

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 18538-13

AGENCY DKT. NO. 2014/20536

M.K. ON BEHALF OF J.P.,

Petitioner,

v.

HAWTHORNE BOARD OF EDUCATION,

Respondent.

M.K., appearing pro se

Rodney T. Hara, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: May 8, 2014

Decided: July 30, 2014

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 25, 2013, M.K., Petitioner, filed a due process petition seeking relief from the Hawthorne Board of Education (respondent or District) in the form of out-of-district placement at Sage Day School. The District agreed to an amendment to the petition to reflect a challenge to the minor child's Individual Education Plan (IEP). The New Jersey Department of Education transmitted the matter as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on December 23, 2013.

On January 14, 2014, a Settlement Conference was held and an Order for Peremptory Hearing was entered. On January 23, 2014, the parties entered an Addendum to EDS Order for Peremptory Hearing. On May 5, 2014, an Evidentiary Hearing was held and the record closed on May 8, 2014.

SUMMARY OF FACTS

J.P. is a thirteen-year-old boy in the eighth grade at the Lincoln Middle School (LMS). He is classified by the Hawthorne School District as multiply disabled. His May 2013 reevaluation revealed that he performs within the lower-average range in word recognition, decoding, reading fluency, and comprehension tasks and at the above-average range in word attack skills. In the areas of mathematics and language, J.P.'s performance was in the below-average range. His performance in the cognitive areas, auditory processing, and comprehensive knowledge were assessed in the average and lower-end-of-average ranges, respectively. J.P.'s performance on oral comprehension, listening comprehension, and sound blending were assessed in the average range with passage comprehension in the low-average range and word attack in the above-average range. In the social/emotional domain, observations, testing and feedback from J.P.'s teacher indicate that he has shown significant improvements in his behaviors. Teacher reports indicate that J.P. is able to follow the classroom routine and directions. He is able to control his emotions, work independently, and complete most of the assignments without getting discouraged. He has developed positive relationships with his teachers and peers. He interacts willingly and is respectful with his classmates.

As of December 2, 2013, J.P. only attended school for approximately five days for the 2013-2014 school year.

SUMMARY OF TESTIMONY

Edyta Markowski

Edyta Markowski (Markowski), is a Hawthorne Board of Education School psychologist. In September 2012, she assumed responsibility for J.P. as his case manager. (R-1) During the 2012–2013 school year, Markowski provided J.P. with direct counseling services and maintained a regular schedule with him. (R-2) These individual sessions included: assisting him with his adjustment to Lincoln Middle School helping him deal with his emotions, resolve problems, and answer any questions that he had. There were no indications of bullying during these sessions.

Markowski identified the Comprehensive Evaluation Report with a test date of May 9, 2013 as Exhibit R-5. She stated that the report was shared with petitioner and it indicates that J.P. scored in the below-average to average range of functioning. The child study team concluded that J.P. is eligible to be classified as multiply disabled, and petitioner agreed with the classification.

Markowski identified the Re-evaluation Classification Summary that was prepared and signed by petitioner at a conference held on June 7, 2013. (R-3.) The conference was attended by petitioner, Markowski, Lorraine Powell (from the Guidance Office), a special education teacher, Meghan Hanson, and J.P. She testified that the summary includes all educational and psychological evaluations conducted for J.P. Markowski conducted the Psychological Evaluation on May 30, 2013. (R-4.)

Markowski identified the Reevaluation IEP for J.P. that was signed by petitioner on June 12, 2013. (R-6) This report covers the end of the 2012–2013 school year and the summer of 2013. The program that was recommended for J.P. is a self-contained classroom for all core subjects and a summer program (extended school year) from June 10, to June 24, 2013. The program also included a “shared paraprofessional” who works with two students at a time to address the students’ needs. Markowski testified that J.P. only participated in the Extended School Year program for one day.

Markowski testified that J.P. had some “teenager issues” during lunch time. That was the reason that the IEP reevaluation references petitioner’s interest in adjusting J.P.’s schedule to “avoid those students who he has the most issues with at school.”

(R-6, at page 4) Petitioner indicated that there was a specific boy, A.G., with whom J.P. had a problem. Markowski gave as an example of these “issues,” a situation where J.P. liked a particular girl that another boy also liked. This caused a conflict between J.P. and the boy; however, J.P. did not want Markowski to intervene. She stated that J.P. acknowledged that he sometimes has similar conflicts with his friends.

Markowski identified the Annual Review IEP for J.P. that was signed by petitioner on June 12, 2013. (R-7) This report covers the 2013–2014 school year. The program recommended included the following: a resource center program, individual/group therapy, counseling, a shared paraprofessional, and comprehensive support services. (ibid.)

