State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00294-21
AGENCY DKT. NO. 2017-26311

F.H. AND M.H. ON BEHALF OF J.H.,
Petitioners,
v.
WEST MORRIS REGIONAL HIGH BOARD OF EDUCATION,
Respondent.

OAL Dkt. No. EDS 10706-17
(ON REMAND)

Julie Warshaw, Esq., and **Jamie Epstein**, Esq., for Petitioners (Warshaw Law Firm, LLC, attorneys)

Jodi S. Howlett, Esq., for Respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys)

Record Closed: January 14, 2021 Decided: August 10, 2021

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a Due Process Petition on June 5, 2017, with the Office of Special Education Programs (OSEP) in the New Jersey Department of Education

(DOE). OSEP transmitted the 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 July 28, 2017.

A prehearing conference was held on August 11, 2017, and a prehearing Order was entered on the same date.

Petitioners filed a motion for summary decision on September 20, 2017. That motion was held in abeyance pending a decision on petitioners' motion for leave to amend the due process petition, which was filed with the OAL on October 23, 2017.

Leave was granted to amend the due process petition by Order dated November 14, 2017; and a briefing schedule for the summary decision motion was established.

Respondent filed its answer to the amended due process with the OAL on November 28, 2017.

Respondent filed its reply brief to Petitioners' summary decision motion on December 4, 2017. Petitioners filed a sur-reply brief on December 14, 2017. The motion for summary decision was denied by Order dated December 19, 2017.

Respondent filed a cross petition for due process with the OAL on February 13, 2018.

Respondent filed a brief on March 16, 2018, in support of its request in its cross petition for due process to limit the scope of the hearing to whether J.H meets the eligibility criteria to be eligible for special education and related services under the classification Specific Learning Disability, as defined in N.J.A.C. 6A:14-3.5(c)(12), as respondent alleges that petitioner revoked their consent to the classification of J.H. Petitioners filed their brief on March 14, 2018, in support of their right to have all issues

heard at the hearing and in opposition to the relief requested by respondent in its cross petition to limit the scope of the hearing above stated.

Respondent then submitted a motion in limine on April 4, 2018, seeking to exclude evidence and expert reports pursuant to the "snapshot rule". Petitioners filed a responsive letter, also on April 4, 2018. Respondent submitted its sur-reply on April 6, 2018. Petitioners, in the responsive letter, requested the following: that respondent's Answer to the Amended Due Process Petition be stricken for failure to provide discovery; that respondent be barred from presenting all of their evidence in this matter, also for failure to provide discovery; for counsel fees; and, that petitioners be permitted to present their entire case.

The initial due process petition was filed with OSEP on June 5, 2017, and requests relief for alleged IDEA and other violations for the 2017-2018 school year. The amended due process petition was filed with the OAL on October 23, 2017, and requests relief for alleged IDEA and other violations for the 2017-2018 and 2018-2019 school years.

Respondent filed its cross petition for due process with the OAL on February 13, 2018 and requests relief, inter alia, that the hearing be limited to whether J.H meets the eligibility criteria to be eligible for special education and related services under the classification Specific Learning Disability, as defined in N.J.A.C. 6A:14-3.5(c)(12), as respondent alleges that petitioners revoked their consent to the classification of J.H. as Emotionally Disturbed.

By Order dated April 20, 2018, respondent's motion in limine was granted in part and denied in part, as follows:

1. Respondent's motion in liminal was granted as follows: all evidence presented by petitioner that was obtained after the date of the IEP shall

not be considered for purposes of determining if respondent complied with the IDEA in developing the IEP;

2. Respondent's motion in liming was denied as follows: petitioners were permitted to submit evidence dated after the date of the IEP for purposes of demonstrating that respondent failed to comply with the IDEA after the date of the IEP.

Said Order dated April 20, 2018 also denied respondent's request in its cross petition to limit the scope of the hearing to whether J.H. meets the eligibility criteria to be eligible for special education and related services under the classification Specific Learning Disability, as defined in N.J.A.C. 6A: 14-3(c)(12).

