

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 00083-17

AGENCY DKT. NO. 2017-25480

S.P. ON BEHALF OF G.M.,

Petitioners,

v.

RIVERSIDE TOWNSHIP BOARD

OF EDUCATION,

Respondent.

Bradley Flynn, Esq., for petitioners (Montgomery Law, LLC, attorneys)

Sanmathi Dev, Esq., for respondent (Capehart Scratchard, attorneys)

Record Closed: March 14, 2018

Decided: March 27, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, S.P., on behalf of her son, G.M. filed a petition alleging that her son, a second-grade student at the Riverside Township School District (respondent) was not provided a free and appropriate public education (FAPE). Petitioner alleges in her petition that due to the failure of respondent to do a behavior assessment and have a behavioral plan for G.M., he was denied FAPE, and is entitled to compensatory education for the months of September, October, November, and December 2016. Petitioner moved out-of-district in January 2017, and thus, there is no continuing issue with respect to petitioner's IEP or placement.

G.M. was a second-grade special education student enrolled at the Riverside Township School District for the 2016-2017 school year. He was eligible for special education services under the classification of other health impaired. G.M. was in general education classes and received special services, therapy and an individual aid. Respondent maintains that it conferred G.M. a free and appropriate public education, a program that provided G.M. with significant learning and meaningful educational benefit in the least restrictive environment. When G.M. began exhibiting behavior issues in the late fall 2016, a functional behavior assessment was completed, the child study team convened and the IEP was modified to include a behavior plan. Petitioner argues that the assessment should have been ordered sooner and that G.M. was denied FAPE for the three or four months in question.

The petition was filed on or about December 12, 2016, with the New Jersey Department of Special Education. After the parties participated in mediation conducted by the Office of Special Education Programs (OSEP) on January 3, 2017, the matter was transmitted to the Office of Administrative Law on January 3, 2017. The case was heard before the undersigned Administrative Law Judge (ALJ) on December 4, 5, 6 and 8, 2017. Submissions were filed by the parties on January 31, 2018, and the record closed after a conference with the parties on March 14, 2018.

ISSUES

1. Did respondent offer petitioner a free and appropriate public education where he could make meaningful educational progress during the fall of the 2016-2017 school year?
2. Did respondent fail to do a behavior assessment within a reasonable period of time for petitioner, and if so, is petitioner entitled to compensatory education for the period in question?

SUMMARY OF TESTIMONY

For respondent:

Tiffany Ross

Tiffany Ross was G.M.'s second grade teacher during the 2016-2017 school year. She has been a teacher with the respondent for approximately twenty-one years. She has taught various grades throughout her tenure in the District and was experienced with working with students with disabilities. During the 2016-2017 school year, she had twenty-three students in her class, several of which had IEPs and 504 plans, including G.M. She discussed the discipline process in the classroom and the use of positive and negative consequences and a progressive discipline process. This process was explained to all the students and their parents at the beginning of the school year.

Ms. Ross testified that G.M. was on grade level with his academics and she did not have any problems with him initially. She noted some academic areas where he was a little behind grade level, but indicated that he had been making progress. G.M. had an aid due to his medical issues and there were times when he needed to be reminded of classroom rules and the consequences. She explained this was not unusual for second grade students. She had problems with G.M.'s mother from the beginning of the year. The first incident occurred during back to school night when G.M.'s mother was rude and disrespectful to her. G.M.'s mother verbally attacked her on October 20, 2016, which left her somewhat fearful. Thereafter, petitioner filed a DCF complaint against her, which was dismissed as unfounded.

In late October and early November, she noticed a change in G.M.'s attitude towards her and he became more disruptive and was acting out in the classroom. G.M. always had a one on one aid, Ms. Santino. Ms. Santino would work with him to cool down when he got angry or misbehaved in the classroom. She also called on the guidance counselor to step in and try to provide positive reinforcement for G.M. Academically, he continued to meet their goals. She identified the documentation to support the progress of G.M. academically and a few areas where he was struggling.

