



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**DECISION**

OAL DKT. NO. EDS 1080-11

AGENCY DKT. NO. 2011 16755

**L.R. ON BEHALF OF J.R.,**

Petitioner,

v.

**CAMDEN CITY BOARD OF EDUCATION,**

Respondent.

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**Jamie Epstein, Esq.,** for petitioner

**Lester Taylor, Esq.,** for respondent (Florio, Perrucci, Steinhardt & Fader,  
attorneys)

Record Closed: June 7, 2011

Decided: August 1, 2011

BEFORE **LISA JAMES-BEAVERS, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

This special education case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1401 to 1484(a). In this case, L.R. filed a petition for due process on behalf of her daughter J.R. seeking an order that the Camden City Board of Education (“the District”) change J.R.’s classification; pay for an independent neurological examination, an independent psychiatric examination, and a Functional

Behavioral Assessment; and provide J.R. with an appropriate Individualized Education Program (IEP). The District contends that the IEP, signed April 1, 2010, was appropriate and reasonable. On February 2, 2011, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law for final determination, and in accordance with 20 U.S.C.A. § 1415 and 34 C.F.R. §§ 300.500 to 300.587, at which time it was requested that an administrative law judge be assigned to conduct a hearing. The director of the Office of Administrative Law assigned this administrative law judge to hear the case. N.J.S.A. 52:14F-5(o).

The first day of hearing was held on March 14, 2011. Initially, petitioners moved to dismiss the petition and find in their favor because the District did not answer the complaint with specific responses within ten days as the statute requires. The motion was denied because the District answered the complaint, although not with the specificity petitioner believed was required. The additional dates of March 30, April 5, and April 13, 2011, were agreed to by the parties at the hearing. On April 5, 2011, Mr. Epstein called to inform the court that his client L.R. had an emergency with her other child, and so Mr. Epstein did not come to the hearing. I requested that he come to conclude cross-examination of a witness who was present for the hearing. He appeared without his client and his client was offered the opportunity to listen to a CD of the proceedings later. On April 13, 2011, the parties appeared and Mr. Epstein made a motion for summary decision, which was actually a motion to dismiss due to the Board's not meeting its burden to demonstrate that it provided J.R. with a free appropriate public education (FAPE). The motion was denied and additional hearing dates were scheduled for May 6 and May 13, 2011. The hearing did not take place on May 6, 2011, but proceeded on May 13, 2011. After hearing all of the testimony and considering all of the evidence presented in that regard, as well as Mr. Taylor's written summation, I closed the record on May 29, 2011. However, subsequently I received a letter from Mr. Taylor saying that he inadvertently failed to provide Mr. Epstein with a copy of his summation. Mr. Epstein provided a written summation on June 7, 2011, upon receipt of which I closed the record.

## **FINDINGS OF FACT**

The following is undisputed and is **FOUND** as **FACT**. J.R., who was born on November 10, 2003, is the seven-year-old female child of L.R. They reside in Camden, Camden County, New Jersey. At the time of the hearing J.R. attended first grade at the Dudley School in Camden. When she was three years old, J.R. had a Pre-School Learning Evaluation by Belinda Howe, certified learning disabilities teacher/consultant, who indicated that J.R. was suspected of exhibiting delays in cognitive and speech and language development and exhibited characteristics associated with “autism.” In September 2007, when J.R. was almost four years old, she had a Social Evaluation, which indicated that that J.R. exhibited moderately low adaptive behavior skills for her chronological age, and a Speech-Language Evaluation, which indicated that J.R. showed many sensory seeking behaviors generally associated with the spectrum of autism.

J.R.’s current IEP was drafted on April 1, 2010. (R-1.) Her most recent evaluations were a Psycho-Educational Evaluation and a Speech Evaluation that were completed in May 2009 when J.R. was five years old. In July 2009 she had a Speech Language Evaluation, which was also considered in formulating J.R.’s IEP. She received a Neurological Evaluation in November 2007, but it was not at the request of the District. The neurologist, Dr. James Wark, requested that his evaluation be followed by an MRI of the brain and other tests and asked that J.R. return in three months. The District did not follow up on the requests. Dr. Wark concluded that J.R. has pervasive developmental disorder not otherwise specified (PDD NOS) and would benefit from an autism program providing techniques such as applied behavioral analysis. J.R.’s disability category was noted in the IEP as “autistic” and her program was Autism Special Class. J.R.’s mother L.R. signed off on the IEP on April 1, 2010.

## **SUMMARY OF TESTIMONY**

### **Dr. Jonathan Ogbonna**

Dr. Jonathan Ogbonna testified that he is the director of Special Services for the Board. He served as a principal before 2001. He holds many certifications, including Special Education Teacher, Supervisor of Education and School Administrator.

Regarding J.R.'s classification, Dr. Ogbonna said that there is no specific classification in the Code for pervasive development disorder. (R-5.) PDD is within the autism spectrum disorder. J.R.'s disability is autism. He does not know who paid for Dr. Wark's evaluation. The child study team relied on Dr. Wark's statement that J.R. could benefit from an autism program. In reviewing J.R.'s 2008 IEP, he noted that the parent, L.R., signed off on the IEP and that she noted no behavioral problems in J.R. that were causing her concern. Her primary concern was to see improvement in overall speech and language development. (R-4.) The child study team had not brought to Dr. Ogbonna's attention any behavior or discipline problems with J.R. J.R. was evaluated in February 2008 to follow up with the report. J.R. did not go to a subsequent appointment scheduled at Cooper Hospital.

Dr. Ogbonna testified that before L.R. filed the petition, he had received no complaints from L.R. regarding J.R.'s classification of autism in the IEP. In fact, he received no complaints at all regarding J.R.'s behavior or any of the other issues in the petition. He reviewed J.R.'s file and did not see where L.R. had made any complaints to the child study team members either. The case manager on the team retired. He spoke to J.R.'s special education teacher about the petition. However, regarding the allegation that the District failed to perform a psychiatric evaluation, he and the child study team did not believe that one was warranted. There were no discipline or behavior issues in the IEP that would indicate that there were mental issues that had to be evaluated. J.R.'s special education teacher, Ms. Watkis, said that J.R. is "like an angel" in the school and is progressing well. She had no reports regarding behavior outside of school. She had no information or reports that said that her behavior

interferes with the ability of others to learn. J.R.'s report cards and progress reports indicate no discipline problems.

Dr. Ogonna further testified that the plan for J.R. as set forth in the 2010 IEP is that J.R. remain in self-contained classes and receive speech services. The report of Ms. Watkis gives J.R.'s previous history and what is being done. He explained that the percentages noted on page seven of the IEP are goals that the team wants the student to reach. It depends on the child's needs. An IEP can be amended at the request of a parent at any time. J.R. receives an extended-school-year (ESY) program, because all children with the classification of autism qualify for ESY. If children with that classification do not attend an ESY program they tend to regress. Page eleven notes that J.R. is to have inclusion with nondisabled peers to the extent possible. J.R. is distractible, so she is in the autism special class. J.R. is in a self-contained classroom at the recommendation of Ms. Watkis. Dr. Ogonna did not receive any complaints that J.R. was not being educated in the least restrictive environment or that she was not receiving an appropriate education.