Said Order dated April 20, 2018 also denied petitioners' request in their responsive letter to respondent's motion, dated April 4, 2018, seeking to: strike respondent's Answer; bar all respondent's evidence; and, for counsel fees.

The hearing on the above captioned was held on April 9, 2018, April 23, 2018, July 25, 2018 and August 29, 2018.

Petitioners submitted their post hearing summation on December 17, 2018. Respondent submitted its post hearing summation on January 16, 2019. Petitioners were permitted to file a sur-reply post hearing summation which was submitted on January 29, 2019. Counsel was requested by the undersigned to confirm which exhibits were admitted into evidence due to confusion over duplicative exhibits. That was done February 11, 2019. The record closed February 11, 2019 and the Final Decision was rendered on February 13, 2019.

Plaintiffs appealed this Final Decision to the Superior Court of New Jersey, Law Division, Morris County, on May 11, 2019. Thereafter, on June 27, 2019, Respondent removed the state action to the United States District Court for the District of New

Jersey. An Answer from Respondent followed, and the Court denied Petitioners' motion to remand the matter to state court. After a settlement conference on May 7, 2020, Petitioners filed a motion for Summary Judgment based on the administrative record. Respondent filed an opposition and Petitioners submitted a reply.

In Answer to that motion, the Hon. Susan D. Wigenton, USDJ, issued an opinion remanding the matter to the OAL to further vet the claims and arguments set forth in Petitioners' amended due process petition.

A conference call was held on the remand with counsel on January 14, 2021. The parties agreed that there was no requirement for an additional hearing. It was incumbent upon the undersigned to issue a decision in accordance with the remand order entered by Judge Wigenton.

Based upon Judge Wigenton's order remanding the matter, the undersigned undertook a complete review of the record. The remand required the undersigned to issue a decision in compliance with the Order of Judge Wigenton. In effect, the undersigned held a trial de novo on the record.

FINDINGS OF FACT

Based on Judge Wigenton's guidance and upon further review, the undersigned finds:

1. J.H. is the child of petitioners, F.H. and M.H.
2. J.H. completed Long Valley Middle School as a general education student prior to attending West Morris Central High School (Central High School).
3. She completed her freshman year still as a general education student during the 2015-2016 school year.
4. In September of 2016, J.H. began to experience depression and anxiety.

5. Due to these reasons, she was placed at Immediate Care Children's Psychiatric Center (ICCPC) from October 2016 to December 2016.

6. In December 2016, J.H. was medically cleared to return to Central High School.

7. On December 7, 2016, Petitioners attended a 504 Accommodation Plan meeting that the District held.

8. Petitioners consented to the implementation of this 504 Plan.

9. A few days later, J.H. could no longer attend Central High School because of resurfaced medical reasons and reverted to home instruction for the remainder of the 2016- 2017 academic year.

10. In January 2017, J.H. was referred to the CST to determine her eligibility for special education and related services pursuant to the IDEA.

11. On January 9, 2017, the District held an Evaluation Planning Meeting, which Petitioners attended.

12. The Petitioners consented to psychological and social history assessments.

13. The District accepted a psychiatric assessment conducted by Dr. Shankar Srinivasan, an ICCPC psychiatrist, on March 15, 2017.

14. Dr. Srinivasan recommended an out of district placement in this assessment.

15. On April 6, 2017, the District held an IEP meeting and determined J.H. was eligible for special education and related services under the "Emotionally Disturbed" criteria.

16. Petitioners signed the corresponding Eligibility Determination Report reflecting this classification.

17. Petitioners contend they consented to J.H.'s eligibility, but not to the classification of "Emotionally Disturbed."

18. Petitioners did not consent to implementation of an IEP at the meeting on April 6, 2017.

19. This IEP recommended J.H. be placed in the "Behavioral Supports Program" at West Morris Mendham High School (Mendham High School).

20. A subsequent IEP meeting was held on May 16, 2017.

21. Again, the District proposed an IEP that placed J.H. in the "Behavioral Supports Program", also known as "BSP", at Mendham High School.

22. In the IEP, the CST referred to the "Behavioral Supports Program", but allegedly meant to refer to the "Being Successful Program".