Markowski identified the “My Contract” entered into by J.P. (R-8) She stated that the purpose of this agreement was to address J.P.’s poor attendance. It was his commitment to attend school.

Markowski identified J.P.’s daily attendance record for the 2012–2013 school year. (R-9) She testified that J.P. “was many days absent in September” and she spoke with petitioner by telephone about getting J.P. to school. She did not recall any meetings with petitioner in October.

Markowski identified a letter from petitioner dated October 15, 2013, requesting home instruction for J.P. (R-10) This letter refreshed her recollection that on October 15, 2013, she had a meeting with petitioner, along with the District’s Superintendent, Dr. Joe Mortemer, Vice Principal Langone, and Dr. Dowd the interim Director of Special Services. They discussed issues of poor attendance and developed a schedule for J.P. Markowski testified that she did not remember petitioner making any allegations of bullying during that meeting. She stated that petitioner handed her the letter, Exhibit R-10, after the meeting and after everyone else left. There was no discussion of home instruction during this meeting.

Markowski identified the Annual Review IEP for conference held on November 14, 2013. (R-11) This report was not signed by petitioner, nor was it signed by any of the attendees. Markowski testified that during this conference, the participants discussed home instruction and agreed J.P. should receive it for all core courses for two hours each week. She stated that petitioner took the IEP home without signing it and could not recall whether petitioner ever consented to it. Markowski noted that on page three of the document under "Student Strengths and Parental Concerns," there is no mention of bullying, and Markowski does not recall discussing this issue. She "believes" there was no discussion of bullying during this IEP meeting. Markowski stated that the home instruction is now being implemented as a result of an Order that was issued. She identified the EDS Order for Peremptory Hearing and its Addendum wherein the parties agreed to commence home instruction no later than January 27, 2014. (R-12)

Markowski identified the Annual Review IEP Report for the conference held on March 27, 2014. (R-13) She stated that this was a transition IEP with the expectation that J.P. will return to LMS. Markowski referenced page 22, of the IEP, the Systematic Re-Entry Plan which sets forth a daily schedule for J.P. from March 28, to April 18, 2014; it sets forth a daily schedule for the period from April 21, to May 9, 2014; it also sets forth a daily schedule for the period from May 12, to June 24, 2014. Markowski stated that the rationale for the incremental return was to enable J.P. to have a smooth transition back to school. The recommendation was that he should also receive "related services" such as counseling two times per week and full support services.

Markowski testified that initially, J.P. was not present at the March 27, 2014, IEP room. She referenced page 4 of the report and noted that when petitioner was asked why J.P. was not in attendance, she stated that J.P. did not want to come. Markowski stated that some time after the meeting started, J.P. barged into the meeting. He traveled there by way of his scooter. Markowski testified that she asked J.P. how he felt about the transition plan and he said that he was "ok with it." She stated that J.P. seemed to be very happy about coming back to school. He never indicated that he did

not want to return. Markowski testified that petitioner stated that she would not return J.P. to school “under these conditions.”

Markowski identified her own letter dated April 2, 2014, addressed to petitioner which confirmed the “hybrid” transitional education plan discussed during the IEP meeting of March 27, 2014. (R-14) The letter was a cover letter for the IEP report and referenced the inclusion of petitioner’s concerns in the copy that accompanied the letter. Markowski stated that petitioner never consented to the IEP.

Markowski identified J.P.’s sixth-grade report card. (R-15.) She stated that he passed his classes. She also identified J.P.’s progress report for the 2012–2013 school year. (R-16.) She stated that he made progress toward his goals and his objectives improved. Markowski identified J.P.’s Discipline Report for the sixth and seventh grades and noted that there were no log entries. (R-17) She testified that this was an indication that he did not present any discipline problems.

Markowski testified that it was approximately October 2013, when she became aware that petitioner believed that J.P. was the victim of bullying. Petitioner reported to her that it started at the beginning of the school year. Markowski advised petitioner to complete the appropriate forms. She testified that, at first, petitioner stated that “name-calling” was a part of the allegation. However petitioner did not include that as an element of the bullying allegations. Markowski testified that she was only tangentially involved in the investigation. She did not interview any of the students who were named in the bullying report. There were no additional incidents of bullying involving J.P. during the school year because he was rarely in school. She stated that J.P.’s attendance in the 2012–2013 school year was better than in the 2013–2014 school year, however, he did exceed the allotted absences and lateness.

Markowski testified that one day J.P. stopped by her office to report incidents during lunchtime, and she took him to the guidance office to complete a bullying report. She went over the list of “bullying elements” and he did not confirm that any of them had occurred.

