

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 1263-14

AGENCY DKT. NO. 2014 20683

M.H. ON BEHALF OF A.H.,

Petitioner,

v.

WASHINGTON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Jamie Epstein, Esq., for petitioner

Sanmathi Dev, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: February 17, 2015

Decided: July 29, 2016

BEFORE **JOSEPH F. MARTONE**, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, the petitioner, who is the parent of A.W., disagrees with a November 20, 2013, IEP proposed by the school district for a program and placement for A.H. in an in district self-contained class. A.H. attends an in-class resource program in an inclusion class as a stay-put placement within that district, and petitioner is seeking to have A.H. remain in the mainstream or inclusion in-class resource program.

The matter was transmitted to the Office of Administrative Law (OAL) on January 29, 2014, for hearing as a contested case. In accordance with 20 U.S.C.A. § 1415 and 34 C.F.R. §§ 300.500 to 300.586, the Commissioner of the Department of Education

requested that an administrative law judge be assigned to conduct a hearing in this matter. The Director of the OAL initially assigned this matter to three other judges before ultimately reassigning the matter to Hon. Joseph F. Martone, ALJ/t/a, pursuant to N.J.S.A. 52:14F-5(o). The matter was originally scheduled for a hearing to commence on February 6, 2014. The first hearing date before Judge Martone was on March 31, 2014, and continued for nine additional days until January 12, 2015. Another hearing date scheduled for February 17, 2015, was adjourned as unnecessary, and the record was closed.

FACTUAL DISCUSSION

Background

M.H. is the father of A.H., who was seven years of age during the hearing, his date of birth being January 25, 2007. The petitioner resides within the Washington Township school district where A.H. attends an in-class resource program in an inclusion class as a stay-put placement within that district. Petitioner is challenging a November 20, 2013, IEP proposed by the school district for a program and placement change for A.H. in an in district self-contained autism class. Petitioner is seeking to have A.H. remain in the mainstream or inclusion in-class resource program.

By way of background, in mid-September 2013, following discussions between the parent and the school administration, the IEP team proposed an in-class resource program in an inclusion class for a nine week trial period (R-415). The parents were agreeable to this proposal and this was implemented pursuant to a revised IEP (R-25).

On November 20, 2013, the IEP team proposed a change in the program and placement at the conclusion of the trial period to a self-contained program and placement in an in-district self-contained class (R-1). This proposal was based on contentions by the school district that A.H. was having great difficulty functioning in the classroom, even with the assistance of a one-to-one aide, and in keeping up with the academic work required by the first grade inclusion class curriculum. The parents disagreed with this proposal and filed a due process hearing request seeking to have

A.H. remain in the in-class resource program in an inclusion class.

Hearing Testimony and Evidence

In support of the contentions by the school district that the in-class resource program in an inclusion class was not appropriate and the proposed self-contained program and placement in an in-district self-contained class is appropriate, it relied principally on the testimony of Ms. Beth Buono, the first grade special education teacher who also has a Reading Certification, and the reports provided to Ms. Buono by Ms. Trudy Hanrahan, the first grade regular education teacher. They were responsible for M.H. during his placement in the 1st grade inclusion class, which consisted of ten mainstream students and five special education students, including A.H. who was classified as autistic.

Ms. Buono testified to the difficulties experienced by A.H. in mastering most of the skills needed for first grade academic work. Although he was reading on grade level for high frequency and sight words, he had difficulty comprehending what he was reading, understanding and following directions, focusing on his work for more than a short period of time and responding to questions. Benchmark tests in most academic areas showed that he was far below mastery. Ms. Buono testified that A.H. requires one-to-one teaching instruction in all academic subjects based upon IEP goals and objectives, as proposed by the school district. Because of difficulties with focusing and maintaining his focus, a one-on-one aide was provided, and while this helped A.H. to stay focused and he was better able to complete work, he was not doing so independently and he still had difficulties in his academic subjects. In Reading, A.H. could read but did not comprehend what he was reading and he struggled answering in complete sentences. In Language Arts, he was unable to write a complete sentence, even with sentence starters. He was unable to initiate conversations. He was unable to keep pace with the class in academic subjects, attend to instructions and complete his work. He exhibited aggressive behaviors towards others, and this continued throughout the year.

