State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

M.G. AND D.G. ON BEHALF OF M.G.,
Petitioners,
v.
NORTH HUNTERDON/VOORHEES REGIONAL HIGH BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 05635-16
AGENCY DKT. NO. 2016-24130

D.G. AND M.G. ON BEHALF OF M.G.,
Petitioners,
v.
NORTH HUNTERDON/VOORHEES REGIONAL HIGH BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 08289-17
AGENCY DKT. NO. 2017-26216

Adam P. Wilson, Esq., for petitioners (Hinkle, Fingles Prior & Fischer, P.C., attorneys)

Rita F. Barone, Esq., for respondent (Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC, attorneys)

Record Closed: October 2, 2017 Decided: October 13, 2017

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

For the 2016–17 school year, M.G. was educated out-of-district under an Individualized Education Program (IEP) that was reasonably calculated to provide her with significant learning and meaningful benefit. Respondent now seeks to implement the IEP in-district. Is M.G. entitled to remain out-of-district in the more restrictive environment? No. The law requires that an IEP be reasonably calculated to provide significant learning and meaningful benefit in the least restrictive environment.

PROCEDURAL HISTORY

M.G. is seventeen years old and eligible for special education and related services under the classification "autism." She attends school out-of-district in the autism program at the Developmental Learning Center (DLC) in Warren, New Jersey, and has been attending school out-of-district in the autism program at DLC ever since she was seven years old and in first grade. Petitioners are happy with the out-of-district placement and want M.G. to continue in the out-of-district placement until she is twenty-one years old and no longer eligible for special education and related services.

But on February 26, 2016, during the annual review, the child study team proposed a return to district for high school. More specifically, the child study team proposed a change in placement to the in-district autism program at Voorhees High School in Glen Gardner, New Jersey, which petitioners refused, despite the fact that the program would remain the same. In other words, the program requirements and parameters, including the goals and objectives, would remain the same.

On March 8, 2016, petitioners filed the first of two petitions for a due-process hearing with the Office of Special Education Programs. In their petition, petitioners assert that M.G. has a long history of self-injurious behaviors, eluding, and other problematic behaviors, but has made meaningful progress at DLC and should remain at DLC. Petitioners further assert that the in-district program cannot duplicate the out-of-district program for M.G. and that the goals and objectives in the IEP are cookie-cutter and not designed to meet M.G.'s individual needs. Finally, petitioners assert that the

one-to-one aide should not be considered as part of the IEP because it was offered after the IEP meeting.

Petitioners then assert in the alternative that even if the one-to-one aide is considered as part of the IEP, the one-to-one aide will do everything for M.G. and she will lose the independence she has learned at DLC.

In its answer to the petition, respondent asserts that the IEP would have provided M.G. with a free and appropriate public education in the least restrictive environment for the 2016–17 school year.

On April 13, 2016, the Office of Special Education Programs transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.4.

On June 14, 2016, the case was assigned to an administrative law judge for hearing. Settlement negotiations ensued, but the case did not settle. Meanwhile, the judge assigned to the case retired. As a result, the case was reassigned to me for hearing.

During our initial prehearing telephone conference on February 6, 2017, the parties renewed their settlement negotiations and requested additional time to settle the case, which I granted.

The parties then met for the annual review on April 28, 2017, and respondent again proposed the change in placement to the in-district autism program at Voorhees High School, which petitioners rejected.

On June 14, 2017, petitioners filed their second petition for a due-process hearing with the Office of Special Education Programs. In that petition, petitioners

maintain that M.G. should remain in the out-of-district autism program at DLC. More pointedly, petitioners assert that M.G. requires a program that includes the development of socialization skills, communication skills, life skills, and vocational skills, with the appropriate behavioral supports, and a focus on the communication skills, life skills, and vocational skills in particular. Above all, petitioners assert that the in-district program is not appropriately suited to meet these needs and that M.G. will regress if she is placed in it.

In its answer to the petition, respondent asserts that the IEP would have provided M.G. with a free and appropriate public education in the least restrictive environment for the 2017–18 school year.

On June 14, 2017, the Office of Special Education Programs transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.4.

On August 1, 2017, the two cases were consolidated for hearing; on August 1, August 9, and August 16, 2017, I held the hearing; on September 18, 2017, the parties submitted their post-hearing briefs; and on October 2, 2017, I closed the record and issued this decision.

Since the hearing in this case took place after the 2016–17 school year, and M.G. remained in the out-of-district autism program at DLC for that school year, the IEP dated February 26, 2016, is no longer at issue in this case; thus, the IEP dated April 28, 2017, is the only IEP that was the subject of the hearing and the only IEP that is at issue in this decision.

DISCUSSION AND FINDINGS OF FACT

IEP dated April 28, 2017

The IEP dated April 28, 2017, was designed to transition M.G. from the out-of-district autism program at DLC to the in-district autism program at Voorhees High School. The stated belief was that the goals and objectives that had been implemented at DLC could also be implemented at Voorhees High School. Thus, the goals and objectives for M.G. at DLC would remain the same goals and objectives at Voorhees High School.

In particular, the in-district autism program would begin on August 24, 2017, in the self-contained multiple-disabilities class, where M.G. would work on the functional goals and objectives in language arts, math, science, adaptive physical education, and career development. The programming would also be in the same amounts and at the same frequency. Notably, the career-development portion of the day for M.G. would occur nine times in a four-day cycle for fifty-five minutes each session, which is almost five hundred minutes a week, and the focus would be on the vocational and functional skills in the community, which all parties agreed M.G. needed. M.G. would also receive social-skills training, an ABA consultation, and a behavioral plan. Moreover, M.G. would receive a one-to-one aide. Finally, petitioners were to receive parent training.

