# *State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**GRANTING SUMMARY DECISION**

OAL DKT. NO. EDS 08229-14

AGENCY DKT. NO. 2014 21221

**N.S. ON BEHALF OF W.S.**,

Petitioner,

v.

**NEWARK BOARD OF EDUCATION,**

Respondent.

_____

**Jennifer Rosen Valverde**, Esq., for petitioner, N.S. on behalf of W.S. (Rutgers Education and Health Law Clinic, attorneys)

**Janelle Edwards-Stewart**, Esq. for respondent, Newark Board of Education (Charlotte Hitchcock, General Counsel)

Record Closed: October 31, 2014 Decided: November 19, 2014

BEFORE **IRENE JONES**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about may 29, 2014, petitioner, N.S., on behalf of her child, W.S., filed a due-process petition under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415 et seq. with the State Board of Education. On or about June 5, 2014, the respondent, Newark Public Schools District, filed an answer to the petition. On July 2, 2014, the matter was transmitted to the Office of Administrative Law for hearing as a

contested case. A prehearing conference was held on July 31, 2014. During that conference the petitioner, through her attorney, noted that it would file a Motion for Summary Decision. A procedural schedule was established and pursuant to same, petitioner filed a Motion for Summary Decision on August 22, 2014. On September 15, 2014, respondent filed answer in opposition to the motion. Reply briefs were filed by petitioner on September 22, 2014. Oral Argument on the motion was heard on October 31, 2014.

Petitioner seeks a Summary Decision finding that she is entitled to an independent evaluation at the respondent's expense under IDEA.

## FINDGINGS OF FACT

The facts herein are generally undisputed, thus I **FIND** the following **FACTS**:

W.S. (petitioner) is a ten-year-old student who attends school in the State-Operated School District of the City of Newark (respondent or District).

During the 2013-14 school year, W.S. was a fourth-grade student. In September 2013, her classroom teacher, Danielle Brodo (Brodo), noticed her limited focus and attention, and notified her mother, N.S., as well as the Student Support Team (SST) of her observations. Subsequently, an SST member, Roberto Del Rios (Del Rios), spoke with W.S.'s mother, and suggested that she undergo a medical examination. Consequently, on December 10, 2013, she was evaluated by a neurologist, at petitioner's expense. (Resp't's Ex. 7.)[1] The neurologist diagnosed W.S. with "ADHD, inattentive type (more so than hyperactive type) . . . she also demonstrates academic weaknesses particularly in computation." Ibid. The neurologist prescribed medication, and recommended that she receive accommodations such as preferential seating and in class support to help redirect her attention. Ibid.

[1] Respondent's exhibits are improperly numbered after the fourth exhibit, but the Neurological evaluation appears to be the seventh exhibit.

On March 6, 2014, N.S. requested a Child Study Team (CST) evaluation to determine whether N.S. was eligible for special education services. Thereafter on April 17, 2014, N.S. gave the District a copy of the Neurological Report. On April 22, 2014, the parties convened a CST meeting. During the CST meeting, the District determined that N.S. did not need to be evaluated for special education services. Specifically, the CST determined that

> [e]valuations were not warranted at this time based on information presented at the identification meeting. Her teachers indicated that there are no behavioral concerns at this time and progress was noted in terms of her socialization skills since the beginning of the school year. [Petitioner's] science teacher indicated that she does well in science with the use of manipulatives and hands-on activities. Her English Language Arts teacher maintained that she passed the Achievement Network Test (ANet) both times they were administered indicating her ability to perform [fourth] grade work. However, she was absent the third time the test was conducted. Her teachers observed her to be inattentive at times and have difficulty focusing. In response, the Student Support Team Coordinator recommended and the parent arranged for a Neurological evaluation which was conducted on 12/10/2013. However, the written report was provided to the District on 4/21/2014.
>
> It was ascertained that [Petitioner] attended four different schools since enrolling in school. The mother also indicated that she "home schooled" [Petitioner] for a "few months" after she pulled her out of school in [third] grade. Furthermore, a review of her attendance record indicates that she has a history of excessive absences Grade 4:19 absences so far; Grade 3:17 absences/5 tardies; Grade 2:10 absences/12 tardies; and Grade 1:26 absences/15 tardies.
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> [Resp't's Ex. 6.]

With respect to the request for an evaluation, the District noted that

> [a] comprehensive Child Study Team evaluation was requested but rejected at this time. Environmental factors (four schools in four years), "home schooling," absent standardized curriculum, current standardized test scores, medical intervention, progress noted by teachers and parent and her reported increased comfort in her current school [and with her] teachers were relevant factors considered.