Ms. Buono testified to the assistance given to A.H. in preparation for his taking

benchmark tests. There were reviews of the subject-matter of the tests with each student, including A.H. These reviews allowed each of the students to practice the skills that had been taught. When A.H. took the first of these tests, he was overwhelmed and crying, and was unable to complete it.

Ms. Buono testified to her agreement with the proposed change of A.H.'s placement to a self-contained autism class. It would be a very small class of six students, there would be more focus on communications, there would be direct one-to-one instruction by teachers, and a one-to one aide for each student.

Ms. Jane O'Donnell, an LDT/C and A.H.'s case manager, also testified for the school district. She testified to her attempts to converse with A.H. following his engaging in inappropriate behaviors of spitting in class and biting another student. She indicated that when questioned about his inappropriate behaviors A.H.'s answers were non-responsive. She also testified that A.H. was not making progress in the in-class support general education setting for the same reasons expressed by the classroom teachers. She also added that there are too many distractions in the inclusion class for A.H. and they were interfering with his ability to focus on his work. She also testified to the benefits of the self-contained program proposed by the school district and the one-to-one direct instruction A.H. would receive in that proposed program.

Dr. Rebecca Null Forrestel, a behavioral consultant, performed a Functional Behavior Assessment in February 2014 with respect to A.H.'s aggression, protest refusal behaviors and inappropriate social behaviors. She concluded that academic demands and multiple verbal prompts made it more likely that A.H. would engage in problem behavior to escape what he was doing or to gain attention. His difficulties in comprehension and following directions led to these maladaptive behaviors. She testified that A.H. would do better in a smaller or one-to-one setting in order to be able to participate successfully in academic activities. She testified that the self-contained autistic program proposed by the school district would benefit him in making progress and prevent him from engaging in problem behaviors.

Ms. Christine M. Schwarz, a speech-language specialist with the school district,

testified as to her involvement with A.H. She had difficulty getting A.H. to walk appropriately to the speech classroom and had to hold his hand. In addition, during instruction he did not focus on questions being asked unless he was specifically prompted by her calling his name or touching him. Further, she stated that his focus was fleeting. He required that directions be repeated and simplified and he required one-to-one support in order to help him respond to directions. He made some progress in speech therapy because she was constantly using prompts for him in the small group setting. As to pragmatic language and social language he does not have the ability to communicate effectively with other people. His weaknesses are in receptive language, expressive language and social language skills. His strength is in articulation. She agreed that A.H. would benefit from individualized one-to-one instruction in a self-contained program as proposed by the school district.

Petitioner's witnesses included Jennifer Cornely, Director of Inclusive Programming at Partners in Learning, Inc. (Partners), and responsible for scheduling and providing program supports. She testified she has worked with A.H. on one-on-one instruction. His preschool program for the previous 2011-12 school year consisted of one-to-one call out to resource room learning zones two afternoons per week for three hours per afternoon. He also had two one-to-one home sessions per week. He made progress in the preschool program but she admitted that the goals and objectives involving the reported progress were not academic and were done in the one-to-one pullout setting or home setting. He was also given additional support to help him achieve various goals. This raised questions as to his true progress with respect to his achievement of these goals. His kindergarten program at Cherrywood for the 2012-13 school year included the one-to-one home program and one-to-one pull out instruction. He received one-to-one direct ABA therapy/instruction for three hours five mornings per week. All other instruction was always one-to-one. In the afternoons, there were a maximum of ten students total, five of whom were classified. He had a one-to-one aide. She testified that for preschool and kindergarten A.H. was given an iPad, but it was used as a motivation tool and not to supplement his instruction.

Petitioner also called Catherine Steckel, a general education kindergarten teacher working for Partners. She was A.H.'s kindergarten teacher for the 2012-13 school year where she implemented his IEP and maintained documentation on his

goals and objectives based on data kept by his aide. She stated that an iPad was used in the classroom as a tool to help A.H. maintain attention while other children used a SmartBoard. She testified that in general A.H.'s independence, interaction with his peers, self-talk, aggression and stimulatory behaviors were improving, but she could not provide any specifics. She could not recall specific modifications used in the classroom other than the iPad. She testified that A.H. made progress with respect to independence and aggression, but these were due to modifications, the assistance of classroom aides, being in small group settings with one-to-one aides and the assistance of a co-teacher.