Regarding petitioner's expert, Dr. Ogonna testified that Dr. Kathleen McCabe-Odri observed J.R. in January 2011 after the due process petition had been filed. Petitioner's attorney did not request that an expert be allowed to observe and evaluate J.R. Rather, Dr. Odri came in to the school to observe and did not identify herself as an expert hired by Mr. Epstein or L.R. regarding the petition.

On cross-examination, Dr. Ogonna noted Myra Charity-Morton's evaluation that said that J.R. has severe delays in language and speech and sensory-seeking behaviors. (R-5, 9/27/07 Speech Language Evaluation at 3.) It continued that J.R. would benefit from an intensive language-based and highly structured preschool setting, and said, "Behavioral modification is indicated." (R-5 at 3.) He also noted the evaluation by Belinda Howe, M.Ed., LDT/C, dated September 27, 2007, which set forth J.R.'s cognitive delays and self-stimulating behaviors. (R-5, Pre-School Learning Evaluation at 5.) Dr. Ogonna saw nothing that indicated that the District referred J.R. to Dr. Wark. Dr. Wark wrote his report to Glenda Rabie, M.D. Dr. Ogonna did not know who she is, but she was not a member of J.R.'s child study team. He agreed that

Dr. Wark said that J.R. did not have all of the diagnostic features of autism, so he thought her diagnosis is PDD NOS, and he continued that she will, however, benefit from an autistic program providing techniques such as applied behavior analysis. He agreed that there was no applied behavior analysis in J.R.'s IEP. Dr. Ogbonna did not know whether the tests that Dr. Wark recommended in his report were ever done. (R-5.)

Dr. Ogbonna continued on cross-examination that J.R. began to receive services from Camden on July 2, 2008, ten months from the re-evaluation. He explained that he has 3,000 special education students in the District. Regarding the petition, on January 21, 2011, he received a letter from the Office of Special Education Programs (OSEP) advising of the petition, but did not receive the petition itself. He then called Ms. Ehling at OSEP and asked her to fax the petition to him. She faxed it to him the same day. He learned during a conversation with her that the petition had been received at OSEP on December 23, 2010. When he received the fax from OSEP, it contained only seven pages (R-7 at 9), not the entire twenty-nine pages referenced in Mr. Epstein's cover sheet. (R-7 at 10.) He saw that the petition referred to documents including the IEP and Dr. Wark's evaluation, but he did not inquire as to where those pages were. He denied receiving the subpoena for documents as well. Camden has not requested a more recent neurological evaluation since Dr. Wark's. Dr. Ogbonna testified that it is not mandatory that a district get a neurological evaluation every three years. J.R. was doing very well. He has seen her in her class in school visits, but not since the petition was filed. Regarding J.R.'s diagnosis, according to the Code, autism is the same as PDD.

Although page four of J.R.'s IEP indicates that J.R. has inappropriate attention-seeking behaviors, Dr. Ogbonna testified that there has been no use of applied behavior analysis to address these items. (R-1 at 4.) Also, although J.R.'s IEP indicates that "taking care of J.R.'s (special needs) will take too much teacher attention away from the other children in the general class setting" and "J.R. tends to be distractible . . . and this could be disruptive to her peers," he said distractibility is not the same as behavioral issues. Dr. Ogbonna testified that J.R. is in a small specialized classroom for communication problems and developmental delays, not behavioral issues. J.R. has

the opportunity to perform with other non-disabled children in assemblies. Dr. Ogbonna continued that J.R.'s IEP indicated that she will participate with non-disabled peers in all extracurricular activities and non-academic activities. (R-1 at 12.) When questioned as to the plan for such activities and whether it is a goal, he indicated that goal one under Social/Emotional is to cooperate with peers during group activities. The IEP does not mention any specific setting regarding where J.R. would get that exposure to normal to non-disabled peers.

Dr. Ogbonna testified that he trains the staff to determine success criteria. When questioned as to the "80 percent" written in the IEP as criteria for fifteen different objectives, he said 80 percent should be the reasonable level of advancement in one year. The IEP does not set forth how teachers are supposed to keep data. He believes they enter the data into the system every day. The system is called the Genesis system, where at the end of the quarter the data is processed for a progress report. A student may get a four out of five, and that score will be placed in the data entry system. The teacher will enter the data and the parent can see it, but the teacher cannot print it out. This way it cannot be tampered with. At the end of the marking period the computer calculates the entries that become the progress report and report card. In the classroom there are five children, one teacher, and two paraprofessionals.

The teachers in charge of the class implement the IEP. Dr. Ogbonna does not believe that J.R. needs a psychological evaluation, because she does not have behavioral and psychological issues. Dr. Ogbonna acknowledged that Agnes Afolabi, N.S., certified school psychologist, did the Psycho-educational Evaluation. Dr. Afolabi noted that J.R. tested in the average range, which is thought to reflect disruptive or acting behaviors. Further, the tests showed that there may be indications of an underlying emotional problem. Despite the tests, Dr. Ogbonna testified that J.R. does not need a psychological evaluation, even though the last sentence in the first paragraph of the report indicates that J.R. sometimes engages in behaviors that are considered strange or odd, and at times she seems disconnected from her surroundings. (R-5, Dr. Afolabi's evaluation, at 4-5.). Dr. Ogbonna said that the child study team evaluated J.R. and made its conclusions and he agreed with them. He has been in education for thirty years. Dr. Ogbonna continued that J.R. has never been

assessed or evaluated regarding having classes with children in the regular education program. He said that the re-evaluation comes this year and, by regulation, J.R. did not have to be assessed with regard to inclusion, but she will be. She is currently placed in a self-contained classroom. (R-1 at 2.) Dr. Ogbonna indicated that J.R.'s actual placement outside of a self-contained classroom is zero percent. He believes the child study team considered general education, but decided against it.

Dr. Ogbonna further testified that the 2007–2008 IEP states that the reason for the action taken was that J.R. was referred for evaluation because of severe delays in development, which includes communication, her mother's primary concern, and the bizarre behavior and attention delays that appear to be intrinsic. The District did not order a psychiatric evaluation regarding behavior because it was not necessary. The child was progressing well. Dr. Wark recommended a program with behavior analysis, but that analysis was not done. Because the 2007–2008 IEP was obtained in response to the court order for supplemental discovery documents, Dr. Ogbonna was asked whether he had involvement in obtaining the documents. He testified that he sent one of his superiors to go around and gather them. He found no notes from J.R.'s speech therapists. He does not know whether they keep such notes. Similarly, Dr. Ogbonna did not know whether the occupational therapist kept notes on J.R. He said J.R.'s teacher should keep notes, but he believes the notes go home to the mom every day.