She met with the aid and the school counselor to come up with a plan to address this recent behavior change. She stressed that this behavior did not commence until

November and after the behavior intervention methods they employed with G.M. in the classroom were not working, they scheduled an IEP meeting with the parents in November to discuss G.M.'s situation and petitioner's request for a behavior plan. The meeting was not scheduled until December 21 in order to accommodate the petitioner's schedule. However, the petitioner canceled this meeting and it was rescheduled for January 5, 2017. At the meeting, respondent proposed various evaluations and assessments including a functional behavior assessment and the IEP was modified to include a behavior intervention plan. The family moved out-of-district in January 2017, so the plan was never implemented.

Vanessa Connearney

Ms. Connearney is a guidance counselor at Riverside Elementary School and has been a guidance counselor for eighteen years. She works with general and special education students. She has known G.M. for several years. He was a very sweet boy and she always enjoyed seeing him and speaking to him. In late October or early November, his teacher, Ms. Ross reached out to her about some behavior issues she had begun to notice. She worked with Ms. Ross and G.M.'s aid, Ms. Santino to come up with strategies and interventions to help with his behavior in the classroom. They came up with several strategies that they were implementing. She testified that they were also talking with the child study team about these issues and she met with G.M. to provide additional support. They took steps in the classroom as soon as the behavior was observed and attempted to put in the appropriate interventions and consequences. It was appropriate to attempt to put their own interventions in place prior to ordering a behavior assessment. Ms. Connearney stressed that this behavior was out of character for him, so it was reasonable to try some classroom interventions first.

She met with G.M. privately at the end of November through the end of December to provide additional support. She believed that the steps were appropriate and effective since he was able to stay in the classroom and had the appropriate supports in place. When the behavior escalated, the child study team met, to discuss doing assessments and they attempted to meet with the petitioner. Petitioner requested a meeting in late November or early December. Petitioner requested specific dates in

December and then cancelled that meeting. It was rescheduled for January 5, 2017. They met on January 5, 2017, and the IEP was modified and a behavior assessment was ordered. The family moved out-of-district and withdrew G.M. from the District so the modified IEP was never implemented.

Patrice Swenson

Ms. Swenson is the Director of the Child Study Team for Riverside Township. Ms. Swenson was familiar with G.M. and his family. G.M. was classified as other health impaired. He was in a general education setting and received a one on one aid. She testified that Ms. Santino continued as his one on one aid while he was in the District. She was aware that the family had moved due to a bug infestation and their home in Riverside in early September 2016. They moved in with G.M.'s father in a neighboring district and respondent provided busing and kept G.M. and his brother in the District. She was aware that G.M.'s mother had an issue with Ms. Ross from the beginning of the year and continued to complain about her. She testified that G.M. did not exhibit any behavior issues until the end of October. They attempted different classroom interventions, which is the normal protocol.

G.M.'s mother emailed her on November 28, 2017, and requested an IEP meeting. Her secretary responded that day to see if she was available to come in immediately. Ms. P. responded on December 2, 2017, that her CMO Miguel was not available until December 21 or 22, 2016. Her secretary then responded to Ms. P. that they could schedule the meeting for the December 21 or 22, 2016, at 2:30 p.m. That meeting was rescheduled at the request of Ms. P., and the IEP meeting was held on January 5, 2017. At the meeting in January, respondent proposed various evaluations including a function behavior assessment, psychological evaluation and several others. Respondent revised the IEP to include a behavior intervention plan with some individual counseling services and to continue with the one on one aid. The petitioner never followed up with updated medical and moved the child out-of-district, so the modified IEP was never implemented.

For petitioner:

S.P.

S.P. is G.M.'s mother and legal guardian. She discussed G.M.'s medical issues at length. She had concerns about respondent complying with the medical requirements for her son. One issue had to do with the wheelchair use. She testified that G.M. was supposed to use the wheelchair but they did not use it for him regularly. Her primary concern was after he started taking the bus and had to walk from the bus to the school. She disputed Ms. Ross' testimony that the wheelchair was not sent in with petitioner. However, her primary concern was that he was acting out and the District should have ordered a behavior evaluation and had a behavior plan in place for him. She claimed that he was not making progress academically because of the behavior issues. She also claimed that he was being bullied and the teachers did not do anything. However, she did not file any HIB complaints. She also claimed that she did not receive any of the progress reports that were identified by Ms. Ross. She conceded that she did not care for Ms. Ross from the beginning of the school year and had some issues which culminated in a verbal argument with her on school property on October 20, 2016.

