the inclusion classroom. In addition to the general education teacher, L.O. received the assistance of the classroom special education teacher and had a one-on-one aide, which the District replaced with a more trained RBT to serve as L.O.'s one on one aide. The BCBA assisted and spent considerable time with L.O. as well when he was present. L.O. had her own iPad to assist in her learning or provide distraction when she would be inclined to engage in targeted behaviors. The large group teaching setting proved to be challenging for L.O. to remain focused, and the staff had to ensure an aide or teacher was positioned directly behind L.O. or seated on their lap to keep her on task and prevent or thwart L.O. from hitting, slapping, or kicking other students or staff. When the class split into smaller groups for instruction and to work on a lesson, the special education teacher particularly remained alert to L.O. because of L.O.'s attention seeking activities of elopement, screaming, kicking, hitting, and biting would occur when she was not the primary focus of attention from the teachers.

L.O. would often engage in flopping with screaming and elopement and running in the room or throwing objects which frequently lasted for the entire first period of the school day. Her challenging behaviors occurred when she transitioned from a preferred activity back to academic work. The majority of her challenging and disruptive behaviors occurred in the classroom as supported by the meticulous data and observations by the teachers and staff. This disrupted L.O.'s ability to learn, which was averaged to be maybe two to three percent of her time focusing on her academics. The behavior disrupted the other students and resulted in the teachers and staff being diverted to handle L.O. instead of conducting the class lesson. L.O. would be repositioned in the room or all of the other students were taken out of the room and made to sit in the hallway to do their lesson.

Both McCafferty and Pisacreta found that L.O. experienced less outbursts when in one-on-one scenarios and when there were less distractions by having fewer students around her. She vocalized that she liked the self-contained class teacher and would be excited to transition to that classroom for the ELA/math session portion of her day.

Pisacreta spoke to the benefits he and staff members observed from L.O.'s time with one-on-one instruction for her ELA/math in the self-contained room and when a teacher was able to provide one-on-one instruction in the MD classroom during the first portion of first grade in 2023. The teachers in the MD classroom were able to raise L.O.'s level of focus and ability to perform her work. Pisacreta confirmed that L.O. particularly enjoys when she can begin to sing, dance, or watch YouTube videos as a reward for completing a task, but acknowledged that this is not something that can be done in the inclusion classroom as the non-disabled students have begun to focus more on their academics in their curriculum and have less opportunities for play breaks throughout the school day. These accommodations that have had a positive impact on L.O.'s performance with reduced outbursts and negative behaviors are not as readily available to L.O. if she were to continue to be enrolled in the inclusion classroom full time for academics.

Pisacreta's expert opinion which has been accepted as reliable and persuasive is that L.O. should be in the self-contained classroom and would most likely regress and double the number of targeted behaviors if returned to the general education inclusion room. The inclusion classroom, with the multiple assistive services and devices, is not able to provide a proper educational opportunity to L.O. She is not learning there without having one-on-one instruction. That classroom is not designed for that method of teaching. The IDEA does not require teachers and staff to devote all or most of their time to one disabled child in the general education inclusion classroom. See Daniel R.R. at 1049.

The evaluations conducted prior to the IEP in question reflected that L.O. was not meeting the goals of her previous IEP, and was behind in the development of her speech, writing, math, and overall behavior. The independent FBA evaluator determined that L.O. was not progressing because her negative behaviors were interfering with her ability to focus on her work consistently. L.O. likewise scored poorly in her educational evaluation as a result. The FBA indicates that L.O.'s "interfering behaviors" recorded by her one-on-one aide indicate that in a single five-day period that she may have more than 200 interfering behaviors (such as yelling, slapping, flopping, or eloping) when responding to learning or work-related demands. (R-20.) Primarily, these interfering behaviors were found to have occurred when L.O. sought to escape work or learning situations or to draw

attention to herself. Pisacreta testified that these behaviors were exacerbated in the large inclusion classroom setting because of L.O.'s desire for attention and due to the inability to use one-on-one instruction in the general education room. Such teaching instruction occurs in the closed classroom setting, which works to train away the targeted behaviors. L.O. is at a critical stage in her development and it is more important that she learns how to behave in a classroom setting appropriately to ensure that she meets her goals moving forward, which has not been shown to be possible in the inclusion classroom.

The parents contend that L.O. needs to be in the general education inclusion classroom to enable her to model speech and language of her typical non-disabled peers. Pisacreta confirmed that he did not witness L.O. modeling her peers but did see her attempt to model her teachers or staff members.