Dr. Ogbonna continued to testify that J.R.'s mother, L.R., never explained what bizarre behavior she was speaking of in 2007–2008. He believed that Dr. Wark's report was not conclusive regarding a diagnosis. The characteristics of an autistic child include flapping hands, walking on toes and language problems, which a layperson would call bizarre, but they are not actually bizarre. The Functional Behavioral Assessment (FBA) was not done because the district does an FBA if there are behavior issues in class. J.R.'s behavior has been great, so there has been no need for an FBA. She is also progressing academically. He did not authorize an FBA for the 2007–2008 school year IEP. When a child's behavior is impeding the progress of other students or affecting academics and social interactions in the class, an FBA may be necessary to resolve problems in progress. Regarding a March 31, 2010, incident mentioned by J.R.'s teacher, Ms. Watkis, in which J.R. ran out and lifted up her shirt, opened up the

bathroom door without respecting the privacy of another, and was overly friendly, Dr. Ogbonna was asked if such conduct rose to that level he mentioned. Dr. Ogbonna said it did not. The mother never expressed disagreement with the IEP on the goals, the evaluations or anything else noted. The parent can obtain an independent evaluation if the district refuses such an evaluation, but L.R. did not. He noted that J.R. is only distracted in a large environment. J.R.'s report cards and progress reports are the only measure of her progress.

### Samantha Watkis

Samantha Watkis testified that she is a special education teacher in the Camden City School District. She is a certified teacher of the handicapped and also has her principal's license. She's been with the District for eleven years. She also held the job of autism grant facilitator, a job in which she facilitated the use of a \$250,000 grant and helped implement programs. J.R. has been her student for the 2009–2010 and 2010–2011 school years. There are five students in the class with J.R., three paraprofessionals or instruction aides, and her. She met J.R. in September 2009. J.R. had a lot of “stimming” behaviors, which is a characteristic associated with autism. She would flap her hands and move her body from side to side in a self-stimulating manner. She also had a severe communication impairment, in that she was very hard to understand. Watkis recalls discussing with J.R.'s mother her concerns around April of last year. When J.R. was first enrolled, she was classified as PDD-NOS. PDD and autistic are one and the same. During the first year, Ms. Watkis did not see strange behavior, with the exception of the stimming. The stimming behaviors slowed as of 2010. J.R. did not seem at all disconnected from her environment.

Watkis testified that she tries to write in a communication log every day. She uses it to explain what her students have done. The document goes home with the student. The parent can write back on the log and ask questions. A parent can also call her on her cell phone. Her relationship with J.R.'s mother, L.R., is very good. She has had no complaints. L.R. participated in the development of the IEP dated April 1, 2010. She recalled that speech was the main concern. Behavior was a concern in J.R.'s home around March 2010. L.R. had someone come from the Division of

Developmental Disabilities (DDD) and work with her and J.R. The behavior was brought to Watkis' attention because an aide saw J.R. next to a student and the student had scratches on her neck. She did not see J.R. scratch the student's neck, but J.R. had a guilty look. J.R. did not have any behavioral incidents before or after that one. The DDD is an organization that provides resources for children with autism. The DDD shows students what to do instead of the negative behavior. It is not the same as an FBA.

Watkis testified that, in class, J.R. is motivated to learn and to do a good job. She gets along very well with her peers and has conversations with them. She learns social skills three days a week and has learned to wait her turn to speak and to pass things gently. She has difficulty articulating words, but she is improving. Watkis observed J.R. lift her shirt last school year. Another student wanted to show his character undershirt. J.R. would do the same thing as attention-seeking behavior. She was not showing skin at the time and had on an undershirt. Regarding her reference to the incident on page four of R-1, she said that five- and six-year-olds do such things, but she wanted to make sure that J.R.'s instruction aides would redirect her. She did not see the action as anything sexual. Regarding the reference to J.R. copying inappropriate behavior of her peers, J.R. will sneeze or cough if another student sneezes or coughs. Again, it is an attention-seeking behavior. Watkis had a student who would run out of the classroom, and J.R. would do that too.

Watkis further testified that J.R. gets homework every night, including weekends, and she completes it and gets stickers when she does a good job. She had never slacked off until very recently. Regarding Ms. Watkis' reference to J.R. opening the bathroom door with no respect to peers' privacy, she said that J.R. is very inquisitive and wants to know what is going on. She needed to learn how to knock. Watkis first observed this behavior in September or October 2009. It was infrequent, especially when J.R. understood not to do that. The behavior became less frequent as the school year progressed. The behavior was not exhibited at all during the 2010–2011 school year. Regarding Ms. Watkis' comment on page four of R-1 that "[J.R.] can be overly friendly with adults," she was referencing that J.R. stands very close to other paraprofessionals and plays with their hair. These are all females. She would reach

out and touch them on the behind sometimes, but that was because of her height and where they were standing. Watkis put it in the IEP so that the next teacher can keep redirecting J.R. and keep teaching J.R. that rather than touch, she can ask for permission for a hug or just call the adults by name. J.R. did not know her alphabet when she came to the school, but now knows her letters and reads. J.R. reads the books that Watkis assigns. J.R. was not able to count when Watkis first met her. She can count now and tell time. She understands words in English and in Spanish. She plays various sports and interacts with her peers, waiting her turn, sharing and calling them by name.

Watkis continued testifying, stating that J.R. is in a self-contained classroom and she gets exposed to regular education students two days per week and she takes gym for fifty minutes each day. She also gets inclusion time during school activities, such as when they collected cans for the homeless program and when they do things like Hula-Hoop, face painting, etc. She was also on stage in a winter concert. She rehearsed for approximately two weeks with other students. Her behavior and reaction to other peers in the regular education program was great. When she exhibited stimming behaviors, Watkis did not consider the stimming to be inappropriate behavior. J.R. remains in a self-contained class due to her communication deficits. Sometimes being happy and excited makes her exhibit stimming behaviors, as if she is anticipating something. Another inclusion opportunity was the participation in the Hispanic Heritage event. She performed with her special education peers, but the general education students were involved with the event. Rehearsals were inclusive and J.R. participated in approximately ten of them. When asked how J.R. interacted with general education peers, Watkis said she sat patiently in the auditorium and waited her turn. Although more events are planned for this year, they are not identified by dates and times because they are contingent upon scheduling, availability and appropriateness. Watkis wrote the IEP requesting that there be inclusive opportunities when they are appropriate. Watkis stated that she uses strategies to bring about positive behaviors. The IEP goes on to note that "J.R. will participate with non-disabled peers in all extracurricular activities and non-academic activities." (R-1 at 12.) Applied behavior analysis (ABA) is a theory of behavior that if you give a child a reward for positive behavior, you will increase that behavior. J.R. loves to learn, so minimal behavior

modifications are necessary. Watkis uses edibles, such as popcorn, and verbal praise. Watkis developed the social/emotional goals set forth at page eight of the IEP. (R-1.) Those that J.R. has not yet met are noted and the percentage is the expectation or benchmark. Eighty percent means that J.R. did not achieve mastery, but she is progressing. Watkis assesses progress toward the goals every day. The goals are written on card stock and kept in the classroom. Ms. Watkis has had interactions with J.R. and her mother out of school; they went to church together once, and went to a pumpkin patch once this school year. Regarding the social/emotional goals, Ms. Watkis testified that she did not develop new goals, but carried them over from last year because J.R. did not achieve mastery at those levels. When it says 80 percent criteria, it is an evaluation meaning satisfactory in the Board's grading system. The 80 percent on J.R.'s IEP indicates that she was continuing to reach the goal. Once a student achieves mastery, then the team changes the goals or increases the goals. Watkis keeps J.R.'s goals in a file folder. The goals she is working on with J.R. are in the front of the folder, those that they are maintaining go in the middle, and the goals that they have already reached are in the back.