> Her teachers and mother noted progress in the area of attention since the medication has been administered. She is able to produce greater amounts of work and is more well focused.
>
> An assessment at this time was also rejected due to her excessive absences which caused her to have a lack of exposure to the curriculum which may have prevented her from acquiring some of the necessary skills. Furthermore, there is no written documentation set forth regarding the type of general education interventions utilized by [Petitioner], the frequency and duration of each intervention and the effectiveness of each. Mathematics and organization/study skills are currently areas of weakness. Supports and interventions will be put in place by the Student Support Team (SST) to address those deficit areas.
>
> [Ibid.]

The Evaluation Determination stated that the evidentiary basis for the determination not to evaluate included

> [a] neurological assessment (12/10/2013) . . . which revealed a diagnosis of ADHD, inattentive type. A review of her report card indicated that she is currently failing Mathematics. Her Math teacher expressed that she has not acquired some of the basic math skills. According to her attendance record, she has a history of excessive absences and she has been absent [nineteen] days thus far this school year. Her teachers noted that there has been some improvement in her ability to focus as the school year has progressed.
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> [Ibid.]

Finally, the Evaluation Determination concluded that

> [m]athematics was identified as an area of weakness according to her teachers, report card, and the neurological assessment. Therefore, interventions will be put in place to support her in that subject area. It was recommended that her case be referred to the Student Support Teacm (SST) for support and interventions in the classroom.
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> [Ibid.]

Petitioner disagreed with the decision not to conduct a formal evaluation.[2] Accordingly, that same day, petitioner, through counsel, formally requested "a full independent child study team evaluation of N.S. at the District's expense, including but limited to, a psychological evaluation, an educational evaluation, and a social history, as well as any other tests, recommended by the independent evaluators based on their findings." (Pet'r's Ex. 4.)

On or about May 14, 2014, the District denied the petitioner's request for independent evaluations.[3] On May 19, 2014, petitioner's counsel sent the District a letter, which advised that twenty calendar days had passed since the petitioner's April 22, 2014, request for independent evaluations. Since the District had not filed for due process within twenty days, petitioner reiterated her request for independent evaluations.

On May 21, 2014, the District again denied petitioner's request for independent evaluations, and asserted that it was not required to file for due process, and explained that "[d]ue to the fact that there were no evaluations with which the parent expressed disagreement, there is no entitlement to a second opinion via an independent evaluation or any requirement for a due process filing to demonstrate the appropriateness of prior evaluations." (Pet'r's Ex. 7.) On May 23, 2014, petitioner's counsel sent respondent a letter, and asserted that the regulations do not require a prior evaluation, before a student is entitled to an independent evaluation. (Ibid.) On May 29, 2014, petitioner filed for due process.

[2] Respondent asserts that as a matter of fact, "[w]hile N.S., expressed disagreement with the CST's decision not to formally evaluate N.S., N.S. did not express disagreement with any formal evaluation(s) or assessment(s) conducted by [respondent] or any other entity." (Resp't's Br. at 2.) Clearly, that sentence is internally inconsistent. Since the respondent refuses to formally evaluate or assess N.S., her mother cannot disagree with any of respondent's formal evaluations or assessments. The only formal evaluation of N.S. is the Neurological Report, which was obtained by the petitioner.

[3] The parties agree that N.S. received and forwarded the letter to her counsel by May 14, 2014. However, the letter is undated, and neither party appears to know when the respondent sent the letter. (Pet'r's Ex. 5.)

## DISCUSSION AND CONCLUSION OF LAW

Summary decision is appropriate if "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). To prevail, the nonmoving party "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. A "genuine issue of material fact" exists if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Here, the parties agree that there is no issue of material fact, and the dispute can be resolved as a matter of law. The parties agree that the narrow legal question is whether a student is entitled to an independent evaluation, at the school district's expense, if the school district refuses to evaluate the student. Therefore, I **CONCLUDE** that this Motion is ripe for summary disposition.

The Individuals with Disabilities Education Act (IDEA) "is 'frequently described as a model of 'cooperative federalism.'" Schaffer v. Weast, 546 U.S. 49, 52, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). IDEA "mandates cooperation and reporting between state and federal educational authorities. Participating States must certify to the Secretary of Education that they have 'policies and procedures' that will effectively meet the [IDEA's] conditions." Ibid. (quoting 20 U.S.C.A. § 1412(a).) Moreover, "[s]tate educational agencies, in turn, must ensure that local schools and teachers are meeting the State's educational standards." Ibid. Accordingly, "[l]ocal educational agencies (school boards or other administrative bodies) can receive IDEA funds only if they certify to a state educational agency that they are acting in accordance with the State's policies and procedures." Id. at 52-53.