Markowski testified on cross-examination that there was an increasing number of telephone calls placed to petitioner regarding J.P. not completing homework and class work.

Lorraine Anne Powell

Lorraine Anne Powell (Powell) is the District's student coordinator, for K-6 guidance and is the harassment, intimidation, and bullying (HIB) coordinator. On October 8, 2013, she became aware of allegations of bullying towards J.P. and gave Markowski the HIB form to be reviewed by Mr. Codomo, the HIB coordinator for Lincoln Middle School. Codomo advised Powell that he had a conflict with petitioner and asked Powell to take over the investigation. She then forwarded the forms to Mr. Perano, principal of LMS.

Powell testified that there were three students listed on the forms by first name. She needed to get the last names of the children in order to process the complaint. Sergeant King and Officer Carr were assigned to the investigation and visited petitioner at her home. LaGrace met with Sergeant King and went with him to the petitioner's home to complete the form. At that time, J.P. decided not to proceed with the complaint.

Powell testified that she did not process the bullying complaint because the forms were not complete without the students' last names, and because J.P. refused to proceed. On October 15, 2013, Lagrone discussed the bullying complaint with petitioner, who said that they were not going forward with the complaint.

Powell testified that on the second or third day before the end of the school year (June, 2013), J.P. "was on the phone yelling that he was being beat up." Thereafter, he came into the school and said that "he was just playing around."

Powell testified that on October 22, 2013, Markowski brought J.P. to her office about a bullying incident during lunch time. Powell stated that she pulled out the HIB form for him to complete. There were three kids at his lunch table who called him “Goldie locks” because J.P. had dyed his hair. She stated that it did not appear to be a bullying incident because he joked with them about dying his hair purple and he could be called “Barney.” Powell stated that there was another student during recess who approached J.P. about not having to come to school full-time and still get good grades. J.P. went back inside school angry with his friends for disclosing his “secret” and “scam” of not having to come to school and do a lot of work. Based upon this discussion with J.P., Powell concluded that this was not a bullying incident.

Powell testified that another student was interviewed, R.P., who disclosed that J.P. calls one of the other students “fat boy” and they call J.P. “gay” and that there is a third student that they call “gay.” R.P. said that the three students are “best friends” and that J.P. does the bullying and name calling.

Powell identified the Incident Reporting Form for the incident of October 22, 2013. Ibid. She stated that she took handwritten notes during the interview and later typed her notes onto this form. (R-18) Following the interview, Powell concluded that the students were kidding around and that J.P. did not want to pursue the bullying claim because his school schedule and work load were “exposed.” Powell stated that she went over each element of the bullying charge with J.P., and he said “no” to each one. Powell and Lagrone felt that these kids were just “fooling around.”

Powell testified that if J.P. had returned to school, they could have done further investigations. Further, the incident could have been reopened as a disciplinary matter or pursued as a bullying case. She stated that “name-calling” is normal among this age group. She conceded though that sometimes children withhold information due to fear and that faculty members are not included in the HIP law.

Diana J. Davis

Diana J. Davis (Davis) is the supervisor of special programs for the District. She began her employment with respondent on January 2, 2014.

Davis testified that she participated in the IEP meeting of March 27, 2014. Case workers from Circle of Care also participated and were instrumental in calming down petitioner as she became agitated; the volume of her voice rose during the meeting.

Davis testified that J.P. missed his friends and wanted to come back to school. In addition, they discussed the transition plan and J.P. appeared excited about coming back to school. Davis stated that she sat across from J.P. during the meeting and he was smiling. She said that J.P.'s demeanor changed during the meeting when he turned to his mother apparently looking for affirmation. Davis stated that there was no discussion of bullying during the meeting.

Davis testified that the transition plan was appropriate because it is often difficult for students to get back involved in school because, while out, students often stay up late and have trouble getting up early. The objective was to focus on classes that he enjoyed and work up to a full day.

Davis testified that J.P.'s attendance at the IEP meeting was not expected by petitioner or by the administration. He arrived late on his scooter, which showed his interest in participating in the outcome.

Davis testified that the New Jersey Administrative Code requires that children be educated in the "least restrictive" environment. She stated that home instruction placement is the "most restrictive" because the child is isolated from his peers. She stated that out-of-district placement is "one step above" home instruction in the sense that the child is not being educated with his peers in the community.

Davis testified that there is no specific incident of bullying, just allegations. Therefore there is no reason to believe that the district cannot meet J.P.'s needs. She stated that "usually" students who are placed out-of-district have a severe diagnosis and a history that warrants the placement. In J.P.'s case, there is no disciplinary history, no severe clinical diagnosis – no social or emotional disorder, and no medical conditions to be addressed. Therefore, out-of-district placement is not justified in this case.