She testified that there was an issue with bedbugs in their housing, so they moved out-of-district sometime in September which is when G.M. and his brother started taking the bus. Respondent provided bussing for them, since the dislocation was temporary. Petitioner's attorney characterized the family as being "homeless." However, it was petitioner's testimony that they moved into G.M.'s father's home and the boys ultimately started attending school in that District. She believes that the District should have ordered a behavior assessment sooner and that their failure to do so resulted in a denial of FAPE for G.M. She believed that G.M.'s academic progress was hindered during this period of time.

Janice Willis-Kingsbury

Ms. Kingsbury was offered as an expert in special education and psychology. She provided a report dated November 2017. She concluded based upon her review of all the records from petitioner that G.M. had regressed academically in the fall of 2016. She discussed her experience and the different intelligence and psychological testing she conducted on petitioner. She conducted several tests and concluded that his behavior was impacting his ability to progress in school and that a behavior assessment should have been completed on him.

Ms. Willis-Kingsbury met with G.M. and his mother between January and August 2017. She did not observe him in the Riverside School District as he had left the district at the time she met with and interviewed G.M. and petitioner. She conducted a number of different tests and identified and discussed the various progress reports that had been prepared by the Riverside district when he was a student there. She concluded that the respondent had failed to address medical and behavioral issues which resulted in his regression and a denial of FAPE.

FINDINGS OF FACT

The resolution of the allegations in this matter requires that I make a credibility determination regarding critical facts. The choice of accepting or rejection 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 I also must be credible in itself. 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 in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. *Carbo v. United States*, 314 F. 2d 718, 749 (1963). A fact finder is free to weight 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 with alone, or in connection with other circumstances in evidence, except

suspicion as to this truth. In re Perrone, 5 N.J. 514, 521-22 (1950); 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, it is my view that the witnesses from the respondent school district were sincere and honest in their testimony. Moreover, the testimony was consistent with the documentary evidence and with each other. The petitioner is seeking compensatory education for the months of September through December. However, the testimonial and documentary evidence presented at the hearing demonstrate the G.M. was provided FAPE and had been progressing for the months in questions. Moreover, the behavior issues which did not commence until late fall, were appropriately and timely responded to.

Having had the opportunity carefully to observe petitioner, it is my view that although she was sincere in her concern for her son, it was clear that she disliked G.M.'s teacher and the District in general and provided no credible testimony that the District had failed to provide FAPE. Moreover, when she requested a meeting with respect to G.M.'s behavior, the District responded in an appropriate and timely manner and conducted an IEP meeting and ordered a functional behavior assessment. Thereafter, the District modified the IEP to address the behavior issues which did not commence until the late fall of 2016. Finally, it is my view that the expert opinion of Ms. Willis-Kingsbury was not credible as her testimony was inconsistent with the facts and the documentary evidence, which did not indicate that there were any behavior issues prior to the late fall. Moreover, the progress reports, and documentation and IEP from the Spring 2016 indicate the G.M. was meeting milestones and progressing on grade level. Thus, her opinion to the contrary was not based upon the evidence and was not credible.

Accordingly, I **FIND** the following:

1. Petitioner was a second-grade student in the Riverside Elementary School for the 2016-2017 school year. He was eligible for special education services under the classification of other health impaired.