Watkis reviewed the progress report. (R-9.) It indicates the following grade scale: BM = a grade of "B" modified, X = Demonstrates ability to complete the task, M = Mastered the task, and N = Needs strengthening. Exhibit R-10 is the IEP progress report, which is given each quarter. It shows that J.R. was increasingly getting better. R-15 gives examples of what J.R. could do before coming to Watkis' class in 2008–2009. R-14 indicates activities completed in class in 2010–2011. Watkis' supervisor was present when J.R. made one of the pictures in 2011.

Upon cross-examination, Watkis noted that there is a discrepancy with the IEP start date. Initially the IEP notes July 1, 2010, as a start date, but the statement from the Special Educational Services says the start date is August 14, 2010. Language, math and social studies are to begin September 8, 2010. She believed the ESY begins in July, and that occupational therapy was supposed to start in September 2010. She does not teach in the ESY programs. She does not know whether J.R.'s goals and objectives are worked on during the ESY. She is responsible for the student during the school year. She believes that the ESY ends on August 14, 2010, and that is where the

date came from. She acknowledged that the IEP indicates that J.R. has four classes, all self-contained with four other children, the aides and Ms. Watkis. J.R. is taught occupational therapy and speech both in class and as a pullout. Other children in the class have autism spectrum disorders.

Watkis would not identify J.R.'s behaviors as inappropriate because she believes that a behavior is only inappropriate if it is frequent, long-lasting, or impedes the learning of others. She acknowledged that self-stimulating behavior, such as hand flapping, creates a problem in an inclusive setting with non-disabled peers. Watkis has not asked for a psychological evaluation to investigate those behaviors and does not have a current neurological evaluation. She had no reason for either evaluation. The self-stimulating behaviors that J.R. engages in are exhibited when she giggles, moves from side to side, and sways on occasion. The causes of those were not evaluated. Watkis found such behavior acceptable for children like J.R. The other inappropriate behavior J.R. exhibited was inappropriate touching last year. The behavior was not evaluated by professionals to determine if it could be modified. She did not collect data on any of the behavior. Watkis acknowledged that a child may suppress inappropriate behavior due to the close supervision she receives in the highly controlled environment of a self-contained class. Because Watkis believed the inappropriate behavior was infrequent and inconsequential, she did not refer it to the child study team. Regarding J.R.'s opening the door to the bathroom, it was inappropriate, but not unusual for a five-year-old. She never asked a professional to allow other causes of the behavior.

Watkis testified that she believes that the occupational therapist and the speech teachers keep a therapy log and write the progress report quarterly. She disagreed that the criteria of 80 percent that was carried over from J.R.'s last IEP was arbitrary since it did not have a baseline. She believes 80 percent is reasonable given J.R.'s level of functioning. Although J.R. did not achieve success criteria last year, they did not modify the criteria because she was close to mastering. Watkis agreed that "cooperating with peers" was not a goal stated in objective and measurable terms. Data is not collected on J.R.'s performance on a regular basis, only on progress reports quarterly. Watkis further agreed that there are no goals and objectives in the IEP related to J.R.'s functioning with non-disabled peers. She also agreed that there was no time scheduled

in J.R.'s IEP related to J.R.'s functioning with non-disabled peers. She has gym with non-disabled peers twice per week, but the IEP does not set forth a plan for what aides are to do when J.R. is with non-disabled peers. J.R. has gym with approximately twenty other students and one teacher, with no plan of how Watkis' students will integrate with the other twenty. There is no behavior plan to address J.R.'s inappropriate behaviors out of class. The subjects of art, music and computer are taught in the self-contained class.

Regarding the card system, Watkis said that she just changed to that procedure in September 2010. She has had a binder of items in her shed. She did not tell the District that she had it. She would not go get it because there is an issue with squirrels in her shed. The principal told her to get everything out of the classroom at the end of the school year. She works on the goals and objectives daily. She does not keep a record every day; however, progress is reported quarterly. The goal to cut shapes with scissors, she admitted, was not measurable or observable. If the shape J.R. cut out looked like the shape requested, Watkis noted that J.R. had mastered it. Although Watkis generally corrects J.R.'s behavior through redirecting her, the redirecting is not noted as a mechanism in J.R.'s IEP. On page two of R-14 (Tab N in binder), Watkis wrote on J.R.'s work to explain what J.R.'s cue was and her response. She wrote, "Teacher asked, 'Can you make a picture?' [J.R.] said, 'Yes' and drew a cat on her own." She signed the document on February 3, 2011. She gave the document to her supervisor, Henrietta Ballard, but Ballard did not ask her to do it. Ballard asked if she had any samples of J.R.'s work. J.R. made the sample in front of her. On page three of R-14, she asked J.R. if she could spell "carrot" and J.R. wrote it in her way, "carat." This was also dated the same day and turned over to Watkis' supervisor. Pages four and five of R-14 were not prepared in front of Ballard. Page six of R-14 is the back of page five. J.R. wrote her name on the back, but Watkis wrote the date of December 16, 2010. On January 31, 2011, J.R. wrote her name on page seven of R-14. Watkis wrote on J.R.'s work that she had learned to write on lined paper with minimal assistance. She turned that over to Ballard. The last page, page seven, of R-14, was done in the presence of Dr. Odri on February 1, 2011. Watkis wrote at the top that J.R. connected object amounts with the correct number. This sample was also given to Ballard.

Watkis further indicated that she agreed with the statement in Dr. Odri's report that J.R. would benefit from increased exposure to non-disabled peers when appropriate. She also told her that she had written her concerns to the building principal about the lack of inclusion in the IEP, but no changes occurred due to scheduling problems. When they tried to put J.R. in art, music or computer class with non-disabled peers, J.R. had a lot of stimming behaviors and inattention to her work. Watkis also told Dr. Odri that the school-contracted behavior consultant was no longer servicing the program. Watkis initially tracked student progress through ABA training during the prior year, but she determined it was inefficient and no longer does that.

Watkis mentioned that J.R. read 1,000 books this year, but she meant 1,000 steps, which is more like 1,500 books. Every day J.R. reads ten to twelve books with Watkis and her staff, and she reads another ten with her mother. Some of them she reads independently and out loud. There are about eight pages per book, with five words on a page. Her expressive language is understandable to her, but may not be familiar to others. Watkis was not aware that J.R.'s expressive language rated at one year, eleven months, old. J.R. reads the books independently with some scaffolding (an instructional technique in which the teacher models the desired learning strategy or task, provides support as students learn to do the task, and then gradually shifts responsibility to the students). This is so despite that J.R.'s language arts goal in her IEP is to read simple sentences fluently and her objective is to decode at least five out of ten words at the K grade level. (R-1 at 8.) The objective was the same last year, but her current level of performance on that objective is maybe 50 or 60 percent, with success criteria quantified at 80 percent. Watkis does not collect data on how many words out of ten words J.R. gets correct every day because it becomes cumbersome. She collects data at the end of the quarter. Watkis told L.R. that if she wanted a behavior specialist to come to the home, she could call a company and set it up. There is no plan to train J.R.'s parent to do what works with her.