Jessica Allora

Jessica Allora is the school psychologist for respondent and the case manager for all of the out-of-district students at DLC. Allora became the case manager for M.G. at the end of the 2015–16 school year and has remained her case manager ever since. At the hearing, Allora testified about the appropriateness of the IEP dated April 28, 2017.

Allora graduated from North Carolina Wesleyan College in Rocky Mount, North Carolina, in 2001 with a bachelor of arts in psychology, and from George Mason University in Fairfax, Virginia, in 2005 with a master of arts in psychology. While she

was at George Mason, Allora worked at its psychological clinic and center for cognitive development. In 2004, while she was still at George Mason, Allora began working as a school psychologist for the Prince William County Public Schools. In 2016, she left the Prince William County Public Schools to become the school psychologist for respondent.

Allora was offered and accepted as an expert in school psychology and as a case manager of students with disabilities, over the objection of petitioners.

IEP dated April 28, 2017

Allora testified that the IEP dated April 28, 2017, was an appropriate IEP for M.G. because the in-district autism program at Voorhees High School is similar to the out-of-district autism program at DLC, only less restrictive, and that M.G. was ready to return to district based on the documents the child study team had received from DLC. In addition, Allora testified that a vocational and independent-living assessment dated September 14, 2016, from the Johnson Rehabilitation Institute, a vocational rehabilitation institute, as well as a program comparison dated January 1, 2017, from Andrea Quinn, a clinical psychologist and behavior specialist, confirmed their opinion that M.G. was ready to return to district. Finally, Allora testified that her observations of M.G. at DLC likewise confirmed the considered opinion of the child study team that M.G. was ready to return to district.

More specifically, Allora testified that none of the information and documentation the child study team received indicated any significant behaviors that would have prevented M.G. from returning to district, including no instances of elopement or self-injurious behavior. In addition, Allora testified that the child study team incorporated all of the goals and objectives DLC had suggested for M.G., as well as the goals and objectives petitioners had suggested. Moreover, Allora testified that the child study team was concerned about the progress M.G. was making at DLC in reading and math, but was even more concerned about her inability to interact with higher-functioning peers

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To underscore this concern, Allora testified that the inability of M.G. to interact with higher-functioning peers at DLC was a significant factor in the determination by the child study team that M.G. should return to district.

Indeed, Allora testified that this inability to interact with non-disabled peers might have been a contributing factor to the parental concern that M.G. had not been generalizing the skills she was supposedly learning at DLC.

Observation of Out-of-District Program

On November 16, 2016, and on February 22, 2017, Allora observed M.G. in the out-of-district program at DLC. Allora memorialized her observations in a report dated February 28, 2017, which was marked for identification and admitted into evidence as R-16. At the hearing, Allora referred to her report and noted the following as significant, but in no particular order.

First, Allora noted that DLC is housed in a large building but saw M.G. navigate it with minimal supervision and direction. Second, Allora noted that M.G. is especially good at following directions and staying on task. Third, Allora noted that she saw no behaviors, whether from M.G. or someone else, that distracted M.G. from doing what she was asked to do. As an example, Allora noted that she observed M.G. during lunch and saw her throw out her garbage independently and then return to her seat and sit without incident for the remainder of the period even though the cafeteria was loud and chaotic.

Fourth, Allora noted that she saw M.G. go a different way to the laundry room when she was redirected from the stairwell she usually used.

Fifth, Allora noted that she saw M.G. in the ceramics room paint a butterfly on a tile independently, and that when she engaged in an inappropriate behavior it did not escalate. More specifically, Allora noted that she saw M.G. paint on the arm of a boy seated next to her, but that M.G. accepted redirection and separation from the group after she did so, and that M.G. did not engage in that behavior again when she returned

to the group. For Allora, this meant that she had no concerns about M.G. returning to district and following direction.

In fact, Allora noted that when she spoke with M.G.'s teachers at DLC about M.G. and her behaviors, none of them told her that M.G.'s behaviors were problematic. Allora noted that M.G.'s teachers told her that they were still working on some behaviors and that they were working with M.G.'s parents to identify more motivating reinforcements, but that none of M.G.'s teachers told her that M.G.'s behaviors would preclude a return to district. Toward this end, Allora noted that the reinforcement program at DLC is a straightforward one—one that respondent could duplicate and implement in-district without issue.

To be sure, Allora testified that DLC only notifies the district of severe behaviors (meaning self-injurious behaviors or behaviors requiring restraints) and that DLC reported no such severe behaviors during the past year. More specifically, Allora testified that she spoke with Danielle DeCroce, M.G.'s primary teacher at DLC, about M.G.'s behaviors, and that DeCroce reported that M.G. only exhibited some behaviors every now and then, but that they tended to be grouped together, like five behaviors in a week with no behaviors until several weeks later. According to DeCroce, M.G. had made progress with her behaviors and with her communication at DLC. Thus, Allora testified that she was fully confident that M.G. could return to district and that M.G.'s behaviors would continue to improve in-district, especially with the exposure to higher-functioning peers.

Report from JRI

In July 2016, respondent referred M.G. to the Johnson Rehabilitation Institute (JRI) for a four-week vocational and independent-living assessment. From July 16 to August 19, 2016, M.G. participated in the assessment. The report is dated September 14, 2016, and was marked for identification and admitted into evidence as R-10.

In the report, the author notes that on the first day M.G. was not comfortable at JRI, but that M.G.'s aide kept her on track and that M.G. responded well. The author

continues that throughout the assessment, M.G. interacted with her peers, but only when staff initiated it. Ultimately, the author recommended that M.G. continue in a career-development program to continue her exposure to vocational activities and that M.G. do so accompanied by a paraprofessional who could supervise M.G. on a one-to-one basis.