23. Petitioners contend that the April and May 2017 IEPs do not reflect their input and are substantively identical.

24. The IEP developed for J.H. did not offer a Free and Appropriate Public Education (FAPE) in the least restrictive environment (LRE) for J.H.

25. J.H. was improperly classified at the time as "Emotionally Disturbed".

26. On May 22, 2017, Petitioners requested independent psychiatric, psychological, and educational assessments.

27. In July and August 2017, Dr. Schuberth conducted an independent psychoeducational evaluation of J.H.

28. Dr. Schuberth diagnosed J.H. with Major Depressive Disorder, Generalized Anxiety Disorder, and a Specific Learning Disorder with impairment in mathematics, specifically with fluent calculation, under the DSM-V criteria.

29. Dr. Schuberth did not find that J.H. met the criteria for a specific learning disability under N.J.A.C. 6A: 14 – 3.5 (c).

30. In September 2017, Dr. Platt conducted an independent psychiatric evaluation.

31. Dr. Platt diagnosed J.H. under the DSM-V criteria for (i) Major Depressive Disorder, recurrent episode, moderately severe (with irrational thinking); (ii) Generalized Anxiety Disorder; (iii) Panic Disorder; (iv) School avoidance; (v) Specific Learning Disorder with impairment in mathematics, specifically with fluent calculation, moderate; (vi) Major depressive Disorder, recurrent, severe, without psychotic features; (vii) Central Auditory Processing Disorder; and (viii) Agoraphobia.

32. J.H.'s IEP was not updated following these independent assessments.

33. Petitioners' counsel sent emails dated May 22, 2017, May 26, 2017, August 18, 2017, August 24, 2017, August 26, 2017, and August 29, 2017, and letters dated August 26, 2017 and September 16, 2017 to the District in order to resolve placement.

34. The District did not answer any attempts to resolve placement.

35. On August 31, 2017, Petitioners submitted a tuition payment to the Purnell School ("Purnell").

36. J.H. began attending Purnell on September 11, 2017.

LEGAL ANALYSIS AND CONCLUSION

In this remand, Judge Wigenton directed that Petitioners' arguments are addressed and elaborate upon as to whether the District provided J.H. with a FAPE in the LRE, whether J.H. was properly classified, whether the proposed placement was sufficient in light of J.H.'s needs, whether the District had an obligation to continue home instruction under the IDEA's "Stay Put" provision, and finally, whether Petitioners provided adequate notice of J.H.'s unilateral placement.

I. The District's Obligation to Provide a FAPE in the LRE

In New Jersey, State regulations track the requirement that a local school district provide "a free appropriate public education" as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. Moreover, the seminal case, Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S.Ct. 988,1001 (2017), provides that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." This "substantive obligation" is "markedly more demanding than a 'merely more than de minimis' test." Id. at 1000-01. The standard is met if the IEP allows for "significant learning" and confers "meaningful benefit" to the child. M.F. o/b/o C.F. v. Hamilton Twp. Bd. of Educ., EDS 06093-19, final decision, (September 27, 2019), https://njlaw.rutgers.edu/collections/oal/, (citing Endrew F.). Therefore, an appropriate IEP will likely "produce progress, not regression or trivial educational advancement." Id. citing Dunn v. Downingtown Area Sch. Dist. (In re K.D.), 904 F.3d 248, 254 (3rd Cir. 2018) (quoting Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3rd Cir. 2012)). 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 maximum potential of handicapped children." Lascari v. Ramapo Indian Hills Reg. Sch. Dist., 116 N.J. 30 (1989).

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

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

While analyzing a FAPE claim, there is a two-fold inquiry. T.D. o/b/o of J.D. v. Gloucester County Vocational Bd. of Educ., EDS 05282-19, final decision, (May 13,

2019), https://njlaw.rutgers.edu/collections/oal/, (citing Rowley, 458 U.S. at 207). First, a court must ask whether the state or school district complied with the proper procedures when developing the IEP and second, whether the IEP is "reasonably calculated to enable the child to receive educational benefits." Id.

