

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 05183-14

AGENCY DKT. NO. 2014 20951

A.M. ON BEHALF OF I.S.,

Petitioners,

v.

EDISON TOWNSHIP BOARD OF EDUCATION,

Respondent.

Kevin Golembiewski, Esq., and David Berney, Esq., for petitioner (Law Offices of David Berney, attorneys)

Alison Kenney, Esq., for respondent (Schwartz, Simon, Edelstein and Celso, attorneys)

Record Closed: September 16, 2014

Decided: October 14, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, A.M., the grandmother and legal guardian of I.S., challenges the appropriateness of the educational program provided for her grandson by the Edison Board of Education (the Board), through its child study team (CST). She urges that I.S. has been denied a free and appropriate public education (FAPE), and seeks reimbursement for independent evaluations; compensatory education; and an appropriate IEP that includes social-skills training; additional speech and language services; counseling; sequential multi-sensory instruction and more fully developed and

measurable goals and objectives.¹ A.M. seeks declaratory relief in the form of an adjudication that her grandson's rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415 et seq., have been violated by the Board.

This matter arose with the March 28, 2014, filing of a due-process petition by A.M. The contested case was transmitted to the Office of Administrative Law (OAL) on April 30, 2014. Testimony was taken on July 24, 29, and 30, 2014. Written summations were submitted on an additional hearing day scheduled for September 16, 2014, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

At the time of hearing, I.S. was a rising ninth-grade student, who was fourteen years old and classified as eligible for special education services under the category mild cognitive impairment. He resides with his grandmother, who is a domiciliary of Edison Township. The following background facts are uncontroverted and I **FIND**:

I.S. began his educational career in the New York City public schools, and transferred to the Carteret public schools in May 2008, as a second grader. A psychosocial evaluation completed in New York when he was seven years old notes that I.S. was not then attending school but would begin to do so once testing was completed. Although his mother described him as a first grader, and shared that he had received early intervention services, no school records were available. (R-1.)² A psychological evaluation completed by Carteret in May 2010 likewise confirmed that I.S. arrived there with no educational records that predated the spring of 2007. (J-1.) He remained in Carteret until nearly the end of his fifth-grade year, and transferred to Edison in the spring of 2011. The first IEP drafted by Edison personnel is dated April 6, 2011. (J-8.) Accordingly, Edison did not take over responsibility for I.S.'s education

¹ The precise relief sought remains a bit vague. The petition asks for a functional behavioral assessment and the development of a functional behavioral plan and extended-school-day services; neither issue was referenced by counsel in his opening statement in response to my request for clarification regarding the relief sought. Petitioner's post-hearing submission only adds to the confusion. The scope of the relief sought now also omits counseling or social-skills training as concerns.

² Custody was ultimately transferred to A.M., who advised that her son, I.S.'s father, is deceased, and I.S.'s mother is no longer in I.S.'s life.

until he was on the cusp of middle school. During the critical formative years that make up elementary school, I.S. was educated elsewhere. Just prior to his formal enrollment in Edison, I.S. had been placed in For Keeps, a day psychiatric program designed to address behavioral concerns in the home.

I.S. came to Edison already lagging well behind his peers in academic achievement. Edison initially placed I.S. in the same type of program he was enrolled in while in Carteret, a self-contained class for the multiply disabled, where he remained for the 2011-2012 school year. In May 2012, I.S. was formally reevaluated at his grandmother's request. (See J-19.) A June 2012 IEP continued I.S. in the multiply disabled class, where he remained until the middle of his seventh-grade year. But his grandmother was anxious about his educational progress. A letter from Assistant Superintendent Christopher Conklin dated October 2, 2012, confirms receipt of A.M.'s concerns, and suggests further review and analysis of I.S.'s program by the IEP Team. (J-28.) At an IEP meeting held December 18, 2012, it was agreed that I.S. would be transferred to the Self-Contained LLD-Mild/Moderate classroom, effective January 2, 2013. (J-35.) The record confirms that the meeting at which this IEP was presented was rescheduled several times due to the unavailability of I.S.'s grandmother.

A December 18, 2013, IEP continues I.S. in the LLD class for the remainder of his eighth-grade year. (J-39.) On June 16, 2014, an IEP for 2014-2015 was proposed that would place I.S. at the Middlesex County Vocational and Technical High School. (J-42.) The vocational school accepts students via application, and it is an autonomous public school program operated by its own administration and school board. I.S. had applied in February 2014, and was accepted via letter dated May 19, 2014. His grandmother rejected this placement via letter dated June 20, 2014.

I.S.'s Cognitive Ability

I.S.'s cognitive ability has been assessed several times, in each instance by a school psychologist. Reports supplied when I.S. transferred to Edison reveal that he was tested in 2007 at age seven by the New York Public Schools using the Stanford Binet. He was found to have a full-scale IQ of 55, placing him at the .1 percentile, and

in the mildly impaired range. Intelligence testing was administered once again in Carteret in May 2010. On the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV), I.S. scored a full-scale score of 59, which the test administrator noted “is in the Extremely Low range and below the 1st percentile.” (J-1.) The psychologist who administered the test noted that there is a 95 percent probability that I.S.’s true full-scale IQ score fell between 55 and 65.

Two years later, in May 2012, I.S. was tested yet again, this time by Edison personnel and again using the WISC-IV. His full-scale IQ again was found to be in the Extremely Low range, with a score of 60. School psychologist Lai Danik attested to the validity of her results, noting that I.S. was cooperative during the evaluative process and gave her no reason to believe that her results were not a true indicator of his ability. Indeed, Danik’s findings were certainly consistent with scores obtained during prior administrations of the test. Adaptive behavior assessments completed both in 2010 and 2012 likewise corroborated Danik’s findings as to cognitive ability. These latter assessments gauge practical living skills exhibited in the classroom, per teacher report. Here too, I.S. scored in the low range as compared to same-age peers.