At the hearing, Allora referred to the report and testified that since M.G. went somewhere unknown, transitioned well with an aide, stayed on task with an aide, and complied with all staff, M.G. was ready to return to district.

M.G.'s father implied during his testimony that the ease with which his daughter transitioned at JRI is not to be believed because he accompanied his daughter to JRI. The report from JRI, however, does not indicate that he did so. More significantly, it does not note that he accompanied M.G. throughout her assessment. Regardless, no competent evidence exists that his stated accompaniment was clinically significant or had any meaningful impact.

Quinn's Report

On June 1, 2016, Quinn observed the in-district program at Voorhees High School, and on November 16, 2016, Quinn observed the out-of-district autism program at DLC. Quinn observed the in-district and the out-of-district programs so she could compare the two and determine whether the in-district autism program would be the appropriate placement for M.G. in the least restrictive environment. Quinn's report is dated January 1, 2017, and it was marked for identification and admitted into evidence as R-4.

In her report, Quinn wrote that based upon her observation of the two autism programs, her interviews of their personnel, and her review of the file in this case, she believed that the in-district autism program at Voorhees High School would be the appropriate placement for M.G. in the least restrictive environment.

Quinn specified that she examined this question across the five dimensions that are of the greatest importance to the out-of-district program at DLC and are its key features—(1) the ability of the facility to maintain M.G.'s safety; (2) the availability of continued support for the development of self-care skills and life skills; (3) the availability of program-based and community-based development of occupational skills; (4) behavior management; and (5) the opportunity for community integration and peer interaction—and determined that the in-district program at Voorhees High School could meet M.G.'s needs.

At the hearing, Allora referred to Quinn's report and testified that the IEP included a one-to-one aide to address any concerns about safety—such as the parental concern about elopement—and any concerns about transitioning.

Observation of In-District Program

On May 10, 2017, Allora accompanied petitioners during their observation of the in-district career-development program at North Hunterdon High School. Allora memorialized her observations in a report dated May 11, 2017, which was marked for identification and admitted into evidence as R-3. At the hearing, Allora referred to her report and testified that the career-development program at North Hunterdon High School is designed the same way that the career-development program at DLC is designed, meaning students go to various job sites and perform various job-related tasks suited to their abilities.

For example, Allora noted in her report that the parties went to TJ Maxx in Clinton, New Jersey, where the parties observed a student take items of clothing out of boxes; remove the plastic, silica packets, and paper from each item; and then sort the items of clothing in piles for other employees to hang on racks. Significantly, Allora noted that all of these tasks were performed under the supervision of a jobs coach who oversaw their completion. Moreover, Allora noted that the jobs coach assisted as needed and promoted social interaction where possible.

Similarly, Allora noted in her report that the parties went to Stop & Shop in Flemington, New Jersey, where they observed a student return exchanged or misplaced items on the shelves, also under the supervision of a jobs coach.

At the hearing, Allora testified that these trips in the community through the in-district program would take place three times a month for three hours each time—which would be more time than M.G. would spend in the community through the out-of-district program—plus, M.G. would have the advantage of taking these trips in her own community.

Allora further testified that the core-curriculum standards are integrated into all of the in-district programming and that the technology in the in-district program is the same as the technology in the out-of-district program.

In conclusion, Allora testified that the in-district program is more appropriate for M.G. than the out-of-district program because the in-district program is less restrictive than the out-of-district program and is sited in her home community.

Cross-Examination

On cross-examination, Allora testified that the child study team recommended the change in placement in the IEP dated February 26, 2016, before the above observations and additional evaluations, because the then-current information from DLC noted that M.G. was progressing, and the child study team was going to incorporate all of the goals and objectives from DLC into the IEP with the greater specificity petitioners had requested.

Parenthetically, Allora testified that these trips into the community were not included in the earlier IEP dated February 26, 2016, because M.G. was not yet old enough to go on these trips into the community at that time.

Regarding the one instance of elopement that had occurred since the IEP dated February 26, 2016, Allora testified that it was only mentioned for the first time during the

IEP meeting on April 28, 2017, yet was of no concern to the child study team because it was only one instance of elopement, it did not occur at school, and M.G. would have a one-to-one aide to assure petitioners that no instances of elopement would occur at any time during M.G.'s participation in the in-district program.

Finally, Allora testified that any concerns about reading were addressed through the curriculum itself, which would be differentiated and individualized for M.G.

Andrea Quinn

Andrea Quinn is a clinical psychologist and behavior specialist. She received her bachelor of arts from La Salle University in Philadelphia, Pennsylvania, in 2000 and her doctorate in psychology from Rutgers University in New Brunswick, New Jersey, in 2006. From September 2005 to July 2017 she worked as a behavior specialist at the Rutgers Anxiety Disorders Clinic and as the assistant supervisor of a project there. Quinn now serves as the director of the clinic and as a consultant for parents, school districts, and programs.

The parties stipulated that Quinn is an expert in students with developmental disabilities, including autism and behavioral challenges, and I accepted her as such.

Once again, Quinn observed the in-district and out-of-district programs so she could compare the two and determine whether the in-district program would be the appropriate placement for M.G. in the least restrictive environment.

Quinn testified that in preparation of her report she reviewed what she characterized as a comprehensive case file for M.G., and recounted that this comprehensive case file included, among other things, the report from JRI and the communication logs between petitioners and DLC. In addition, Quinn testified that she spoke with the teacher at DLC for M.G. and the behaviorist at DLC for M.G. Similarly, Quinn testified that she spoke with the case manager for M.G. at Voorhees High School, the director of special education for Voorhees High School, and the special-education teacher for M.G. at Voorhees High School. Finally, Quinn testified that she

spoke to the coordinator of the career-development program at North Hunterdon High School.

Meanwhile, in preparation for the hearing, Quinn reviewed the report of Michelle Miller, a clinical psychologist, whom petitioners retained as their expert in this case.

