



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 04821-20

AGENCY DKT. NO. 2020 31368

MONROE TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

v.

J.A. AND J.A. ON BEHALF OF J.A.,

Respondents.

Sanmathi Dev, Esq., for petitioner (Capehart Scatchard, P.A., attorneys)

Robert Thurston, Esq. for respondents (Thurston Law Offices, L.L.C., attorneys)

Record Closed: July 9, 2020

Decided: July 16, 2020

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Monroe Township Board of Education (“District” or “Board”) brings this petition to obtain direction from the tribunal as to the necessity of conducting an auditory evoked potential evaluation of the respondent, student J.A., a sixth grade, eleven-year-old student, eligible for special education, based upon her autism diagnosis. The evaluation request originating in February 2020 after five evaluations were conducted

by the District during that month. None of the evaluations included an auditory evaluation. In prior years the parents of J.A., J.A. and J.A., all respondents, had brought to the attention of the District a diagnosis of auditory processing disorder evaluations privately conducted. The District accepted some of the data from these evaluations, but rejected the recommendation of the evaluations. J.A. does present with anxiety in loud noise situations. The District is aware of this fact. J.A. is pursuant to medical orders being educated during the school year at home for the most part with some counseling in the District. The District's observations of the student, reflect a personable student with no hearing impediments which affect her learning. She performs in the average to above average range under the present educational situation. The District maintains the results of the evaluation will have no impact on the educational strategies used for J.A. The parents' hope the requested evaluation will provide more knowledge and may indicate the advisability of the use of an FM system by the student. The student has expressed dislike of the use of earphones. No identification indicated the student uses hearing aids. Two other due process actions by the parents were filed with the Office of Administrative Law (OAL) in 2017 and 2018, are consolidated as EDS 8588-17 and EDS 11524-18, are presently stayed by an interlocutory appeal; and a stay put order is presently the operable free appropriate public education ("FAPE").

The New Jersey Department of Education, Office of Special Education Programs, transferred the matter to the Office of OAL as a contested case on May 5, 2019. The OAL scheduled an initial conference for June 4, 2020, respondent counsel requested an adjournment and the conference rescheduled for June 18. Respondent made a motion to preclude evidence sometime after June 13, for petitioner's failure to provide evidence pursuant to the five-day rule, interpreting the OAL settlement hearing notice as the actual hearing date. The custom of the OAL is to initially have the parties confer on a settlement conference on the first call date, and thereafter assign the matter to a hearing Administrative Law Judge (ALJ) in the event settlement is not effectuated. The hearing ALJ then conduct a prehearing conference and sets hearing dates. Respondent rejected having a settlement conference and this matter became assigned to the undersigned. The undersigned conducted a prehearing conference on June 16, 2020, and advised respondent's counsel that his motion to preclude evidence required

appropriate time to submit opposition, so his hearing date had to be adjourned if he did not withdraw his motion. Respondent refused to withdraw his motion. The undersigned scheduled a hearing date for July 8, 2020 by Zoom and issued a pre-hearing order requiring all submissions to be made by July 2, 2020. The hearing date occurred on July 8, 2020. The prehearing order required the parties to submit any memorandum on July 2, 2020, both parties submitted memorandum. On July 8, 2020, the hearing proceeded and the record closed after testimony from three witnesses.

FACTUAL DISCUSSION

TESTIMONY

Gillian Corsi (“Corsi”)

Ms. Corsi identified herself as an employee of the District serving as the School Psychologist since 2013, and J.A.’s case manager. She earned a Bachelor and Masters of Arts in Psychology from Rowan University, and is certified by the State of New Jersey as a School Psychologist. The tribunal accepted her as an expert in School Psychology. She confirmed she has no expertise in Audiology. She confirmed that no summer extended services are being provided J.A. presently, and prior to Covid 19, J.A. attended individual and group counseling at the middle school child study team offices, but pursuant to the stay put order, placement of J.A. is at home, where services are provided. Corsi has regular interaction with J.A.’s teachers and J.A.’s mom.

Corsi describes J.A. as a sweet, personable, and intelligent sixth grade student going into seventh grade. Corsi discussed the July 2019 annual review which the parents accepted. She stressed the desire of the District to bring J.A. back into the school for partial days. Corsi discussed the October 24, 2019, Individual Education Plan (IEP) resulting from the stay put order of ALJ Kennedy.