But private testing obtained by A.M. tells a different story, and confuses what appeared previously to be a consistent and clear picture of I.S.’s cognitive ability. I.S. was tested in January 2014 by Lance Halpern, a licensed school psychologist. Halpern spent several hours testing I.S., but did not observe him in his school environment. Once again, the WISC-IV was administered, and Halpern’s findings are as set forth in a report dated January 2, 2014. (J-40.) He testified at hearing via telephone, over the objection of counsel for the Board. Upon beginning her cross-examination, counsel renewed her concerns about the procedure being used to obtain Halpern’s testimony, urging that he had not been given access to the document binders and that this hampered her ability to effectively question him about documents he relied upon in rendering the opinions contained in his report. I found her objections to be well-placed, and began to explore Halpern’s availability to testify via phone with the documents in front of him, or in person. After conferring with his client, counsel for petitioner agreed to limit Halpern’s testimony, and the admissibility of his report, to the findings as to I.S.’s IQ score. With this stipulation in place, counsel for the Board agreed to proceed.

Halpern presented his testimony in a highly professional manner, and was a credible witness. His resume revealed over ten years of experience as a school psychologist. Halpern found that I.S. had a full-scale IQ of 80, placing him in the low average range. The first and easy reaction to I.S.'s score when tested by Halpern is that it is an outlier, and to reject its validity on that basis alone. But inherent in that view would be a finding that Halpern somehow improperly administered the test, and I heard no evidence to that effect. I likewise heard no evidence that the previous administrations of the assessment were faulty. Indeed, Halpern took pains to emphasize that it was not his intent to criticize the several other professionals who had previously tested I.S., nor did he suggest any impropriety in prior administrations of the WISC or Stanford Binet. In saying so, Halpern enhanced his credibility, but likewise confirmed that there is no facile explanation for the discrepancy in I.S.'s scores.

According to Halpern, I.S. complained that he did not enjoy prior assessments, and Halpern worked hard to ensure that he had adequate breaks and was at ease. As a result, I.S. was a ready participant in the evaluation process, and was motivated to do well. Halpern opined that his test results are a valid assessment of I.S.'s ability to function in the classroom. Halpern noted that medication changes and emotional issues, such as I.S.'s hospitalization, could have clouded his performance on earlier administrations of the WISC and Stanford Binet. Halpern conceded that the WISC is not "foolproof." He opined that notwithstanding the fact that IQ scores should typically remain static, they are nonetheless influenced by environmental and psychological factors. Thus, as to the twenty-point change in his scores, Halpern indicated that this could be explained by I.S.'s greater emotional stability.

Halpern's testimony was buttressed by Dr. Mark Cooperberg, a psychologist who had been retained to conduct an educational evaluation for I.S. Cooperberg was likewise a highly qualified and experienced psychologist. He has extensive experience in administering the WISC-IV. Cooperberg agreed that the difference in scores was hard to explain, because IQ test results should be stable. But Cooperberg noted, persuasively, that it is nearly impossible to over-perform on the WISC-IV and that accordingly, a child must be credited with his highest score. Moreover, he noted that

reliability increases over time, and he opined that a score obtained when a child is seven years of age is less reliable than one obtained later. Many factors can affect the outcome of an assessment, to include age, behavioral considerations, psychological considerations, or environmental stressors. But Cooperberg noted, again persuasively, that these factors would serve only to depress a score. As to the stressors in I.S.'s life that may have depressed his scores, there were many, to include the death of his father; separation from his mother; relocation to New Jersey; interruptions in his schooling in New York; and a psychiatric hospitalization.

Based on the credible and persuasive testimony of both Halpern and Cooperberg, I **FIND** that I.S.'s level of cognitive ability is consistent with an IQ of 80. But I **FIND** further that Edison's personnel properly administered the WISC-IV to I.S., and that he underperformed for reasons beyond their control. It bears reiteration that adaptive scales completed on more than one occasion both in Carteret and Edison buttressed the validity of the lower IQ scores. Accordingly, I **FIND** that the belief by Edison personnel that I.S.'s lower score was a true indicator of his ability was reasonable and appropriate.³

I.S.'s Classification

According to Cooperberg, when I.S.'s higher IQ score is taken into account, the discrepancy between I.S.'s ability and achievement points to a specific learning disability. Moreover, Cooperberg opined that I.S. did not respond to previous academic interventions and that on this basis as well, he would qualify for classification as SLD.

Conklin explained how the CST assigns the SLD classification to a student. It uses the discrepancy model described by Cooperberg in his testimony and report. Edison has adopted a statistical formula that defines the relevant discrepancy at one-and-one-half standard deviations, or 22 points.⁴ But in addition, the District relies on a functional model that goes beyond test scores and examines the child's actual

³ In this vein, it is interesting to note that a medical report supplied by I.S.'s grandmother to the District dated November 19, 2012, also described I.S. as having "mild mental retardation." (J-33.) This report postdated the CST evaluation of May 2012.

⁴ A standard deviation is 15 points.

classroom performance and functionality. Conklin indicated that the areas in which evidence of such a discrepancy is relevant is as specifically delineated in the administrative code, and includes reading, mathematics, oral and written expression, and listening skills. Conklin noted that a child with a mild cognitive impairment would not be classified as SLD. Accordingly, based upon its understanding of I.S.'s cognitive functioning, Edison classified him as cognitively impaired.

Conklin clarified that "response to intervention" is a general education initiative. It is a three-tiered strategy that delivers a student a series of scientifically based interventions. If none succeed, referral to special education is appropriate. Conklin testified that an evaluator would not use this method in a one-time snapshot evaluation of a child's eligibility.