Davis testified that petitioner was not allowing J.P. to be present for home instruction. She identified her letter addressed to petitioner dated April 2, 2014, wherein Davis advised petitioner that she has an obligation to make J.P. available for home instruction. (R-19) She stated that the petitioner has not made J.P. available and therefore the transition plan has not been implemented.

Davis testified that J.P.'s medical conditions were the primary subject of discussion during the meeting because petitioner did not provide the updated medical information as required by the initial (Peremptory) Order. She stated that petitioner became angry because she believed that she had sixty days of home instruction before having to submit the medical information rather than sixty days from the Order.

On cross-examination Davis testified that the first time that she met J.P. was at the March 2014, IEP meeting. She became aware of the reasons for this litigation through Dr. Lewis' report. Davis testified that she recalls that petitioner stated that some of the instructors fall asleep while conducting home instruction.

On cross-examination Davis testified that there are a lot of prior behavioral issues regarding J.P. that she is not aware of including prior expulsions and other disciplinary records that she did not read. She acknowledged that she did not read, or did not have access to file information related to J.P.'s social and emotional issues.

On cross-examination Davis testified that it is not typical for a case manager to also be the person serving as a student's counselor. Among her job functions, it would

be within her purview to correct assignments to avoid this situation. In her professional opinion, it would be a conflict of interest to have the same person serve as a student's case manager and as their counselor.

On re-direct examination, Davis identified a letter from Dr. Tanya Lewis dated September 27, 2013. (R-20) This letter indicates that, during his counseling sessions with Dr. Lewis, J.P. reported instances of bullying in school which contribute to "his anxiety and school avoidance." Ibid. The doctor further stated that home instruction was appropriate pending placement in a therapeutic academic environment.

Davis identified her letter dated March 20, 2014, addressed to petitioner wherein she reminded petitioner of the terms of the Order for Peremptory Hearing and its Addendum. (R-21) Specifically, Davis referred to the sixty days of home instruction followed by an IEP meeting and the next scheduled meeting date of March 27, 2014. Davis reminded petitioner that J.P.'s current medical diagnosis should be submitted ten days prior to the IEP meeting, and that the child study team had not received the information as of the date of the letter. Ibid.

Davis identified a facsimile transmission to Markowski from Dr. Lewis, and the attached letter from Dr. Lewis dated March 25, 2014. (R-22) The letters confirm J.P.'s medical diagnosis and reconfirm Dr. Lewis' belief that J.P. should be placed in a therapeutic academic setting and receive home instruction until such placement is made. Ibid. Davis testified that this letter and Exhibit R-20 are similar and the diagnoses stated in these letters do not impact J.P.'s performance in the classroom. Further, respondent has other students with the same diagnoses in-district.

On re-cross examination, Davis stated that she was aware that J.P. has two brain tumors; however, she was not aware that they cause him to have hallucinations. She is also not aware of any other student in-district with hallucinations due to tumors.

Davis identified a report from Dr. Morton Fridman, the psychiatrist who examined J.P. when he had suicidal ideations in the fifth grade. (R-23) This report was dated February 29, 2012, and authorized J.P.'s return to school.

On re-direct examination Davis noted the difficulty with getting J.P. to come back to school. She referenced the first full paragraph on page two of Exhibit 23, as one of the reasons for concluding that it was important to implement a transition period for his return to school. She noted that there were other issues addressed in the report that extended beyond that school year. For example, J.P. takes medication for seizures although she is not aware of any seizures actually occurring beyond the 2011–2012 school year.

Jill Mortimer

Dr. Jill Mortimer is the Superintendent of Schools for the Hawthorne School District (Mortimer). She testified that within the first two weeks of the 2013–2014 school year, she received telephone calls from petitioner about difficulties with getting J.P. to come to school and petitioner requested assistance. Petitioner indicated that bullying was the reason for his reluctance to go to school. Specifically, petitioner stated that he was physically attacked at the end of the prior school year and, at the beginning of the then current school year; there was a conflict with other students.

Mortimer testified that she contacted J.P.'s principal and the end-of-the-year incident could not be verified as a HIB violation. Regarding the incident at the beginning of the school year, the principal indicated that a full investigation was not possible because J.P. was not attending school. Mortimer stated that she read the report, Exhibit R-18, and concluded that it was not a HIB incident.