To that end, "[s]tate educational authorities must identify and evaluate disabled children, . . . develop an IEP for each one, . . . and review every IEP at least once a

year . . . ." Id. at 53 (citations omitted) (citing 20 U.S.C.A. §§ 1414(a)-(c), 1414(d)(2), (4)). Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide. Id. at 53 (citing 20 U.S.C.A. § 1414(d)(1)(A)). Further, "[p]arents and guardians play a significant role in the IEP process . . . [t]hey have the right to examine any records relating to their child, and to obtain an 'independent educational evaluation of the[ir] child.'" Ibid. (citing 20 U.S.C.A. § 1415(b)(1).)

A school district's duty to identify and evaluate students reasonably suspected of a disability is known as a district's "Child Find" duty. See D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012). Consequently, "[a] school's failure to comply with Child Find may constitute a procedural violation of the IDEA." Ibid. Furthermore, "a poorly designed and ineffective round of testing does not satisfy a school's Child Find obligations." Id. at 250. Rather, IDEA requires that initial evaluations upon suspicion of a disability:

> (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent . . . [;]
>
> (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
>
> (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
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> [Ibid. (quoting 20 U.S.C.A. § 1414(b)(2)(A)-(C); 34 C.F.R. § 300.304(b)(1)-(3).]

IDEA provides that "either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability." 20 U.S.C.A. § 1414(a)(1)(B). Such initial evaluation must occur "within 60 days of receiving parental consent for the

evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe . . . ." 20 U.S.C.A. § 1414 (a)(1)(C)(i)(I); 34 C.F.R. § 300.301(c)(1)(i). New Jersey regulations further provide that a "parent may make a written request for an evaluation to determine eligibility for services under this chapter. Such a request shall be considered a referral and shall be forwarded without delay to the child study team for consideration." N.J.A.C. 6A:14-3.3(d)(1).

Moreover, "[a] parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency . . . ." 34 C.F.R. § 300.502(b)(1). After such request for an independent evaluation, "the public agency must, without unnecessary delay, either—(i) File a due-process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense . . . ." 34 C.F.R. § 300.502(b)(2)(i)-(ii). Federal regulations provide that though the school district can ask the parent about the reason for disagreement with the evaluation, the school district "may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

However, the New Jersey regulation N.J.A.C. 6A:14-2.5(c) is worded slightly differently. Cf. 34 C.F.R. § 300.502(b)(1); N.J.A.C. 6A:14-2.5(c)(1). It provides that "[a] parent may request an independent evaluation if there is disagreement with any assessment conducted as part of an initial evaluation or a reevaluation provided by a district board of education." The regulation further provides that "[i]f a parent seeks an independent evaluation in an area not assessed as part of an initial evaluation or a reevaluation, the school district shall first have the opportunity to conduct the requested evaluation." N.J.A.C. 6A:14-2.5(c)(1).

The Federal Office of Special Education Programs (OSEP) recognized this slight discrepancy in 2012, and provided guidance. (Pet'r's Ex. 10.) OSEP recognized "that N.J.A.C. 6A:14-2.5(c)(1) limits parents' rights to an [independent evaluation] by giving the public agency an opportunity to conduct an assessment in an area not covered by

the initial evaluation or reevaluation before the parents are granted an [independent evaluation]." Ibid. Accordingly, OSEP advised that to continue to receive federal funds, New Jersey must

> provide specific written assurance to OSEP that the State will: (1) Revise New Jersey regulation N.J.A.C. 6A:14-2.5(c) to eliminate the provision that, "If a parent seeks an independent evaluation in an area not assessed as part of an initial evaluation or a reevaluation, the school district shall first have the opportunity to conduct the requested evaluation." (2) Ensure compliance in the interim throughout the FFY 2012 grant period with the specific requirements of 34 C.F.R. 300.502; and (3) Send a memorandum to all Local Educational Agencies to inform them of the changes to the regulation and the need to comply with the requirements in 34 C.F.R. 300.502.
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> [Ibid.]