I.S.'s Academic Program in Edison

The particulars of I.S.'s program in Edison are as described in his IEPs and as elaborated upon in the testimony of Edison personnel. No other witnesses had firsthand knowledge of the programs provided to I.S. While A.M. testified that she observed I.S.'s school program on several occasions, she is not a professional educator, nor a regular observer of school programming, and is thus not qualified to assess or report on the type of instruction being delivered to I.S. Likewise, neither Cooperberg nor Michele Havens, an educational expert who testified on A.M.'s behalf, had observed the programs offered I.S. in Edison. Indeed, Cooperberg stressed that his report contained recommended interventions that may not be necessarily needed. A perfect example was his discussion of a behavioral plan. Cooperberg quickly conceded that one was needed only "if" maladaptive behaviors were evident in school, and that he had no indication if this was the case, one way or the other. While Havens reviewed school records, she readily admitted that not everything that takes place in a classroom can be memorialized in the IEP, conceding that if it were, IEPs would be unwieldy and voluminous.

Accordingly, the testimony of case managers Lai Danik and Nancy Sica, and that of Assistant Superintendent Christopher Conklin, was uncontroverted and I **FIND**:

Danik was I.S.'s case manager upon his transfer to the Edison Schools, was responsible for monitoring his program, and was a frequent visitor to the classroom. His self-contained multiply disabled classroom included about seven children, a teacher, and two paraprofessionals. The students worked one-to-one with their teachers, or in small groups. Instruction was individualized and provided through multiple modalities. Technology, including the use of iPads, enhanced instruction. Functional life skills were emphasized in the classroom. I.S. was mainstreamed for art, lunch, and physical education. Social skills' training was provided with a school social worker, one time per week. Community-based activities allowed class members to generalize skills in real life environments such as restaurants and stores. I.S. also received related services, to include speech and language services and occupational therapy. Executive functioning deficits were addressed in the classroom; the modifications page of I.S.'s June 2011 IEP provides for such strategies and assistance as repeating, clarifying and simplifying instructions; providing immediate assistance when frustration is evident; additional time to complete assignments and multi-sensory instruction.

Conklin supervises all special education programming in Edison, visits all classrooms regularly, and urged that he would have no reason to believe that the instruction promised by the IEP was not being delivered. I too was presented with no testimonial or documentary evidence that demonstrated that this IEP was not delivered with fidelity, and I **FIND** that the services and programming delivered to I.S. were indeed as set forth in this IEP.

It was determined to continue I.S. in seventh grade in his self-contained class for the multiply disabled at an IEP meeting conducted in February 2012. Speech and language therapy and occupational therapy continued as well. Modification and supplementary aids continued to stress such assistance as frequent praise; instant feedback; and frequent checking for understanding. (J-15.) An amended IEP drafted in July 2012, again continued his program in the self-contained multiply disabled classroom. (J-26.) Accommodations such as frequent checking for understanding; instant feedback; frequent breaks; verbal reminders; and use of graphic organizers and

visual aids were included in the IEP. Danik noted that multi-sensory instruction continued in the classroom.

Nancy Sica became I.S.'s case manager when he transferred to the self-contained learning and language disabilities (LLD) class. She visits the class with regularity, typically two to three times per week. The classroom includes thirteen students with one teacher and one paraprofessional. During the last school year, two additional adults were present in the classroom as one-to-one aides for other students. The classroom is set up with centers and instruction integrates technology. It is a multi-grade classroom, and instruction is individualized to meet each student's needs. I.S. continued to have mainstreaming opportunities in electives, physical education, and lunch. A social-skills program is embedded in the classroom program and facilitated by Sica and a social worker. The program addressed such issues as bullying, appropriate peer interactions, safety, and prepared the students for community based instruction. The latter allowed them to generalize skills in natural settings and exposed the students to supermarkets, restaurants, and banks. A speech and language component was likewise embedded in the class program, and involved "push-in" speech and language services with a focus on phonemic awareness. Throughout this time period I.S. continued to receive occupational therapy. The modifications offered to support instruction once I.S. moved to the LLD class continued to include, but were not limited to, multi-sensory instruction ("use visual, auditory and tactile supports and learning modalities"); breaking down of tasks into manageable units; frequent breaks; additional time; increased font size and spacing on worksheets; and instant feedback.

A December 2013 annual review amended the IEP to provide additional support in mathematics via daily instruction in a pull-out replacement resource setting. (J-39.) Sica indicated that this change was made based on input from A.M., who sought additional instruction for her grandson in practical mathematics skills such as using money. The resource program was highly individualized, with only six children in the classroom. Sica indicated that the IEP drafted in December 2013 was purposefully only six months in duration. I.S. was at a transition point educationally, with middle school ending at the conclusion of the 2013–2014 school year. His grandmother had raised concerns that his education needed to include a strong vocational component, and it

was agreed to chart I.S.'s progress and make a more informed decision about I.S.'s educational next steps in the spring of his eighth grade year.

A June 2014 IEP places I.S. at the County Vocational-Technical School on a full-time basis. I.S. would continue to receive academic instruction in resource replacement and self-contained settings, and would also “cycle” through vocational shops, as a way to explore future vocational options. Related services would continue to include speech therapy and occupational therapy. The modification page of the proposed IEP noted that I.S. would benefit from multi-sensory instruction; as well as frequent checks for understanding; hands-on learning activities; simplified directions and assessment of understanding of the assignment. Sica explained that upon I.S.'s enrollment at the vocational school, its CST would take over management of his IEP.

Sica opined that the June 2014 IEP was reasonably calculated to provide educational benefit to I.S., and that this was a placement appropriate to his educational needs. Her testimony in this regard was unrebutted, as none of the witnesses called by petitioner had any information about the program proposed for 2014-2015, nor offered any opinion about its efficacy. But it is noteworthy that the program does include much of what I.S.'s experts contends he needs; to include multi-sensory instruction; modifications that address his executive functioning deficits; and frequent checks for understanding. Indeed, Cooperberg expressly noted in his report that “many of the accommodations, modifications and related services outlined in [I.'s] IEP appear to appropriately fit his strengths and needs.”

Moreover, Cooperberg stressed the need for transitional planning so that I.S. is ready for the move from school to the “real world.” He noted that it was appropriate to transition him to functional academics, and community based activities. These recommendations are entirely in line with the change to the vocational school setting recommended by the CST. I **FIND** that the vocational school program is appropriate for I.S.