Mortimer testified that she attended the October 15, 2013, meeting because of expressed concerns about how one of the staff treated J.P. Mortimer does not recall a specific discussion about bullying at the meeting, however, she believes that “it came up” because that was the general tenor of the fall discussions. She stated that

petitioner's letter requesting home instruction, Exhibit R-10, was written after the meeting in her office. Mortimer stated that she made a copy of the letter for petitioner and kept the original. The next day she sent the letter to the school psychologist.

Mortimer identified her letter dated October 17, 2013, addressed to Dr. Norman S. Penera of the Valley Health Medical Group. (R-24) She attached the request for home instruction because the District used Dr. Penera to approve home instruction. She stated that his response was delayed.

Mortimer identified Dr. Penera's letter dated October 28, 2013, wherein he stated that home instruction was not medically necessary. (R-25)

Mortimer testified that in November 2013, there was a home instruction IEP meeting, notwithstanding Dr. Penera's letter. She stated that on November 15, 2013, she met with petitioner, who was "disheartened" by the meeting. Mortimer stated that petitioner made reference to a sixth-grade student who was placed at the Sage Day School as a result of bullying issues.

Mortimer testified that she asked petitioner to bring J.P. to school that same afternoon so that she could meet with him. During that 1:30 p.m. meeting, Mortimer let J.P. know that she'd heard he was having trouble with students in school. J.P. told her that "it was not an issue anymore." She asked him what the problem was and J.P. stated that he didn't like teachers. Mortimer told J.P. that she contacted the school to let them know that if he had a problem with a particular teacher, he could come to her or go to a designated teacher if Mortimer was not in the school – a "comfort zone." Mortimer testified that she encouraged J.P. to return to school on Monday. She stated that on Monday, the school secretary informed her that petitioner called to say that J.P. would not be in school. Mortimer stated that the next contact that she had with petitioner was the Due Process request.

Mortimer testified that during the November 15th meeting, there was no mention of being afraid to return to school. There was no mention of the name of a child

causing him problems, just mention of a problem with a teacher. Mortimer stated that she created a modified schedule for J.P. to accommodate his favorite classes. Her goal was to get him back into school. Home instruction started in January 2014.

Mortimer testified that she “heard” about the March 2014 IEP meeting. She stated that petitioner’s concerns were a “moving target” – she did not know whether the issue was medical or bullying. She stated that she was not convinced that the District could not provide for J.P.’s needs.

Timothy Conway

Timothy Conway is a New Jersey licensed, professional in-home counselor for Circle of Care where he has worked since 2013 (Conway). He has been the director of school counseling at Lakeland School District for five years. He also served as the director of school counseling at the Bergenfield School District for one year. He received his Bachelor’s degree in psychology from Montclair State University. He received a Master’s Degree in psychology from Fairleigh Dickenson University, and Master’s Degree in education administration from Montclair State University. He is a Ph.D. candidate in counselor education at Montclair State University. Conway has certifications in teacher psychology, student assistant coordinator, school counselor, director of school counseling, school principal and district superintendent. He does not have the certification necessary to allow him to join a child study team.

Conway testified on behalf of petitioner. He stated that he was assigned to J.P. in October 2013, and started out seeing him two days per week for one hour each session. As of March 2014, he counsels J.P. one evening per week for two hours. Conway stated that J.P. was eager to go back to a school setting; however, J.P. is anxious and suffers from a mood disorder, depression, and ADHD.

Conway testified that J.P. was usually energetic and is now averse to going back to the same school. He stated that J.P. has hallucinations. Conway stated that J.P. is suffering educationally because he’s only getting ten hours of instruction per week.

Conway testified that he spoke with Markowski in October in order to get the home instruction started. There were three reasons for the request: 1) there are teachers that are not nice to J.P. and yell at him; 2) at least once per week J.P. is bullied – for example, the last day of school, J.P.’s head was smashed into a locker and the first day of school, his book bag was stolen; and 3) J.P. was the subject of name-calling.

Conway testified that the original objective of counseling was to try to get J.P. back to school and to address his aggressiveness. He stated that J.P. expressed that he was having nightmares and hallucinations in mid-October. Further, when they began counseling, J.P.’s hygiene included bathing two to three times per week. His hygiene has since declined. J.P.’s interest in seeing his friends declined. J.P. stopped going out to see his friends in February or March 2014. Conway stated that J.P. does not like to talk about himself or his feelings. He does not trust many people.

Conway testified that J.P. is frustrated about not going back to school. He stated that J.P. is insecure about academics and how the staff and students treat him. He stated that J.P. is a very social child and would be able to go to a new school with a “fresh start.” J.P. did not trust that anyone at LMS would do anything about the reports of bullying.