Nevertheless, the regulation has not been amended. See N.J.A.C. 6A:14-2.5(c)(1). However, OSEP reiterated this directive in October 2013. (Pet'r's Ex. 12.) Regardless, the aforementioned regulation further provides that:

> i. The school district shall determine within ten days of receipt of the request for an independent evaluation whether or not to conduct an evaluation . . . and notify the parent of its determination.
>
> ii. If the school district determines to conduct the evaluation, it shall notify the parent in writing and complete the evaluation within 45 calendar days of the date of the parent's request.
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> iii. If the school district determines not to conduct the evaluation first, it shall proceed in accordance with (c)(2) below [and either grant the independent evaluation or file for due process within twenty days].
>
> iv. After receipt of the school district's evaluation, or the expiration of the 45 calendar day period in which to complete the evaluation, the parent may then request an independent evaluation if the parent disagrees with the evaluation conducted by the school district.
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> [N.J.A.C. 6A:14-2.5(c)(1)(i)-(iv).]

Here, the District argues that neither an independent evaluation nor a due process hearing were required, because "there has been no prior evaluation with which [Petitioner] has disagreed. Indeed, there has been no prior evaluation of N.S. by [Respondent]." (Resp't's Br. at 5.) Respondent asserts that "[r]ather, the CST having reviewed [Petitioner's] student record information and consulted with her teachers, determined that evaluation of [Petitioner] was not warranted, although academic support was." (Ibid.) Respondent reasons that "[b]ecause here has been no District evaluation of [Petitioner] with which [Petitioner] can disagree, [Petitioner] is not eligible to request independent evaluations." (Ibid.)

Assuming, *de arguendo*, the New Jersey regulation valid, the plain language of the regulation does not permit a school district to simply unilaterally refuse an independent evaluation. See N.J.A.C. 6A:14-2.5(c)(1)(i)-(iv). When a parent requests an independent evaluation, the New Jersey regulation gives school districts a choice; conduct an evaluation, or file for due process. N.J.A.C. 6A:14-2.5(c)(1)(ii), (iii). Though the regulation incorrectly gives school districts an opportunity to evaluate first, the regulation plainly requires the school district to either conduct that evaluation or file for due process. Ibid. The regulation does not permit the school district to refuse to evaluate indefinitely, without recourse to the parent. Ibid.

Indeed, the regulation provides a specific timeframe for each course of action. See N.J.A.C. 6A:14-2.5(c)(1)(i), (ii) (iv); N.J.A.C. 6A:14-2.5(c)(2)(ii). First, the school district has ten days to decide whether to conduct an evaluation or file for due process. N.J.A.C. 6A:14-2.5(c)(1)(i). If the school district decides to evaluate first, that evaluation must be completed within forty-five days of the parent's request. N.J.A.C. 6A:14-2.5(c)(1)(ii). If the school district's evaluation is not completed within forty-five days, the parent may again request an independent evaluation. N.J.A.C. 6A:14-2.5(c)(1)(ii). If the school district decides not to evaluate first, as here, the school district must file due process within twenty days. N.J.A.C. 6A:14-2.5(c)(2)(ii). Even by the terms of this questionable regulation, a school district may not simply refuse to evaluate indefinitely, and refuse to grant an independent evaluation. See N.J.A.C. 6A:14-2.5(c)(1)(i), (ii) (iv); N.J.A.C. 6A:14-2.5(c)(2)(ii). Indeed, pursuant to respondent's logic, school districts

could unilaterally refuse to identify, evaluate, and provide special education services to any students indefinitely, without any recourse to parents and advocates. (See Pet'r's Br. at 4-6.) Such logic clearly violates the most basic principles of IDEA. See D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012).

Alternatively, the District relies on N.J.A.C. 6A:14-3.3(b), which provides that "[i]nterventions in the general education setting shall be provided to students exhibiting academic difficulties and shall be utilized, as appropriate, prior to referring a student for an evaluation of eligibility for special education and related services." N.J.A.C. 6A:14-3.3(b). It further cites N.J.A.C. 6A:14-3.3(c)(1), which provides that

> [w]hen it is determined through analysis of relevant documentation and data concerning each intervention utilized that interventions in the general education program have not adequately addressed the educational difficulties, and it is believed that the student may have a disability, the student shall be referred for evaluation to determine eligibility for special education programs and services under this chapter.
>
> [N.J.A.C. 6A:14-3.3(c)(1).]

