

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 08542-15

AGENCY DKT. NO. 2015 22952

L.S. AND S.S. ON BEHALF OF K.S.,

Petitioners,

v.

HOWELL TOWNSHIP BOARD

OF EDUCATION,

Respondent.

Monica Medina-Finson, for petitioners, Parent Advocate

Viola Lordi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: September 9, 2016

Decided: September 22, 2016

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEEDURAL HISTORY

Petitioners, L.S. and S.S. on behalf of their minor child K.S., requested a due process hearing because of a disagreement with the Howell Township Board of Education (Howell or Board). The Board proposed placement for K.S in the autistic program. Petitioners are seeking continued placement in the LLD program for K.S. The matter was transferred to the Office of Administrative Law (OAL) as a contested matter on June 11, 2015. On July 2, 2015, a settlement was reached between the parties regarding an extended school year (ESY) program for K.S. for the summer of 2015.

(See attached.) On August 3, 2016, a settlement was reached between the parties regarding an ESY program for K.S. for the summer of 2016. (See attached.)

Hearings were conducted on October 20, 2015 December 9, 2015; March 3, 2016 May 31, 2016 and September 9, 2016, on which date the record closed.

TESTIMONY

Patricia Callander

Patricia Callander (Callander) is the Assistant Superintendent of Pupil Services for Howell. She oversees special education and other student services. She has a Master's Degree in school administration and supervision. Callander has the following education certificates: Principal, Supervisor, School Administrator, and Teacher of the Handicapped and Elementary School Teacher. Prior to becoming the Assistant Superintendent, she was the Supervisor of Special Education beginning in 2004. She taught in Howell from 1998 to 2004. She taught special education in Howell, primarily in resource programming. She was previously a special education teacher in Freehold Township.

Special Education in Howell schools can consist of the following: general education with supplements, resource room mainstream with a para-professional and special education classes. The special education classes have students with cognitive and behavioral issues, autistic students, as well as students with learning language disability (LLD).

Callander is familiar with K.S. She recalled that he enrolled in Howell in the April 2015. Once he enrolled, he was having difficulty transitioning and maintaining appropriate behavior. He was previously a student in the Edison school district. A report from Dr. Sinha, on K.S. from the Edison school district on K.S. stated that he had autistic disorder with developmental delay in fine and gross motor skills. This impression is consistent with what Callander observed of K.S. K.S. had an IEP from Edison, dated February 27, 2015, when he enrolled in Howell. That IEP stated that K.S.

should be in an LLD program. The Edison IEP was the stay put. Howell placed K.S. in its LLD program in accordance with the Edison IEP. An educational evaluation dated December 8, 2014, Psychological report dated November 25, 2014 and Functional Behavioral Assessment (FBA) were done by Edison with various dates from November 26, 2014, to January 7, 2015. K.S. engaged in a variety of maladaptive behaviors in a variety of settings in the LLD classes. He had difficulty attending to whole-group instruction and he had difficulty behaviorally attending in a large setting.

Callander observed K.S. in the LLD class in Howell. He was crying and had a difficult time with attention, behavior, and compliance. He did not interact in the LLD classes or the general education classes. A BCBA worked with the teacher to setup a behavior plan to help K.S. transition. A para-professional worked directly with K.S. one-to-one all day, which was not required by the IEP, to keep him on task and on target. The para-professional prompts, cues, rephrases, and gives hand-over-hand assistance. Even with the assistance of the para-professional, K.S. still had problems maintaining his behavior and was disrupting other students. He needs much prompting because of his lack of attention. There were eight students in the LLD class at that time.

The Howell LLD program allows the students to interact with the general education students in certain classes. The LLD program is not the right program for K.S. He has difficulty in the school environment and was not benefitting from time with the general education students. He had behavioral difficulties and was not participating in a meaningful way. He needed a great deal of prompting to participate and it appears that he just followed the prompts.

There was an IEP meeting on May 12, 2015. The recommendation for K.S. was the autism program for academic and special area subjects. The level of mainstreaming would be introduced as appropriate. A behavior plan was included in the IEP. This was based on K.S. disability and the way it affected him. The parents did not accept the IEP. K.S. has continued in the LLD program. K.S. went to the extended school year (ESY) autism program in the summer of 2015. He did not cry or try to escape at the extended summer school program.

L.S. and S.S. requested independent evaluations for K.S. in a letter dated May 19, 2015. Howell agreed to provide a psychological, neurological, physical therapy (P.T), occupational therapy (O.T), speech, and educational evaluations for K.S. In a letter dated June 11, 2015, L.S. and S.S. requested a behavioral evaluation. Howell denied this request. The educational evaluation had similar findings to the prior educational evaluation. The O.T. report recommends O.T. twice a week in class pull-out sessions. The psychological evaluation was consistent with the prior psychological evaluation. The cognitive testing was consistent. The P.T. evaluation was not done in a school setting. Many of the skills were simulated and the best estimate of abilities was used for other skills. The Edison occupational evaluation was consistent with the observations of K.S. at Howell. K.S. worked with teachers and participated in play in the ESY autistic program. The June 2015 progress report of K.S. showed he was inconsistent in some areas. He had less than anticipated progress.

