



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 13556-23

AGENCY DKT. NO. 2024-36694

S.S. and K.S. o/b/o A.S.,

Petitioners,

v.

MONTGOMERY TOWNSHIP

BOARD OF EDUCATION,

Respondent.

S.S. and K.S., petitioners, pro se

Rita F. Barone, Esq., for respondent (Flanagan Barone & O'Brien, LLC,
attorneys)

Record Closed: December 9, 2024

Decided: December 16, 2024

BEFORE **SARAH G. CROWLEY, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1401-1484(a). A.S. is a resident of Montgomery Township and was eligible for special education and related services during the 2021-2022, and the 2022-2023 school years. The district proposed declassifying her based upon reevaluations that were completed in the fall of 2023. The petitioners opposed the declassification, filed a

due process petition, requested stay put, and thereafter, provided notice of unilateral placement at the Cambridge School. A hearing was held on September 4, 2024 and September 5, 2024, and the record closed after the parties filed closing submissions on December 6, 2024. The issues to be determined in this case are: (1) are whether A.S. was being provided a free and appropriate public education (FAPE) in the least restrictive environment (LRE); (2) was the proposed declassification in October 2023 appropriate; and (3) if she was not receiving FAPE in the LRE, was the unilateral placement of A.S. justified and appropriate.

Testimony

For the respondent:

Erica Pawlo, Psy. D. is a licensed school psychologist employed as a psychologist and a case manager for special education students in the Montgomery school district. She was qualified as an expert in special education. Dr. Pawlo identified a report, dated October 3, 2023, that she authored based upon an examination of A.S. conducted on September 21, 2023. A.S. was in the 7th grade at the time of the evaluation. A.S. was classified under the category of Specific Learning Disability (SLD) in the area of basic reading, fluency and reading comprehension. She received in-class resource for language arts, supplement reading instruction and was in general education classes for all other subjects. A.S. was in a classroom that had in-class resources for all subjects, and she received a grade of eighty-nine in language arts and A's in all other subjects. Her 2023 NJSLA scoring supported the removal of in-class resource for math, science and social studies in the 7th grade. She remained in a classroom that had in-class support for language arts.

Dr. Pawlo reviewed all of the A.S.'s records and found that she was doing well in all her classes and was functioning on normal levels. There were no discrepancies in the testing that would have supported special education services. In addition, based upon her discussions with her teachers and review of the reports, A.S. did not receive any type of modified curriculum or specialized instruction. She was reading on average and below average in certain testing that was done. However, testing low in certain

areas does not mean you are “disabled” or qualify as a special education student. Many students test low in certain areas and that does not mean they are disabled. If A.S., or any student is struggling with reading, there was in-class and out-of-class supports available. The Child Study Team determined, and she concurred, that A.S. no longer met the benchmarks to be classified. She was receiving all As and Bs and her curriculum was not modified in any way. They conducted a reading screening based on concerns raised by her parents and agreed to put her in supplemental reading to address any weaknesses in reading fluency and comprehension that she may have. Dr. Pawlo reviewed the speech and language assessments conducted and concluded that the decision to declassify her was appropriate.

Dr. Pawlo testified that educational and psychological assessments were also conducted, and the differentials did not rise to a level which would qualify A.S. for special educational services. She had been classified as “SLD” due to some past problems with reading, but the discrepancies in reading were all in the average range. Moreover, being in the average or below average range in one area did not indicate that she was in need of special education services. She reviewed a number of the assessments, including the Star reading assessment, and determined that A.S. fell within the normal range and was not in need of intervention. Dr. Pawlo also discussed the parental concerns with reading and some anxiety that the parents reported. However, A.S. did not display any signs of anxiety to her teachers in school. A psychological evaluation was conducted and there were no emotional issues or other issues related to learning that were affecting her ability to learn. Their conclusion to declassify A.S. was predicated on observations in the classroom as well as teacher input, testing and grades .

The district also conducted a reading screening based upon the parents’ recommendation. Based upon the results of this, A.S. was recommended for supplemental reading services. However, she did not qualify for special education services. A.S. had some weakness in reading fluency and supplemental services were readily available in the general education classroom to her or any student that had a weakness in reading. Dr. Pawlo reported that A.S. “no longer demonstrated any significant discrepancy between her cognitive ability, as measured by the WISC-V and

her academic achievement, as measured by the WIAT-4 on her most recent evaluations.” Dr. Pawlo discussed the results of several evaluations that demonstrated in her expert opinion that A.S. was no longer in need of special education services.