Although Quinn testified from her report at the hearing, she only referred to it on occasion, having excellent recall of this case and intimate familiarity with the two programs she compared, especially the in-district program, which she serves as its consultant.

From the outset, Quinn testified that she has no concerns about M.G.'s safety in the in-district program because M.G. would receive visual supervision (just like she does in the out-of-district program) and a one-to-one aide (which she does not receive in the out-of-district program). Quinn also testified that she has no concerns about M.G.'s safety in the in-district program because there have been no recent attempts at elopement in the out-of-district program, and M.G. responds well to direction when she walks ahead of the group, whether at school or in the community. In fact, Quinn testified that she does not even think M.G. needs the one-to-one aide beyond the transition from the out-of-district placement to the in-district placement, and that the one-to-one aide can be faded over time. Indeed, Quinn further testified that even Miller believed that the one-to-one aid could be faded over time.

Quinn strongly disagreed with Miller that M.G. would not be able to do the work in the in-district program. Quinn testified that Miller's conclusion was unfounded because it was based on only one observation, which was incomplete and not fully understood. Quinn explained that the higher level of reading and writing that Miller thought she observed was not the case, but even if it were, the in-district program has the tools to differentiate the teaching and instruction. As such, Quinn asserted that all of the goals and objectives in the out-of-district program, not just the ones for reading and writing, can be implemented in the in-district program.

Strikingly, Quinn was not only complimentary of the in-district program but also of M.G. Quinn testified that the capabilities she saw M.G. demonstrate during her observation were "impressive" and that M.G. possessed a "high degree of independence." Quinn specified that M.G. only needs prompting to transition from one task to another, is "mostly independent" when transitioning, and is not easily distracted by other students, even when those students engage in serious behaviors, including those that require restraints.

Regarding M.G.'s alleged "aggressive" behaviors, Quinn testified that they merely constitute slaps with an open hand and the random throwing of objects, but that this random throwing of objects is not at people, and that it is sporadic and easily redirected. Most important, Quinn explained that these aggressive behaviors are not self-injurious and that M.G. responds well to straightforward verbal redirection. In fact, Quinn noted that these inconsistent behaviors tend to spike at times, that a behavioral intervention plan had just been implemented when she observed M.G., and that the behavioral intervention plan had already borne fruit. Indeed, Quinn testified the reinforcement program is a straightforward one (which the district has implemented before) and that the district even has the software to implement it (which the district has been using consistently for some time already).

On July 25, 2017, Quinn issued a second report, in response to the IEP dated April 28, 2017, and noted that M.G.'s behaviors had decreased since she had issued her previous report on January 1, 2017. Quinn's report was marked for identification and admitted into evidence as R-15. Quinn wrote that DLC reported zero incidents of "non-compliance" from November 2016 through February 2017, and only four incidents of "non-compliance" in March 2017. Quinn explained in her report that "non-compliance" included not only elopement but also related behaviors such as walking ahead after being told to stop. Similarly, Quinn explained that "non-compliance" also included the more broadly defined behavior of continuing with the present activity or inappropriate behavior after being given a direction. Still, none of the incidents DLC reported included elopement. Moreover, Quinn attributed this decrease in M.G.'s behaviors to the success of the behavioral intervention plan, and reiterated that all of

the safety measures in the IEP could easily be implemented in-district just as they were out-of-district.

In addition, Quinn wrote that the development of self-care and life skills could continue in the in-district program through program-based practice opportunities in the classroom and in the community.

Similarly, Quinn wrote that M.G. had already begun to develop a variety of vocational skills at DLC through multiple jobs at DLC and job sampling in the community, and that these opportunities would continue in the career-development program at North Hunterdon High School.

Returning to M.G.'s behaviors, Quinn wrote that they alternate between periods of escalation and periods of next-to-no behaviors, and that they are effectively managed through the behavioral intervention plan, which includes proactive strategies, verbal prompts, reminders of behavioral expectations, natural consequences for actions, and physical intervention to redirect or prevent behaviors, as needed. Quinn wrote too that a positive-reinforcement system had already been implemented with early success. Moreover, Quinn wrote that all of the other target behaviors had been maintained at lower levels since November 2016.

Finally, Quinn wrote that the out-of-district program at DLC had become stagnant for M.G. because the out-of-district program at DLC only services learners with autism-spectrum disorders or autistic-like behaviors and limited M.G.'s opportunities for interaction with non-disabled peers in her local community.

At the hearing, Quinn summarized that the in-district and out-of-district programs are comparable, but that the in-district program is more appropriate because it is less restrictive and will provide M.G. with greater opportunities for personal and vocational growth, just as Quinn had asserted in her report. In particular, Quinn emphasized that the in-district program would afford M.G. greater opportunities to model a broader spectrum of peers and develop a career in her own home community. Quinn said that she understood that petitioners were anxious about changing programs and feared the

unknown, but reassured petitioners that M.G. has the requisite skills to succeed in the in-district program. Moreover, Quinn testified that she knows that all the recommendations contained in Miller's report could be implemented in-district because she is the one who trained the district's personnel and knows that the instruction can be differentiated for M.G., who is one of the higher-functioning learners at DLC.

The fact that M.G. is one of the higher-functioning learners at DLC is point Quinn made time and again throughout her testimony.

On redirect examination, Quinn explained that not every goal and objective in the IEP is reading or writing dependent and that M.G. could still benefit from a lesson even if it had a reading or writing component because the whole point of that lesson could be the prompting of social interaction, just like it was in the lesson Miller observed, and that the instruction in the lesson could be differentiated even if it was.

Significantly, Miller would later testify that she did not know the cognitive ability of the learners she observed in district or the fact that the reading and writing had been differentiated for them.