L.S. and S.S. met with Howell on October 7, 2015, to discuss the independent evaluations that were done. The evaluations were discussed with the parents and people certified in the area of each evaluation. At the meeting, the teacher in the LLD program stated that K.S. does not act out anymore. He still needs to be prompted and has difficulty maintaining attention particularly in a group setting. It is difficult for him to be on task without prompts. He is being prompted to do work. He is not independently doing the work. His lack of focusing and lack of attention keep him from working independently. He needs the intensive teaching of the autism program. His language level is not appropriate. The autism program is based on developing language. Data was collected by the LLD teacher.

Callander testified that some students use augmented communication methods, which is primarily the use of a device such as an iPad. The staff is trained in using these devices. Augmented communication methods are not generally used, but used with specific students. The Child Study Team (CST) spoke to L.S. and S.S. regarding augmented communication devices, but K.S. does not need one. He is capable of using language but he needs to improve his skills.

The autism program uses ABA throughout the day and uses the verbal behavior (VB) map to access skills and plan instruction. There is intensive teaching throughout the day. Intensive teaching is one-to-one with scheduled reinforcement. In the autism program the teachers receive training on the principals of ABA, reinforcement of skills and behavior, and elimination of negative behavior. LLD teachers do not receive this training.

K.S.'s June 2015 progress report had twelve goals and thirty-six benchmarks. Eight of the benchmarks were achieved. Twelve of the benchmarks were related to speech and language. K.S. was inconsistent with developing and maintaining language skills. He did not interact with his peers. His occupational therapy was one-to-one and he had difficulty being attentive for two to three minutes.

Dorothea Fernandez

Dorothea Fernandez (Fernandez) is the Vice-Principal of the Edith M. Griebling School. She is also the District Supervisor of special education since 2004. Prior to 2004, Fernandez was a general education teacher. She has a Bachelor's degree in English and a Master's degree in Administration, Supervision and Curriculum Planning. As supervisor of special education her duties included evaluating staff, overseeing programs, crisis training, train teachers to use crisis intervention, and ensuring teachers had adequate materials. She has taken BCBA classes.

Fernandez has contact with the autistic classes at Griebling daily. There are two autistic first-grade classes at Griebling. The VB map is used to access students and create goals.

Fernandez testified that she consulted on his IEP. She saw him in general education and special classes. Fernandez has reviewed the educational evaluation of K.S. done on August 12, 2015, which states that placement in a larger group setting would be overwhelming for K.S. This is consistent with her observations. K.S. educational evaluation of August 12, 2015, shows that he needs to reinforce old skills. The psychological evaluation of K.S. done on August 17, 2015, shows that he would

benefit from being in a classroom with a low student-to-teacher ratio. K.S.'s speech evaluation of August 20, 2015, shows autism spectrum in the summary.

K.S. would not have access to his peers in the LLD program because of his lack of language. He does not have the skill set of the other students in the LLD class. In the autism class, he would have more opportunity to work with his peers. If K.S. had one to one in the LLD program it would be all day and he would not have the opportunity to interact with his peers. In the autism classroom, he would not need one-to-one all day because his peers would be on the same level as him. Students in the autism program have similar language issues as K.S.

The Howell IEP calls for two speech language sessions per week for K.S., one individual and one group separate from the language instruction in the autism class. Language skills are worked on throughout the day in the autism class. The speech and language evaluation recommends K.S. have two to three speech sessions per week.

Fernandez stated that the goals and objectives of the IEP are implemented in class. Data is taken to determine if goals are achieved. Modifications are done through the methodology. The stay-put IEP of K.S. (R-4) states that K.S would receive speech and language as a related service would be a group session twice per week for thirty minutes. The Howell IEP (J-4) provided K.S. with individual speech sessions once a week for twenty-five minutes and one group speech sessions per week for twenty-five minutes.

K.S. is presently in a LLD class. Fernandez is not sure if K.S. had integrated speech services in Edison. The Howell IEP states "The district will build into K.S.'s day the appropriate level of integration that benefits him."

The Howell IEP had goals for K.S. to produce sounds for twenty letters of the alphabet under the reading category. In the reading science and social studies categories a goal is for K.S. to be able to answer a "who or what" question after a short story. Both of these goals involve speech, language and generalization. He would

have the ability to practice language in the autism program. In the Edison IEP the reading goals reference language.

In the spring of 2015, Fernandez took L.S. on a tour of the autism program. She showed L.S. the class program and explained to her that there would maybe six students in the class. She also explained that the primary methodology in the autism program was ABA and that verbal behavior was a component of ABA. There was a meeting thirty days after K.S. began school in Howell. At that meeting L.S. was told about the autism program. In ABA the lower ratio of student to staff is most efficient. ABA is not a program it is a methodology. The verbal behavior map is an assessment and placement tool. Verbal behavior is a component of ABA. The autism program offers strict ABA which includes discrete trial training, stimulus response, set up and reinforcement. The ESY autism program conditions are the same as the in school autism program.

The LLD program is different from the autistic program. It has a higher student to teacher ratio, there are more distractions. ABA is not done in the LLD classes, there are too many distractions.