I.S.'s Academic Progress

The record paints a confusing picture of I.S.'s academic growth or lack thereof. The reality is that a child like I.S. is complex; accordingly, so is gauging his academic progress. If a typical child makes a year of growth in one year, it is readily apparent that he is progressing. But I.S. has disabilities that interfere with his academic performance; and he arrived in Edison already lagging well behind, and with his early formative years behind him. He may never achieve grade-level skills. Thus, Conklin asserted persuasively that a multi-disciplinary approach to assessing progress is required; that is, one that looks at a child's classroom demeanor and performance, assesses progress through ongoing informal inventories, and supplements those assessments with formal standardized testing.

School personnel urged that I.S. was happy and comfortable in his in-district program. Danik observed him in the classroom and found him to be polite, cooperative and an eager learner. According to Danik, there was no behavioral plan in place for I.S., nor one needed. He exhibits no maladaptive behaviors in school. The move to the Self-Contained LLD class was in recognition of I.S.'s progress, with Danik noting that the students in the MD class had more significant academic needs. The change in placement was agreed upon by the CST precisely because teachers had reported that I.S. had made positive gains, and all felt he was ready for a more challenging environment.

Sica likewise felt that I.S. continued to experience success in his educational program. Sica described I.S. as a personable, well-liked and happy child who integrated well with typical peers, and attended school functions such as dances, where he was socially successful. While Sica relied on teacher report, her impressions of him as a willing and eager learner were certainly corroborated by Cooperberg, whose observations of I.S. during his testing sessions confirmed that I.S. was pleasant and positive in his attitude, even when asked to extend his efforts. Cooperberg noted that he was at no time oppositional or defiant, and was polite and appropriate throughout the testing sessions.

School personnel urge that I.S.'s IEPs confirm his academic progress. When he entered the Edison school system I.S. could read 20 sight words. (J-8.) In March 2012, the IEP noted that I.S.'s reading ability was at a second-grade level. (J-15.) An IEP agreed upon in December 2013 noted a third-grade reading level. (J-39.) While an IEP dated June 2014 still indicated that I.S. read at a third-grade level (J-42), that IEP reflected that I.S. now could read some 123 sight words. He was able to identify the main character in a story and answer literal questions. Relative to his mathematics skills, an IEP dated April 6, 2011, indicated that I.S. could identify coins independently with 70 percent accuracy, and with prompting at 90 percent accuracy. (J-8.) The June 2014 IEP reveals that he improved his skills with money, could identify coins and dollar bill values, and had some addition and subtraction skills mastered as well.

Cooperberg opined that I.S. had no academic growth. He emphasized standardized testing. But assessments completed during the course of the sixth and seventh grade years revealed some growth in mathematics and reading; Conklin conceded the growth was not dramatic, but likewise was not inconsistent with I.S.'s overall academic profile, which was one in which dramatic growth would not be expected. (J-48.) Conklin moreover indicated that Woodcock Johnson test scores confirmed progress for I.S. The Woodcock Johnson is a normed test that compares academic performance by age or grade level relative to a student's peers.

Conklin pointed out that I.S.'s standard scores remained about the same in several areas across two administrations of the test. But when the test was given in 2012, I.S. was being compared to twelve year olds; in 2014 he was being compared to fourteen year olds. Had he not progressed, his standard scores would have decreased; the fact that they remained the same is an indicator that he continued to keep pace with his peers. In other words, they grew academically, and since I.S. continued to compare the same way to them, he grew as well. Oral expression was offered as an example, with I.S. earning a standard score in 2012 of 75, and 73 in 2014.

Cooperberg rejected this contention, however. He urged that Conklin's analysis was fallacious; since I.S. scored in his overall academic achievement in the lowest percentile, he could not do any worse. But Conklin was comparing standard scores, not

percentiles; the former scores had room to decline. Thus, Cooperberg's view was not entirely persuasive, particularly in light of the fact that he agreed, when pressed, that Conklin's premise could have validity with a higher performing student. Nonetheless, Cooperberg remained adamant that I.S.'s test scores showed no growth. He asserted that a comparison of age equivalents would be a more valuable measure of academic growth and that in many areas I.S. continued to function at the same age level across the two administrations of the test. Cooperberg is somewhat correct, and I.S.'s performance in "broad reading" is an example. He scored an age equivalent of 7-7 in 2012 and 7-11 in 2014, reflecting only four months of growth in two years. In "broad mathematics" he scored a 7-5 age equivalency in 2012 and a 7-4 age equivalency in 2014. There was also some regression in his scores. There was a dramatic drop in score in "story recall," from 9-4 to 6-10 age equivalencies. His "word attack" scores also dropped from 7-4 to 6-8. "Reading fluency" dropped by eight months.

To the extent that there was any growth evidenced in I.S.'s test scores, Cooperberg dismissed the notion that this reflected any real progress, describing a phenomenon called "regression to the mean"; that is, on second testing a low-scoring student would tend to do better.⁵ Indeed, the Woodcock-Johnson scores did show some areas of growth even using age equivalency as a point of comparison. In "oral expression" I.S. progressed ten months; in "broad written language" he progressed twelve months; in "academic skills" he progressed eight months; and in "written expression" he progressed ten months. In some of the sub-tests there is also evidence of progress; for example, I.S. progressed from an age equivalent of 7-4 in "writing samples" in 2012 to an age equivalent of 9-1 in 2014. In "math fluency" he progressed seven months; eight months in "letter-word identification." In the end, the varying explanations of I.S.'s test scores, and the reliance by his expert on arcane statistical theories such as "regression to the mean," served to buttress Conklin's contention that measuring student growth exclusively through the use of standardized test scores is unreliable.

⁵ A high scorer would tend to do worse.