A. Procedural and Substantive Violations

A procedural violation of the IDEA does not automatically result in the denial of a FAPE. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 565 (3d Cir. 2010). However, an ALJ may decide that a child did not receive a FAPE if the procedural violations: 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." N.J.A.C. 6A:14-2.7(k)). See D.B. v. Gloucester Twp. Sch. Dist., supra, 751 F. Supp. 2d at 770 (procedural violations may lead to a finding that a student did not receive a FAPE….") If a procedural violation "causes substantive harm to the child or his parents," it may rise to the level of a denial of FAPE. C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 66 (3d Cir. 2010) (citing Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001).

Petitioners allege several procedural violations including:

i. The proposed IEP was predetermined

The record indicates a procedural violation whereby the District predetermined J.H.'s placement because the placement was effectively decided without parental input. See D.B. v. Gloucester Twp. Sch. Dist., 751 F. Supp. 2d 764, 771 (D.N.J. 2010), aff'd, 489 Fed. Appx. 564 (3d Cir. July 19, 2012); 34 C.F.R. § 300.513(a)(2)(ii). A predetermined IEP is actionable because it seriously deprives parents of their participation rights, "exclud[ing] parents from meaningfully participating in the decision-making process." D.B., 751 F. Supp. 2d at 771. Further, the IDEA and New Jersey regulations specifically require that a placement decision can only be made after the development of an IEP and in accordance with its terms. 34 C.F.R. § 300.116(b)(2); N.J.A.C. 6A:14-4.2(a)(5).

The facts in the instant matter closely align to D.B. The IEP proposed to Petitioners at the April 6, 2017 meeting was completed to the point that even the placement was listed, contrary to existing regulations. Petitioners correctly contend that the IEP was presented as a final product rather than a draft, evidenced by the listed program, J.H.'s class selection, and finalized goals and objectives. Even when Petitioner asked about other options, she was told, "…this is it, this is what we're proposing." Similarly, the district in D.B. "refused to discuss any alternative placements." The court in D.B. held that the IEP was predetermined because the district decided the student's placement without parental input and did not listen to their concerns..." The Petitioners' parental rights were essentially deprived as they were not given the opportunity to meaningfully partake in the decision-making process despite their best efforts to do so.

Although they were vocal about their concerns during this meeting, these concerns were not listed in the appropriate section of the IEP by the next IEP meeting on May 16, 2017. Not only were parental concerns unrecorded, the "new" proposed IEP was the exact same as the IEP proposed in April. The District showed no effort to meaningfully include the Petitioners' valid concerns or to resolve the matter amicably.

ii. The District failed to provide J.H. with a valid IEP to begin the 2017- 2018 school year

> An IEP must be created and in effect for a qualifying child with disabilities by the beginning of each school year. U.S.C. §§ 1412 (a)(1)(A).

Here, the District did not prepare an IEP for J.H. at the start of the 2017-2018 school year. The District contends that Petitioner unilaterally placed J.H. at Purnell for the 2017 – 2018 and 2018 – 2019 school years after they filed their Due Process petition in May 2017. However, this contention is contrary to the facts. The emails dated May 22, 2017, May 26, 2017, August 18, 2017, August 24, 2017, August 26, 2017, and August 29, 2017, and letters dated August 26, 2017 and September 16, 2017 from Petitioners' counsel to the District's counsel show numerous attempts to amend the IEP and figure out placement. These requests went unanswered and ignored. In spite of these emails

documenting a desire to find the appropriate placement for J.H., the District argues it had no obligation to develop an IEP.

The evidence shows that the District failed in its obligation to provide J.H. with a valid IEP to begin the 2017 – 2018 school year.

iii. April and May proposed IEPs did not include measurable academic and functional goals or objectives

> Similar to the federal regulations, N.J.A.C. 6A:14-3.7(e)(2) reads, "[w]ith the exception of an IEP for a student classified as eligible for speech-language services, the IEP shall include, but not be limited to…where appropriate, a statement of detailed measurable annual academic and functional goals that shall, as appropriate, be related to the core curriculum content standards through the general education curriculum unless otherwise required according to the student's educational needs, or appropriate, student specific, functional needs." See also G.N. and S.N. o/b/o J.N. v. Bd. of Educ. of the Township of Livingston, 2007 U.S. Dist. LEXIS 57081 (D.N.J. August 6, 2007).