Lauren Cadott

Lauren Cadott (Cadott) is employed by Howell as a pre-school disabled teacher. She has a Bachelor's degree in elementary education. She received a Master's degree in special education in January 2015. She has teaching certificates in Elementary Grades K-6 and Pre-K to 12 teacher of students with disabilities. She taught in the autism primary grades one and two in Howell from September 2014 to June 2015. She taught the autism primary grade one class in the ESY program in 2015. She is presently teaches the preschool disabilities class. When she taught the autism primary grades one and two, there were five students in the class. There was small-group instruction, whole-group instruction, and intensive teaching time one-on-one instruction.

The ESY program in 2015 had five students. It was four days a week for four hours a day. The SRA reading mastery program was used. It works on the students

reading skills from sounds to words. The language skills instruction involved teaching how to ask for an item, taking turns, speaking to the child next to you. The students were taught to do these things without prompting. The ESY is to maintain the goals of the IEP.

Cadott recalled that K.S. did well in the ESY program. His skills with his goals increased; his social skills increased; and he was very sociable by the end of the program. Speech therapist came in to work with the students. She collaborated with the related service workers. K.S. enjoyed working with toys and the iPad. They were rewards for him.

Cadott began working with the verbal map with K.S. but could not complete the assessment during the time of the ESY program. The OT therapist worked outside of the classroom with K.S. Speech sessions were done in the classroom. During the day she worked with the class on speech skills. K.S. did not exhibit any negative behavior. K.S. did not have any transition problems in the ESY program. Data was collected and graphed. The autism program at Howell is the correct program for K.S. because of the smaller setting and the use of the VB map. One-to-one teaching and small-group teaching worked well for K.S.

K.S. has a sensory processing disorder, a language processing disorder, developmental delays, and medical needs. He has receptive language difficulties. This is addressed through language and skill acquisition. The goals were worked on by working on his social skills. K.S. was taught to ask for things in a group setting and talk to his classmates. K.S. did not constantly need to be redirected. When he needed to be redirected it would be once with a visual prompt or physical gesture.

The VB Map is a verbal behavior milestone assessment placement program. It comes from the program book. It is an assessment program for verbal and language acquisition skills. Each student has a VB Map book. It is used in class with the student. VB map has milestones. It is for zero to forty-eight months language development. Students are assessed based on the milestones. Training is needed in how to perform

the assessments and use the book. The VB Map has group skills that have to be accessed in a group setting.

Nicole Lempa

Nicole Lempa (Lempa) is employed by Howell as a Board Certified Behavioral Analyst (BCBA) for the District. She has a Bachelor's degree in special education and a Master's degree in early childhood education. She has a post-Master's certificate in applied behavioral analysis issued by the Board of the Association of Behavioral Analysts. She has a teacher of the handicapped preschool through third grade and a supervisor's certificate. She was first employed by Howell in September 2004 as a teacher of preschool children with disabilities. She became the BCBA for Howell in September 2015. As a BCBA her duties included assisting teachers and assessing students using the verbal map.

Lempa worked with Cadott in the ESY program in 2015 with regard to K.S. and the verbal map. She gave Cadott pictures and told her to assess K.S. in different language components. K.S.'s manding (requesting) and following levels were also tested. Lempa observed K.S. in the classroom in the ESY program. He was compliant. He needed redirection sometimes and prompting. Once he was redirected, he would get back on task. K.S. did not have any transition issues. K.S. did well in the small class size structured environment. In a structured environment everything is laid out for K.S. He knew exactly what was expected of him throughout the day. In the beginning a visual schedule was used, and K.S. was able to understand the structure of the day. The schedule was of different activities that would be presented to him throughout the day. He needs to develop language acquisition with teachers and staff that know how to implement it. Language acquisition needs to be generalized though out the day.

Antecedent strategies are used in the autism program to help students become more willing learners. An example is mixing mastered and non-mastered demands to achieve mastery. This was done with K.S. A token economy is a reinforcement system to increase response effort. After the student achieves the behavior that the teacher wants he is reinforced. K.S. responded well to the token economy.

The ESY program that K.S. was in in the summer of 2015 is essentially the same program as the autism program. The autism program is appropriate for K.S. because he made efforts to reach his goals and interacted with other students. Language development is a primary focus of the autism program.

L.S.

L.S. is the mother of K.S. In April 2015, she testified that the family moved from Edison to Howell. K.S. started school in Howell on April 6, 2015. The transition in school was difficult for K.S. He cried often. In Edison, he had transition issues and cried there as well. In Edison he had a behavioral plan and sensory diet. He had special education mild/moderate LLD classes in language arts, math, and social studies in Edison.

L.S. does not agree with the FBA of January 2015, which states that K.S. engaged in maladaptive behaviors. L.S. says the FBA is a lie. L.S. believes that K.S. crawling around and inappropriate vocalizations are not behavioral difficulties. L.S. does not believe that he did exhibit these behaviors while he was in Edison. K.S. is autistic and has ADHD which is the reason he has difficulty with attention. She believes that Nina Cervini, K.S.'s teacher at the time of the FBA could have lied to Despina Fassilis (Fassilis), who did the FBA, about K.S. L.S. stated that K.S. did not engage in maladaptive behaviors in Edison and that Fassilis is lying. K.S.'s inappropriate vocalizations, such as yelling, screaming, growling, humming and laughing are acceptable according to L.S. She states that he is learning and engaging when he engages in these vocalizations.