Finally, petitioners urge that there was little change annually in IEP goals and objectives, and that this was an indicator that I.S. was not mastering these goals or progressing academically. Petitioner relied heavily on the testimony of Michele Havens in support of the argument that the absence of proper goals impeded I.S.'s progress. Havens is a speech and language pathologist who also holds a doctorate in special education and currently teaches special education at the college level. She was admitted as an expert in speech and language and special education. Her knowledge of I.S. was based on a review of his records and a one hour visit with him at his home about two weeks prior to her testimony. She did no formal testing. Based upon this limited interaction, Havens opined that the IEPs provided I.S. were inappropriate. She noted that the goals, objectives, strategies, and modifications in the educational plans were in generic and "computer generated." At one point she described the goals as "useless."

But Havens attempted to opine in areas in which she had no expertise; questions about the amount of occupational therapy being provided I.S. were met with an objection, which was sustained. She urged that he needed additional speech and language services, but did so without having done any formal speech and language testing. She noted that there is a lot of "down time" in the sort of group speech and language services provided I.S. without ever having observed those services or how they are delivered in Edison. Although an expert in special education, Havens is not specifically an expert in reading instruction, but nonetheless offered her opinion as to the methodology of reading instruction I.S. needs. She based her opinion that multi-sensory instruction was needed on Cooperberg's conclusion that I.S. suffered from learning disabilities. An effort to opine that she agreed with Cooperberg's conclusions based on her brief observation of I.S. in his home was met with an objection, which was sustained. Thus, although Havens was professional in her demeanor and certainly projected as well-spoken and well-trained in her field, I could give her opinions little weight. She simply did not know I.S. well enough to persuasively opine about his progress or his needs. Her opinion and that of Cooperberg that the expectations of school personnel sold I.S. short because it incorrectly assessed his IQ and thus assigned the incorrect classification, was based exclusively on generalized accepted wisdom about human nature and not on any hard facts.

Moreover, some of what Havens contended was lacking in the IEPs was included in the documents I reviewed, notwithstanding her view that these modifications were “generically” expressed. For example, Havens stressed that to ensure understanding of the material instruction must be presented via a “continuous feedback loop,” but the IEPs all stressed frequent checks for understanding, some even using the phrase “instant feedback.” Nonetheless, Havens pointed out, and I agree, that some of the goals and objectives were inartfully drafted; for example, the December 2012 IEP’s goal of listening actively to information, includes the objective, “listening comprehension.” Elsewhere a goal reads simply as “calculator.”

Havens testified that the IEP goals should have at least three parts, to include “a condition,” a measurable behavior, and specific measurable criteria so the teacher knows when the goal is achieved. She stated that I.S.’s goals were not structured in this way, using the example of the following reading goal: “will use context clues or knowledge of phonics, syllabication, prefixes and suffixes to decode new words.” That goal should start with a condition, such as “given grade level text.” Relative to achieving the goal, it should provide more specificity, such as “across four worksheets over a two week period.” Havens discussed the need for a baseline, so that a teacher can know where a child started and finished and thus measure progress. Baselines were lacking in I.S.’s IEP goals. As to this area of her testimony, Haven was credible and persuasive and I **FIND** that many of the goals in I.S.’s IEPs lacked the structure needed to make them measurable and clear.

Havens also correctly pointed out certain needed goals were absent in the IEPs. For example, the December 2013 IEP contains no goal pertaining to solving mathematical word problems. That IEP has no goals relative to spelling or verb tenses. But Havens had never observed instruction for I.S. and thus was unable to correlate the language in the IEP with the education actually being delivered in the classroom. Simply put, a poorly written or missing goal matters less if the instructional intent is being realized in the actual instructional setting. The overarching goal of the IEP is to ensure delivery of instruction; what matters most is that appropriate instruction is actually being delivered to a student. As to that, Havens could offer no opinion.

The repetition of the same goals and objectives year after year was likewise troubling to Haven. The goals do repeat themselves in several areas. A review of the IEPs reveals some 8-10 other goals that appear to repeat until the development of the last two IEPs during the 2013-2014 school year. For example, “will use context clues or knowledge of phonics, syllabication, prefixes and suffixes to decode new words,” appears in every IEP until the one developed in December 2013. But Conklin opined persuasively that for a child like I.S., who may never reach grade level, there may be little change in goals each year, as achieving competency in certain basic skills is an ongoing, multi-year process. He noted that for each child, the district aspires for grade level achievement. Thus, if a student is achieving at a third-grade level, but is a sixth-grade student, that student would be given modified sixth-grade work. If, at the end of the year, the student was still at a third-grade level, the progress report would read “progressing.” Since the child was not an independent learner at the sixth-grade level, the goals would not change.

In petitioner’s view, the absence of any change in annual goals is an indicator that the CST never changed its technique or approach relative to I.S.’s instruction; but this argument is belied by the facts developed at the hearing. Indeed, I.S.’s instructional program was changed several times while in Edison, and the last IEP proposed an out-of-district placement; other programmatic changes were offered along the way, but were rejected by his grandmother.⁶

Based on the totality of the information made available to me, to include test scores and the anecdotal evidence contained in the IEP documents and progress reports, I **FIND** that I.S. did progress academically during the three years he was a student in the Edison school system. Moreover, while some goals and objectives may have changed little over the years, and some could have been articulated more completely and eloquently, the instructional programs used by Edison evolved during I.S.’s time there as did his placements, and he progressed successfully to a less

⁶ Indeed, in January 2012 Danik discussed a change to the resource center for English with I.S.’s grandmother; this change was recommended after I.S. had been in Edison about five months. She declined this change in programming for her grandson.

restrictive setting, an indicator of progress. A review of the documentary evidence reveals no fewer than seven IEPs during the three years of I.S.'s enrollment in Edison, an indicator that his program was being repeatedly "tweaked." The sheer number of IEPs also explains, somewhat, the lack of a dramatic change in his goals and objectives from document to document.

The Request for Independent Evaluations

Petitioner seeks reimbursement for the evaluations she obtained from Halpern and Cooperberg. The Halpern evaluation was conducted in January 2014. The Cooperberg evaluation was obtained on March 13, 2014; the due process petition was filed about two weeks thereafter.