Corsi describes the 2018 summer planning meeting where new evaluations were planned, as well as the parents request for an auditory evaluation. This evaluation was not considered as there were no historical issues regarding J.A.’s ability to hear. None

of the teachers expressed hearing issues. Corsi did not see hearing as a deficiency. Corsi identified J.A.'s educational abilities as average to above average

Corsi again consulted with the parents and the child study team as to new evaluations in 2020. The parents did not raise issue with the proposed evaluations nor did they object to the proposed evaluations. By agreement speech and occupational therapy counseling sessions were terminated. J.A. continued average growth in all areas. No auditory issues were presented.

Subsequent to the parents' request for the auditory evoked potential evaluation, the team met to determine the necessity for the evaluation. Corsi knew of the existing diagnosis of auditory processing issues. The observations of the student did not support the medical position. The issue with loud noises, the district attempted to address with earphones; however, the student did not agree to wear them. The determination to deny the evaluation resulted from the observations of the teachers that auditory issues were not a deficiency of J.A. The district addressed J.A.'s distraction from loud noises by conducting her testing in quiet environments. As stay put was home placement the only school activities were the counseling done in small groups in quiet environments.

The parents were supportive of returning J.A. to a school setting; however, the parents related experiences were not observed in school. Auditory sub-tests did not reveal hearing deficiencies.

John Lee Bersh, Ph.D. ("Bersh")

Dr. Bersh identified himself as an employee of the District serving as the Supervisor of Special Education. He has worked with the District for approximately thirty-two years and has served as Supervisor since 2009. He earned a Bachelor of Arts from Springfield College, Springfield, Massachusetts, in 1972, and a Masters of Education in 1973. He earned his Doctorate of Philosophy from Temple University in 1988 in the area Psychology with a certification in Advance Graduate studies. The tribunal accepted him as an expert in Special Education from his experience and in

Psychology. His first employment in the educational arena was with the City of Philadelphia for their school system. He has observed J.A. from time to time, he stated she has a good sense of self. He identified the thirty-two evaluations conducted since 2011, ten of which occurred in the last two years. On the requested evaluation, he needed to acquaint himself with the proposed evaluation and from his research discovered the evaluation is done on infants and dogs, who cannot clearly communicate lack of hearing problems. He identified the items he reviewed on the internet; they were not admitted into evidence. Dr. Bersh consulted with the team members, the educational records, and input from the staff made the District's determination to reject approving the test. He directed the District to commence the due process petition, as the student performs well. He could not see what additional educational assistant would be provided by the results of the testing. The teachers work with J.A. one on one and can accommodate to J.A.'s needs. Due to Covid-19 lock downs in March 2020, all education is remote. Dr. Bersh did not see any efficacy of conducting the evaluation.

He did acknowledge the evaluation is conduct not only on infants and dogs, but young children. He did not see J.A. as a young child. The materials refer to a subject with the inability to communicate. He recognized J.A. is diagnosed with autism and central auditory processing disorder, but disputes it is a report of the central auditory processing disorder. He does not dispute the existence of a central auditory processing disorder, and sees it as a co-morbidity of autism. J.A. has never had an issue with standard hearing, only the distraction of loud noises. The District has never performed an auditory evaluation and engages outside contractors when necessary to perform same.

J.A. (J.A.'s Mom)

Ms. A. identified herself as J.A.'s mom. She stated a typical week involves J.A. watching videos and following along. She claimed to have issues with a teacher. J.A. could not follow and described the teacher as, "has no patience." She became aware of the test from another parent of an autistic student. The student has a hearing aid. She recognizes it is not a standard test. She represented she could not get medical insurance coverage for the exam. She identified the locations she would have to travel

to for the test to be conducted. She thought the benefit might be the use of an FM system.

From the October 24, 2019, IEP's speech language evaluation of J.A., the document reflects:

J.A. has age appropriate articulation skills. J.A.'s speech was clear and intelligible, with no misarticulations present. J.A.'s social communication skill are all age appropriate, indicating that J.A. has the skill and knowledge base to understand social situations and can respond appropriately in different social settings. J.A.'s receptive and expressive vocabulary is developmentally appropriate. J.A. has a very good understanding of what words mean and is capable of using vocabulary appropriate. J.A.'s overall language fundamentals are developmentally appropriate. J.A. is able to follow simple to complex directions appropriately, recall information, comprehend spoken paragraphs, create grammatically correct sentences and can understand similarities and differences between words.