While he was in Edison K.S. did not require significant assistance beyond what LLD classes provided. In Edison K.S. was in an in-class resource setting and LLD. K.S. had more difficulty in the in-class resource (ICR) class than the LLD class in Edison. The FBA is not accurate. Although L.S. was not present at the FBA, she believes that Fassilis is not truthful in the FBA report.

The stay-put IEP (R-4) does not show K.S. in ICR. L.S. says that this is not the last IEP she received from Edison. That IEP does not have a behavior intervention plan (BIP) because he was not exhibiting any behaviors. K.S. behaviors began when he transitioned into Howell. L.S. does not agree that Edison was of the opinion that K.S. needed special classes exclusively because ICR was not appropriate.

K.S. was non-verbal until pre-k. He speaks in a broken language. He now speaks with one word answers. His answers are not complete. He understands simple questions like "Did you wash your hands?" but he cannot answer "What did you do in school?"

K.S. had ABA services for two years beginning in pre-k. He did well with ABA. He progresses in activities other than education with ABA. L.S. informed Howell that K.S. had received ABA services and was told that the autism program had ABA services. She wants K.S to receive ABA in the general education and LLD classes. Howell does not have ABA services in LLD classes.

Howell sent notes to her that K.S. was crying and that he needed to be in an autistic class, not an LLD class. Howell did not have a behavior plan for K.S.; it said behavior would be addressed in the autism class.

K.S. attended the extended school year (ESY) autistic program in Howell in the summer of 2015. K.S. had a good relationship with the teacher. His behaviors disappeared and he was happy. The crying and scripting stopped during ESY. The teacher modified his program which changed his behavior. There was a rewards system in this program. K.S. was focused, attentive, and enjoyed rewards in the ESY program. He was engaged in the ESY program. L.S. was not satisfied with this program, but K.S. did improve in ESY program because ABA and a reward system were used. K.S. did not have transition issues in the ESY program. K.S. began to progress in the ESY program and with the Edmark program. L.S. later testified that K.S. did not learn at ESY and ESY is a camp. He did well in ESY because of the reward system. L.S. states that K.S. was playing in the ESY program, but she stated that when she

observed him in the ESY program, he was doing school work. The ESY program is an autistic program.

L.S. stated that she does not want K.S. in the autism class. She feels that inclusion is very helpful for K.S. She wants him to have friends and peer modeling. In pre-k he was in an autism class half of the time and general education class half of the time and he did not have speech or social skills. K.S. has never been in an all-day autism class.

L.S. requested K.S. have an aide in class. She observed the LLD and regular education classroom and the autistic class. The psychological evaluation of Grazielle Zaneti stated that K.S. needed a multi-sensory approach and to be in small groups.

L.S. observed K.S. in the general education class. There was no aide or multisensory approach. K.S. sat in the back of the class away from the other students. He was crying. L.S. also observed K.S. in the LLD class and aid was redirecting him. He was sitting next to the aide. In October 2015, K.S. had an aid in the LLD class. In the general education class the teacher was with him. There was no reward system in the general education or LLD classrooms. In the ESY class L.S. saw K.S. writing and responding appropriately when told to play with the iPad. When L.S. observed the general education class in May 2015 during calendar time she did not see any visual aids. When L.S. observed the general education and the LLD classes she did not observe any other children with broken language. All of the other students were very verbal and could answer questions. L.S. also observed LLD classes in April 2015. A reward system was not being used in the class.

K.S. has speech sessions twice a week, one individual session for twenty-five minutes and another group session for twenty five minutes. The speech services did not address social skills. K.S. has made progress in answering questions that he knows about like toys. He cannot answer complex questions.

She did not know that the school had concerns regarding K.S. ability to understand directions. L.S. visited the autistic classes in July 2015. In one autistic

class she saw five students. The students were writing and none spoke in a broken language. Some of the students were being redirected. In the other autism class the students did not speak in broken language and could speak in full sentences. She did not see any ABA in the autistic classes or use of the VB map.

K.S. has low muscle tone. He cannot sit crossed legged on the floor. L.S. does not know if the occupational therapist is working on K.S. gross motor skills. She asked for various supports but does not know if they have been implemented. The school used a weighted vest to help with K.S. muscle tone but it did not help. K.S. has various allergies that L.S. informed Howell about. Howell was notified that K.S. was allergic to marshmallows. In December 2015 there were marshmallows in his backpack. His May 12, 2015 IEP does not list that that K.S. is on a restricted diet.

In September 2015, K.S. returned to Greenville school in the general education and LLD classes. He was compliant and no behaviors were reported. The teacher told L.S. that K.S. "gets into his thoughts" and it is a challenge to bring him out of that. L.S. stated that the LLD class did not use rewards but later noted that a token economy is used to reinforce desired behavior.

L.S. testified that K.S. knows the numbers one to twenty and can write his letters but he cannot read. The Edmark reading program was suggested. He began that program in either January or February 2016. She was sent a copy of what would be used and asked K.S. what it was. K.S. read everything. K.S. does not receive homework in the general education classes. He receives worksheets in LLD classes.

The February 27, 2015, stay put IEP has a short-term goal was for K.S. to count using one-to-one correspondence with object up to ten. K.S. would be given homework with two-digit addition or to count to sixty, which he cannot do. L.S. addressed this with the teacher after which K.S. received no addition or subtraction homework. K.S. does not want to do homework. L.S. asked Ms. Rice the case manager for an outreach program. She was told that they do not know what an outreach program is.