Quinn also explained that a transition plan was in fact discussed at the IEP meeting on April 28, 2017, and was in fact memorialized in the IEP. Indeed, a review of the IEP reveals that it kept all of the goals and objectives from DLC in place during the transition, scheduled a review within the first thirty days of the transition, and included a one-to-one aide during this transition. More significantly, the plan to fade the one-to-one aide would only be developed "as appropriate" and on notice to petitioners. Finally, a review of the IEP reveals that respondent was willing to consider a "step-down transition plan" in which M.G. attended DLC for a specified number of days per week and Voorhees High School for the remaining days of the week:

> On 4/28/17, the district proposes the following plan for transition back to district:
>
> --[M.G.] will finish out the 2016–17 school year at DLC
> --[M.G.] will attend ESY in-district from July 10–August 5

> --[M.G.] will attend the Autism program at Voorhees High School full time beginning on August 24, 2017. (Refer to program page for details.)
>
> All current goals and objectives will be kept in place during the transition and a 30-day review meeting will be held to evaluate the current placement and make any necessary revisions. [M.G.'s] home program will continue to be implemented and monitored frequently. The BCBA providing home programing will observe [M.G.'s] classroom and consult with the BCBA at her school. A personal aide will be assigned to [M.G.] [and] collect data regarding her independence and progress. The need for the aide will be evaluated every 6–8 weeks. A plan to fade will be developed as appropriate and parents will be informed during the whole process.
>
> The district is willing to consider a "step-down transition plan" in which [M.G.] attends DLC for a specified amount of days per week and Voorhees for the remaining days.
>
> [R-1 at 20.]

Mary Pat Publicover

Mary Pat Publicover is the director of special education for respondent and has served in that capacity since 2012. Publicover testified that she has spent a tremendous amount of time, money, and effort in improving the in-district autism program, especially its technological component, so that the program can differentiate instruction better and offer more to its learners. Throughout her testimony, Publicover touted the in-district program and its staff, shared her confidence that M.G. would succeed in the program, and expressed her concern that the out-of-district autism program was no longer appropriate for M.G. "M.G. needs higher-functioning peers to facilitate skill acquisition in a natural setting," she said.

On cross-examination, Publicover clarified that she had reviewed, and that the child study team had reviewed, all the data and all the observations concerning M.G., and that they knew that M.G. had progressed, and that her behaviors had improved, to the point where M.G. could return to district.

For Publicover, the return to district was not only warranted, but also necessary.

On redirect, Publicover explained that M.G. no longer had the behavioral issues that most of the other learners in the out-of-district program have. More expansively, Publicover asserted that M.G. was higher functioning than most of the other learners in the out-of-district program and had greater potential than most of the other learners in the out-of-district program because she could sustain her attention so well. As such, Publicover advocated for a return to district.

D.G.

D.G. testified on behalf of petitioners. D.G. testified in no uncertain terms that the in-district program is inappropriate for his daughter and that respondent could not implement it with fidelity even if it were appropriate. D.G. testified that he made these assertions based on what he knows about his daughter as her father. D.G. testified that he also based these assertions on what he knows about autism from what he has read in books and what he knows about the in-district program from what he has heard from others. The locus of his testimony, however, was the safety of his child. According to D.G., M.G. will lull respondent into a false sense of security because her elopement is so infrequent and so unexpected that respondent will remove the one-to-one aide, and M.G. will then elope from school and be harmed.

D.G. continued that he knows that M.G. will elope from school in the future because M.G. has eloped from home in the past and that D.G. should remain at DLC because everyone knows her there and they keep the doors there locked so she cannot escape.

D.G. was also unsparing in his criticism of the in-district program and its personnel. D.G. testified that the district personnel do not know his daughter well enough to meet her needs, repeated that the facility is not designed well enough to keep her safe, and commented that the personnel is not trained well enough to meet her needs. In support of his argument, D.G. testified that only 30 percent of all district personnel are trained in special education. It did not matter to him that 100 percent of

the district personnel in the in-district program are trained in special education. He still feared for her safety. "I'm terrified," he said.

D.G. also feared that his daughter would be unhappy in the in-district program because he saw some learners in the in-district program eat alone during lunch, and he did not want to take the chance that his daughter would eat alone during lunch.

D.G. also testified that the emphasis on peer modeling in the in-district program is silly because it is his understanding that children with autism do not communicate with one another, and that his daughter has not learned to communicate in the out-of-district program during all this time so he does not understand how this would be any different in the in-district program.

Becoming emotionally charged, D.G. testified that all of the prompts in the out-of-district program have taught his daughter nothing but trained responses, that trained responses are not communication, and that M.G. can get all the peer interaction she needs at home with her sisters and their friends.

In the same vein, D.G. testified that all of the vocational training and peer mentoring in the in-district program are bunk and asserted that he could do it better. D.G. was especially critical of the peer-mentoring program, commenting that it is nothing more than non-disabled students following disabled students around at school and ignoring them. D.G. said that he knows this happens because one of his other daughters participated in the program at Voorhees High School and this is what she told him. Thus, it was the not fear of the unknown that kept him from agreeing to a return to district, he said, but a fear of the known. "People talk . . . people talk off the record . . . I know what's going on here," he declared.

Yet this testimony, which was at times sarcastic and at other times sardonic, was also contradictory. For example, D.G. testified that M.G. did not make much progress at DLC during the 2016–17 school year, but then testified that he wants M.G. to remain at DLC for the 2017–18 school year. Similarly, D.G. testified that M.G. had not learned to communicate at DLC, but then testified that M.G. has become more conversational at

DLC. Putting aside the manner in which D.G. testified, the fact remains that the testimony was not anchored in any competent evidence beyond personal experience. As such, it was largely lay opinion to which I give little weight.