Kathleen McCabe-Odri, Ed.D.

Kathleen McCabe-Odri, Ed.D., testified that she is a board certified analyst at the doctoral level. She works for Advance, Inc., a private practice that consults for children

with language and behavior disorders. She consults both with the school districts and directly with students. The majority of her work is with autism spectrum disorders. In consulting, she would review the IEP to advise and consult with families and schools. She uses principles of applied behavior analysis to treat students and privately run school districts. As the executive director and co-president, she develops curriculum and trains supervisors regarding applied behavior analysis. She develops behavior intervention plans, etc. Dr. Odri has a master's degree in special education with a focus on autism, and she notes that there are eleven areas of focus within the criteria for becoming a board certified behavioral analyst. She is certified nationally and recognized in New Jersey. There is no separate certification requirement for New Jersey. She was qualified as an expert in special education, applied behavioral analysis and autism.

In preparing her report, Dr. Odri reviewed the petition, the current IEP, the prior IEP and the original neurological and educational evaluations. She observed J.R.'s current level of functioning at school and at home. She observed J.R. for three hours at school. She spent one hour at J.R.'s home, interviewed anyone who has a relationship with J.R., and spoke with J.R.'s teacher, J.R.'s mother and J.R.'s grandmother. Dr. Odri proceeded to score in three data observations. J.R. scored very well. She was very engaged in a small group setting with Watkis and performed well. Dr. Odri's interview with Watkis indicated that Watkis did not have objective measurements to show her. Watkis had discontinued objective measurements after last year. J.R. was one of the top students in the class academically and behaviorally. Watkis said that the class did not integrate with non-disabled students in music, lunch or playground. When she asked if there was a plan to include J.R. with non-disabled students, Watkis said that there were scheduling problems. In short, inclusion was not occurring. When compared to her peers, J.R. was 90 percent engaged and her peer was 78 percent engaged. In a less structured lunch setting, J.R. was 80 percent engaged and responded with 89 percent accuracy to questions. To get the level of engagement, Dr. Odri just took note of whether J.R. responded, whether the response was accurate, and whether there was inappropriate behavior. This was not a Functional Behavior Assessment because that is a more in-depth study and observation period in order to assess a child's behavior.

Dr. Odri continued testifying that during the home observation, J.R. scored very well and was on task while working with her mother. J.R. engaged in some aggressive behaviors and some stereotypical behaviors when they were not working on an activity. Both the parent and the teacher reported that there was a contrast when the mother and the teacher were present. Dr. Odri recommended generalizing the school program to home so J.R. had structure and clear activities at home. She recommended regularly scheduled meetings between the home and school that set forth expectations for J.R.'s behavior, in addition to training workshops. The IEP summary indicated types of inappropriate behaviors. Dr. Odri's review of the current IEP was that there were blanket criteria of 80 percent accuracy without an explanation of how the percentage was obtained. She felt that the goals and objectives were sparse for J.R.'s performance level and not objective and measurable. She noted that the IEP repeated the goals from prior years. Skills that J.R. had mastered were repeated in the current IEP. Measurable goals are needed to assess the rate of mastery of certain skills. Regarding the 80 percent criteria, there is generally not one level of performance that would apply to every level of skill. Some skills may require 100 percent mastery; others may require 50 percent mastery, for social events. For a social emotion goal of "cooperating with peers," a percentage may not be the best measure of the skill. There was no data being collected and no baseline from which to determine progress. There were no evaluation procedures in the IEP. The only notable progress was shown in report cards and progress reports.

Dr. Odri testified that the IEP lacks specific goals for inclusion. J.R.'s classmates did not provide social opportunities or models for language. Such opportunities should be scheduled in the IEP. Criteria should be indicated for increasing a timeframe and a setting. The IEP goals and objectives should be measured while in an inclusive setting with academic supports. Dr. Odri recommended training for the staff because the work for the aides in the current classroom was going to be different from the work in an inclusive classroom. Watkis had told her that an aide was new to the program and she was responsible for training her. Consulting services are supposed to be provided to the team, but the service had not been in to train the workers on a regular basis. The behavior management plan would be required in order to train the staff on strategies to

assist and motivate J.R. Further, the staff should be trained on how to collect data and monitor J.R. There are no objective measurement strategies this year. The teacher and the staff should be able to interpret and assess progress.

Last, because the neurological evaluation classified J.R. as PDD, but the learning evaluation noted other concerns that could be caused by other underlying issues, she recommended that the District should rule out other issues and have a new neurological evaluation done. Updating the evaluations would offer insights into J.R.'s current educational needs. Also because J.R. is older now, she is much more able to be tested regarding her performance levels. Similarly, it was very challenging to test her using a psychological evaluation at a very young age. Testing her now would be useful for intervention strategies. Dr. Odri stopped short of recommending an FBA, and did not recommend it in her report of March 10, 2011. She said that an FBA is indicated to assess low-level behaviors that need increasing and to reduce problem behavior. Her observation did not appear to indicate interference with J.R.'s progress. They need to collect baseline data to determine if an FBA is needed.

Upon cross-examination, Dr. Odri said that when she met Watkis at the school, she introduced herself by name and said she was there on behalf L.R. From her observation, she could not classify the behavior she saw by J.R. as stimming. However, what she saw was brief and quickly redirected. She did not recommend an FBA. She did note the behaviors observed in her report because she did not observe them except on a low level. Watkis noted that in a prior year, a consultant came in on regular basis and worked in the classroom. Watkis said that one aide in a classroom had been trained, but the others were just hired or she was training them. The aggressive behavior she observed of J.R. at home was that J.R. attempted to pinch her mom and swat her mom's hair. She would have taken data to assess the reason and whether it was meant to be playful. J.R. did not demonstrate socially significant inappropriate behavior in the classroom. Both the parent and the teacher reported that J.R. had made significant gains, but there was no data to determine true progress. Regarding the criteria percentages, it is possible, but not probable, that the percentages would all be the same. It does not mean that the IEP is not providing FAPE.

Dr. Odri continued that the IEP is not comprehensive enough and that the goals and objectives should be increased to remove those that have already been met. J.R. was able to switch topics, and answer by color and function, and therefore, Dr. Odri recommended increasing the goals. She confirmed it was her testimony that inclusive opportunities were not provided, and that the failure to provide those opportunities in the IEP denied FAPE. Students should be educated in the least restrictive environment, but she still would need to know the appropriate level of inclusion. In J.R.'s case, there was no specific schedule for inclusion. It would need to be daily, based on Dr. Odri's observation of J.R. that she was the highest functioning child in the class. Assemblies and lunch had J.R. in the vicinity of non-disabled students, but not integrated with the other classes. Ms. Watkis' class goes to lunch and to assemblies as a group. Watkis told her that she needs assistance. The main deficiency in the IEP was the opportunity for inclusiveness. A psychological evaluation could address concerns about emotional issues that were not clear. These psychological tests are worthwhile to rule things out, because emotional issues could affect intervention strategies. The neurological evaluation is now three and half years old. J.R. was only four when it was done. Because J.R.'s language skills have increased, she will better be able to take the necessary tests. Placing J.R. in an inclusive setting could dramatically change her performance. Her levels of functioning may change. The IEP needs an inclusive transition program. Without data, one cannot get to a reasonable level of progress.