Ann Kilgore Michael also testified for petitioner. She was a speech therapist for Partners and she provided A.H. with speech therapy once a week for thirty minutes when A.H. attended Country Acres for preschool during the 2011-12 school year. In addition, she was retained by the parents to provide an additional weekly individual speed session during that same school year. She did not work on any of A.H.'s academic goals. During the 2012-13 school year she supervised the speech program but did not provide services to A.H. During that school year A.H. received one speech session for twenty to thirty minutes per week in a group of two to three students and a second speech session per week at thirty minutes per session. Ms. Michael identified the speech and language goals recommended by Cherrywood for consideration by the school district for the 2013-14 school year (R-281). She explained that this exhibit identifies the areas that A.H. had still not mastered such as comprehending yes/no and "wh" questions, paying attention for longer than ten minutes during small group lessons, increasing his vocabulary, correct use of language to communicate needs, and engagement by actually interacting with others. She testified that a critical foundation for children with autism is to establish an engagement with others in order to have other types of learning occur. A.H. had a limited ability to relate and retell, and an inability to process what was being asked of him and accurately relate correct answers and information. He had not progressed to the level of a typical child.

Rebecca Barone also testified for petitioner. She is employed by Partners and works with students as a one-to-one aide or shadow in the classroom. She was assigned as A.H.'s aide during the 2012-13 school year to control his behaviors and

take data. She did not focus on his academics but was attempting to get him to be independent. She testified there was a behavior plan in place for A.H. for that school year. She testified that A.H. had weaknesses in independence, noncompliance, aggression, and stereotypical behavior. She also testified to the data that was collected by her with respect to A.H.'s progress but acknowledged that it involved excessive prompts and interventions before A.H. was considered to be noncompliant.

Petitioner M.H., the child's father, testified concerning the May 29, 2013, IEP. His testimony supported his main objection to a placement other than a mainstream, general education setting. His objection is that A.H. would be away from ordinary mainstream students as role models. He did acknowledge that A.H. has weaknesses in speech and reading comprehension and with respect to appropriate behaviors and social skills at times.

Dr. Samantha Levine Dawson, a former school psychologist and child study team member for the school district, was called as a rebuttal witness for the respondent. She has a Ph.D. in school psychology and was A.H.'s case manager during his kindergarten year for the 2012-13 school year. She testified that the May 29, 2013 IEP (R-53 at pp. R-55 through R-59) indicated to her that A.H. was still working on underlying developmental skills needed to access the curriculum. Specifically, she explained that A.H. needed to work on attention, communication, behavior, understanding direction and interacting with peers and teachers, and that these are skills that typically developing first-graders are not working on and have achieved. She observed that A.H. required hand-over-hand assistance from his aide in order to complete simple tasks. She testified that at the May 29, 2013, IEP meeting she recommended that A.H. be placed in a self-contained program for students with autism so that he could continue working on the underlying developmental skills that Cherrywood previously worked on. She did not recommend a general education setting because he needed to work on underlying developmental skills and would not be able to handle a general education setting. The interventions and strategies used by Cherrywood are not appropriate to implement in a general education setting because of its brisk pace, and there is no time and space to implement those interventions while the rest of the students are moving through the general education curriculum.

Findings of Fact

As a result of my review of the hearing testimony summarized above and the documentary evidence, I make the following **Findings of Fact**:

1. The testimony of Ms. Buono, the first grade special education teacher established that A.H. had difficulties mastering most of the skills needed for first grade academic work. Her testimony supports Findings 2 through 11 which follow.

2. While A.H. could read on grade level, he had difficulty comprehending what he was reading, understanding and following directions, focusing on his work for more than a short period, and responding to questions.

3. Benchmark tests in most academic areas showed that he was far below mastery.

4. A.H. required one-to-one teaching instruction in all academic subjects based upon IEP goals and objectives.

5. Because of A.H.'s difficulties maintaining his focus, a one-on-one aide was provided.

6. While the aide helped A.H. to stay focused he was not completing his work independently and he still had difficulties in his academic subjects.

7. In Reading, A.H. could read but did not comprehend what he was reading and he struggled answering in complete sentences.

8. In Language Arts, A.H. was unable to write a complete sentence, even with sentence starters. He was unable to initiate conversations.