Ina DiGangi is a teacher in Montgomery Township. She is a general education teacher in language arts. She had A.S. as a student in the 7th grade. She described her demeanor as sweet, quiet and generally a very strong B student. She reviewed the Star testing records for two years and described some of the issues that they would look for. She discussed the reading workshop which was available to all general education students. If there were any concerns with a student’s reading, they would refer them to the reading workshop. She discussed A.S. in the classroom. A.S. would advocate for herself, ask questions if she had them, and use resources that were available to her. These are resources available to all general education students. A.S. was approaching and meeting her expectations in language arts. She was a B student in her class. She may have been higher in the first marking period, but she was doing fine. Ms. DiGangi testified that A.S. was in the red in some areas, but many general education students test red in this area and are referred to the reading workshop to address concerns. She testified that A.S. did not have a severe discrepancy that would qualify for special education and related services.

Amy Costa is a learning disability teacher consultant for the Montgomery Township School District. She teaches Wison reading, which she describes as a multisensory approach to teaching reading and was accepted as an expert in learning disabilities. She was involved in the evaluations of A.S. conducted in 2020 and the reevaluations conducted in 2023. She described the evaluation process, including background review of the student’s records, as well as observations of the student in the classroom setting. She also interviewed A.S.’s teachers and all the testing materials including standardized assessments. She identified the report that she prepared on A.S., dated September 29, 2023. She testified that the discrepancies in A.S.’s reading proficiency did not elevate to a level of requiring special education services. Many students struggle with reading and there are supplemental services available. However, based upon her evaluation, in her expert opinion, A.S. did not meet any of the requirements for classification as a special education student.

Catherine Mislan is a special education teacher in Montgomery Township and has been there for approximately ten years. She has taught in different positions in the district. She has taught both seventh and eighth grade classes and has been an in-class support teacher and teacher in the pull-out programs. She first met A.S. when she was an in-class resource teacher in the seventh grade for language arts. This was in September of A.S.'s 7th grade year. Ms. Mislan was the co-teacher with Ms. DiGangi. A.S. was receiving additional time for assignments and assessments if she needed it, and she was able to use google read and write programs if she requested them. There was no modification of her curriculum, and she was being taught the same way as all other general education 7th graders. She recalls that she was asked to fill out some paperwork in terms of A.S. and what support she was using and how she was doing. Ms. Mislan remarked that A.S. had incredible advocacy skills and if she needed assistance, she was capable of and did ask for support. All students also had the ability to ask for a conference, in a group or one-on-one, which was something that was available to and utilized by all students. She recalled one vocabulary test where the extra time or scope of the assignment was modified for A.S. but other than that no accommodations were utilized, and the curriculum was not modified. She was doing fine in language arts and had a high B or low A.

For petitioners:

K.S. is A.S.'s mother and testified on behalf of her child. The petitioners presented a great deal of testimony regarding A.S.'s test scores and evaluations over the years and in the fall of 2023. However, they presented no other fact or expert witnesses to interpret these evaluations and data. K.S. testified that A.S. spent hours completing her homework at night and was stressed out about school all the time. She reviewed the testing that they had done as well as the results of testing that was conducted by the district which indicated that she was scoring low and at an alarming level in some areas of reading proficiency. She believed that these areas of low testing should entitle A.S. to special education services. There was testimony regarding her diagnosis as Dyslexic and the districts acknowledgment of this diagnosis. However,

there was no testimony as to how such a diagnosis, if demonstrated, qualified A.S. for special education services.

K.S. pointed out score levels of various tests which indicated that they were at low or alarming levels. She testified that she expressed her concern to the district on numerous occasions and felt that the decision to declassify A.S. was done without any participation from her or her husband. However, the correspondence to and from K.S. and S.S. and the district demonstrates that they were informed and involved in her education and the process involving her declassification. She testified that she was present at the IEP meeting but felt that the district had already made their decision without input from her or her husband. The petitioner provided no expert testimony regarding the test results or the criteria for special education services or any testimony to discredit the expert and fact witnesses presented by the district whom I found sincere and credible.

FINDINGS OF FACT

The resolution of the petitioners' claims in this matter requires that I make credibility determination regarding the critical facts, as well as the expert testimony. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experiences 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 witnesses' story considering its rationality, internal consistency, and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re

Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, and based on the testimony and evidence before me, I **FOUND** the expert and fact witnesses presented by the district credible and their testimony supported by the documentary evidence presented and I therefore, **FIND** the following as **FACT**:

1. A.S. is a resident of Montgomery Township School District, currently in the 8th grade at the Cambridge School, an out-of-district placement.
2. A.S. was qualified for special education services under the classification of SLD in the 4th grade, due to reading fluency and comprehension concerns.
3. A.S. had been consistently making meaningful progress and receiving As and Bs in all her subjects.
4. The district conducted a reevaluation of A.S. and proposed to declassify in October of 2023 based upon the evaluations.
5. The evaluations demonstrated that A.S. was making meaningful progress and was no longer in need of special education and related services. A.S. did not meet the criteria for specific learning disability or any other special education classification.
6. A.S. only received support in language arts due to a deficiency in reading and was receiving in-class support for language arts only.
7. A.S. did not have a modified curriculum; tested within normal range and was receiving high Bs in Language Arts, and did not present with a severe discrepancy under the applicable testing modules.
7. Support and interventions were available to non-classified students to support any challenges, which were sufficient to meet any challenges that A.S. had with reading and language arts.