Jennifer Gonzalez

Jennifer Gonzalez testified that she is a speech therapist with the District. She has been J.R.'s speech therapist and is familiar with J.R.'s IEP. The last time she looked at it, however, was probably at the beginning of the school year. She was part of the IEP meeting and signed the IEP for J.R. on April 1, 2010, as the speech language specialist. She did the speech portion of the IEP at page seven. (R-1.) She came up with the benchmarks or short-term objectives by looking at J.R.'s abilities and creating appropriate goals. The percentage criteria were determined because J.R. should be able to master better language. Her current levels of functioning are not included. She measures progress toward the benchmarks by observation during therapy sessions. J.R. is required to use effective communication and wait her turn to speak. J.R. did not

have skills previously to greet people and speak her needs. J.R.'s progress toward her goals is reported in a progress report every quarter. She cannot write percentages or levels in the progress report because there is a drop-down menu from which she must select that only includes grades. (R-10 at Tab J.) The progress report indicates objectives, but there are no specific tasks associated with each objective. The team knows her tasks because she communicates them to the members. She spends a half hour with J.R. twice a week, in sessions with one other child.

### Henrietta Ballard

Henrietta Ballard testified that she is the supervisor of Special Education for the District. She has responsibility for secondary schools, mainly high schools. She has certifications in Special Education and as a Teacher of the Handicapped, K-12. About two months before she testified, Dr. Ogonna told her to go the Dudley School to pick up a folder of a student's work from Watkis. She was not sure whether the documents at R-14, Tab N, were all of the documents that she obtained at that time. She was there only long enough to get the folder. She denied being present when J.R.'s drawing was made. Watkis did not discuss with her the comments she had made on the papers. The documents were in a manila folder, but she does not recall how thick the folder was. She took it down to Ogonna and he made a copy. She did not have a conversation with Ogonna, except that he thanked her for getting the papers. They did not discuss the child or any legal issues regarding the child. She had no further involvement with this case.

### Joseph Ortiz

Joseph Ortiz testified by telephone that he became acting principal at the Dudley School in Camden in September 2010. J.R.'s parent was concerned about the services provided to J.R. He spoke to Watkis, J.R.'s teacher, and to Ogonna, her director. When asked about the policy or procedure regarding keeping student records, he said that there are folders secured in the guidance counselor's office. They keep transfer records, report cards, IEPs and any records that follow from school to school if a child transfers. There is a policy for keeping information related to a child's progress. Every

nine weeks, teachers provide information via report cards. Student-generated documents are not kept in the folder. They are retained by the teacher until returned to the student. The teachers' procedures for keeping documents vary from teacher to teacher. He was not involved with documents being requested from his school for this case. He did not recall anyone from Dr. Ogbonna's office requesting records. He does not recall Ms. Ballard coming to get records from Watkis or talking to Watkis about the need to gather documents that reference J.R. Such a request would have to come through the guidance office. He had no knowledge that Watkis had documents in her shed at her home.

Dr. Jonathan Ogbonna

As a witness for petitioner, Dr. Ogbonna testified that he signed the Certification on March 18, 2011, saying that he conducted a diligent search for documents. He went to the file room to check if there were records that had not been submitted. He went to the guidance counselor to check J.R.'s folder. Ortiz was not in that day. He spoke to the vice principal, picked up the folder and made a copy. He did not ask Watkis if she had more documents because at that time, he had been instructed to stay away from her while the litigation was pending. He believes that he sent someone else to get the records, possibly Special Services supervisor Dawn Selden. Everything that he found was packed up and submitted with the certification. He did not disclose the cards because he cannot control all that a staff member does. He does not know if Dawn got the documents that had been found under J.R.'s desk. He held meetings with staff members about the importance of maintaining all student records in the school. He told Ballard to get the papers Watkis had in the classroom regarding J.R. He did not instruct Watkis to have J.R. perform tasks. He does not know why Watkis wrote in the margins. He guessed that Ballard brought about forty pages of documents from Watkis, and they were faxed to the solicitor on February 3, 2011.

## CONCLUSIONS OF LAW

The Individuals with Disability Education Act (IDEA), 20 U.S.C.A. §§ 1400 to 1487, provides federal funds to assist states in providing an education for handicapped children. Receipt of the funds is conditioned on the state's compliance with the IDEA's goals and requirements. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). New Jersey assures all handicapped children the right to a FAPE under 20 U.S.C.A. § 1412(a)(1), N.J.S.A. 18A:46-1 et seq., and N.J.A.C. 6A:14-1.1. FAPE requires a school district to provide related services and supports that will enable the disabled child to benefit from the education. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 181, 102 S. Ct. 3034, 3038, 73 L. Ed. 2d 690, 696 (1982). Further, the IDEA mandates that the child's FAPE be "tailored to the unique needs of each handicapped child through an 'individualized education program' (IEP), which must be reviewed annually." Lascari, supra, 116 N.J. at 34. Accordingly, each New Jersey district board of education shall provide a free, appropriate public education program and related services for educationally handicapped pupils in the least restrictive environments. N.J.A.C. 6A:14-4.2(a).

Petitioner seeks relief as a result of Camden's failure to provide J.R. with a free appropriate public education in the least restrictive environment that is individualized to meet her specific needs. Each request will be addressed in turn. I have carefully weighed the evidence and observed the demeanor of each witness for inconsistencies in their testimony. The District presented no expert witness to support its contention that, in all aspects, it provided J.R. FAPE.

First, petitioner requests that I find that J.R.'s IEP fails to offer J.R. FAPE in the least restrictive environment and/or has not been individualized for her, in violation of her rights under both state and federal law. Regarding educating J.R. in the least restrictive environment, respondent has demonstrated meager attempts at inclusion at best. Dr. Ogonna's testimony is not credible that an occasional assembly and gym with non-disabled peers is sufficient. It does not constitute the least restrictive environment when J.R.'s day is spent almost exclusively in a self-contained classroom. The IEP does not set forth goals for inclusion; and therefore, does not set objectives for

reaching those goals. Dr. Odri's testimony that inclusion is warranted is supported by all indications from Watkis that J.R. is performing better academically and behaviorally than her peers. J.R. is copying inappropriate attention-seeking behavior from them rather than copying appropriate behavior and language of non-disabled peers. Further, the IEP sets forth goals that were merely copied from one year to the next without regard to whether J.R. had mastered the skill or was close to mastery, such that the criteria for success should at least be elevated. Further, the District is not keeping data from which such progress could be noted from year to year, and skills worked on and developed to determine a more individualized program. In short, I **CONCLUDE** that respondent had failed to prove by a preponderance of the evidence that J.R.'s IEP offers her FAPE in the least restrictive environment and is individualized to meet her needs as required by state and federal law.