9. A.H. was unable to keep pace with the class in academic subjects, attend to instructions and complete his work.

10. A.H. exhibited aggressive behaviors towards others, and this continued throughout the year.

11. Despite reviewing the subject matter of benchmark tests with A.H., he was overwhelmed and crying when he was given these tests and was unable to complete the tests.

12. Ms. O'Donnell, A.H.'s case manager, testified that A.H.'s answers to her questions about his inappropriate behaviors towards other students were non-responsive; he was not making progress in the current placement; and there were too many distractions interfering with A.H.'s ability to focus on his work in the inclusion class.

13. Ms. O'Donnell testified that A.H. would benefit from the one-to-one direct instruction he would receive in the self-contained program proposed by the school district.

14. Dr. Forrestel, a behavioral consultant, concluded from a Functional Behavioral Assessment that academic demands and multiple verbal prompts in the current inclusion placement made it more likely that A.H. would continue to engage in aggression, protest refusal behaviors and inappropriate social behaviors to escape what he was doing or to gain attention. His difficulties in comprehension and following directions led to these maladaptive behaviors.

15. Dr. Forrestel opined that A.H. would do better in a smaller or one-to-one setting in order to be able to participate successfully in academic activities. She felt that the self-contained autistic program proposed by the school district would benefit him in making progress and prevent him from engaging in problem behaviors.

16. Ms. Schwarz, a school district speech-language specialist, testified that during instruction A.H. did not focus on questions being asked unless he was specifically prompted by her calling his name or touching him, and that his focus was fleeting.

17. A.H. required that directions be repeated and simplified and he required one-to-one support in order to help him respond to directions.

18. A.H. made some progress in speech therapy because Ms. Schwarz was constantly using prompts for him in the small group setting. As to pragmatic language and social language he does not have the ability to communicate effectively with other people. His weaknesses are in receptive language, expressive language and social language skills. His strength is in articulation.

19. Ms. Schwarz agreed that A.H. would benefit from individualized one-to-one instruction in a self-contained program as proposed by the school district.

20. Dr. Dawson, a former school psychologist and child study team member for the school district, was called as a rebuttal witness for the respondent. She was

A.H.'s case manager during his kindergarten year for the 2012-13 school year. She testified that A.H. was still working on underlying developmental skills needed to access the curriculum. Specifically, A.H. needed to work on and master attention, communication, behavior, understanding direction and interacting with peers and teachers, and that these are skills that typically developing first-graders are not working on and have achieved. A.H. required hand-over-hand assistance from his aide in order to complete simple tasks.

21. At the May 29, 2013, IEP meeting Dr. Dawson recommended that A.H. be placed in a self-contained program for students with autism so that he could continue working on the underlying developmental skills that Cherrywood previously worked on. She did not recommend a general education setting because he needed to work on these underlying developmental skills and would not be able to handle a general education setting. The interventions and strategies used by Cherrywood in A.H.'s previous placement are not appropriate to implement in a general education setting because of its brisk pace, and there is no time and space to implement those interventions while the rest of the students are moving through the general education curriculum.

22. Ms. Cornely testified for petitioner. She worked with A.H. on one-on-one instruction for his preschool program for the previous 2011-12 school year. She testified that he made progress in the preschool program but she admitted that the goals and objectives involving the reported progress were not academic and were done in the one-to-one pullout setting or home setting, and that he was also given additional support to help him achieve various goals. This raised questions as to his true progress with respect to his achievement of these goals.

23. A.H.'s kindergarten program at Cherrywood for the 2012-13 school year included the one-to-one home program and one-to-one pull out instruction. He received one-to-one direct ABA therapy/instruction for three hours five mornings per week. All other instruction was always one-to-one.

24. Petitioner's witness, Ms. Steckel, a general education kindergarten teacher, was A.H.'s kindergarten teacher for the 2012-13 school year where she implemented his IEP and maintained documentation on his goals and objectives based on data kept by his aide. In general, A.H.'s independence, interaction with his peers, self-talk, aggression and stimulatory behaviors were improving, but she could not

provide any specifics. A.H. made progress with respect to independence and aggression, but these were due to modifications, the assistance of classroom aides, being in small group settings with one-to-one aides and the assistance of a co-teacher.

25. Ms. Michael, a speech therapist, also testified for petitioner. She provided A.H. with speech therapy for preschool during the 2011-12 school year. In addition, she was retained by the parents to provide an additional weekly individual speed session during that same school year. She did not work on any of A.H.'s academic goals. During the 2012-13 school year she supervised the speech program but did not provide services to A.H.