K.S. has a home program where people come to the house to play with him. K.S. currently receives science, social studies, and specials in the general education classes. In the proposed IEP (J-4) all of his classes would be in the autism class. He is progressing in the LLD program. The proposed IEP stated that K.S. continued to struggle with transition but L.S. was told that he was doing better. She does not agree with the proposed IEP statement that K.S. was reinforced with a token economy. He settled down by the time he went to ESY. The teacher knew how to modify the "Camp" for his needs and used ABA. L.S. stated that she would agree with K.S. being placed in an autism class if he was provided with ABA and verbal map. L.S. did not witness any of the modifications listed in proposed IEP (J-4): breakdown tasks, verbal praise, and encouragement or eye contact when she visited the school in April 2015.

The proposed IEP (J-4) social emotional behavior portion, written by Miss Wright the special education teacher on May 15, 2015, states that K.S. is observed crying, growling, kicking, making inappropriate vocalizations, and repeating staff members and peers. L.S. does not believe that this is the same behaviors as those listed in the FBA (R-3). She also states that Miss Wright is lying. The proposed IEP did not call for a one-to-one aid because K.S. would be in the autistic program. K.S. had a one-to-one aid in the LLD program.

The proposed IEP (J-4) offered a BIP with positive supports and interventions for K.S. L.S. does not recall being told of the positive supports; however, it is in the proposed IEP (J-4). She would be surprised if the proposed supports are ABA.

K.S. progress report goals (J-7) show slight improvement in benchmark 7.1 which is "K.S. will participate in sensory play to help regulate self and increase attention span by attending for five consecutive minutes to a given task with minimal verbal cueing." K.S. progressed gradually. He was easily distracted, scripting using avoidance behavior, crying, and refusing to participate in larger groups. L.S. was not told that he refused to participate but did know about the crying and scripting. Scripting and crying are his form of communication. He also uses crying and scripting when he does not want to do something.

K.S. had an aid in Howell in May and June 2015 because he cried all the time. The stay put IEP does not require K.S. to have an aid. Howell did not offer K.S. the following modifications: a personal aide all day, more speech therapy, sensory diet, strategies to deal with K.S. crying, modify token economy to use toys, and occupational therapy addressing sensory needs. She has seen the modifications in the stay-put IEP (J-4).

An educational evaluation (J-8) was done three months after the Howell proposed IEP. The educational evaluation stated that K.S. would be overwhelmed in a group placement with more than five students.

L.S. discussed K.S. speech and language needs with Howell. She has seen no improvement in K.S. speech and language since the ESY program. L.S. believes that Howell has not done enough regarding K.S.'s sensory needs. The stay-put IEP has a benchmark to improve K.S.'s sensory processing capability. It lists that K.S. is on a restricted diet.

L.S. was not told that K.S. had a problem sustaining attention while he was in ESY program. L.S. does not believe that the LLD class with twelve to sixteen students was overwhelming for K.S. L.S. does not believe a smaller class size will change K.S.'s need for redirection. The LLD class has approximately twelve students. The ESY summer autistic program had five to six students. L.S. says class size does not matter; modification of the program will help K.S. One of the other goals in his progress report was "K.S. will attend to large group instruction with minimal teacher prompting." He made inconsistent progress needing continual prompting and redirection.

L.S. does not recall being told that under the proposed IEP that K.S. would have exposure in mainstream classes when he was ready. However, during cross-examination after viewing the proposed IEP she remembered the conversation.

There is classroom behavioral data for K.S. (R-6). L.S. testified that she never received the classroom behavioral data and Miss Wright, K.S.'s teacher is not telling the truth about sending the classroom behavioral data to her.

FACTUAL DISCUSSION

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963).

In order to assess credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transp. Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness's interest in the outcome, motive or bias should be considered.

I **FIND** the testimony of the Callander, Fernandez, Cadott, and Lempa credible. Callander testified about the Edison IEP and FBA of January 2015. She clearly described her observations of K.S. her interaction with L.S. and the autism program. Fernandez stated that K.S. no longer cries in school and that he is vocal. She addressed the ten minute time difference for speech services for K.S. between the Edison and Howell IEP's. Cadott was clear about the ESY autism program that she taught where K.S. was a student and the progress he made in the program. Lempa's observations of K.S. in the ESY program and testimony about a visual schedule for K.S. were clear and concise.

I **FIND** L.S. not to be credible. She not only disagreed with Fassilis about behaviors K.S. exhibited when Fassilis observed him, she also stated that Fassilis was lying. She asserted that the February 27, 2015, IEP from Edison is not the stay-put IEP on the last day of the hearing but did not provided what she states is the stay-put IEP. In the proposed IEP (J-4) Miss Wright lists behaviors that K.S. engaged in and L.S. says that Miss Wright is lying. L.S. testified that K.S. improved in the ESY program. He was focused and engaged. She stated that she observed him doing school work in the ESY program and he improved in the program. She later testified that the ESY program was

a camp and he did not learn anything there. L.S. testified that K.S. did not engage in maladaptive behaviors in Edison which is contradicted by the FBA and February 27, 2015 IEP.