8. A.S. no longer qualified for special education services and the decision to declassify her was supported by the evaluations, testing and the meaningful progress that she was making.
9. Stay put was invoked leaving A.S.'s accommodations in place.
10. Thereafter, the parents unilaterally placed A.S. in an out-of-district placement at Cambridge School and served a notice of same on the district.
11. A.S. was receiving FAPE in the LRE in Montgomery Township School District at the time of the unilateral placement.
12. The decision to declassify A.S. in October of 2023 was supported by documentary evidence and testimony from the district. evidence.

LEGAL ANALYSIS AND CONCLUSION

The Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §§ 1400-1482, provides the framework for special education in New Jersey. It is designed “to ensure that all children with disabilities have available to them free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. § 1400(d)(1)(A); see generally id. § 1400(c), (d) (describing need for, and purposes of, the IDEA). A state may qualify for federal funds under the IDEA by adopting “policies and procedures to ensure that it meets” several enumerated conditions.

This Act requires that boards of education provide students between the ages of three and twenty-one who suffer from a disability with a free appropriate public education, or FAPE. In fulfilling its FAPE obligation, the Board must develop an IEP for the student, and the IEP must be reasonably calculated to confer some educational benefit. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 192, 73 L.Ed. 2d 690, 703, 102 S.Ct. 3034 (1982) (Rowley). The Third Circuit Court of Appeals has clarified the meaning of this “educational benefit.” It must be “more than trivial and

must be significant” and “meaningful.” Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989) (Polk); Ridgewood Board of Education v. N.E., 172 F.3d 238, 247-48 (3rd Cir. 1999) (Ridgewood). In evaluating whether a free, appropriate public education was furnished, an individual inquiry into the student’s potential and educational needs must be made. Ridgewood, 172 F.3d at 247. In providing a student with a FAPE, a school district must provide such related services and supports as are necessary to enable the disabled child to benefit from the education. Rowley, 458 U.S. at 188-89.

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

A “student with a disability” is defined as a student who has been determined to be eligible for special education and related services. N.J.A.C. 6A:14-1.3.

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

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

Thus, in order to be eligible for special education and related services, the student must 1) have one or more disabilities as defined in N.J.A.C. 6A:14-3.5(c)(1)-(14); 2) the disability must adversely affect the student's educational performance; and 3) the student is in need of special education and related services.

A.S. was classified due to a deficiency in her reading in the fourth grade. She was classified as "SLD" and received in-class support for language arts. Revaluations were conducted in the 6th grade, and the district determined that she no longer met the requirements to be eligible for special education services. In the fall of her seventh grade year, they proposed to declassify her based upon all the testing and the collective decision of the child study team. The testing, as well as the collective determination of the child study team, was that she was no longer in need of, nor was she utilizing the limited accommodations that were offered. Supplemental services were available to all general education students to address weakness in reading or any other subject. However, a weakness in an area did not qualify a student for special education services and the evaluations conducted of A.S. demonstrated that she no longer met the criteria for SLD.

The district relied on the concrete evidence, reports, and teacher input in determining that A.S. was no longer in need of any special education and related services. I found the district's reliance on that information, as well as the expert testimony of several witnesses, was credible and persuasive. The record is replete with evidence that A.S. was making meaningful progress and no longer in need of special education services. Petitioners offered no credible evidence to contradict this evidence. K.S. provided sincere testimony that her daughter was struggling with her homework at night and relied upon the results of some of the evaluations that indicated that A.S. demonstrated a weakness in reading and fluency. However, no one provided any expert testimony regarding these evaluations or provided any credible testimony which supported the continued classification of A.S. A.S. was making meaningful progress in all her subjects and was receiving As and Bs. Moreover, based upon the expert testimony from the district, a weakness in the area of reading did not render A.S. qualified for special education services.

Many students participate in supplement programs in reading and other subjects if they are struggling. A weakness in a subject area does not render a child entitled to special education services. There are several cases which support this conclusion that even where there is evidence of some weaknesses of a student, it does not in and of itself establish a basis for classification and entitlement to special education services. See *E.P. v. N. Arlington BOE*, 2019 U.S. District LEXIS 5543. At the time of the declassification meeting, the IEP team had an in-depth discussion about declassifying A.S. based on all the information available to them. There were objective proofs which confirmed the significant progress made by A.S. based on concrete evidence and the evidence supporting declassification was persuasive and credible. Expert testimony was provided to support the documentary evidence and the determination that A.S. no longer qualified for special education services

Accordingly, **I CONCLUDE** that the determination to declassify A.S. was appropriate under the circumstances of this case. I further **CONCLUDE** that A.S. was receiving FAPE in the LRE under the existing “stay put” IEP.