In the present case, the goal listed for J.H. was that "J.H. will increase her ability to manage anxiety pertaining to school related function." The short-term objectives were that she will be able to: identify 2-3 triggers of anxiety, learn to use an anxiety scale to gauge and measure the strength of emotional reactions to triggers, identify up to 3 strategies that can be used to reduce anxiety, increase attendance at school in accordance with her schedule, and seek support when feeling anxious. For a college-bound student, these goals are not complete as they do not specify any measurable academic goals.

iv. The April IEP meeting did not have the complete CST

The IEP meeting attendance sheet listed Tamara Wubbenhorst as the general education teacher designated to attend the meeting; however, Ms. Wubbenhorst was not present. Next, David Ehasz, the special education teacher, was listed to attend, but was also not present. Finally, Belina Goldberg-Rappaport, who conducted the social

assessment, also did not attend. Without Ms. Goldberg-Rappaport, the Petitioners were unable to discuss several corrections and concerns about her report.

Petitioners assert that these absences prevented any updates or progress to the IEP because it limited any meaningful discussions about J.H.'s needs and appropriate placements. It is mentioned on the IEP attendance sheet that a required member of the IEP team may be excused from participation with parental consent. Nevertheless, Petitioners did not consent nor did they waive their rights to have these members of the child study team present for the IEP meeting.

Based on the several procedural violations, it is unequivocal that the District failed to provide J.H. with a FAPE in the LRE. Since the FAPE analysis failed in its first prong, it is fruitless to analyze the second prong on whether the IEP would confer some educational benefit.

II. Classification under "Emotionally Disturbed"

Eligibility for special education and related services is determined by the criteria listed in N.J.A.C. 6A:14-3.5(c). This decision is based on whether the student has one of the following fourteen disabilities listed in the regulation: 1) Auditory impairment; 2) Autism; 3) Intellectual disability; 4) Communication impaired; 5) Emotionally disturbed[1]; 6) Multiple disabilities; 7) Deaf/blindness; 8) Orthopedic impairment; 9) Other health impairment; 10) Preschool child with a disability; 11) Social maladjustment; 12) Specific learning disability; 13) Traumatic brain injury; 14) "Visual impairment". N.J.A.C. 6A:14-3.5.

Petitioners maintain that J.H. was misclassified as "emotionally disturbed" and that "specific learning disorder" was the most appropriate classification. N.J.A.C. 6A:14-3.5(c)(5) provides:

[1] As mentioned in Judge Wigenton's Opinion, the previous classification of "Emotionally Disturbed" was amended to "Emotional Regulation Impairment" under N.J.A.C. 6A:14-3.5(c). The definition of the classification remains unchanged.

> "Emotionally disturbed" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance due to:
>
> i. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
> ii. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
> iii. Inappropriate types of behaviors or feelings under normal circumstances;
> iv. A general pervasive mood of unhappiness or depression; or
> v. A tendency to develop physical symptoms or fears associated with personal or school problems.

Further, the student must demonstrate (a) one of the five listed symptoms, (b) over a long period of time, (c) to a marked degree, and (d) that this must adversely affect the student's educational performance. Id.

The District fails to analyze exactly how J.H. exhibits these characteristics, and instead simply concludes, "testimony offered by both Respondent's and Petitioners' witnesses at the due process hearing, unequivocally confirmed that J.H. exhibited each of the enumerated characteristics…"

Regarding the first enumerated characteristic: J.H. did not have an "inability" to learn, evidenced by her academic records. If, for argument's sake, J.H. did have an "inability to learn," it would be explained by "intellectual, sensory, or health factors" including her diagnosed specific learning disorder in math, auditory issues, anxiety, and depression.

Regarding the second enumerated characteristic: J.H. struggled to build and maintain interpersonal relationships with her peers due to her anxiety. In the mainstream education, J.H. did not relate to her peers due to the social anxiety, but this was not the case at ICCPC. She worked better in small groups and felt more socially

comfortable. This same behavior was witnessed at Purnell. In the appropriate environment, J.H. develops close relationships with her peers.

