



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 03389-22

AGENCY DKT. NO. 2022-34020

(CONSOLIDATED)

K.L. AND M.L. ON BEHALF OF J.L.,

Petitioners,

v.

TOMS RIVER REGIONAL BOARD OF

EDUCATION,

Respondent

And

TOMS RIVER REGIONAL BOARD OF

EDUCATION,

Petitioner,

v.

K.L. and M.L. ON BEHALF OF J.L.,

Respondents.

OAL DKT. NO. EDS 03390-2022

AGENCY DKT NO. 2022-34059

Katherine McKay, Esq., for petitioners/respondents (Brain Injury Rights Group, Ltd., attorneys)

R. Taylor Ruilova, Esq., for respondent/petitioner (Comegno Law Group, P.C., attorneys)

Record closed: August 22, 2023

Decided: September 12, 2023

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner J.L. is a resident of Toms River and attended preschool in Toms River Regional Board of Education (District) as a disabled child and was classified and received special education services. After evaluations were conducted by the District in November of 2021, the District determined that J.L. was no longer in need of any special education services and declassified him for the 2022 school year. The parents filed a due process petition challenging the declassification. In addition, the parents requested an independent evaluation which was denied by the District, leading to the second due process action filed by the District, which has been consolidated herein. Both matters were transmitted to the Office of Administrative Law as a contested case. The matter was heard on January 11, 2023, January 12, 2023, January 18, 2023, March 10, 2023, and March 14, 2023. The record was closed after briefs were filed by the parties on August 14, 2023, and a conference call to clarify the record was closed on August 22, 2023.

TESTIMONY AND FINDINGS OF FACT

Ellen Higgins is a learning disability teacher in Toms River. She has worked in special education for twenty-seven years. Her CV was entered into evidence, and she was accepted as an expert in learning disabilities. She conducted an educational evaluation of J.L. in November of 2021. She was not his teacher but was part of the team and she concurred with the decision to declassify him. He was in general education classes and making progress. He was achieving his goals and meeting all of the benchmarks. The appropriate reevaluations were conducted, and the parents consented to them. She conducted the educational evaluation and there was no need for him to be classified any longer. She never worked directly as his teacher,- but she reviewed his records and performed an evaluation. She did not recommend that they test him for oppositional defiant disorder, as no one on the team noted any behavior issues, and there

was no indication of a need for any such evaluation.

Jean Sharkey is a speech and language specialist and was qualified as an expert in speech and language and special education. She evaluated J.L. and provided speech and language services to him when he was in preschool. She reviewed his test scores and testified about the speech and language assessment that she conducted. She testified that he had met his goals and objectives during preschool, and she did not observe any behavior issues, nor did she think he needed any further speech and language therapy. She attended the IEP meeting and concurred with the conclusion of everyone on the team that he was meeting all his goals and objectives and was no longer eligible for speech and language service nor did he qualify for special education services.

Arielle Bowen was offered as a fact and expert witness for the District. She is a speech pathologist and a speech and language specialist. She has been working with students and preparing IEPs for over forty years. She was offered and accepted as an expert in speech and language pathology. She testified that she had observed J.L. and was present at the eligibility meeting. She reviewed some of her notes about observations and testing done of J.L. and opined in her expert opinion that he was not in need of special education services, and she concurred with the decision to declassify him. She did continue to provide some speech and language services pursuant to the last IEP for a period of time. However, she believed that he was meeting his goals and objectives and was not a student in need of special education services.

Lea Valentino is the school psychologist for Toms River school district. She was qualified as an expert in childhood psychology. She conducted a psychological assessment of J.L. in 2021 when he was still in preschool and found no behavior issues and his attention and social skills were not unusual and nothing that required any behavior intervention plan, and that further classification was not appropriate. She noted that the reported behavior from J.L.'s mother was inconsistent with the observations at school and that no further classification or services were necessary. His behavior and attention were normal and typical of his peers in this age group. He had a high IQ, good eye contact and she saw no reason for his continued classification. She opined that he was making meaningful progress and was being provided Free and Appropriate Public Education

(FAPE) in the Least Restrictive Environment (LRE). He was not tested for Oppositional Deviant Disorder as she saw no reason for any such testing. There were not any behaviors that would have warranted an FBA.