Next, petitioner seeks reclassification as "Pervasive Developmental Disorder" and a current independent neurological evaluation at Camden's expense due to J.R.'s current misclassification. The last neurological examination for J.R. is dated November 9, 2007, and indicates that J.R. was evaluated by the child study team in September 2007 and diagnosed with autism. The report sets forth that J.R. meets two of the three diagnostic criteria areas, and so does not meet the criteria for the diagnosis of autism. Dr. Wark thus concludes, "I would say therefore, that she has Pervasive Developmental Disorder, not otherwise specified." (R-5 at 1.) Although Dr. Wark says that he thinks J.R.'s diagnosis is PDD, not otherwise specified, (PDD NOS) he goes on to summarize as follows: "She will, however, benefit from an autistic program providing techniques such as applied behavioral analysis." Dr. Wark requested an MRI of the brain, and tests to detect abnormalities involving Fragile X, chromosomes, chip genomic hybridization array, amino acids, lactate, and organic acids. He asked that J.R. return to the clinic in three months to review her progress. Camden did not have her return to the clinic, nor did it provide the MRI and tests that Dr. Wark requested.

The testimony and documents in evidence, particularly the old evaluation itself, are clear that J.R. is greatly in need of an updated neurological examination. Moreover, contrary to the testimony of Dr. Ogbonna, the regulations provide, "Within three years of the previous classification, a multi-disciplinary reevaluation shall be completed to

determine whether the student continues to be a student with a disability.” N.J.A.C. 6A:14-3.8(a). Dr. Odri testified credibly that an updated neurological evaluation will clarify J.R.’s appropriate classification. Watkis testified that there really is no difference between PDD NOS and autistic classifications because they are both autism spectrum disorders. Dr. Wark or another expert would have had to testify to the precise distinction between the classifications. Further, the evidence demonstrated that the District never ordered the neurological evaluation initially, although such an evaluation was clearly warranted. I **CONCLUDE** that the District’s failure to follow through with Dr. Wark’s recommendations and update the neurological examination denied J.R. a free appropriate public education. Dr. Wark’s report is not clear on J.R.’s diagnosis, so an independent neurological examination is warranted at the District’s expense. Because Dr. Wark’s diagnosis is not clear, I do not **CONCLUDE** that changing J.R.’s classification to PDD NOS is appropriate at this time. Dr. Odri did not testify or write in her report that J.R. had been misclassified and was entitled to reclassification. Although petitioner’s written summation requests a new classification of “multiply disabled,” such a request was not part of the petition and was not addressed in the hearing. An independent neurological examination and associated tests that Dr. Wark previously requested will determine J.R.’s appropriate classification.

Petitioner next contends that respondent failed to provide J.R. with FAPE in the least restrictive environment due to the failure to seek a psychiatric evaluation in order to rule out various mental health disorders that may cause J.R. to exhibit the identified inappropriate behaviors that interfere with her ability to learn. Petitioner thus requests an order that respondent pay for J.R. to receive an independent psychiatric evaluation by an evaluator of J.R.’s choice at respondent’s expense.

J.R.’s IEP sets forth that “[t]he behavior of this student does not impede his or her learning or that of others. Therefore, a behavior intervention plan is not required for this student.” (R-1 at 3.) Watkis testified, however, that as set forth in the IEP, J.R. has inappropriate attention-seeking behaviors. The most notable behavior is running out of the classroom and lifting up her shirt. Watkis’ report stated, “She will sometimes copy inappropriate behaviors from her peers.” Also, it sets forth that “[J.R.] can be overly friendly with adults. This should be discouraged and boundaries should be set so that

appropriate social skills are taught.” Watkis downplayed these behaviors and said that such behaviors had diminished over the past school year. Dr. Ogbonna testified that the parent had not reported any behavior problems and discipline was not an issue with J.R. Petitioner’s expert, Dr. Odri, did not, in testimony or in her report, indicate that a psychiatric evaluation was necessary or that the failure to obtain a psychiatric evaluation was a failure to provide FAPE. Dr. Odri did not find during her observation that any inappropriate behaviors were interfering with J.R.’s ability to learn. Based upon all of the foregoing, I **CONCLUDE** that a psychiatric evaluation is not warranted to provide a free appropriate public education to J.R.

Next, in the area of J.R.’s behavior, petitioner seeks a Functional Behavioral Assessment and a Positive Behavioral Intervention Plan developed by a qualified professional in the field of applied behavior analysis. Petitioner seeks an order that she can select the independent education evaluator to perform such services at respondent’s expense.

As set forth above, petitioner’s own expert would not support the petitioner’s claim of entitlement to an independent Functional Behavioral Assessment and a Positive Behavioral Intervention Plan. Nonetheless, Dr. Odri did indicate that there was behavior of J.R. that warrants further study, especially since inappropriate behavior increases at home. Although Watkis insisted that in no way did J.R.’s behavior interfere with J.R.’s learning or the learning of others in the classroom, Watkis indicated that such behavior was the reason for continuing J.R. in a self-contained classroom segregated from her non-disabled peers. In the testimony of Watkis and Dr. Ogbonna, there appeared to be a tone of low expectations for J.R., despite the fact that J.R.’s performance had improved since coming under the teaching of Watkis. The low expectations seemed to come from the fact that J.R. spends almost all of her time in school in a self-contained classroom with her disabled peers. Dr. Ogbonna also testified that such behavior was normal for a child with autism. Watkis admitted that such behaviors did not and would not work well in an inclusive environment with non-disabled peers. Yet, there was no plan to set goals that would eventually help J.R. integrate into the non-disabled environment. The testimony of Watkis and documents in evidence support Dr. Odri’s recommendation for additional training and support for the

classroom team so that objective measures and data assessments can be reinstated to systematically monitor J.R.'s progress. Such data assessments are needed to determine if indeed an FBA is warranted and necessary. However, at the present time, without testimony or documentation that an FBA is required, I **CONCLUDE** that the District's omission of a Functional Behavioral Assessment and a Positive Behavioral Intervention Plan did not result in a failure to provide J.R. FAPE that is reasonably calculated to provide a meaningful educational benefit in the least restrictive environment.

The next request is that the District be required to develop an appropriate IEP for J.R. with appropriate data-based levels of functioning, goals and objectives, success criteria stated in measurable and observable terms which are individualized for J.R. with proper systems for recording progress and specifically identified staff responsible for implementation of each goal and service. In the alternative, petitioner requests a "special master" to develop J.R.'s IEP.