On cross-examination Conway testified that a student’s perception can be very different from what can actually occur when trying to “catch up” with academic work. He stated that it is possible to develop a plan to facilitate a student catching up. He stated that J.P. wants to be with his friends and that the problems that he had were with his best friends. Conway also stated that it is not unusual for students to have issues with, and preference for, certain teachers.

Conway testified that it is difficult to convince J.P. to go back to the school when his mother and the school district are in opposition as they are. He believes that the

transitional plan was a good idea and stated that he has “tried everything” but does not believe that at this point, J.P. will go back.

On re-direct examination Conway stated that, while he has been unsuccessful at getting J.P. back to school, he has been successful with him in other areas. He stated that currently, J.P. is not medically cleared to go back to the school and forcing him to go back would have a detrimental effect on J.P. He stated that attempting to have J.P. catch up on the 40% of the time that he’s missed would be excessive.

Conway testified that he has witnessed J.P.’s violent behavior when being forced to do something. He stated that he’s been present when petitioner has called the police to get control over J.P.

J.P.

J.P. turned thirteen years of age on September 12, 2013. Since January 3, 2014, he has been in school a total of three days. Home instruction started in January and he has had approximately fifty sessions. He does not feel that he “got a decent education” at Lincoln Middle School. His last math counseling session was four weeks ago.

J.P. testified that he does not want to go back to LMS because he does not like the staff there. Some of the students bully him as well as some of the staff – in particular Mr. Codomo. He stated that at a meeting Mr. Codomo “got in my face and yelled at me.” J.P. testified that Markowski had to take J.P. out of the room to calm him down. J.P. stated that when he thinks about going to Lincoln Middle School, he has nightmares.

J.P. testified that he likes to cook and wants to do culinary arts in school. He stated that his medical conditions are: epilepsy, two brain tumors, depression and mood disorder. The last time that he had a seizure was at Lincoln Middle School. He stated that he had approximately forty seizures during the sixth grade.

J.P. testified that when he was in the second grade, he was suspended for having a cap gun in his backpack. In the fifth grade he was expelled from Roosevelt School for punching a wall and for punching a teacher for putting his hands on J.P.

J.P. testified that during the last school year (not sure of the month) he was “jumped” by two other students. He stated that he did not report it to anyone in the school.

J.P. testified that, while at Roosevelt School, he had been locked in the “quiet room” because he threw a ball at a student because the student “distracted and bothered” him. He stated that when in the sixth grade he was “kicked out” of the dance class because of a fight. J.P. stated that he has had problems with “cops” because he ran away. He does not want to do home instruction because “it interferes with my social life.” He stated that his mother has called “the cops” on him ten or eleven times because does not go to school.

J.P. testified that he has counseling at home once per week and counseling with Dr. Lewis once per month. He does not want to go to Lincoln Middle School because he gets bullied by staff and “they don’t care about my education.” He stated that he gets headaches, stomach aches, and is nauseous when he talks about going to that school. J.P. believes that he would get a better education at another school because the teachers would care about his interest.

On cross-examination J.P. stated that the friends that he likes to be with are J.M., R.P., K.N., and M.R. They were in his class and were the students that he doesn’t get to see because of home instruction. He acknowledged that if he went to another school he would not be able to see these friends. The students that bullied him which caused the conversation with Powell were C. and A.G. He stated that Powell’s testimony was accurate. There was only one teacher who bullied him and no other adults. The teacher who bullied him was not one of his teachers.

J.P. stated that there were times when he just did not participate in home instruction as opposed to the instructor failing to perform.

Edyta Markowski on Rebuttal

Markowski testified that during the first few weeks of the 2012–2013 school year J.P. came to her office many times for issues related to his homework, classroom activities, testing, and his teachers. She stated that she counseled J.P. and often worked with his teachers to develop a strategy to address his problems. J.P. also had lunchroom issues, and they had discussions about girls that he liked. Markowski stated that she made herself available for any situation when he was uncomfortable. Misunderstandings with his friends were often resolved in her office. Markowski acknowledged that there was one teacher that J.P. did not like.

Markowski testified that she took over J.P.'s case in the sixth grade. She stated that J.P. was not expelled but placed on home instruction pending transfer to another school.

Markowski testified that there were repeated instances when J.P. would “shake his hand” to simulate seizures. Petitioner would then come to school to take him home.

Markowski referred to the Psychiatric Evaluation provided by Dr. Fridman, respondent's doctor (Exhibit R-23), which provided insight into J.P. seizures. She stated that J.P. used seizures for “task-avoidance.”