The record confirms, and I **FIND**, that no request, for an independent evaluation, either written or oral, was made by A.M. in 2014, until she filed her due process petition in late March, and subsequent to having the evaluations at issue completed. I further **FIND** that a request for independent evaluations was made by A.M. via letter dated September 25, 2012. Via letter dated October 2, 2012, the Board denied that request, and filed a petition for due process dated October 11, 2012. A due process petition was filed by A.M. on or about October 17, 2012. Neither petition proceeded to hearing. A.M. appeared unclear regarding the procedural course of these petitions; Conklin indicated that it was his understanding that the petitions were ultimately withdrawn, as was the request for an independent evaluation. Since no independent evaluations were conducted in 2012, it would appear that Conklin's recollection was accurate.

Conklin discussed local Board policy and procedure pertaining to independent evaluations (IEE). (R-4.) A written request is required, which the district will respond to either with agreement to proceed, or a denial, which then would be formalized in a due process petition. If an IEE is granted, the policy stipulates that the evaluations take place in-district, or at the student's out-of-district placement. The policy sets out criteria for approved examiners, to include appropriate licensure and a cap on the cost at \$750 per evaluation. The independent examiner must be permitted to directly communicate with members of the CST, and agree to release his or her findings and report prior to

payment. The policy notes that “[a]ny evaluation that requires a classroom observation, such as learning disability, must be completed by the Examiner.” It is uncontroverted that none of these procedures were utilized to obtain the Halpern and Cooperberg reports.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Educational Program Provided to I.S.

The Board will have satisfied the requirements of law by providing I.S. with personalized instruction and sufficient support services “as are necessary to permit [him] ‘to benefit’ from the instruction.” G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009) (citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189, 102 S. Ct. 3034, 3042, 73 L. Ed. 2d 690, 701 (1982)). The IDEA does not require the Board to maximize I.S.’s potential or provide him the best education possible. Instead, the IDEA 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). But an IEP must provide meaningful access to education, and confer some educational benefit upon the child. Rowley, supra, 458 U.S. at 192. In order to be appropriate, the educational benefit conferred must be more than trivial. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999).

The educational opportunities provided by a public school system will differ from student to student, based upon the “myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.” Rowley, supra, 458 U.S. at 198. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry, and that “[i]t is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variation in-between.” Id. at 202. I **CONCLUDE** that the program offered I.S. by the Board constituted FAPE as that term is defined by law. A review of the evidence reveals that I.S. progressed in his educational program, albeit slowly, and that the CST constantly adjusted that program in an ongoing effort to personalize his instruction and address his educational needs.

School personnel testified convincingly to I.S.'s progress. Petitioner urges that the Board's case must fail because the classroom teachers did not testify and vouch for the program delivered to I.S. I disagree. It is true that in New Jersey, the burden of proof and production rests with the Board per N.J.S.A. 18A:46-1.1. But the argument that the Board cannot meet that burden by presenting the testimony of the school personnel who supervise I.S.'s program is tantamount to a suggestion that the District must overcome a rebuttable presumption that it was not providing FAPE. I do not view that as the intent of N.J.S.A. 18A:46-1.1, and like United States Supreme Court Justice Stevens, I believe that "we should presume that public school officials are properly performing their difficult responsibilities under this important statute [the IDEA]." Schaffer v. Weast, 546 U.S. 49, 62-63, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387, 400 (2005).⁷ Here, the Board met its prima facie burden of demonstrating that it was delivering FAPE; the burden then shifted to the petitioning family to articulate some facts that supported its claimed denial of I.S.'s rights under the IDEA. By offering not a single witness who had observed the Edison program and thus could competently speak to its efficacy, petitioner clearly failed to present a convincing claim of a denial of FAPE.

Generally, a determination whether a plaintiff was denied FAPE will be made on substantive grounds. 20 U.S.C.A. § 1415(f)(3)(E)(i). I have found that parts of I.S.'s IEPs were inartfully written, most specifically the goals and objectives, which Havens correctly opined were vague and sometimes hard to understand. This failing must be analyzed with reference to N.J.A.C. 6A:14-2.7(k), which provides that procedural violations may lead to a finding that FAPE was denied if the violations impeded the child's right to an appropriate education; impeded the parents' opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. Our regulation is consistent with the case law, which recognizes that procedural safeguards emphasize the process by which the IEP is produced, "rather than the myriad of

⁷ My interpretation of N.J.S.A. 18A:46-1.1 is one that allows the statute to harmonize with the decision in Schaffer. Placing yet a higher burden on the district would be entirely inconsistent with the Court's statement that "[p]etitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The [IDEA] does not support this conclusion." Schaffer, supra, 546 U.S. at 60, 126 S. Ct. at 536, 163 L. Ed. 2d at 398.

technical items that must be included in the written document” G.N. and S.N. on behalf of J.N. v. Livingston Bd. of Educ., 2007 U.S. Dist. LEXIS 57081 (D.N.J. 2007) (citing Doe v. Defendant, 898 F.2d 1186, 1190 (6th Cir. 1990); Rodrigues v. Fort Lee Bd. of Educ., 2011 U.S. Dist. LEXIS, *18 (D.N.J. 2011).

Relative specifically to the adequacy of an IEP’s goals and objectives, the court in G.N. recognized that a failure to include appropriate goals and objectives violated the IDEA. But the court went on to hold, that “to elevate this failing to a denial of a FAPE would be elevating form over substance. The true question is whether the failure to include goals and objectives 1) resulted in the loss of educational opportunity or 2) seriously infringed the parents’ opportunity to participate in the process.” G.N., supra, 2007 U.S. LEXIS 57081 at *21-22; see also Coleman v. Pottstown Sch. Dist., 2014 U.S. App. LEXIS 17685 *16 (3rd. Cir. 2014).