Janeen Carnick was J.L.'s teacher in preschool. She is a certified special education and general education teacher and qualified as an expert in special education. She testified regarding her observations of J.L. during the year in her classroom. She reviewed the goals and objectives for J.L. and the declassification decision. She agreed with the decision to declassify him. He made appropriate and meaningful progress and he was meeting or exceeding all his goals and objectives.

Melissa Pennestri is a kindergarten teacher and was qualified as an expert in elementary general education. J.L. was a student in her general education kindergarten class. She testified that J.L. was meeting grade level expectations. He was mastering or exceeding most goals and objectives. She believed in her expert opinion that J.L. was appropriately placed in a general education kindergarten class and was making meaningful progress.

K.L. is J.L.'s mother. She testified that J.L. had significant behavior issues and that they had received a diagnosis of Oppositional Defiant Disorder from a doctor. She felt that his behaviors were interfering with his ability to learn. She produced a letter from Brick Pediatric Group regarding his behavior and testified that he displayed significant behavior issues at home. She shared her concerns with the members of the child study team and was present at all the meetings. When she learned of the declassification, she expressed that she disagreed with this decision. She did not think he was ready to be declassified.

No other witnesses were presented for the petitioners/respondents and no testimony regarding the inadequacy or disagreement with any of the evaluations conducted in connection with the declassification or in support of request for an independent evaluation.

FINDINGS OF FACT

The resolution of the issues in this matter requires that I make a credibility determination regarding critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718, 749 (1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that the witnesses from the District were sincere and credible in their testimony. Moreover, their testimony was consistent with the documentary evidence and with each other. The petitioners have alleged that the decision to declassify J.L. was improper and resulted in a denial of FAPE in the LRE; and that J.L. is entitled to an independent evaluation. However, the extensive testimonial and documentary evidence presented by the District demonstrates that the decision to declassify J.L. was appropriate and he was being provided FAPE in the LRE. The district demonstrated the evaluations provided were appropriate and not deficient in any way. Petitioners failed to demonstrate any deficiencies in the evaluations or any entitlement to an independent evaluation.

Having had the opportunity to observe J.L.'s parent, it is my view that although she was sincere in her concern for her child, she provided no credible testimony that the District's decision to declassify resulted in a failure to provide FAPE in the LRE. There

was no other testimony, expert or otherwise, to discredit the credible testimony supported by documentary evidence presented by the District. Moreover, there was no evidence to support the claim for an independent evaluation.

Accordingly, I **FIND** the following:

1. J.L. attended preschool in the District as a preschool disabled child. He was classified and received special education services during his pre-school years.
2. J.L. was reevaluated in November of 2021 to determine continued eligibility for special education services.
3. Based on all the evaluations conducted and the collective opinion of the child study team, J.L. was declassified for the 2022-2023 school year.
4. J.L. was meeting his goals and objectives and displayed no behavior issues.
5. J.L. was making meaningful progress in all areas.
6. J.L. continues to make progress in the general education kindergarten class and is meeting his goals and objectives.
7. The evaluations that were conducted by the District were comprehensive and complete and there was no evidence of any deficiencies in any of them.
8. There was no demonstration of a need for a functional behavior assessment or testing for Oppositional Deviant Disorder.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA or the Act), 20 U.S.C. §§ 1400 et seq., requires New Jersey to effectuate procedures that ensure that all children with disabilities residing in the State have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). A purpose of the IDEA is

to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.

[20 U.S.C. § 1400(d)(1)(A).]

Under 20 U.S.C. § 1412(a)(1), any state qualifying for Federal assistance under the IDEA must adopt a policy that assures all children with disabilities the right to a free appropriate public education. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180-81, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 696 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey follows the federal standard requiring such entitlement to be “sufficient to confer some educational benefit,” although the State is not required to maximize the potential of handicapped children. Lascari v. Ramapo Indian Hills Reg. High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). Third Circuit decisions have further refined that standard to clarify that such educational benefit must be “meaningful,” “achieve significant learning,” and confer “more than merely trivial benefit.” T.R. v. Kingwood Tp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-84 (3d Cir. 1988), cert. den. sub. nom., Ctr. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989).