Respondent argues that these provisions mandate that "general education interventions must be trialed with students prior to CST referral." (Resp't's Br. at 11.) Accordingly, it reasons that "Petitioner's request for independent evaluations was not only improper but also premature." (Ibid.) However, these provisions do not, and cannot, be read to suggest that a child cannot be evaluated for special education services unless all general education interventions have failed. (See ibid.) The first-quoted provision directs general education interventions to be attempted "as appropriate" prior to referral." N.J.A.C. 6A:14-3.3(b). Therefore, the language is clearly discretionary, and does not establish a condition precedent to referral. Ibid. Moreover, respondent does not propose how much time a school district must be permitted to "try" such general education interventions, before the district is required to comply with IDEA. (Resp't's Br. at 11-12.) Finally, the language addresses referral, not evaluation. (See ibid.) Here, the issue is whether respondent has a duty to evaluate petitioner. Petitioner's mother

unquestionably referred petitioner, and that referral was properly forwarded to the CST. See N.J.A.C. 6A:14-3.3(d)(1).

Moreover, "[a] fundamental tenet of statutory construction is that 'every effort should be made to harmonize the law relating to the same subject matter. Statutes in pari materia are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent.'" In re Return of Weapons to J.W.D., 149 N.J. 108, 115 (1997) (quoting State v. Green, 62 N.J. 547, 554-55 (1973)). The quoted provisions are part of New Jersey's Child Find regulation. See N.J.A.C. 6A:14-3.3. The first provision in that section directs school districts to "develop written procedures for students age three through 21 . . . with respect to the location and referral of students who may have a disability due to physical, sensory, emotional, communication, cognitive or social difficulties." N.J.A.C. 6A:14-3.3(a). Such procedures must include

> i. Utilizing strategies identified through the Intervention and Referral Services program according to N.J.A.C. 6A:16-8, as well as other general education strategies;
>
> ii. Referral by instructional, administrative and other professional staff of the local school district, parents and state agencies, including the New Jersey Department of Education and agencies concerned with the welfare of students.
>
> iii. Evaluation to determine eligibility for special education and related services; and/or
>
> iv. Other educational action, as appropriate.
>
> [N.J.A.C. 6A:14-3.3(a)(3).]

Thus, general education interventions, referrals, and evaluations are an alternative, but not mutually exclusive, courses of action. See Ibid. Again, general education interventions are not a condition precedent to referral or evaluation. Ibid. Moreover, referral is distinguished from evaluation, and a parent is expressly permitted to refer a student. Ibid. Here, the referral has already occurred; petitioner's mother referred her daughter to the child study team, and requested an evaluation. I therefore, **FIND** and

**CONCLUDE** that the District's suggestion that N.S. was not permitted to refer her daughter, prior to general education interventions, has no basis in the regulation. See Ibid.

Parenthetically, it must be noted that the cross-referenced regulation governing general education intervention reinforces that such interventions and the strictures of IDEA are not mutually exclusive. Cf. Ibid.; N.J.A.C. 6A:16-8.1. That general education regulation provides that school districts must

> establish and implement in each school building in which general education students are served a coordinated system for planning and delivering intervention and referral services designed to assist students who are experiencing learning, behavior, or health difficulties, and to assist staff who have difficulties in addressing students' learning, behavior, or health needs. District boards of education shall choose the appropriate multidisciplinary team approach for planning and delivering the services required under this subchapter.
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> [N.J.A.C. 6A:16-8.1(a).]

The regulation further provides that "1. The intervention and referral services shall be provided to aid students in the general education program; and 2. The intervention and referral services may be provided for students who have been determined to need special education programs and services." Ibid. (emphasis added). Thus, such general education services may actually supplement, not preclude, special education services pursuant to IDEA. Ibid. That same regulation mandates that "[t]he intervention and referral services provided for students determined to need special education programs and services shall be coordinated with the student's individualized education program team, as appropriate." N.J.A.C. 6A:16-8.1(a)(2)(i). Moreover, "[c]hild study team members and, to the extent appropriate, specialists in the area of disability may participate on intervention and referral services teams . . . ." N.J.A.C. 6A:16-8.1(a)(3). Therefore, the regulations clearly envision general education intervention that supplement, and certainly don't preclude, special education services. See Ibid.

Finally, respondent's asserts that petitioner's

> general education teacher noted her inattention and lack of focus at the start of the 2013-14 school year. After notifying the [SST] and [Petitioner's mother], her teacher commenced classroom interventions. [Petitioner's] teacher noted improvements in [Petitioner's] performance in response to the interventions. The teacher noticed even greater gains once the interventions were combined with [Petitioner's] medicinal treatment for Attention Deficit Hyperactivity Disorder.
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> [See Resp't's Br. at 11.]