Michelle Miller

Perhaps the impetus for the parental paradigm of what is best for M.G., as opposed to what is appropriate for M.G., can be found in their expert's report.

Miller received her bachelor of arts from Clark University in Worcester, Massachusetts, in 2007, and her doctorate in clinical psychology from Rutgers University in Piscataway, New Jersey, in 2013. From September 2013 to August 2015, Miller worked as a psychology fellow and clinical supervisor at the Tourette Syndrome Clinic and as a member of the assessment team at the Program for Addictions Consultation and Treatment (PACT) at the Rutgers Psychological Services Clinic. During this time, Miller also served as a post-doctoral fellow and clinical psychologist at Therapy West and Academics West in New York, New York. Miller now serves as a clinical psychologist and clinical assistant professor of child and adolescent psychiatry at the Child Study Center at New York University's Langone Medical Center.

The parties stipulated that Miller is an expert in education for children with autism, and I accepted her as such.

Miller evaluated M.G. on March 13, March 15, March 20, and March 22, 2017. She observed the in-district program at Voorhees High School on February 8, 2017, and at North Hunterdon High School on May 10, 2017, and she observed M.G. in the out-of-district program on February 22, 2017. Miller also reviewed all of M.G.'s educational records and interviewed petitioners. Miller's test results and school observations, as well as her summary and impressions, are contained in her detailed report, which was marked for identification and admitted into evidence as P-F.

Miller's directive, that is, the reason for petitioners' referral, was not to determine whether the in-district program was appropriate for M.G., but which program would be

best for M.G.: "[D.G. and M.G.] are seeking this evaluation to better understand what school environment would best support [M.G.'s] individual social, emotional, and intellectual needs." At the hearing, Miller highlighted the testing she conducted, described M.G.'s relative strengths and weaknesses, and opined which program would be more appropriate for M.G.

More specifically, Miller testified that her test results were consistent with respondent's test results, that M.G.'s cognitive and speech abilities were limited, and that M.G.'s reported behaviors were not a problem. As such, Miller agreed that the program for M.G. should not focus on academics but on life skills, vocational skills, and communication skills, all with one-to-one support. Thus, Miller agreed with the district about the program requirements or parameters for M.G.

Yet Miller testified and wrote that the in-district program was still inappropriate for M.G. based on a one-time observation of the in-district program and her belief that the students she observed in the in-district program were too high functioning for M.G. Miller specified on direct examination that the reading and math she observed would have been too challenging for M.G. Meanwhile, in her report, Miller was less sure, writing that the students *appeared* to be higher functioning, not that they *were* higher functioning:

> While there are benefits to having higher functioning peers for models, the students at the Voorhees High School Program <u>appeared</u> to be at a significantly higher level of academic and intellectual functioning than [M.G.], which would limit the gains that she might be expected to receive as she cannot emulate their behavior.
>
> [P-F at 18 (emphasis added).]

Then on cross-examination, Miller admitted that she did not know the level of functioning she observed.

Moreover, Miller overlooked the fact that the instruction in the in-district program is designed to be differentiated—a fact that Miller had noted earlier in her report when

writing about the students she observed and the use of the Unique Learning System in the in-district program:

> Ms. Baumann reported that the students had recently moved into working on multiplication and division as they had already completed addition and subtraction. It was unclear what exactly the math problems looked like as the students were on their computers completing independent math practices with headphones and the screens were not visible from where the evaluator was sitting. The math program was also reported to be through Unique Learning System. Ms. Bauman explained that students can be working on programs of the same content, <u>but geared to their personal academic level</u>.
>
> [P-F at 5–6 (emphasis added).]

Indeed, Publicover highlighted the fact during her examination that the Unique Learning System is but a platform for the many programs the district offers to its learners to differentiate teaching and instruction for them, and that M.G. would be assessed for all of those programs so the teaching and instruction could be differentiated for her.

More significantly, Miller's criticism or concern about what appeared to be higher-functioning students in the in-district program is the only criticism or concern in her entire report about the in-district program, and one that Quinn specifically addressed during her examination when she explained that the whole point of the lesson Miller observed was not to teach reading or math but to facilitate social interaction.

Besides, Miller admitted on cross-examination that she did not know anything about the different programs available to M.G. in the in-district program to differentiate instruction, and was not even aware of the fact that differentiated instruction is best practices.

Finally, Miller did not even include this lone criticism or concern about the in-district program in the initial draft of her report, which was marked for identification and

admitted into evidence as R-17, and only included it in the final draft of her report because petitioners encouraged her to do so.

On balance, Miller is not nearly as reliable an expert as Quinn. Quinn knows more about the in-district program and wrote a more genuine report. Above all, what Miller ultimately recommends for M.G. in a program is what the district ultimately proposed for M.G. in the April 2017 IEP. In fact, Miller acknowledges as much when she describes the IEP in her report:

> [M.G.'s] current IEP provides her with speech and occupational therapy (both individual and integrated into the classroom), an aide, parent training, an extended school year, as well as all of her work presented in a class for children with autism. Her IEP goals are primarily focused on safety, communication and interpersonal skills, ADLs, and vocational skills.
>
> [P-F at 2–3.]

Indeed a comparison of Miller's stated recommendations and the IEP's written components lay this bare: First, Miller recommends a specialized setting for teens and young adults with autism that is consistent with M.G.'s abilities and focused on vocational training, interpersonal skills, speech and language development, safety skills, and daily living skills rather than traditional academics such as reading, writing, and arithmetic—which the April 2017 IEP provides. Second, Miller recommends an environment that is safe, secure, and supportive—safe enough to address the possibility of elopement, secure enough to address potential aggressiveness, and supportive enough to address emerging independence—which the April 2017 IEP provides.