The first prong in the Oberti analysis for LRE requires consideration of the negative effects on L.O.'s non-disabled peers for it to be conducive for her to remain in the inclusion classroom. Pisacreta's observations, McCafferty's observations, the notes from L.O.'s one on one aide all confirm hundreds of instances of inappropriate physical contact or attempted inappropriate physical contact with L.O.'s peers and the teachers and staff on a daily basis while in first grade in the inclusion room. Other students and staff had been sent to the nurse due to the physical aggression from L.O. Students were targeted in the room by L.O. and McCafferty saw the nervousness in students and learned that students in the class sought counseling. The entire class has been vacated from the classroom and made to sit in the hallway for their lesson as other teachers or staff tended to L.O. in the classroom to address her behaviors to get her calmed and re-focused. L.O.'s verbal outbursts when she refused to do work would impact her classmates because the screaming would go on for an extended period of time and disrupt the inclusion classroom learning environment and stress the teachers to talk more loudly and attempt to keep the focus of the classroom students on the learning.

Through the detailed testimony of Pisacreta and the introduction of his graphs and meticulous tracking of L.O.'s behaviors, the District has gone to great lengths to try and keep L.O. in the inclusion classroom through her kindergarten year and the first half of her first grade year, with the use of various methods of servicing and assistive devices,

but her behaviors are too difficult to control in a large group setting. L.O. struggles to control her emotional outbursts and negative behaviors, which have proven to be a distraction to her non-disabled peers and have inhibited her ability to focus on learning. She cannot focus on academics to have meaningful benefit in the inclusion room, and the classroom and the curriculum is not designed to provide daily one on one instruction to a student. The negative impact and strain on the teachers, staff, and most particularly the other students in the room, some being disabled with IEPs and her non-disabled peers, cannot continue to endure. I **CONCLUDE** the District has demonstrated that a satisfactory education cannot be achieved for L.O. in the general education inclusion classroom, even with the use of supplementary aids and services.

The second prong of the Oberti analysis requires a determination as to whether the child has been included in school programs with nondisabled children to the maximum extent appropriate. Although limited at this stage, L.O. does attend physical education, library, music, art, and innovation and design classes with the general education students. It is recognized this is not the majority of time for L.O.'s school day. She attends lunch and recess with the general education student population and attends classroom parties and field trips. It has been demonstrated that L.O. particularly enjoys art class and her level of focus is much higher in art class and her disruptions are lessened when the work is related to coloring or drawing. The IEP does restrict L.O. from attending core classes such as reading and math, but she is around her peers in the special classes and lunch and recess time. These are opportunities for L.O. to model speech and language of her peers, which is of greatest concern to her parents, and will occur during L.O.'s preferred activities, when she is better focused. It has been demonstrated that L.O.'s negative behaviors are lessened during preferred activities.

L.O. did not get to attend the World Down Syndrome Day celebration with the general education inclusion class in March 2023, and McCafferty testified this was not a classroom party event. It was encouraging to hear that L.O.'s self-contained class would be having some type of recognition or Rock Your Socks event for 2024, and if not in the future, it certainly would be a reasonable accommodation to allow L.O. to participate with general education non-disabled peers to watch a video or be photographed as a group wearing mis-matched socks, if that is the "celebration" being done for World Down

Syndrome day. The other peers would greatly benefit from having L.O. part of a celebration for her specific disability, to gain greater knowledge and understanding of Down Syndrome.

The Rock Your Socks Day was not an event specifically drafted into the IEP, nor is it classroom party. There has been nothing demonstrated to rebut the District's evidence that the IEP provides the maximum amount of time with non-disabled peers, considering her placement in the self-contained room is the most advantageous program for her academic needs to focus on her gaining meaningful academic progress. Nothing has been demonstrated that the District failed to follow the IEP for the inclusion provisions in the programming. I **CONCLUDE** that the District has demonstrated that the IEP programming provides that L.O. is included in school programs with nondisabled children to the maximum extent appropriate.

BCBA Pisacreta's well-reasoned and supported expert opinion that the self-contained room is the proper placement to meet L.O.'s academic needs is the conclusion that must be reached here. The District's un rebutted evidence has demonstrated that it met its burden in this matter. I **CONCLUDE** that the IEP is appropriate and designed to provide a FAPE to L.O. I further **CONCLUDE** that the District has demonstrated the change in placement to the self-contained room was appropriate and that the District has provided a FAPE in the LRE for L.O. in accordance with the controlling regulations and case law. I **CONCLUDE** that any requested relief in the due process petition is denied, and the petition is thus dismissed.