Respondent readily admits that petitioner suffers from ADHD, that petitioner's ADHD interferes with her education, and interventions are necessary for petitioner to learn. (Ibid.)

I **FIND** that the "general education" interventions herein are identical to typical special education services, including one-on-one instruction in reading and math. (See Brody Cert. ¶¶ 21-24.) Indeed, the SST drafted a "Pupil Action Plan" (PAP) nearly identical to an Individualized Education Program (IEP) required by IDEA. Cf. N.J.A.C. 6A:14-3.7; (Resp't's Ex. 8.). Specifically, an IEP would require, and the PAP includes, "[a] statement of the special [or here, general] education and related services and supplementary aids and services that shall be provided for the student, or on behalf of the student." Cf. N.J.A.C. 6A:14-3.7; (Resp't's Ex. 8.) Besides one-on-one instruction in reading and math, the PAP provides for standardized test accommodations, including extra time, small-group instruction, modified assignments, and use of manipulatives. (Resp't's Ex. 8.) Moreover, just as required in an IEP, the PAP provides measurable goals and objectives, such as "[s]olve word problems involving multiplication and division with 60% proficiency." Cf. Ibid.; N.J.A.C. 6A:14-3.7(e)(2). Thus, it is apparent **and** respondent concedes that petitioner requires individualized instruction, but proposes to deliver that individualized instruction without conforming to the strict procedural and substantive strictures of IDEA. (Resp't's Br. at 11-12.) The respondent further argues that New Jersey regulations dictate that school districts must be given the opportunity to deliver individualized support services, outside of the strictures of IDEA, before the strictures of IDEA are applicable. Ibid. I **FIND** that such a proposition

undermines the very purpose of IDEA, and accordingly, is without merit. 20 U.S.C.A. § 412(a).

Finally, I **CONCLUDE** that the District's is assertion that an independent evaluation of petitioner amounts to prioritizing the rights of non-disabled students over disabled students is unsupported and in conflict with the mandate of IDEA. (Resp't's Br. at 12-13.) Likewise, I am not persuaded by respondent's argument that contends:

> [i]t is common knowledge that students, particularly minority students (of which [Petitioner] is one) have been over classified for special education. What Petitioner would create in espousing her current position is an alternative route or "backdoor" into special education. Where environmental factors have coalesced to compromise a student's educational opportunities, and experts have recognized this and opted to provide discrete but intensive academic support, Petitioner would insist on unnecessary and potentially stigmatizing evaluation and classification. Before resorting to this tack, those relied upon to make appropriate educational decisions must consider the social and other ramifications of shoehorning minority student[s] into special education, when a bit of added support would suffice.
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> [Resp't's Br. at 13.]

First, there is no evidence in the record that minority students are "over classified." (Ibid.) Nor, for that matter, is there any evidence in the record that petitioner is a member of a minority group in a district where she is in the majority population. (See Ibid.[4]) I **CONCLUDE** that, no provision of IDEA, and no federal or state regulation, permits a school district to "consider the social and other ramifications of shoehorning minority student[s] into special education" to determine whether a particular student is entitled to special education services. 20 U.S.C.A. § 1414(b)(2)(A)-(C); 34 C.F.R. § 300.304(b)(1)-(3); N.J.A.C. 6A:14-3.3. That consideration is a matter of public policy, to be addressed by Congress and the state legislature. School personnel may not

[4] A brief internet search reveals that only 12.9% of respondent's students are not members of a minority group (2955 white students of 38,188 total students). See District Information, Newark Public Schools, <http://www.nps.k12.nj.us/district/info/> (last visited October 7, 2014).

unilaterally decide to cease identifying, evaluating, and providing services to students who are members of a minority group, to remedy this alleged policy issue.

Finally, while I agree that there is no doubt that the "environmental factors" respondent alludes to, and specifies elsewhere as attendance issues, multiple school transfers, and a period of home schooling, may well have contributed to petitioner's academic problems. (Resp't's Br. at 13.) However, without comprehensive evaluations, this is conjecture.

I **CONCLUDE** that pursuant to the clear dictates of federal regulations and OSEP's unequivocal direction, petitioner is entitled to independent evaluations as a matter of law. N.J.A.C. 6A:14-2.5(c)(1)(ii), (iii). Accordingly, petitioner's request for independent evaluations is hereby **GRANTED**.

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.

November 19, 2014 _____

DATE **IRENE JONES**, ALJ

Date Mailed to Agency _____

Date Mailed to Parties: _____

kep/sej