2. G.M. was in a general education class and was academically on grade. He has a classroom aid and other related services.
3. G.M. was in Tiffany Ross' class for the second grade and performed adequately academically and was meeting milestones in the fall of 2016.
4. Progress reports were prepared for G.M. which indicated that he was performing adequately in the fall of the second-grade school year.
5. G.M. began to exhibit some behavior issues at the end of October and early November, which was not unusual for second graders. These behavior issues were dealt with through normal classroom intervention techniques. The guidance counselor at the school was consulted and meet with G.M. to provide support and assistance, and G.M. continued to have a one-on-one aide.
6. Appropriate interventions were implemented when the petitioner began to demonstrate behavior issues.
7. An IEP meeting and appropriate assessments were ordered after the in-classroom behavior interventions were unsuccessful.
8. An IEP meeting was scheduled with petitioner in December which was postponed by petitioner until January 5, 2018. An IEP meeting was conducted on January 5, 2018, and appropriate assessments and modifications made to the G.M.'s IEP.
9. G.M. made meaningful progress during the months of September 2016 to December of 2016, and was not denied FAPE.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

New Jersey as a recipient of Federal funds under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. must have a policy that assures all

children with disabilities the right to a free appropriate public education (FAPE), 20 U.S.C. § 1412. IDEA defines FAPE as special education and related services that are provided at public expense, under public supervision and direction, without charge; that meet the standards of the state educational agency that include an appropriate preschool, elementary school or secondary school education in the state involved; and that it is provided in conformity with an IEP. 34 C.F.R. § 300.17; 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.

The responsibility to provide a free appropriate public education (FAPE) rests with the local public school district. N.J.A.C. 6A:14-1.1(d). The local district satisfies the requirement that a child with disabilities receives a free appropriate public education by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. Of Education v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L.Ed. 2d 690, 710 (1982). It is only after the program offered by the District is found not to provide a FAPE can an appropriate alternative program selected by the parents be evaluated and reimbursement ordered. See Forest Grove Sch. Dist. V. T.A. 129 S. Ct 2484, 2496, 174 L.Ed. 2d 168, 183 (2009).

In order to provide a FAPE, a school district must develop and implement an IEP N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. Of Burlington v. Dept. of Education of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). The educational opportunities provided by a public school system will differ from student to student, based upon the “myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.” Rowley, Supra., 458 U.S. at 198. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry.

In this case because and as I **FOUND**, that G.M.’s IEP was appropriate and he made meaningful progress during the period in question. I have also **FOUND** that the District did implement appropriate behavioral intervention plan to assist in his general

education plan, and ordered appropriate behavior assessments when other interventions were unsuccessful.

I therefore **CONCLUDE** that a preponderance of the evidence has shown that G.M. was properly classified as entitled to special education services under the classification of other health impaired. I further **CONCLUDE** that he was in the proper classroom and was making meaningful progress during the time in question. I further **CONCLUDE** that respondent implemented appropriate behavior interventions when G.M. started exhibiting some behavior issues in the fall 2016. I further **CONCLUDE** that when such interventions were unsuccessful, respondent convened the child study team and ordered appropriate assessment, including a functional behavior assessment. I **CONCLUDE** that there was a meaningful and consistent behavioral intervention plan, and thereafter appropriate assessments within a reasonable short period of time. I **CONCLUDE** that there was no denial of FAPE to G.M., and there is no basis for an award of Compensatory Education.

ORDER

It is hereby **ORDERED** that the petitioner's complaint seeking compensatory education for the period of September through December 2016, and other relief is hereby dismissed.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2016). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

March 27, 2018 _____

DATE

SARAH G. CROWLEY, ALJ

Date Mailed to Agency

March 27, 2018 (emailed)_____

Date Mailed to Parties:

SGC/mel

APPENDIX

WITNESSES

For Petitioners:

S.P.

Janice Willis-Kingsbury

For Respondent:

Tiffany Ross

Patricia Swenson, Child Study Team Director

Vanessa Conneaney, School Counselor

EXHIBITS

For Petitioners:

- P-1 Parent's five-disclosure Letter
- P-2 Parents Due Process Complaint
- P-3 District's Response
- P-4 Occupational Therapy Reports
- P-5 Physical Therapy Reports
- P-6 Letter from De. Carrie Larsen, Physical Therapist, October 8, 2012
- P-7 Learning Evaluation Reports
- P-8 Psychological Evaluation Reports
- P-9 Social History, November 2011
- P-10 Speech and Language Evaluations
- P-11 IEP, November 2011
- P-12 IEP, December 2011
- P-13 IEP, January 2012