Here, poorly written goals here did not deprive I.S. of educational opportunity. The record reveals that his educational placements were appropriate, and indeed, entailed many of the services that were initially sought in the due process petition. Social skills training, multi-sensory instruction, and immediate feedback are examples. The record reveals progress in I.S.’s mathematics and reading skills. My finding that each and every one of the evaluators who previously assessed I.S.’s cognitive ability appeared to have underestimated his cognitive ability does not diminish my conclusions in this regard. I heard no evidence that anyone in Edison improperly administered the needed evaluations, but rather, heard that I.S.’s age and increased emotional stability may have factored into his newly elevated scores. Several witnesses attested to I.S.’s comfort in his educational environment in Edison, and it warrants noting that thus Edison’s program, unlike those in his prior school districts, surely may have positively contributed to I.S.’s emotional stability, and his consequent better performance on the cognitive testing administered by Halpern.

A change in classification might be warranted based on the finding that I.S.’s IQ score is higher than originally thought. Classification categories must be analyzed and assigned to students with special needs in accordance with regulation. N.J.A.C. 6A:14-3.5(c)(3)(i) defines “mild cognitive impairment” to mean a

[L]evel of cognitive development and adaptive behavior in home, school and community setting that are mildly below age expectations with respect to . . . the quality and rate of learning . . . the use of symbols for the interpretation of information and the solution of problems . . . [and] performance on an individually administered test of intelligence that falls within a range of two to three standard deviation below the mean.

The witnesses at hearing indicated that a standard deviation is 15 points; accordingly, I.S. would need to function at an IQ as low as 70 to continue to qualify for the classification he currently is assigned.

Petitioner's experts, most specifically Cooperberg, urge that I.S. has a learning disability. But Cooperberg did not conduct the sort of analysis needed to determine that I.S. should be reclassified as having a Specific Learning Disability (SLD) per N.J.A.C. 6A:14-3.5(c)(12). As Conklin correctly pointed out, Cooperberg's reliance on the response to intervention methodology was misplaced, as I.S. is already classified, and the multiple scientifically based interventions that would comprise this approach to determining eligibility did not take place here. N.J.A.C. 6A:14-3.4(h)(6).

Cooperberg bases his opinion exclusively on the disparity between I.S.'s higher IQ score and his achievement, but this too oversimplifies the information needed to determine that a child should be classified as SLD. The regulation speaks about a discrepancy in test scores, and notes that a statistical formula must be used to determine if such a discrepancy exists. But the regulation also recognizes that the inquiry must not end there, providing that the term "severe discrepancy" does not apply to "students who have learning problems that are primarily the result of . . . general cognitive deficits, emotional disturbance or environmental, cultural or economic disadvantage."⁸ N.J.A.C. 6A:14-3.5(c)(12)(iii).

⁸ Cooperberg testified that even if I.S. had an IQ of 60, as previously thought, there was a severe discrepancy between his math achievement and ability. But the regulation makes it clear that I.S.'s cognitive impairment would then make the SLD classification inappropriate.

Case law is in accord. Although a school district may use the discrepancy model to assign the SLD classification, it may not be the sole determinant. V.M. on behalf of B.M. v Sparta Twp. Bd. of Educ., 2014 U.S. Dist LEXIS 91254. *56 (D.N.J. 2014). Rather, a school district must base its determination on a variety of assessments of the child, and on a careful, documented consideration of parent input, teacher input, test results, and information concerning the child's health and background. Ibid.; see also M.B. and K.H. on behalf of J.B. v S. Orange/Maplewood Bd. of Educ., 2010 U.S. Dist. LEXIS 78163 (D.N.J. 2010); see N.J.A.C. 6A:14-3.4 (f)(4)(i)(1) (which requires that an evaluator observe the student's academic performance if considering an SLD classification).

Cooperberg did not observe I.S. in the classroom or interview his teachers, and thus did not adequately consider the other factors that might be impacting learning for this very complicated child. Although I thus am unable to **CONCLUDE** that a change in classification to SLD is appropriate for I.S. based on the record before me, I direct the CST and petitioner to promptly meet and discuss a possible change in classification for I.S. Naturally, this prompts the concern that there should be a concomitant change in placement. We are now into the 2014-2015 school year, and my paramount concern is for I.S.'s educational program moving forward.

The parties have not updated me on I.S.'s status, and his attorney's focal point in his post-hearing submission is what Edison provided in the past and whether any shortcomings in his prior IEPs and program warrant the conclusion that the IDEA was violated. His submission offers only a vague demand for an appropriate IEP moving forward. But where I.S. continues to go to school for this year, and those to come, is perhaps the most critical consideration here. Having heard nothing to rebut the testimony of the Board witnesses that placement at the vocational school program is appropriate, I **CONCLUDE** that the June 2014 IEP is reasonably calculated to offer FAPE to I.S. My common sense tells me that this is the right program for I.S. as well. His grandmother stressed that he can learn, and she feels he has sufficient skills to enable him to be independent. From the record developed at hearing, I surely agree.

In light of his academic deficits, however, a vocational track seems best designed to ensure that I.S. will one day become a productive member of society. Moreover, and importantly, I am unconvinced that a change in classification will likely change the appropriateness of this placement. The classification categories are intended to help CSTs and classroom teachers understand a student and his needs. But a child remains much more than a label, and based on all that was shared with me about I.S. I **CONCLUDE** that the vocational program is an appropriate one for him.

As was explained by the Board witnesses, once I.S. transfers to the county vocational school, it will become the local educational agency (LEA) responsible for his education, and its CST will direct his educational program. See N.J.A.C. 6A:14-4.7(h)(1)(i), which provides that “[i]n a full-time county vocational school, all responsibility for programs and services rests with the receiving district board of education.” I.S.’s grandmother and the vocational CST should meet and develop an IEP for him, if they have not done so already. That discussion should likewise encompass a conversation about the appropriate classification. But as the vocational school district is not a party to this action, I have no authority to direct it to do so under any particular time frame or in any particular fashion.