The general course of events in this matter is undisputed and I **FIND** the following **FACTS**:

K.S. began school in Howell on April 6, 2015, prior to that he was a student in Edison. He is receiving special education services under the classification of autistic.

A FBA of K.S. was done by Fassilis on January 9, 2015. Fassilis is a BCBA. Fassilis observed K.S. on November 26, December 3, 12, and 18, 2014, and January 7, 2015. The report states that when K.S. was given oral instructions; he would ignore or repeat the last word of the verbal demand. If K.S. is left alone he will go off task. While K.S. was in Edison he engaged in negative behavior in class including crawling, yelling, and growling. During Fassilis's November 26, 2014, observation, K.S. was roaming around the class, humming and scripting. During the December 3, 2014, observation K.S. threw himself on the floor, made loud noises, and crawled on the floor. Fassilis states that K.S. engages in these behaviors to get attention.

The February 27, 2015, IEP (R-4) did not include an ESY program for K.S. or a one to one aide for K.S. K.S. was in a LLD class in Edison. In Howell students in LLD classes also have general education classes. The amount of general education classes the LLD students have depends on what is appropriate for the student. LLD has a set schedule. There can be up to sixteen students in an LLD class. If the LLD class has more than ten students an aid is assigned to assist the teacher. The LLD teachers in Howell do not have training in ABA. The Edison student file for K.S. included a Social Assessment Report dated October 18, 2011, which stated that K.S. had a lack of communication skills and was communication delayed.

K.S. was placed in the Howell LLD program in accordance with the Edison February 27, 2015, IEP. He had difficulty transitioning. K.S. was crying and wanted to go home. He had a difficult time with attention, behavior, and compliance. He did not

interact with his peers in the LLD classes or the general education classes. A BCBA worked with the teacher to setup a behavior plan to help K.S. transition. A para-professional worked directly with K.S. one-to-one all day, which was not required by the IEP, to keep him on task and on target. The para-professional prompts, cues, rephrases, and give hand-over-hand assistance. Even with the para-professional, K.S. still had problems maintaining his behavior and was disrupting other students. He needs a great deal of prompting because of his lack of attention. There were eight students in the LLD class at that time.

K.S. can physically make language. He is vocal and does not need augmented communication devices. He has non-contextual language. He is not using language that will help him in his environment. He may need visual supports for language, but not his primary method of communication. The LLD program is for students with more language skills than K.S. The other students in the LLD program have language skills that K.S. does not have. K.S. no longer cries in school or asks to go home as he did when he began school in Howell. It is not clear if K.S. understands what is being asked of him. He is very prompt dependent. He does not have the skills to do what is asked of him and cannot navigate his way through the environment that he is in. K.S. is not self-injurious. K.S. is more likely to develop language skills in an autistic program because of the intensity of the program. The autistic program has a more analytical approach than the LLD program. In Howell the related services are provided in the classroom unless it is necessary for the student to be removed. In the LLD classroom, speech is not integrated throughout the day.

Howell has twelve autism classes from kindergarten to eighth grade. The autism classes can have a maximum of six students. There is a three student to one teacher ratio in the autism classes. There is more intensive teaching for the students in the in the autism program. The teachers use one-to-one and two-to-one method of teaching. Two board certified behavioral analysts (BCBA) work with the autism program. At times they are in the classroom observing the students. The principals of ABA are used in the autism program all day. The first grade autistic program is at the Griebing School. Griebing has seven classes for students with autism from kindergarten to second grade.

Howell uses ABA and the VB map to target behavior in the autism classes. The VB map shows what verbal skills are intact and where there are gaps. Through the VB map, goals and objectives for the student are obtained as well as target behaviors. The instruction is based on the goals, objectives, and target behaviors. The VB map is an assessment tool. The rate of reinforcement is individualized in ABA. The goal is for the student to achieve new goals and retain old skills. Every student in the autism program has one-to-one instruction, but also has group instruction. ABA is embedded in the autism program.

The teachers in the autistic program are trained by Dr. Carbon and consultants from Dr. Carbon. The consultants come into the classroom to work with the teachers on student programs. The teachers work with a VB map person and BCBA's. The ABA methodology is not documented in the IEP. It is in place in the classroom. VB map and ABA are not incorporated into the LLD program. They are by their nature incorporated into the autism program. ABA drives the autism program. It cannot be separated out.

The proposed IEP would have placed K.S. in the autism program for all of his classes beginning in September 2015 as well as ESY. The proposed speech and language group therapy would be once a week for twenty-five minutes and individual speech and language therapy once a week for twenty-five minutes. The Edison IEP of February 27, 2015, which is the stay-put IEP, provided K.S. with group speech therapy twice a week. In group sessions students are working on goals with peers inclusion and more generalization. Individual sessions are one-to-one and more intensive. Although the Howell IEP provides ten minutes less speech as a related service, K.S. would not receive less speech services because of the way the Howell IEP is set up. The substance and delivery of the speech and language services are different in Howell than they are in Edison. The Howell IEP allows for direct instruction and generalization. The speech would "push in" to the classroom as opposed K.S. being taken to the speech therapist classroom. K.S would be able to use language across all environments. Although he has one speech session individually with the therapist, he would receive language services throughout the day. There is a collaborative speech approach in the classroom.