ORDER

It is **ORDERED** that with the District's demonstration that the IEP was appropriate and that it has provided a FAPE in the LRE, the due process petition is **DISMISSED** and any requested relief in the petition is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2024) 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 (2024). 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.



June 28, 2024

DATE

ELAINE B. FRICK, ALJ

Date Received at Agency

Date Mailed to Parties:

EBF/gd

APPENDIX

WITNESSES

For petitioner

K.O.
J.O.

For respondent

Jeffrey Pisacreta
Sarah McCafferty

EXHIBITS

For petitioner

- P-A IEP implementation July 11, 2022
- P-B Settlement Agreement and General Release, unsigned, undated
- P-C January 30, 2023, letter to Judge Bogan from parents
- P-D Augmentative Communication Evaluation by L. Kate Flaxman, March 7, 2023
- P-E Independent Educational Evaluation-Functional Behavioral Assessment by Leonard Educational Evaluations, LLC, Chad Leonard, April 2, 2023
- P-F Independent Educational Evaluation-Learning/Educational Evaluation by Leonard Educational Evaluations, LLC, Chad Leonard, April 2, 2023
- P-G Independent Educational Evaluation-Psychological Evaluation by Leonard Educational Evaluations, LLC, Nicole Watson, April 2, 2023
- P-H May 8, 2023, note by parents rejecting IEP of April 25, 2023
- P-I Email from school Social Worker to parents, May 11, 2023, fifteen day review period expired
- P-J IEP implementation May 11, 2023
- P-K Emails between teacher and parents, February 16, through February 21, 2023, re Mystery Reader
- P-L Email from teacher re World Down Syndrome Day, March 17, 2023
- P-M Email re writing celebration, May 15, 2023
- P-N Progress Reports ESY 2023

P-O August 30, 2023, due process complaint letter submission to
Superintendent by Kat McKay, Esquire

For respondent

- R-1 Reevaluation plan February 16, 2021
- R-2 Social Assessment, January 25, 2019, by Tina Heil
- R-3 OT Evaluation by Mitchell Federico, March 1, 2021
- R-4 S/L evaluation by Kristin Piperno, March 3 and March 4, 2021
- R-5 Psychological evaluation by Danielle Nemeth, March 30, 2021
- R-6 PT evaluation by Christianna Farrell, March 31, 2021
- R-7 IEP from April 12, 2021, for July 12, 2021, through April 11, 2024
- R-8 Harrison Township School Report Card, kindergarten, with progress reports, 2021-2022 school year
- R-9 IEP from April 5, 2022, for July 11, 2022, through April 11, 2024
- R-10 Jeff Pisacreta behavioral spreadsheets and graphs
- R-11 Daily behavioral data from September 7, 2022, through December 21, 2022
- R-12 IEP from January 6, 2023
- R-13 Reevaluation plan, signed January 16 and January 17, 2023
- R-14 Harrison Township School Report Card, grade 1, with progress report for 2022-2023 school year
- R-15 IEP goals and objectives progress report June 12, 2023
- R-16 Evaluation plan-reevaluation, signed January 16 and January 17, 2023
- R-17 Independent Educational Evaluation-Learning/Educational Evaluation by Leonard Educational Evaluations, LLC, Chad Leonard, April 2, 2023
- R-18 Independent Educational Evaluation-Psychological Evaluation by Leonard Educational Evaluations, LLC, Nicole Watson, April 2, 2023
- R-19 Augmentative Communication Evaluation, March 29, 2023
- R-20 Independent Educational Evaluation-Functional Behavioral Assessment by Leonard Educational Evaluations, LLC, Chad Leonard, April 2, 2023
- R-21 Eligibility Conference Report-Reevaluation April 12, 2023, meeting date
- R-22 IEP of April 12, 2023, for implementation May 11, 2023, through April 11, 2023, for remaining first grade through projected second grade

- R-23 IEP goals and objectives progress report February 26, 2024
- R-24 Target behaviors graphs and charts April 2023 through February 2024
- R-25 Emails-multiple from social worker Tina Heil to parents, multiple dates
- R-26 Emails-multiple from Sarah McCafferty, first grade teacher 2022-2023, multiple dates
- R-27 Daily communication behavior charts, voluminous, unnumbered pages
- R-28 Home schooling data sheets, voluminous, unnumbered pages
- R-29 Nicole Grieb resume
- R-30 Tina Heil resume
- R-31 Lori Hynes resume
- R-32 Sarah McCafferty resume
- R-33 Jeffrey Pisacreta resume
- R-34 Danielle (Genovese) Nemeth resume