26. Ms. Michael identified the speech and language goals recommended by Cherrywood for consideration by the school district for the 2013-14 school year (R-281). She explained that this exhibit identifies the areas that A.H. had still not mastered such as comprehending yes/no and "wh" questions, paying attention for longer than ten minutes during small group lessons, increasing his vocabulary, correct use of language to communicate needs, and engagement by actually interacting with others.

27. Ms. Michael testified that a critical foundation for children with autism is to establish an engagement with others in order to have other types of learning occur. A.H. had a limited ability to relate and retell, and an inability to process what was being asked of him and accurately relate correct answers and information. He had not progressed to the level of a typical child.

28. Ms. Barone testified for petitioner and testified that she was assigned as A.H.'s aide during the 2012-13 school year to control his behaviors and take data. She did not focus on his academics but was attempting to get him to be independent.

29. Ms. Barone testified there was a behavior plan in place for A.H. for that school year, and that A.H. had weaknesses in independence, noncompliance, aggression, and stereotypical behavior. She also testified to the data that was collected by her with respect to A.H.'s progress but acknowledged that it involved excessive prompts and interventions before A.H. was considered to be noncompliant.

Factual Analysis

I found the testimony of the witnesses called by the respondent school district

with respect to A.H.'s skills and needs to be credible and consistent. The crux of this testimony is that there are underlying developmental skills which must be acquired by all students in order to access the academic subjects making up the curriculum in a general education setting. These skills include the necessity that a student pay attention, focus on the work, achieve comprehension of the subject, understand and following directions, respond to questions, complete the work and interact with teachers and peers.

The consistent testimony of Ms. Buono, A.H.'s current teacher, Ms. O'Donnell, his case manager, Dr. Forrestel, a behavior consultant, Ms. Schwarz, a school district speech-language specialist, and Dr. Dawson, a school psychologist and former CST member, was that A.H. was deficient in a number of the underlying developmental skills needed to learn, and that he needed to master these skills that typically developing first graders have achieved in order to succeed academically.

The testimony of the petitioner or his witnesses did not dispute the foregoing, and in some cases implicitly confirmed this position. Ms. Cornely acknowledged that A.H.'s progress in his preschool years was not in academic subjects. Ms. Steckel, A.H.'s kindergarten teacher for the 2012-13 school year, testified that A.H. was making progress in areas such as independence and interaction with peers, which appear to be underlying developmental skills. Ms. Michael, a speech therapist, and Ms. Barone, an aide, testified to their involvement in helping A.H. master skills which are clearly underlying developmental skills.

I have given great weight to the testimony of Dr. Dawson, who testified that at the May 29, 2013, IEP meeting she recommended that A.H. be placed in a self-contained program for students with autism so that he could continue working on the underlying developmental skills that Cherrywood previously worked on. She did not recommend a general education setting because he needed to work on these underlying developmental skills and would not be able to handle a general education setting. The interventions and strategies used by Cherrywood in A.H.'s previous placement are not appropriate to implement in a general education setting because of its brisk pace, and there is no time and space to implement those interventions while the rest of the

students are moving through the general education curriculum.

LEGAL DISCUSSION AND ANALYSIS

Overview

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1487, enacted in 1975 as the Education of the Handicapped Act, requires that all children with educational disabilities have access to a free appropriate education and related services designed to meet their unique needs, and establishes procedural due process rights. In 1997, the IDEA was completely revised when Congress reauthorized the Act. Pub. L. 105-17, June 4, 1997, 111 Stat. 37. Subsequently, Congress passed the Individuals with Disabilities Education (IDEA) Improvement Act of 2004. Pub. L. 108-446, 118 Stat. 2647 (2004). Federal regulations detailing the requirements of the IDEA are contained in 34 C.F.R. §§ 300.1 to 300.718. The federal statute is a grant formula law used to distribute federal funds to the states to provide services for the disabled. State law regarding education for the educationally disabled must be consistent with the IDEA and the federal regulations in order for the state to receive federal funds. See Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989).