The Supreme Court has held that two factual findings must be made before awarding reimbursement for the costs of a unilateral placement: (1) the school district failed to provide a FAPE to the student, and (2) the placement selected by the parents was proper. *School Comm’n of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369-70 (1985). Since the *Burlington* decision, its holding has been adopted by both Congress and the United States Department of Education. 20 U.S.C. §1412(a)(10)(C); 34 C.F.R. 300.403(c) (2005). It is also set forth at N.J.A.C. 6A:14-2.10(b) in that an ALJ may require the district to reimburse the parents for the cost of enrollment if the ALJ finds that the district had not made FAPE available to that student in a timely manner prior to that enrollment and that private placement is appropriate. When a parent places a child into private school unilaterally, reimbursement may be ordered where there is compliance with standards set forth in 20 U.S.C. § 1412(a)(10)(C)(iii), which states:

The cost of reimbursement [for unilateral private-school placement] may be reduced or denied--

(l) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa).

The pertinent New Jersey regulation, N.J.A.C. 6A:14-2.10(c), is consistent with this federal provision.

Based on the foregoing, I **CONCLUDE** that the district was providing FAPE in the LRE under the prior IEP and that the determination to declassify A.S. was appropriate. I further **CONCLUDE** that the parents were not justified in unilaterally placing A.S. in an out-of-district school. A.S. was making meaningful progress in the district and being provided with FAPE in the LRE. There is no evidence of a denial of FAPE under the prior IEP or that FAPE would not be provided under the proposal to declassify A.S. Based on the evidence and testimony, I **CONCLUDE** that the IEP was reasonably calculated to provide a meaningful educational benefit to A.S. and that the proposal to declassify her was reasonable based upon her consistent and meaningful progress and the test results. Accordingly, I **CONCLUDE** that reimbursement for unilateral placement is **DENIED**.

DECISION AND ORDER

For the reasons set forth above, it is hereby **ORDERED** that the reimbursement for the unilateral placement at Cambridge is **DENIED**, along with any other requests for compensatory education, fees and costs associated with this claim.

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 the program or services, this concern should be communicated in writing to the Director, Office of Special Education.



December 16, 2024 _____

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency

Date Mailed to Parties:

SGC/lam

APPENDIX

WITNESSES

For petitioners:

K.S.

For respondent:

Erica Pawlo, Psy.D.

Amy Costa, LDTC

Ina DiGangi

Catherine Mislan

EXHIBITS

For respondents:

- R-1 Psychological Evaluation Report, dated October 2, 2020
- R-2 Education Evaluation Report
- R-3 IEP, dated June 1, 2022
- R-4 IEP, dated March 24, 2023
- R-5 6th Grade Report Card
- R-6 Parent letter and Report, dated August 4, 2023
- R-9 Acceptance-Rejection of Evaluations
- R-11 IEP, dated September 12, 2023
- R-12 Consent to implement IEP, dated September 15, 2023
- R-13 Reevaluation testing consent
- R-14 NJSLA ELA
- R-16 Psychological Evaluation, dated October 3, 2023
- R-17 Speech Evaluation, dated October 2, 2023
- R-18 Educational Evaluation, dated September 29, 2023
- R-19 Eligibility, dated October 13, 2023
- R-20 Reevaluation eligibility Determination
- R-21 SLD guide

- R-23 Star ELA Record Book, dated June 2023 through September 2023
- R-24 Star Assessment December 12, 2023
- R-25 Star ELA Mastery Projection, dated December 2023
- R-26 Teacher Data
- R-28 IEP dated, January 5, 2024
- R-29 Resume Erica Pawlo, Psy.D
- R-30 Resume Amy Costa, LDTC
- R-32 Resume Catherine Mislán
- R-33 Resume Ina DiGangi
- R-36 7th Grade MP1 and MP2 grades
- R-37 Star Progress Report with trend lines (generated November 29, 2023)

For petitioners:

- P-1 Email dated November 22, 2023
- P-2 Email dated January 9, 2023
- P-3 Email from Dr. Erica Pawlo
- P-4 Assessment Summaries (NJSLA)
- P-6 Test Data – only the last two pages admitted into evidence
- P-7 Wechsler Individual Achievement Test - first 4 pages only
- P-8 September 12, 2023, IEP meeting results
- P-9 Letter from S.S. and K.S. to district dated December 14, 2023