Regarding the third enumerated characteristic: records do not indicate that J.H. exhibited inappropriate types of behaviors or feelings under normal circumstances.

Regarding the fourth enumerated characteristic: a general pervasive mood of unhappiness or depression. While J.H. is diagnosed with Major Depression, this characteristic does not "adversely affect the student's educational performance." Again, as indicated in her performance during home placement and eventually at Purnell, J.H. performed well in the right, appropriate environment given her needs.

Regarding the fifth and final enumerated characteristic: while J.H. had fears associated with school, it is unfair to establish that it affected her educational performance. Although this fear and anxiety limited her ability to enter mainstream classes, she excelled and performed academically well in the appropriate environments.

Based on the analysis and evidence set forth, J.H. does not meet the characteristics for the classification of "Emotionally Disturbed."

III. The Appropriateness of the "Being Successful Program"

Not only did Petitioners disagree with the "Emotionally Disturbed" diagnosis, but they also firmly objected that "BSP" was an appropriate placement for J.H. In fact, this is one of the largest points of contention in this matter.

In the IEP dated April 6, 2017, the appropriate placement listed was the "Behavioral Support Program" at Mendham High School. After visiting, Petitioners and J.H. had concerns and reservations about the program and its appropriateness. A few of their concerns included that the program did not facilitate a college-track learning environment, that some electives had to be taken on a computer, and that students had

to walk through the mainstream, crowded hallways to get to their program. Furthermore, and contrary to the program's objectives, J.H. did not have behavioral issues, was not a disaffected learner, was not defiant in school, and did not refuse to attend school. J.H.'s inability to attend school was not a conscious decision and as such, should not be reduced to a "refusal" to attend school.

Petitioners discussed these concerns, but they were still not given any other options. In fact, the IEP presented at the May meeting was identical. In both proposed IEPs, BSP is listed as "Behavioral Supports Program" on several pages. The District's counsel's assertion that that was a typographical error (meant to say "Being Successful Program") on both IEPs and on several pages is certainly questionable; regardless, upon further review, the Being Successful Program is wholly inappropriate for J.H.

It is true that the brochure lists students manifesting anxiety and depression as a target population for the program. However, the brochure also stresses that the program is meant for the "disaffected learner" "due to lack of productivity and follow through." J.H.'s records do not indicate she is a disaffected learner or that she struggles with lack of productivity and follow through. In fact, she is on a college-track education and performs well in school given the appropriate environment suitable for her unique needs. These needs require that her classes are smaller unlike the mainstream general education classes. Dr. Leigh suggested that J.H. would not have to take general education classes unless it was for an IB or AP course and Ms. Costa, a social worker in the program, testified that J.H. would have to take any advanced placement course in general education classes. The brochure for Being Successful Program also states that a teacher bilingual in Spanish is on staff for students taking mainstream Spanish classes.

J.H. was on a college-track and needed advanced classes for her academic progress. This would require her to partake in the general education environment since advanced classes are not offered within the Being Successful Program. And, in order to attend those classes, J.H. would likely have to walk through noisy and crowded

hallways despite the fact her school anxiety is worsened by a large school with a lot of noise.

In addition to academically limiting J.H, the program is described to "[offer] structure and [focus] on strengthening student behaviors such as responsibility for one's self and school assignments, socialization skills, and self-confidence." To facilitate these goals, a point-based incentive program is set up for showing up on time, remaining alert, participation, respecting one' self and others, and accomplishments. These points allow students to qualify for a monthly field trip and other awards. The brochure also has a "The Being Successful Program Cont[r]act" that the student and BSP team signs; this states that the student understands these guidelines and regulations are to "improve [their] self-discipline and educational practices" and should they "choose not to follow the BSP procedures/guidelines, [they are] aware there will be consequences that will directly affect [their] education and independence during [their] school day."

The descriptions and contract within the brochure confirm that the premise of this program is behavioral-oriented to correct behavior issues of concern. However, as indicated in J.H.'s academic records, she does not struggle with self-discipline, respect, or completing her work. She struggles with depression and anxiety that are not willful behaviors and cannot be corrected through a point-based system that is described to correct behavioral issues with self-discipline.