The IDEA was enacted following a series of federal and state court decisions that expanded the rights of educationally disabled children to receive publicly financed education. See Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); and Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972) (challenging the exclusion of disabled children from free public education systems). These cases focused not only on the right to education, but also on the need for procedural safeguards throughout the process of identification, evaluation, placement and education of educationally disabled children. The IDEA and federal regulations are based on PARC, Mills and other cases; the basic requirements are as follows:

1. The provision of a free appropriate education (FAPE), including related services designed to meet the individual needs of the educationally disabled student. 20 U.S.C.A. § 1400 (d)(1).
2. Placement in the least restrictive environment appropriate to the student's needs. 20 U.S.C.A. § 1412(a)(5).
3. Prior written notice of any change in a student's educational program, including the initial identification of being educationally disabled. 20 U.S.C.A. § 1415(b)(3).
4. Opportunity for parent or guardian to examine relevant school records. 20 U.S.C.A. § 1415(b)(1).
5. Due process hearing to resolve disputes, with appeal to state or federal court. 20 U.S.C.A. §§ 1415(f) and (i)(2).
6. At the due process hearing, the right to representation by an attorney or a non-lawyer with special knowledge or training in special education; present evidence, cross-examine and compel attendance of witnesses; a verbatim record; and a written decision. 20 U.S.C.A. § 1415(h).
7. Pending the outcome of litigation, the student remains in the current placement ("stay put" provision) unless both parties otherwise agree, 20 U.S.C.A. § 1415(j), or except in discipline cases, 20 U.S.C.A. § 1415(k)(3).

New Jersey has enacted legislation, N.J.S.A. 18A:46-1 et seq., and has adopted regulations to assure all disabled children enjoy the right to a free, appropriate public education (FAPE) as required by 20 U.S.C.A. §1412(1). See also Hendrick Hudson Dist. of Educ. v. Rowley, 458 U.S. 176, 181 (1982). The IDEA requires a disabled child's FAPE be designed to meet the unique needs of that child through an IEP which is reviewed annually. Lascari, supra at 30, citation omitted. Each New Jersey district board of education, therefore, is required to provide a free, appropriate public education program and related services for educationally disabled students in the least restrictive environment. N.J.A.C. 6A:14-2.1(a).

In order to assess whether the school district's proposal to change the IEP and placement of A.H. conforms with the IDEA and implementing regulations, it is necessary to examine the rights and benefits afforded to A.H. by the IDEA by reviewing the

statutory and regulatory framework obligating a school district to provide special education to eligible students.

State and federal laws require local public school districts to identify, classify and provide a free and appropriate education to children with disabilities. 20 U.S.C.A. §1412. N.J.S.A. 18A:46-8, 9. The term “children with disabilities” means children --

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services.

(20 U.S.C.A. §1401(a)(1)(A)).

The IDEA states that the determination of whether the child is a “child with a disability” shall be made by a team of qualified professionals and the parent of the child.

A “free appropriate public education” is defined as special education and related services that are provided at public expense, under public supervision and direction, without charge; meeting the standards of the State educational agency; include an appropriate preschool, elementary, or secondary school education; and provided in conformity with an IEP as required under 20 U.S.C.A. §1414(a)(5). 20 U.S.C.A. §1401(a)(18). “Special education,” in turn, is specially designed instruction meeting the educational needs of students with disabilities including, but not limited to, subject-matter instruction, physical education and vocational training. Id. at (16); c.f. N.J.A.C. 6A:14-1.3.

The education of a child with a disability must be tailored to the unique needs of each child through an IEP. An IEP must be established or revised, whichever is appropriate, for each handicapped child at the beginning of each school year. The provisions of the IEP must be reviewed and, if appropriate, revised periodically, but not

less than annually. 20 U.S.C.A. §1414(a)(5). An IEP is a written plan setting forth measurable annual goals and short-term objectives or benchmarks and describing an integrated, sequential program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives. The IEP shall establish the rationale for a pupil's educational placement, serve as the basis for program implementation, and comply with the mandates set forth in N.J.A.C. 6A:14-1.1 to -10.2. N.J.A.C. 6A:14-1.3.