K.S. has autistic disorder with developmental delay in fine and gross motor skills. The Edison IEP of February 27, 2015, showed the following:

His IQ is fifty-three, on the full scale IQ, which is in the extremely low range in the 0.1 percentile of children his age. His verbal comprehension score is fifty-three which is extremely low. His visual spatial score is seventy-eight, which is borderline. His fluid reasoning score is fifty-nine which is extremely low. His working memory score is fifty-four which is extremely low and his processing speed score is sixty-eight which is extremely low.

Due to K.S. delays in the acquisition of written language, reading comprehension, vocabulary development skills, and math he needs reinforcement and re-explanation of concepts taught at a more concrete level. Due to his difficulties with language processing he needs re-explanation and re-teaching in the areas of science and history. Due to his organizational and attentional difficulties, K.S. needs constant redirection, reinforcement and re-explanation of the concepts taught in language arts, math science and social studies.

K.S. has difficulty attending and behaviorally in a large group setting. He needs a great deal of prompting. He is inconsistent with developing and maintaining language. In a one-to-one setting, K.S. can maintain attention for fifteen minutes. In a larger class, K.S. can maintain attention for two to three minutes.

K.S. was in the Howell autism ESY program in the summer of 2015. He went to ESY four days a week for four hours a day. There were five students in the ESY program. It included whole group, small group, and one-to-one instruction. The students worked on language, academic skills, math, and reading programs. The related services were done in the classroom. Cadott, K.S.'s ESY teacher in 2015, changed the way she asked K.S. questions based on his needs and he began to achieve the goals. K.S. progressed with sounding out letters. He could answer questions regarding short stories, he could count up to ten, he did well in knowledge of colors, and he could match identical pictures. He had difficulty identifying numbers above ten. K.S. did not engage in any inappropriate behavior. He did not have

problems in a smaller setting with smaller demands working in smaller increments. He exceeded his IEP skills. Cadott began working with K.S. on the VB map. He was talking and playing. K.S. was initially shy in the ESY program but by the second week he was talking to students, playing with students, and asking for things. The ESY autism program is the same autism program that is used in Howell IEP.

K.S. was compliant the 2015 summer ESY program. He needed redirection sometimes and prompting. Once he was redirected, he would get back on task. K.S. did not have any transition issues in the ESY program. K.S. did well in the small class size structured environment. In a structured environment everything is laid out for K.S. He knew exactly what was expected of him throughout the day. In the beginning a visual schedule was used and then K.S. was able to understand the structure of the day. The visual schedule was of different activities that would be presented to him throughout the day. K.S. has difficulty with developing language acquisition.

LEGAL ANALYSIS AND CONCLUSIONS

The IDEA provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 695 (1982). One of purposes of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] 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). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C.A. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court has construed the FAPE mandate to require the provision of “personalized instruction with sufficient support services to permit the

child to benefit educationally from that instruction.” Rowley, supra, 458 U.S. at 203, 102 S. Ct. at 3049, 73 L. Ed. 2d at 710. New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). The IDEA does not require that a school district “maximize the potential” of the student, Rowley, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708, but requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the IEP provides for “significant learning” and confers “meaningful benefit” to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182-84 (3d Cir. 1988), cert. den. sub. nom. Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). In other words, the school district must show that the IEP will provide the student with “a meaningful educational benefit.” S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). This determination must be assessed in light of the individual potential and educational needs of the student. T.R., supra, 205 F.3d at 578; Ridgewood, supra, 172 F.3d at 247-48. The appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H., supra, 336 F.3d at 271. Rather, the pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

Toward this end, an IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C.A. § 1414 (d)(2) and (4); N.J.A.C. 6A:14-3.7. A complete IEP must contain a detailed statement of annual goals and objectives. N.J.A.C. 6A:14-3.7(e)(2). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and “be measurable” so both parents and educational personnel can be apprised of “the expected level of achievement attendant to each goal.” Ibid.

Further, such “measurable annual goals shall include benchmarks or short-term objectives” related to meeting the student’s needs. N.J.A.C. 6A:14-3.7(e)(3). The New Jersey Supreme Court has recognized that “[w]ithout an adequately drafted IEP, it would be difficult, if not impossible, to measure a child’s progress, a measurement that is necessary to determine changes to be made in the next IEP.” Lascari, supra, 116 N.J. at 48.

In determining where to deliver that instruction, it is clear that the district must be guided by the strong statutory preference for educating children in the “least restrictive environment.” 20 U.S.C.A. § 1412(a)(5) mandates that:

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115; N.J.A.C. 6A:14-4.3. Federal regulations further require that placement must be “as close as possible to the child’s home.” 34 C.F.R. § 300.116(b)(3); see also N.J.A.C. 6A:14-4.2.

In Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993), the Third Circuit established a two-pronged test for determining whether a school district has complied with the IDEA’s mainstreaming mandate: first, whether education in the regular classroom, with use of supplementary aids and services, can be achieved satisfactorily; and second, if placement outside of the regular classroom is necessary for the child’s educational benefit, whether the district has included the child in school programs with non-disabled children to the maximum extent appropriate. Id. at 1215. Oberti analyzes whether the initial prong of this inquiry has been met by reviewing the steps the school district has taken to attempt to include the child in a regular classroom; by comparing the benefits that the child would receive in a regular classroom versus the benefits the

child would receive in a segregated special education classroom; and, by analyzing any possible negative effects that the child's inclusion will have on the education of the other children in the regular classroom. Id. at 1515-18.