While the BSP is completely inappropriate for J.H., the program also would not be the least restrictive environment for her. As mentioned, J.H. would have to take general education classes for advanced learning, deal with noisy and crowded hallways in a mainstream environment and take an online gym class to avoid the mainstream gym class.

Therefore, the Being Successful Program was not an appropriate placement.

IV. The District's Stay-Put Obligation

The IDEA sets out a "Stay-Put" provision. 20 USCA § 1400, et seq. Stay-Put acts as an automatic statutory injunction to prevent a change to a student's placement that is in effect at the time the parents invoke the dispute resolution procedures. See C.T. and J.H. o/b/o of J.H. v. Cherry Hill Twp. Bd. of Educ., EDS 10598-09, final decision, (Nov. 9, 2009), https://njlaw.rutgers.edu/collections/oal/, (citing Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996)). The purpose of this provision is to maintain the status quo for the student while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270-71 (D.N.J. 2006). N.J.A.C. 6A:14-2.7(u), the New Jersey counterpart of the "Stay-Put" provision provides:

> Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program, or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to (m) above or as provided by U.S.C. § 1415(k)4.

The "then-current educational placement" must be determined. If "the dispute arises before any IEP has been implemented, [that placement] will be the operative placement under which the child is actually receiving instruction at the time the dispute arises." Northfield City Bd. of Educ., 2020 U.S. Dist. LEXIS 97184 *34, (citing Drinker at 867). In the present matter, the "then-current educational placement" is home instruction due to the 504 Student Accommodation Plan.

Generally, home instruction is a stop-gap measure, to be used "in limited circumstances and for a limited time." T.D. o/b/o of J.D. v. Gloucester County Vocational Bd. of Educ., EDS 05282-19, final decision, (May 13, 2019), https://njlaw.rutgers.edu/collections/oal/, (citing B.K. v. Princeton Regional Bd. of Educ., EDS 4813-13, final decision, (April 15, 2013)). This is primarily because of an obligation to place a child in the least restrictive environment; home instruction is a more restrictive

environment. However, each case must be analyzed by its own facts. In the instant matter, J.H.'s disability manifested in a serious school avoidance. Therefore, home instruction was appropriate as a stay-put measure until the dispute over the IEP was resolved. After all, home instruction is better than no instruction.

As such, the District had an obligation to continue J.H.'s home instruction until an IEP was in place under the IDEA's "Stay-Put" provision.

Unilateral Placement at Purnell

The first step in determining whether a parent is entitled to reimbursement under a unilateral placement theory is whether a school district provided the parent's child with a free appropriate public education; if the school district provided a FAPE, the parent is not entitled to reimbursement. N.J.A.C. 6A:14-2.10(a); S.N. v. Washington Twp. Bd. of Educ., No. 11-3876, 2012 U.S. Dist. LEXIS 147606, 2012 WL 4753428, at *1, *2 (D.N.J. Sept. 27, 2012). The next steps as per unilateral placement analysis examine whether the unilateral placement was appropriate and whether the parents complied with the notice requirements under the IDEA and New Jersey law's regulatory equivalent. See K.S. & M.S. v. Summit Bd. of Educ., 2014 U.S. Dist. LEXIS 102672 *20.

When a district fails to satisfy the statutory mandate and provide a FAPE, parents have the option to make a unilateral placement when they are dissatisfied and receive reimbursement for a unilateral placement; however, this remedy first requires parents to meaningfully engage in the process. Burlington v. Department of Educ. of Commonwealth of Mass., 471 U.S. 359, 370 (1985); T.R. v. Kingwood Township Bd. of Educ., 205 F. 3d 572, 577 (3d Cir. 2000).

A school board of education will pay for a child's private school tuition when the child is placed in, or referred to, such a school by the State or the local agency as a means of complying with its legal obligations. See 20 U.S.C. § 1412(a)(10)(B)(i). However, when a parent places a child into private school unilaterally, a court may

require reimbursement where there is compliance with standards set forth in 20 U.S.C. § 1412(a)(10)(C)(iii), which states, in relevant part:

> The cost of reimbursement [for unilateral private school placement] may be reduced or denied:
>
> (I) if--
>
> (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);
>
> [Ibid.]