State regulations also detail the educational goals and objectives to be included in an IEP. The basic plan shall be written upon completion of a child study team evaluation and prior to a pupil's placement in a special education program. It should be developed with the participation of parents and members of a district board of education's child study team who have participated in the evaluation. N.J.A.C. 6A:14-3.7(a) and (b). The basic plan of the IEP shall include, but not be limited to, a statement of the pupil's eligibility for special education and related services; a statement of the pupil's present levels of educational performance; a statement of measurable annual goals that shall be related to the core curriculum content standards through the general education curriculum; and a description of the pupil's special education and related services; an explanation of the extent, if any, to which the student shall not participate with nondisabled students in general education classes and in extracurricular and nonacademic activities; and a statement of any individual modifications to the administration of Statewide or district wide assessments. Id. at subsection (d). N.J.A.C. 6A:14-3.7(d)7 requires the IEP to include a statement of the State and local graduation requirements that the student shall be expected to meet, and goes on to provide that there must be a rationale for any such exemption based on the student's educational needs.

A board of education is required to educate a child with an educational disability in the least restrictive environment possible. When an IEP does not describe specific restrictions, the student shall be educated in the school he or she would attend if not disabled. N.J.A.C. 6A:14-4.2(a)7.

Federal law is complied with when a local school board provides a handicapped child with a personalized educational program and sufficient support services to confer some educational benefit on the child. Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176 (1982). New Jersey has adopted the Rowley standard. One of the purposes of applicable State special education regulations is to insure that all educationally handicapped pupils have available to them a free, appropriate public education as such standard is set forth under what is now the Individuals with Disabilities Education Act) 20 U.S.C. 1400 et. seq.; N.J.A.C. 6A:14-1.1(b). Lascari v. Board of Education, 116 N.J. 30, 47-48 (1989). A school district has the burden of proving that it is providing an appropriate education to the child. The burden on the parents at a due-process hearing is merely to place the appropriateness of the IEP in issue. The school board then bears the burden of proving that the IEP is appropriate. In this analysis, the focus should be on the IEP actually offered, and not one that the board could have offered if it had been so inclined. Lascari, at 44-47.

A child's program in a placement should also be considered. The Supreme Court in Rowley recognized that "[t]he determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a . . . difficult problem," and stated that it would not attempt to establish any one test for determining whether the benefits conferred upon a child are adequate and that it was limiting its analysis to the facts in Rowley. Angevine v. Jenkins, 17 EHLR 444, 445 (G.R.C. 1990) (citing Rowley at 201-202). Thus, there is no general rule for testing the adequacy for a placement, rather:

The key appears to be that the child receive "some educational benefits," but that does not mean that the child is not to advance. Advancement is not necessarily "potential maximizing." In Rowley, it means that if the child is being educated in a regular classroom, the special education "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Therefore, while recognizing the unique needs of each child, the school system is to have in mind, not only the placement of the child, but the advancement of the child where possible. And, the desire by the parents to have the child advance, to the extent possible, is not necessarily synonymous with "maximizing." The purpose of the [Act] is

“that handicapped children be enabled to achieve a reasonable degree of self-sufficiency.” . . . Thus, the determination of progress is a factor to be considered in assessing any special education program and the fact that [a child] is making progress strongly suggests that the program is affording [the child] an “educational benefit.” “Progress” is not a code word for “maximizing,” rather, it is one measurement based upon which the program may be assessed.

[Angevine, supra, at 445, 446; citations omitted].

The Third Circuit Court of Appeals has indicated that the appropriate standard is whether the IEP offers the opportunity for “significant learning” and “meaningful educational benefit.” In evaluating whether an FAPE was furnished, an individual inquiry into the student’s potential and educational needs must be made. Ridgewood Bd. Of Educ. v. N.E., 172 F.3d 238 (3d. Cir., 1999).

The IDEA and the New Jersey implementing regulations create a strong preference in favor of mainstreaming and educating a disabled student in his regular neighborhood school. It is the responsibility of the school district to make an effort to provide supplemental aids and services in order to accommodate a disabled child in the regular school environment and if the school district has failed to do so, then it has failed to meet its statutory obligation. Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). This standard has been adopted by the United States Circuit of Appeals for the Third Circuit in Oberti v. Board of Education of the Borough of Clementon School District, 95 F.2d 1204 (3d. Cir. 1993).

The issue in this case is whether A.H.’s continued placement in a mainstream class with supports and related services is the appropriate placement as being appropriate to his needs. I **FIND** in this case that the school district has made more than reasonable efforts to maintain A.H. in the inclusionary/mainstream placement as desired by the parents. These efforts need only be reasonable, and need not involve a complete and total dedication of every member of the school staff to maintaining a student in a mainstream setting.