Third, Miller recommends an extended school year—which the April 2017 IEP provides. Fourth, Miller recommends additional safety goals concerning elopement—which the April 2017 IEP provides. Fifth, Miller recommends a behavioral plan to address M.G.'s negative interactions with her peers—which the April 2017 IEP provides.

Sixth, Miller recommends at least two hours per week of home-based ABA interventions—which the April 2017 IEP provides. Seventh, Miller recommends the continuation of speech and language therapy for at least four sessions per week of thirty minutes each—which the April 2017 IEP provides. Finally, Miller recommends that M.G. continue to work with a psychiatrist to manage her psychopharmacological interventions—which the April 2017 IEP provides.

Therefore, I **FIND** that no genuine difference exists between the program petitioners recommend for M.G. and the program respondent offered for M.G. in the IEP dated April 28, 2017.

To be clear, I **FIND** that the IEP dated April 28, 2017, includes the development of socialization skills, communication skills, life skills, and vocational skills, with the appropriate behavioral supports, and a focus on the communication skills, life skills, and vocational skills in particular, which both parties agree M.G. needs, and that no competent evidence exists that M.G. will regress if she is placed in the in-district program.

In addition, I **FIND** that none of the information and documentation the child study team received indicated any significant behaviors that would have prevented M.G. from returning to district, including no instances of elopement or self-injurious behavior in the past year, and that the child study team incorporated all of the goals and objectives DLC had suggested for M.G., as well as all of the goals and objectives petitioners had suggested.

Moreover, I **FIND** that the information and documentation the child study team received indicated that M.G. had progressed at DLC during the 2015–16 and 2016–17 school years.

CONCLUSIONS OF LAW

FAPE

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482. One purpose of the Act is to ensure that all children with disabilities have available to them a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.A. § 1400(d)(1)(A). This "free appropriate public education" is known as FAPE.

Another purpose of the Act is to assist states in the provision of FAPE. See 20 U.S.C.A. § 1400(d)(1)(C). Toward this end, a state is eligible for assistance if the state has in effect policies and procedures to ensure that it will meet the requirements of the Act. 20 U.S.C.A. § 1412(a). In New Jersey, such policies and procedures are set forth in the State statute, special schools, classes and facilities for handicapped children, N.J.S.A. 18A:46–1 to -53, and the implementing regulations, special education, N.J.A.C. 6A:14-1.1 to -10.2. See Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 34 (1989).

The primary issue in this case is whether respondent failed to provide M.G. with FAPE for the 2016–17 school year.

The Act defines FAPE as special education and related services provided in conformity with the IEP. 20 U.S.C.A. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that

would result in individualized consideration of and instruction for each child. Rowley, supra, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701.

Reasonably Calculated

Yet, the Act did not impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043, 73 L. Ed. 2d at 703. In support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972). Rowley, supra, 458 U.S. at 192, 102 S. Ct. at 3043–44, 73 L. Ed. 2d at 703. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, supra, 458 U.S. at 192–93, 102 S. Ct. at 3043–44, 73 L. Ed. 2d at 703–04. The Court also wrote that available funds need only be expended "equitably" so that no child is entirely excluded. Rowley, supra, 458 U.S. at 193, 102 S. Ct. at 3044, 73 L. Ed. 2d at 704, n.15. Indeed, the Court commented that "the furnishing of every special service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go." Rowley, supra, 458 U.S. at 199, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. Thus, the inquiry is whether the IEP is "reasonably calculated" to enable the child to receive educational benefits. Rowley, supra, 458 U.S. at 206–07, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

Significant Learning and Meaningful Benefit

The Third Circuit later held that this educational benefit must be more than "trivial." See Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988). Stated otherwise, it must be "meaningful." Id. at 184. Relying on the phrase "full educational opportunity" contained in the Act, and the emphasis on "self-sufficiency" contained in its legislative history, the Third Circuit inferred that Congress must have envisioned that "significant learning" would occur. Id. at 181–82. The Third Circuit also

relied upon the use of the term "meaningful" contained in Rowley, as well as its own interpretation of the benefit the handicapped child was receiving in that case, to reason that the Court in Rowley expected the benefit to be more than "de minimis," noting that the benefit the child was receiving from her educational program was "substantial" and meant a great deal more than a "negligible amount." Id. at 182. Nevertheless, the Third Circuit recognized the difficulty of measuring this benefit and concluded that the question of whether the benefit is de minimis must be answered in relation to the child's potential. Id. at 185. As such, the Third Circuit has written that the standard set forth in Polk requires "significant learning" and "meaningful benefit"; that the provision of "more than a trivial educational benefit" does not meet that standard; and that an analysis of "the type and amount of learning" of which a student is capable is required. Ridgewood, supra, 172 F.3d at 247–48. In short, such an approach requires a student-by-student analysis that carefully considers the student's individual abilities. Id. at 248. In other words, the IEP must confer a meaningful educational benefit in light of a student's individual needs and potential. See T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).

Appropriately Ambitious

In Endrew v. Douglas County School District, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017), the United States Supreme Court returned to the meaning of FAPE. The Court explicated that while it had declined to establish any one test in Rowley for determining the adequacy of the educational benefits conferred upon all children covered by the Act, the statute and the decision point to a general approach: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 999, 197 L. Ed. 2d at 349. Toward this end, the IEP must be "appropriately ambitious" in light of those circumstances. 137 S. Ct. at 1000, 197 L. Ed. 2d at 351.

The Court continued that a student offered an educational program providing merely more than de minimis progress from year to year could hardly be said to have been offered an education at all, and that it would be tantamount to sitting idly until they were old enough to drop out. 137 S. Ct. at 1001, 197 L. Ed. 2d at 352. The Act

demands more, the Court asserted. "It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Ibid.