In this matter K.S. was placed in an LLD classes with general education classes in the Edison IEP. While he came to Howell in April 2015, he was placed in the LLD program which included general education classes. K.S. does not interact with peers or staff in the LLD or general education classes. The LLD class can have twelve to sixteen students, which is too much for K.S. He has a para-professional assisting him every day and he still has problems maintaining his behavior. He does not have the necessary language skills for the LLD program. He does not have the skills to meaningfully engage in the LLD program. K.S. could not receive a satisfactory education in the LLD class.

K.S. did well when he was placed in the autism ESY program. In the autism ESY program K.S. could answer questions about short stories, had knowledge of colors and exceeded his IEP skills. In addition, he did not engage in inappropriate behavior and talked and played with the other student. The Howell IEP recommending placement of K.S. in the autism class was based on his individualized needs. He will receive an educational benefit that will allow him to work up to his potential in the autism class. In the autistic class, the principals of ABA are used all day. K.S. is more likely to develop language skills in the autism program because of the intensity of the autism program. The small group and one-to-one teaching will allow K.S. to work up to his potential without distraction of a larger class.

Once he was placed in the autism ESY program he exceeded his IEP skills and interacted with the other students. The program used an ABA methodology and began using a VB map with K.S. The Howell IEP will build into K.S. day the appropriate level of integration that benefits him. The focus of the autism program is on skill development focused on moving students into the mainstream as appropriate.

I **CONCLUDE** that the LLD placement is not appropriate for K.S. I further **CONCLUDE** the placement proposed by the District for K.S. is appropriate,

individualized for K.S., and designed to provide K.S. with a meaningful educational benefit. The May 12, 2015, Howell IEP provides FAPE to K.S. It will provide K.S. with opportunities for integration with general education students when it is appropriate for him.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the relief requested by petitioners be **DENIED** and the petition be **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2010) 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 (2010). 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.

September 22, 2016

DATE

ljb

KIMBERLY A. MOSS, ALJ

WITNESSES

For Petitioners:

L.S.

For Respondent:

Patricia Callander
Dorothea Fernandez
Lauren Cadott
Nicole Lempa

EXHIBITS

Joint:

- J-1 Neurological Report by Dr. Kavita Sinha dated November 30, 2011
- J-2 Social Assessment Report by Elizabeth Dagress dated January 17, 2012
- J-3 Educational Evaluation by Pamela Aurilio
- J-4 Proposed IEP of Howell dated May 12, 2015
- J-5 Letter from Callander to petitioners with Board Approved Providers dated May 29, 2015
- J-6 Letter from Callander to petitioners dated June 11, 2015
- J-7 Progress Report of K.S. dated June 19, 2015
- J-8 Educational Evaluation by Phyllis Logan dated August 12, 2015
- J-9 Occupational Therapy Evaluation by Lisa Walker dated August 17, 2015
- J-10 Psychological Evaluation by Grazielle Zaneti dated August 17, 2015
- J-11 Speech and Language Evaluation by Tracy Nagy dated August 20, 2015
- J-12 Email from Callander to petitioner dated August 27, 2015
- J-13 Physical Therapy Evaluation by Christine Carlo dated September 29, 2015
- J-14 Occupational Therapy Recommendation Undated

For Petitioners:

None

For Respondent:

- R-1 Physical Therapy Initial Evaluations by Adrienne Espin dated December 18, 2014
- R-2 Psychological Evaluation by Melissa Brandies dated December 19, 2014
- R-3 Functional Behavioral Assessment by Despina Fassilis dated January 9, 2015
- R-4 Edison Stay-Put IEP dated February 27, 2015
- R-5 Memorandum from Stephanie Spinaport to Principals and Staff dated April 14, 2015
- R-6 K.S. Classroom Behavioral Data and Student Work from May 4, 2015, to June 1, 2015
- R-7 Letter from petitioners to Callander dated May 19, 2015
- R-8 Letter from Callander to petitioners dated June 2, 2015
- R-9 Pupil Records from Extended School year Program for the summer of 2015
- R-10 Certification of Ronald Sanasac, business administrator, regarding settlement agreement
- R-11 Email From petitioners to Linda Goad, Callander, and from Viola Lordi and Monica Medina-Finsen from August 26, 2015, to September 2, 2015
- R-12 Email from Sharon DeMuth to Callander dated September 22, 2015, and Memo of Learning Consultant Phyllis Logan dated September 14, 2015
- R-13 Invitation to petitioners to assess progress and review independent evaluations dated September 22, 2015
- R-14 Letter from Judy Naples of Cornerstone Physical Therapy Health and Wellness Center to Callander with Statement and Chart
- R-15 Invitation to petitioners to assess progress and review independent evaluations dated October 1, 2015
- R-16 Emails between petitioners and Melissa Rice dated September 28, 2015, to October 1, 2015
- R-17 Email from Sharon DeMuth to Callander including updated occupational therapy recommendation
- R-18 Emails between Callander and petitioners dated October 5, 2015, to October 6, 2015
- R-19 Email from petitioners to Callander and Viola Lordi dated October 8, 2015
- R-20 Email from petitioners to Callander and Viola Lordi dated October 9, 2015