This is codified as N.J.A.C. 6A:14-2.10(c) in a manner consistent with the above federal regulation.

When reviewing unilateral placements, ALJs typically strictly enforce notice requirements against parents. See D.A. ex. rel. R.A. v. Haworth Bd. of Educ., EDS 12450-07, final decision, (Feb. 15, 2008), https://njlaw.rutgers.edu/collections/oal/, (denying reimbursement to parents who did not sign the proposed IEP but also did not express their dissatisfaction and failed to give the district proper notice of their intent to unilaterally place the student). See also M.S. v. Mullica Twp. Bd. of Educ., 485 F. Supp. 2d 555 (D.N.J. 2007), where the District Court affirmed the ALJ's decision to deny a parent of a preschool disabled child from being reimbursed for a unilateral placement. The parent's actions were determined unreasonable after the parent insisted on an out-of-district placement, refused to consent to reevaluations, and prevented the district from implementing the recommendations of the independent evaluator.

The discussion and analysis above already concludes that the District failed to provide J.H. with a FAPE. Thus, it is prudent to examine whether the unilateral placement was appropriate and whether the parents complied with the notice requirements.

The Petitioners timely notified the District of their intent to unilaterally place J.H. in a more appropriate setting should they not work out a proper arrangement with the District. This notice is indicated in emails from Petitioners' counsel to the District's counsel dated May 22, 2017, May 26, 2017, August 18, 2017, August 24, 2017, August 26, 2017, and August 29, 2017 in addition to letters dated August 26, 2017 and September 16, 2017. Although these emails and letters were not responded to by the District, they unequivocally indicate that notice was provided in advance of 10 days prior to J.H.'s removal.

It is also evident that Purnell was an appropriate fit for J.H. and her specific emotional and educational needs. Megan Du Vall, her counselor, provided testimony illustrating the appropriateness of the placement. Although Ms. Duvall did not review the IEP, she met with J.H. weekly and observed noticeable changes. For instance, in her first month, J.H. was very anxious about coming to the school and so, kept to herself; however, by the next month, J.H. was making friends and putting herself out there. (Transcript of August 29, 2018, 31:5-25; 32:1-8). Further, J.H. adjusted well, performed well in school, was not stressed about school work, and worked on her school social anxiety. (Transcript of August 29, 2018; 33:21-22).

J.H.'s anxiety related to a large high school and auditory issues were also addressed with her placement at Purnell. Ms. Du Vall described Purnell as a small environment with about 58 girls; the classrooms are "between five and it gets as big as 20 if that's a new seminar, but that only meets twice a week." (Transcript of August 29, 2018; 33:10-20). In the situation that J.H. may become stressed, or need a break, she

can go to the dorm room, which students are assigned even if they are not residential, the health center, or quiet rooms. (Transcript of August 29, 2018; 8-15:1-12).

Moreover, in addition to her emotional needs, J.H.'s educational needs were met at Purnell. Unlike the Being Successful Program, Purnell is a college preparatory school, so the classes were geared towards college and academic advancement. (Transcript of August 29, 2018; 8-15:1-12). According to Nicole Dowd, J.H.'s math teacher and advisor, J.H. was a conscientious student, a good listener, and performed well in school, all signs that reflect that Purnell was appropriate.

Based upon the foregoing, I **CONCLUDE** that the District did not offer FAPE in the LRE for the 2017-2018 school year, and, that the District violated the IDEA thereafter, and that the Petitioners' amended due process petition should be **GRANTED.**

ORDER

It is hereby **ORDERED** as follows:

1. The District shall reimburse Petitioners the cost of tuition and fees at the Purnell School for the school year 2017-2018; and,
2. The District shall reimburse Petitioners the cost of tuition and fees at the Purnell School for the school year 2018-2019; and,
3. The District shall reimburse Petitioners the cost of transportation to the Purnell school for the school year 2017-2018; and
4. The District shall reimburse Petitioners the cost of transportation to the Purnell school for the school year 2018-2019; and
5. The District shall amend the IEP to provide for placement at the Purnell School.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2008) 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 (2018). 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 Programs.

August 10, 2021

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

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