Markowski testified that home instruction started in January 2014. She stated that there were many snow days when school was closed. There were circumstances in which petitioner and J.P. were having a conflict and instruction was cancelled for those days. Markowski stated that the original the math instructor had a personal emergency that made her unable to continue the assignment. The new math instructor has not been able to set up an appointment with petitioner.

Dr. Jill Mortimer on Rebuttal

Mortimer testified that, with respect to teachers being “mean” to J.P., she either met with petitioner or spoke with her on the telephone about Mr. Codomo. Mortimer addressed this issue and if J.P. returns to school Codomo would not be his guidance counselor because his last day in the district was May 9, 2014. There were no other specific complaints about teachers bullying J.P. and no other specific complaints about teachers being “mean” to him. In reference to J.P.’s interest in Passaic County Technical Institute, Mortimer stated that this school is not a therapeutic school and does not have a program in place to accommodate J.P.

DISCUSSION AND LEGAL ANALYSIS

Federal funding of state special education programs is contingent on the states providing a “free and appropriate education” (FAPE) to all disabled children. 20 U.S.C. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C. § 1400 et seq. “[T]he IDEA specifies that the education the states provide to these children ‘specially [be] designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.’” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A) – (B). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

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) (citations omitted). The IDEA does not require that a school district “maximize the potential” of the student but requires a school district to provide a “basic floor of opportunity”. Hendrick Hudson

Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 3047, 73 L. Ed. 2d 690, 708 (1982). 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 child’s education plan 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) (internal citations omitted).

As noted in Bayonne, an Individual Education Plan (IEP) is the primary vehicle for providing students with the required FAPE. D.S., supra, 602 F.3d at 557. An IEP is a written statement developed for each child that explains how FAPE will be provided to the child. 20 U.S.C. § 1414(d)(1)(A)(i). The IEP must contain such information as a specific statement of the student’s current performance levels, the student’s short-term and long-term goals, the proposed educational services, and criteria for evaluating the student’s progress. See U.S.C. § 1414(d)(1)(A)(i)(I)-(VII). 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.” N.J.A.C. 6A:14-3.7(e)(2). 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 school district must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C. § 1414(d)(4)(A)(i).

A due process challenge can allege substantive and/or procedural violations of the IDEA. If a party files a petition on substantive grounds, the Administrative Law Judge (ALJ) must determine whether the student received a FAPE. N.J.A.C. 6A:14-2.7(k). If a party alleges a procedural violation, an ALJ may decide that a student did not receive a FAPE only if the procedural inadequacies: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) caused a deprivation of educational benefits. Ibid. In the present matter, petitioner alleges both

a substantive violation and a procedural violation. Substantively, petitioner disagrees with the IEP plan to transition J.P. back into his school, and she contends that J.P. should be placed in an out-of-district academic environment due to alleged bullying in his school. Procedurally, petitioner contends that respondent failed to provide FAPE because respondent failed to provide home instruction while he was out of school.

Petitioner's procedural claim is without merit because it ignores the fact that J.P. unilaterally elected to stay out of school because of alleged bullying incidents. Respondent was unable to confirm those incidents and did not recommend that he stay home and receive home instruction. In fact, the District determined, and the undersigned agrees, that the facts of the alleged incidents of bullying did not meet the HIB criteria. Following J.P.'s refusal to return to school, respondent offered FAPE by recommending a revised IEP that proposed a transition period for getting J.P. back into school. Respondent also provided home instruction. J.P. admitted that he sometimes did not make himself available for instruction.

Dr. Lewis and Mr. Conway suggested that "bullying" in school was a significant enough of a problem for J.P. that they recommended he receive home instruction pending an out-of-district placement. Petitioner contends that these recommendations should be sufficient to compel the District to consent to an out-of-district placement. However, it is undisputed that when the District investigated the incidents, J.P. either denied certain incidents occurred or acknowledged that none of the criteria for determining a HIB incident were met. It is undisputed that on at least one occasion of an alleged incident, J.P. and petitioner declined to complete the required forms. Further, witnesses for both parties as well as J.P., indicate that J.P. missed his friends in school. The evidence indicates that he took an interest in the decisions that were being made about his return to school; he raced to school on his scooter to make it to, and participate in, the March 2014 IEP meeting.

The District held an IEP meeting in which petitioner participated and the child study team recommended a "phase-in" period for gradually getting J.P. back into school. There is no evidence that during any of the IEP meetings that bullying was

mentioned as an issue or discussed by petitioner. Respondent was unable to confirm the alleged instances of bullying, and as such, the child study team never determined that the IEP needed to accommodate such a circumstance. The one incident involving J.P.'s guidance counselor was addressed by the District and that person is no longer working in the District.