- P-14 IEP, July 2012
- P-15 IEP, September 2013
- P-16 IEP, September 2014
- P-17 IEP, September 2015
- P-18 IEP, June 2016
- P-19 IEP, January 6, 2017
- P-20 IEP, January 23, 2017
- P-21 IEP, June 2017
- P-22 IEP, Documents, January 2017
- P-23 Parent IEP Concerns, 2016
- P-24 Family Questionnaire
- P-25 Audiologist Report, Dr. Kelli Shivers-Beswick, November 2016
- P-26 Medical Records
- P-27 Behavioral Records
- P-28 Behavioral Emails Between Parent and District
- P-29 Work Samples and Assessments
- P30 Parent Conference Rubric
- P-31 Parent Email with District, May 16, 2017
- P-32 Parent Correspondences with District and Intra-District Emails
- P-33 Private Evaluations by Janice Kingsbury, Expert
- P-34 Janice Kingsbury C.V.
- P-35 Report by Geoffrey Mastro, MA LPC Ed.S., School Psychologist
- P-36 Photographic Exhibits
- P-37 Letter Revoking Consent for IEP, June 15, 2017
- P-38 Attorney Correspondences
- P-39 Functional Behavior Assessment, February 2017
- P-40 Psychological Reevaluation, January 2017
- P-41 Speech and Language Reevaluation, January 2017
- P-42 Social History Reevaluation, January 2017
- P-43 Physical Therapy Reevaluation, January 2017
- P-44 Occupational Therapy Reevaluation January 2017
- P-45 Learning Reevaluation February 2017

- P-46 Weisman Occupational Evaluation Reports by Stephanie Hartman, April 2017
- P-47 Auditory Evaluation Report, Drs. Elizabeth Patterson and Megan Mapes, February 2017.
- P-48 School Nurse Reports
- P-49 School Letter to Parent
- P-50 IEP Progress Report, 2017

For Respondent:

- R-1 Riverside Township Public Schools 2016-2017 Calendar (BOE 1838-1839)
- R-2 Classroom Management System (BOE 1792-1793)
- R-3 IEP dated June 16, 2016 (BOE 247-263)
- R-4 Emergency Health Care Plan and Seizure Health Care Plan dated September 2016 (BOE 511-513, 1094) and dated September 2015 (BOE 317-319)
- R-5 IEP dated September 15, 2016 (BOE 265-280)
- R-6 October 20, 2016 Incident (BOE 514-516)
- R-7 Institutional Abuse Investigation Unit Report dated December 14, 2016
- R-8 Conference Invitation dated November 21, 2016 (BOE 523)
- R-9 Attendance, September – December 2016 (BOE 1064-1066)
- R-10 Student Grades, September – December 2016 (BOE 1729-1734; BOE 1737-1750)
- R-11 Prehearing Order dated April 7, 2017
- R-12 Release and Waiver of Claims by Herminio Maciel dated April 6, 2017
- R-13 Emails dated November 28, 2017 to December 8, 2016 regarding scheduling of IEP meeting (BOE 725-759)
- R-14 Evaluations dated 2011 (Social, Psychological, Education/Speech-Language, Occupational Therapy, and Physical Therapy) (BOE 2-33)
- R-15 Evaluations dated 2011 (Occupational Therapy, Speech-Language, Physical therapy, and Learning) (BOE 34-58)

- R-16 Evaluations dated 2017 (Psychological, Learning, Functional Behavior Assessment, Social, Physical Therapy, Occupational Therapy, Speech and Language, and Audiologic (BOE 986-1053)
- R-17 Parental Consent for Evaluations dated January 5, 2017 (BOE 1253-1256)
- R-18 Meeting Notices December 21, 2016 and January 5, 2017 (BOE 1285-1288)
- R-19 IEPs dated January 23, 2017 and January 5, 2017 (BOE 1216-1236; BOE 1266-1284)
- R-20 Emails (BOS 481, 483, 486)
- R-21 Progress Documents (BOE 508, 509, 517, 518, 520, 522, 525, 526, 530-536, 537-540, 553-555, 589, 1798, 1257-1265, 1796-1797)