Under the circumstances of this case, I **FIND** that the school district has made more than a reasonable effort to accommodate A.H. in the mainstream classroom. I **FIND** that the educational benefits available to A.H. in the mainstream classroom have been severely curtailed or hampered by A.H.'s lack of his mastery of the underlying developmental skills needed to access the curriculum. Specifically, I **FIND** that A.H. requires further instruction on attention, communication, behavior, understanding direction and interacting with peers and teachers, and that these are skills that typically developing first-graders are not just learning, but have already mastered. I **FIND** that the negative effects of A.H.'s continued inclusion in the mainstream class on not only A.H. and his behaviors, but also on the other students in the class, are significant and outweigh any possible educational benefit which may result from A.H.'s continued attendance in a mainstream classroom.

Since I have determined that the school district is correct in removing A.H. from an inclusion classroom environment with supplemental aids and services, the next question is whether the program and placement offered by the school district is the proper program and placement for A.H. In order to address this issue, it is necessary to review the IEP actually offered to A.H. (R-1). I **FIND** this IEP contains a proper program to address all of A.H.'s many needs relating to his lack of underlying developmental skills. I **FIND** that this IEP properly identify his disabilities and needs and has designed a program to meet those needs. I **FIND** that this IEP is designed to provide A.H. with further instruction on his deficiencies with respect to attention, communication, behavior, understanding direction and interacting with peers and teachers.

DECISION AND ORDER

Based on the foregoing it is hereby **ORDERED** that A.H.'s placement in regular inclusion mainstream classes with various aids and supplementary services is not the appropriate placement for A.H. because of his need for instruction in developmental skills. It is further **ORDERED** that the school district's actions seeking to implement the IEP of November 20, 2013, to address his need for instruction in developmental skills, are sufficient to provide A.H. with FAPE and are **AFFIRMED**. All other claims of the parties are hereby **DENIED** and **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2012) 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 (2012). 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.

July 29, 2016

DATE

JOSEPH F. MARTONE, ALJ t/a

Date Received at Agency

Date Mailed to Parties:

JFM/cmo

APPENDIX
LIST OF WITNESSES

For Petitioner:

Jennifer Cornely
Catherine Steckel
Ann Kilgore Michael
Rebecca Barone
M.H. (father of A.H.)

For Respondent:

Beth Buono
Nancy Stevick
James M. Rolan
Jane O'Donnell
Rebecca Null Forrestel
Christine M. Schwartz
Samantha Levine Dawson

LIST OF EXHIBITS

For Petitioner:

None (Petitioner referred to respondent's exhibits in the presentation of his case.)

For Respondent:

R-1 Proposed IEP, dated November 20, 2013
R-3 Speech Section of November 20, 2013 IEP
R-10 Speech Goals Section of November 20, 2013 IEP

R-16 Special Ed/Related Services page of November 20, 2013 IEP
R-18 Placement Recommendation 2013
R-25 IEP dated September 16, 2013
R-34 Speech and Language Goals of R-25
R-53 IEP dated May 29, 2013
R-55 Present Levels of Performance for 2012-13
R-57 Cherrywood Behavior Plan (part of R-53)
R-80 2012-13 Washington Township IEP
R-82 January 18, 2012 to April 30, 2012 Progress Summary
R-87 September-April Interval Data
R-97 2012-2013 School Year IEP
R-104 2012-2013 School Year Behavior Plan
R-241 Report of Learning Evaluation dated February 7, 2014
R-250 Developmental Assessment dated January 19, 2010
R-266 Redacted Student Benchmarks Scores
R-277 Ms. Schwarz Speech Therapy Logs
R-279 2013-2014 IEP Speech Therapy Goals
R-280 Kindergarten End of Year Speech Therapy Summary
R-313 Theme Progress Tests
R-366 Physical Science Benchmark Assessments
R-369 Social Studies Benchmark Assessments
R-380 Email, Buono to O'Donnell
R-414 Notice of Scheduling of September 16 2013 IEP meeting
R-415 Mr. Rolan to M.H. letter of July 29, 2013
R-416 Mr. Rolan to M.H. letter of June 12, 2013
R-455 Attorney for respondent letter dated January 16, 2014
R-493 Evaluation Plan Conference Report
R-534 Writing Benchmark Assessment
R-536 Writing Baseline Assessment
R-539 Winter Writing Benchmark Assessment