Petitioners seek compensatory education. Our courts recognize compensatory education as a remedy under the IDEA that should be awarded “for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem.” M.C. o/b/o J.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 398, 397 (3d Cir. 1996). Compensatory education requires school districts to “belatedly pay expenses that [they] should have paid all along.” Id. at 395. Having rejected petitioner’s contention that the IEPs offered her grandson were inappropriate, there is no basis for an award of compensatory education. Petitioner’s experts did successfully convince me that I.S. has greater cognitive ability than previously thought. But this finding likewise does not warrant an award of compensatory education because I heard no evidence that prior testing of I.S. was done incorrectly. Moreover, Edison’s findings as to IQ were consistent with the scores I.S. had previously achieved, buttressing the conclusion that the district neither

knew, nor should have known, that I.S. had greater cognitive ability than previously thought.

Independent Evaluations

I **CONCLUDE** that petitioner's failure to request an IEE prior to securing the services of Cooperberg and Halpern is fatal to her request for reimbursement, and that accordingly, her request must be denied. Her right to request independent evaluations is clear under both federal and state regulations. 34 C.F.R. § 300.502; N.J.A.C. 6A:14-2.5(c). While both regulations make it plain that a parent may "request" an IEE if she disagrees with the district's evaluations, the regulations then goes on to give the Board the option to either grant the request or file for due process to show that its evaluation is appropriate. New Jersey regulations afford the district ten days "of receipt of the request" to determine whether or not to grant it. N.J.A.C. 6A:14-2.5(c)(1)(i). Petitioner's contention that no request is required prior to obtaining an IEE is thus inconsistent with the regulatory scheme. Indeed, how could a school district exercise its right to determine whether to grant a requested IEE when there has been no request for one; when instead, the evaluation is a *fait accompli*? Moreover, it is uncontroverted that petitioner expressed dissatisfaction with the 2012 evaluations by writing and requesting an IEE in 2012. The district then proceeded to file for due process, and the request for the IEE was apparently abandoned. Thus, petitioner clearly knew the proper recourse if she wished to request an IEE.

Finally, the timing of the Halpern and Cooperberg evaluations make it appear that these were experts retained in anticipation of litigation. It is well established that the IDEA contains no provision for the recoupment of fees for expert services. Arlington Cent. Sch. Dist. v. Murphy, 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526 (2006). Accordingly, for this additional reason, I **CONCLUDE** that the request for reimbursement of these fees must be denied.

ORDER

Based on the foregoing, together with the record as a whole, I **ORDER** an IEP Team to convene and discuss the appropriate classification for I.S. in light of the findings made here. I further **ORDER** the Board to place I.S. in the vocational school program recommended in its June 2014 IEP, and to seek the input of the vocational school team in any discussion regarding classification. The remaining claims of the petition for due process are **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.

October 14, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency

Date Mailed to Parties:

APPENDIX

Witnesses

For Petitioner:

A.M.
Mark Cooperberg
Lance Halpern
Michele Havens

For Respondent:

Lai Danik
Nancy Sica
Christopher Conklin

Exhibits

For Petitioners:

- P-1 Picture of student
- P-2 Annual IEP, dated 5/27/10
- P-3 Not admitted
- P-4 Not admitted
- P-5 Due process petition
- P-6 Amended due process petition
- P-7 Answer to petition
- P-8 Not admitted
- P-9 Not admitted
- P-10 Letter dated 2/17/14
- P-11 Admitted at J-43
- P-12 Homework samples
- P-13 Science work product
- P-14 Social studies work product
- P-15 Math work product

- P-16 English work product
- P-17 For Keeps Discharge Summary
- P-18 Not admitted
- P-19 Not admitted
- P-20 Not admitted
- P-21 Not admitted
- P-22 Not admitted
- P-23 Not admitted
- P-24 Not admitted
- P-25 C.V. of Michele Havens
- P-26 C.V. of Lance Halpern
- P-27 C.V. of Mark Cooperberg
- P-28 Not admitted
- P-29 Invoice
- P-30 Invoice
- P-31 Not admitted
- P-32 Not admitted

For Respondent:

- R-1 Not admitted
- R-2 Psycho-Educational Evaluation
- R-3 Edison Policy Regarding IEE
- R-4 Edison Procedures Regarding IEE
- R-5 Student Application
- R-6 Letter dated 5/19/14
- R-7 Resume of Lai Danik
- R-8 Resume of Nancy Sica
- R-9 Resume of Christopher Conklin

Joint Exhibits:

- J-1 Psychological Evaluation dated 5/3/10
- J-2 Occupational therapy Evaluation
- J-3 Educational Evaluation

- J-4 Speech Language Evaluation
- J-5 Letter dated 10/7/10
- J-6 Student enrollment form
- J-7 Invitation to a meeting
- J-8 New Entrant IEP
- J-9 Invitation to a meeting
- J-10 Annual Review IEP, 6/1/11
- J-11 Progress reports
- J-12 ESY Progress reports
- J-13 UMDNJ Connors Scale
- J-14 Invitation to a meeting
- J-15 Annual Review IEP, 2/29/12
- J-16 Invitation to a meeting
- J-17 Invitation to a meeting
- J-18 Evaluation plan
- J-19 Multi-disciplinary evaluation
- J-20 Progress reports
- J-21 Invitation to a meeting
- J-22 Invitation to a meeting
- J-23 Notification of eligibility conference report
- J-24 IEP notice
- J-25 Eligibility report
- J-26 Reevaluation IEP, dated 7/26/12
- J-27 Invitation to a meeting
- J-28 Letter dated 10/2/12
- J-29 Letter dated 10/10/12
- J-30 Invitation to a meeting
- J-31 Invitation to a meeting
- J-32 Invitation to a meeting
- J-33 Letter dated 11/19/12
- J-34 Invitation to a meeting
- J-35 Annual Review IEP, dated 12/18/12
- J-36 Treatment Plan 12/27/12

- J-37 Progress reports
- J-38 ESY Narrative
- J-39 IEP dated 12/18/13
- J-40 Psychological Evaluation, Halpern
- J-41 Educational Evaluation, Cooperberg
- J-42 IEP dated 6/16/14
- J-43 Letter dated 6/20/14
- J-44 Progress reports
- J-45 Letter dated 7/1/14
- J-46 Report cards
- J-47 NJASK scores
- J-48 NWEA Student Progress Report