The basic floor for such education is an education which offers the student an opportunity for meaningful learning, taking into account the child’s potential. Ridgewood, 172 F.3d at 247 wherein the Court found that meaningful education must be more than de minimis. New Jersey has adopted the standards set forth by the United States Supreme Court and the Third Circuit. Lascari, 116 N.J. at 47-48, wherein it was found that the District is not required to provide the best education available. See R.D. and A.D. for C.D. v. Delran Board of Education, 2001 WL 830871 (N.J. Adm. 2001). Therefore, if the District through the applicable IEP is reasonably calculated to provide more than a de minimis benefit, then the school district has met its obligation under the IDEA. CV.J. and D.J. o/b/o B.J. v. Ocean City Board of Education, 2004 WL 763590 (N.J. Adm. 2004).

Thus, the issue is whether the IEP proposed and implemented by the District was appropriate and offered FAPE in the least restrictive environment, and did the District appropriately declassify J.L.

The witnesses offered by the respondent, who were qualified experts were very familiar with the IEP and educational services provided by the District for the 2021-2022 school year. They all testified regarding J.L.'s progress. The District presented progress reports, and evaluations which supported the fact that the IEPs provided J.L. with an educational program reasonably calculated to provide meaningful educational benefit. All of the witnesses for the District credibly testified that there were no behavior issues observed in J.L. and he was making meaningful progress and meeting his goals and objectives. The testimony supported the finding that classification was no longer appropriate for J.L.

In support of J.L.'s case, J.L.'s mother testified. There were no witnesses to testify factually or as an expert as to J.L.'s progress in the classroom. Although J.L.'s mother was sincere in her testimony, she provided no testimony to demonstrate that the District has not provided FAPE in the LRE and that the proposed declassification was inappropriate, or that any of the assessments were deficient in any way.

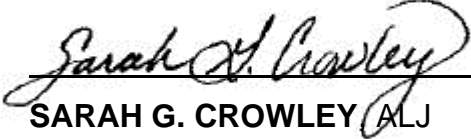
I **CONCLUDE** that based on the credible and persuasive testimony presented by the District, the education provided to J.L. was reasonably calculated to offer FAPE in the least restrictive environment. I further, **CONCLUDE** that the determination to declassify J.L. at the end of 2021 was proper.

I further **CONCLUDE** that the petitioners are not entitled to compensatory education, costs or fees associated with this case.

I further **CONCLUDE** that there was no demonstration that any of the evaluations that were conducted by the District were deficient in any way, thus, failing to demonstrate entitlement to an independent evaluation.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2022). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

September 12, 2023
DATE


SARAH G. CROWLEY ALJ

Date Received at Agency: _____

Date emailed to Parties: _____

SGC/kl/mph

APPENDIX

WITNESSES

For petitioners

K.L.

For respondent

Ellen Higgins

Jean Sharkey

Arielle Bowen

Lea Valentino

Janeen Carnick

Melissa Pennestri

EXHIBITS

For petitioner

P-A – P-G Not Admitted

P-H Document from Brick Pediatric Group

P-I – P-K Not Admitted

For respondent

R-1 – R-18 Not Admitted

R-19 IEP dated November 14, 2019

R-20 Progress Reports 2019-2020

R-21 Not Admitted

R-22 IEP dated June 4, 2020

R-23 Not Admitted

R-24 Progress Reports 2020-2021 School Year

R-25 Not Admitted

R-26 IEP dated June 11, 2022

R-27 – R-30 Not Admitted

- R-31 Psychological Evaluation, dated November 9, 2021
- R-32 Speech and Language Evaluation, dated November 11, 2021
- R-33 Invitation for Re-Evaluation Eligibility Meeting
- R-34 Not Admitted
- R-35 Progress Reports
- R-36 – R-39 Not Admitted
- R-40 CV Ellen Higgins
- R-41 CV of Lea Valentine
- R-42 CV Junnie Sharkey
- R-43 CV of Arielle Bowen
- R-44 CV of Janeen Cartnick
- R-45 CV of Melissa Pennestri
- R-46 Progress Report for Kindergarten