Thus, in writing that the IEP be "appropriately ambitious in light of the child's circumstances", the Court sanctioned what has already been the standard in New Jersey: The IEP must be reasonably calculated to provide significant learning and meaningful benefit in light of a student's individual needs and potential.

LRE

An IEP must not only be reasonably calculated to provide significant learning and meaningful benefit in light of a student's needs and potential but also be provided in the least restrictive environment. See 20 U.S.C.A. § 1412(a)(5)(A). To the maximum extent appropriate, children with disabilities are to be educated with children without disabilities. Ibid. Thus, removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Ibid. Indeed, this provision evidences a "strong congressional preference" for integrating children with disabilities in regular classrooms. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993).

To determine whether a school is in compliance with the Act's mainstreaming requirement, a court must first determine whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. Id. at 1215. If such education cannot be achieved satisfactorily, and placement outside of the regular classroom is necessary, then the court must determine whether the school has made efforts to include the child in school programs with nondisabled children whenever possible. Ibid. This two-part test is faithful to the Act's directive that children with disabilities be educated with nondisabled children to the maximum extent appropriate and closely tracks the language of the federal regulations. Ibid.

Accordingly, a school must consider, among other things, the whole range of supplemental aids and services, including resource rooms and itinerant instruction, speech and language therapy, special-education training for the regular teacher, or any other aid or service appropriate to the child's needs. Id. at 1216. "If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." Ibid. Indeed, the Act does not permit states to make mere token gestures to accommodate handicapped children, and its requirement for modifying and supplementing regular education is broad. Ibid.

To underscore this point, the Third Circuit has emphasized that just because a child with disabilities might make greater academic progress in segregated special education classroom does not necessarily warrant excluding that child from a general education classroom. Id. at 1217.

This Case

In this case, the parties disagree which placement is the optimal placement for M.G. That argument, however, does not concern me. What concerns me as a matter of law is whether the in-district program is the appropriate placement for M.G. in the least restrictive environment.

On this score, the record is clear. First, I found that no genuine difference exists between the program petitioners recommend for M.G. and the program respondent offered for M.G. in the IEP dated April 28, 2017. Second, I found that the IEP dated April 28, 2017, includes the development of socialization skills, communication skills, life skills, and vocational skills, with the appropriate behavioral supports, and a focus on the communication skills, life skills, and vocational skills in particular, which both parties agree M.G. needs, and that no competent evidence exists that M.G. will regress if she is placed in the in-district program.

Third, I found that none of the information and documentation the child study team received indicated any significant behaviors that would have prevented M.G. from returning to district, including no instances of elopement or self-injurious behavior in the past year, and that the child study team incorporated all of the goals and objectives DLC had suggested for M.G., as well as all of the goals and objectives petitioners had suggested.

Moreover, I found that the information and documentation the child study team received indicated that M.G. had progressed at DLC during the 2015–16 and 2016–17 school years, which is further indication that the goals and objectives were individualized for M.G. and would have been appropriate for M.G. in 2017-18.

Indeed, petitioners cannot argue that the goals and objectives were not individualized for M.G. simply because they were contained in an IEP that changed the placement. In doing so, petitioners are confusing the placement for the program. Above all, respondent carried its burden that the goals and objectives could be implemented in district whereas petitioners have not carried its burden that they could not.

Therefore, I **CONCLUDE** that the IEP dated April 28, 2017, is reasonably calculated to provide M.G. with significant learning and meaningful educational benefit in light of M.G.'s individual needs and potential, that is, it is appropriately ambitious in light of those circumstances, and that it does so in the least restrictive environment, warranting a return to district where M.G. will have exposure to higher-functioning peers.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the petitions for due-process hearing in this case are hereby **DISMISSED** in their entirety.

This decision is final under 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) and is appealable by filing a complaint and bringing a civil action in the Law Division of the Superior Court of New Jersey or in a district court of the United States under 20 U.S.C.A. § 1415(i)(2) and 34 C.F.R. § 300.516 (2017). If the parent or adult student believes that this decision is not being fully implemented with respect to a program or service, this concern should be communicated in writing to the Director of the Office of Special Education Programs.

October 13, 2017
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: October 13, 2017

Date Mailed to Parties:

dr

APPENDIX

Witnesses

For Petitioners:

Michelle Miller
D.G.

For Respondent:

Jessica Allora
Andrea Quinn
Mary Pat Publicover

Documents

For Petitioners:

P-C IEP dated February 26, 2016
P-F Neuropsychological and Educational Evaluation Report by Michelle Miller, Psy.D., undated
P-M Educational Evaluation by Kathy Nace, M.Ed., LDT-C, dated October 27, 2014
P-Q Student Accident/Injury Report dated November 4, 2015, March 16, 2016, May 2, 2016, and June 1, 2016
P-X Curriculum Vitae of Michelle Miller, Psy.D., undated

For Respondent:

R-1 IEP dated April 28, 2017
R-2 Present Levels of Academic Achievement and Functional Performance from Developmental Learning Center dated April 4, 2017
R-3 Report of Observation by Jessica Allora, M.A., NCSP, dated May 11, 2017
R-4 Program Comparison by Andrea Quinn, Psy.D., dated January 1, 2017
R-10 Evaluation Report by Donna Quinn-Horan, MA, CRC, dated September 14, 2016

R-12 Curriculum Vitae of Andrea Quinn, Psy.D., undated

R-13 Curriculum Vitae of Jessica Allora, M.A., NCSP, undated

R-14 Curriculum Vitae of Mary Patricia Publicover undated

R-15 Program Comparison Summary—Updated by Andrea Quinn, Psy.D., dated July 25, 2017

R-16 Report of Observation by Jessica Allora, M.A., NCSP, dated February 28, 2017

R-17 Draft of Neuropsychological and Educational Evaluation Report by Michelle Miller, Psy.D., undated