In order “[t]o prevail on a claim that a school district failed to implement an IEP . . . the school [must have] failed to implement substantial or significant provisions of the IEP, as opposed to a mere de minimis failure, such that the disabled child was denied a meaningful educational benefit.” Melissa S. v. Dist. of Pittsburgh, 183 Fed. Appx. 184, 187 (3d Cir. 2006). The record in the present matter establishes that the respondent attempted to implement each IEP prepared for J.P. and petitioner has not cooperated with the District to either ensure that J.P. participates in home instruction or that he attends school. Petitioner has not provided evidence that J.P. was denied a meaningful educational benefit by the respondent. A New Jersey District Court determined that the East Orange Board of Education did not deprive a student of a FAPE despite the fact that the student “was without an IEP for approximately one year, between May 18, 2004 and May 25, 2005.” N.P., individually and o.b.o J.P. v. E. Orange Bd. of Educ., Civ. No. 06-5130 (DRD), 2011 U.S. Dist. LEXIS 11171, *23 (D.N.J. Feb. 3, 2011).

In N.P., for most of the 2004-2005 school year, the student was not enrolled in the District because he “was placed on home instruction from October 2004 until June 8, 2005,” during which he “spent approximately four months of that time in the hospital to stabilize his behavior.” Id. at 23-24. Senior District Judge Debevoise determined that “[w]hile these circumstances are certainly lamentable, they do not amount to the loss of an educational benefit. Therefore, the absence of an IEP during the 2004-2005 school year did not deprive N.P. of an FAPE.” Id. at 24. “Furthermore, as a practical matter, under such fluctuating circumstances, it is unclear how the Board would have been able to properly develop an IEP for N.P.” Id. at 24, n.12.

In N.P. it was determined that the school district did not deny the student a FAPE by failing to develop any IEP for an entire school year because the student was not

enrolled due to home instruction and extended hospitalization. Here respondent actually did develop an IEP but could not implement it due to the student's refusal to go to school or to participate in home instruction.

Petitioner seeks out-of-district placement at Sage Day School. The facts do not support a conclusion that respondent cannot provide, or denied, petitioner FAPE during a time when he was entitled to it.

CONCLUSION AND ORDER

For the foregoing reasons, I **CONLCULDE** that there were no confirmed incidents of bullying and therefore J.P. should have continued to attend school. I further **CONCLUDE** that respondent offered FAPE even when J.P. refused to attend school.

For the foregoing reasons I **CONCLUDE** that petitioner is not entitled out-of-district placement.

I therefore **ORDER** that the petitioner's application seeking relief from the Hawthorne Board of Education for out-of-district placement at Sage Day School and challenging the minor child's Individual Education Plan (IEP) is hereby **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2012) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2012). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

July 30, 2014

DATE

LELAND S. MCGEE, ALJ

Date Received at Agency

July 30, 2014

Date Mailed to Parties:

lr

APPENDIX

Witnesses

For Petitioner:

J.P.
Timothy Conway

For Respondent:

Edyta Markowski
Lorraine Anne Powell
Diana J. Davis
Jill Mortimer

Exhibits

For Petitioner:

None

For Respondent:

- R-1 Letter from Edyta Markowski dated September 10, 2012
- R-2 Markowski counseling schedule for J.P.
- R-3 Re-Evaluation Classification Summary dated June 7, 2013
- R-4 Psychological Evaluation dated May 30, 2013
- R-5 Comprehensive Educational Services Evaluation Report dated May 9, 2013
- R-6 Re-Evaluation Individualized Education Program Report dated June 7, 2013
- R-7 Annual Review Individualized Education Program Report dated June 7, 2013
- R-8 "My Contract" – J.P.
- R-9 Daily Attendance Records for J.P.
- R-10 Handwritten letter from petitioner dated October 15, 2013

- R-11 Annual Review Individualized Education Program Report dated November 14, 2013
- R-12 EDS Order for Peremptory Hearing dated January 14, 2014
- R-13 Annual Review Individualized Education Program Report dated March 27, 2014
- R-14 Letter from Edyta Markowski dated April 2, 2014
- R-15 Grade Six report card for J.P.
- R-16 Progress Report for J.P.
- R-17 Discipline Report for J.P.
- R-18 Incident Report Form
- R-19 Letter from Diana Davis dated April 2, 2014
- R-20 Letter from Dr. Tanya Lewis dated September 27, 2013
- R-21 Letter from Diana Davis dated March 20, 2014
- R-22 Letter from Dr. Tanya Lewis dated March 25, 2014
- R-23 Psychiatric Evaluation dated February 29, 2012