At all times relevant to the present petition, Watkis was J.R.'s teacher. While Watkis served as J.R.'s teacher, J.R. exhibited progress in both academics and behavior. However, the forms the District uses to note progress provide no meaningful information that can be useful to child study team members to know what modifications to J.R.'s IEP are needed to continue her progress. The progress reports set forth grades, but there is no data to back up the grades. The IEP sets forth goals, objectives and success criteria that were copied from one year to the next without consideration of whether J.R. had mastered the skill or was close to mastery, such that the goals should be removed or the criteria for success should be elevated. Watkis admitted that many goals and objectives in the IEP were neither measurable nor observable. For instance, the goal "Student will develop appropriate physical/verbal self-control behaviors" is not measurable. (R-1 at 8.) Similarly, the objective underneath it, "Cooperate with peers during group activities", cannot be easily measured in order to determine what specific skill achievement constitutes meeting the success criteria of 80 percent. Further, Watkis indicated that although the District used to keep data of their observations of students to determine whether they were meeting their goals and objectives, doing so became too "cumbersome." Without such data, the District has no baseline from which to say how

much the student has improved or whether she has improved at all. Gonzalez's testimony that she had not even looked at the IEP during the school year despite having the responsibility of providing speech therapy was also troubling and showed that there were no measurable objectives that she had to try to meet. In addition, as Dr. Odri testified, Watkis and her aides need to receive consultative services to develop appropriate positive behavioral supports to correct the deficient social/emotional goals in the IEP. She added that training in planning and curriculum adjustments are likely needed to support J.R.'s success. In this regard, I **CONCLUDE** that the District has failed to develop an appropriate IEP with data-based levels of functioning, goals and objectives, and success criteria stated in measurable and observable terms which are individualized for J.R. with proper systems for recording progress. However, I **CONCLUDE** that petitioner has not established the need for an appointment of a special master. The District has to be given the first opportunity to develop an appropriate IEP.

Next, petitioner seeks an order requiring the District to amend the IEP with a specific schedule for J.R.'s exposure to non-disabled peers, including the supports to be provided, the responsible staff, and the goals and objectives for those activities. The IDEA provides that states must establish procedures to assure that:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes . . . 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.

[20 U.S.C.A. § 1412(a)(5).]

The Third Circuit recognized that the IDEA sets forth a strong congressional preference for integrating children with disabilities in regular classrooms. Oberti v. Bd. of Educ., 995 F.2d 1204, 1213–14 (3d Cir. 1993).

By admission of Watkis, the District did not provide in the IEP scheduled opportunities for exposure to non-disabled peers. The opportunity to be in the vicinity of non-disabled peers in an assembly is not inclusion. J.R.'s current self-contained class does not offer frequent, normal models of peer language or opportunities for social stimulation that will help her develop and grow beyond her current stage, which is already ahead of her disabled peers in her class. Watkis testified that attempts had been made at inclusion in art and music classes, but they were not successful. Yet, remarkably, the child study team did not decide to write inclusion in such classes as a goal for J.R. to work toward for the 2010–2011 school year. Rather, the child study team wrote an IEP that took the path of least resistance and kept J.R. with her disabled peers for the length of the school day. For the foregoing reasons, I **CONCLUDE** that the District failed to prove by a preponderance of the credible evidence that its meager inclusion opportunities with an absence of a planned program provided J.R. access to FAPE in the least restrictive environment.

Last, petitioner requests that the District be ordered to provide compensatory education for the period of time that it knew or should have known that J.R. was not receiving a free appropriate education in the least restrictive environment. The District knew or should have known when it developed J.R.'s IEP that the failure to plan and set goals for J.R.'s inclusion with non-disabled peers in the IEP was going to result in a failure to provide FAPE in the least restrictive environment. In this regard, the fact that L.R. was present in the IEP meeting and had opportunities to bring concerns to the child study team about J.R.'s opportunities for inclusion does not mitigate the District's duty to comply with the IDEA. Similarly, the District knew that it was required to set forth J.R.'s present levels of achievement and set forth goals and objectives in measurable terms. Yet, it failed to do so for the 2010–2011 school year. The District was responsible for providing FAPE in accordance with the law, but did not. I **CONCLUDE** that petitioner is entitled to an hour per day for a school year, 180 days, of compensatory education in the form of one-to-one instruction. Compensatory education does not have to be provided every day, but the requirement must be completed prior to the start of the 2012–2013 school year in September 2012.

**ORDER**

It is hereby **ORDERED** that the District provide the following relief requested in petitioner's due process petition:

1. The District will create a new IEP that offers J.R. FAPE in the least restrictive environment that is individualized to address her unique abilities.
2. The District will immediately schedule an independent neurological evaluation at the District's expense.
3. The District will develop an appropriate IEP for J.R. with goals, objectives and success criteria that are stated in measurable and observable terms that are individualized for J.R. based on data and recorded notes of progress.
4. The IEP that the District develops will have scheduled opportunities for exposure to non-disabled peers with supports to be provided to promote a successful transition. The District will provide additional training and support for the classroom team to assist in objectively measuring the success of the transition efforts.
5. The District will provide J.R. with 180 hours of compensatory education during the 2011–2012 school year for the violations set forth in this decision for not providing FAPE.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2010) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2010).

\_\_\_\_\_  
August 1, 2011



DATE

**LISA JAMES-BEAVERS, ALJ**

/cmo/lz

**APPENDIX**  
**WITNESSES**

**For Petitioner:**

Kathleen McCabe-Odri, Ed.D.  
Jennifer Gonzalez  
Henrietta Ballard  
Joseph Ortiz  
Dr. Jonathan Ogbonna

**For Respondent:**

Dr. Jonathan Ogbonna  
Samantha Lynn Watkis

**EXHIBITS**

**Joint:**

J-1 Petition for Due Process dated October 25, 2010

**For Petitioner:**

P-1 Curriculum Vitae of Kathleen McCabe-Odri, Ed.D., BCBA  
P-2 Dr. Odri's Summary of Observation and Recommendations  
P-3 Certification of Dr. Jonathan Ogbonna dated March 18, 2011<sup>1</sup>

**For Respondent:**

R-1 March 31, 2010, IEP  
R-2 May 20, 2009, IEP  
R-3 May 2, 2009, Eligibility Conference Meeting  
R-4 April 22, 2008, IEP

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<sup>1</sup> At the hearing on March 30, 2011, the 2007–2008 IEP was marked for identification as P-3, but not entered into evidence. Because there was no document marked into evidence as P-3, subsequently Dr. Ogbonna's certification was marked P-3 and entered in evidence.

- R-5 November 9, 2007
  - a) Dr. Wark's report
  - b) Neurological notes
  - c) Speech and Language report
  - d) Psycho-Educational Evaluation
  - e) Pre-school Evaluation
  - f) Social Evaluation
  - g) Speech and Language Evaluation
- R-6 January 24, 2011, letter to L.R. re: Resolution Meeting
- R-7 Proof of Service of January 24, 2011, Resolution Meeting Letter
- R-8 January 31, 2011, Resolution Meeting Sign-in Sheet
- R-9 2010–2011 2nd Marking Period Report Card
- R-10 2010–2011 IEP Progress Report, Period One
- R-11 2010–2011 IEP Progress Report, Period Two
- R-12 2009–2010 Final Report Card
- R-13 2009 Progress Report
- R-14 Samples of J.R.'s work for school year 2010–2011
- R-15 Samples of J.R.'s work for PDD-Autism Program 2008–2009