J.A. received scores that fell within the average range. These results are considered to be a true representation of J.A.'s ability within the classroom regarding language development, articulation, receptive and expressive vocabulary and social skills compared to peers within the same age and grade.

FINDINGS OF FACTS

Based upon consideration of the testimonial and documentary evidence presented at the hearing, and having had an opportunity to observe the witnesses and to assess their credibility, I **FIND** the following **FACTS**:

1. J.A.'s date of birth is May 22, 2008. She is an eleven-year-old, sixth grade, special education student who resides with parental units in Williamstown, New Jersey within the Monroe Township School District.
2. J.A.'s current placement is homebound instruction pursuant to a stay-put order of Administrative Law Judge John Kennedy, dated September 12,

2019, in consolidated OAL Docket numbers EDS 8588-17 and EDS 11524-18. At the time of the hearing no services are being provided as the school is not in session due to the summer hiatus.

3. J.A. initially found eligible for special education in 2011, has undergone numerous evaluations. Specifically, in 2018 and 2020, the District conducted five evaluations of J.A., in each of those years. The evaluations included Social, Psychological, Educational, Speech/Language, and Occupational Therapy.
4. In 2015, the parents submitted to the District a private central auditory evaluation. The District reviewed the evaluation, but did not accept its recommendations.
5. The District accepted J.A. as a student in need of special education due to a diagnosis of autism.
6. In August 2017, the parents submitted to the District documents from the Huntington Learning Center, the District considered the materials, partially accepted the evaluative data, but did not accept the recommendations.
7. In December 2017, the parents submitted to the District a private audiological report, but did not accept the data, diagnosis, or recommendations.
8. J.A.'s fifth grade placement (2018-2019) included an in-class support for Math, Language Arts, and English. The District offered Speech/Language services and Consultive Occupational Therapy in compliance with stay-put requirements.
9. On August 21, 2018, the parents provided the District with J.A.'s primary care physician's recommendation for at home instruction due to anxiety and central auditory processing disorder.

10. On August 28, 2018, the District convened a reevaluation eligibility meeting and determined that J.A. was eligible for special education related services under the category specific learning disability in written expression. In addition, the District recommended an in-class resource discharged for J.A. from speech/language and occupational therapy services.
11. On September 21, 2018, the District placed J.A. on homebound instruction through November 8, 2018, based upon the primary care physician's recommendation. This placement has continued to date.
12. In February 2020, the District determined J.A. eligible to special education due to the diagnosis of autism.
13. On February 18, 2020, the parents, through counsel, requested the District conduct an auditory evoked potential evaluation, allegedly by an independent evaluator.
14. The District rejected the parents' evaluation request.
15. Neither parents nor counsel's request for the evaluation provided any explanation for the requested evaluation.
16. J.A.'s hearing issues reflect sensitivity to loud noises, not an absence of hearing ability.
17. The proposed evaluation appears addressed to deficiencies of the nervous system which may make the ability to hear things compromised.
18. There is no indication from the teacher observations that J.A. is deficient in hearing, understanding or communicating sounds in the form of language.

19. J.A. is performing in the average range of her abilities and in some areas in the above average range.

20. There is no good cause to conduct the auditory evoked potential evaluation.

LEGAL ANALYSIS AND CONCLUSIONS

The IDEA provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 695 (1982). One of purposes of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C.A. § 1400(d)(1)(A). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public-school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court has construed the FAPE mandate to require the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley, 458 U.S. at 203, 102 S. Ct. at 3049, 73 L. Ed. 2d at 710. New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” The Rowley standard the United States Supreme Court recently questioned in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____ (2017), March 22, 2017, 15-287 cert. from 10th Circ. Ct. of Appeals, the Supreme Court remanded the case for further proceedings consistent with its decision. The Supreme Court determined that a school district must show a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make

progress appropriate in light of his (the student's) circumstances. The New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit cases appear to require similar inquiry into the educational proposal of the district in compliance with the requirements of Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). The IDEA does not require that a school district "maximize the potential" of the student, Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708, but requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the IEP provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182-84 (3d Cir. 1988), cert. den. sub. nom., Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). In other words, the school district must show that the IEP will provide the student with "a meaningful educational benefit." S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). This determination must be made in light of the individual potential and educational needs of the student. T.R., 205 F.3d at 578; Ridgewood, 172 F.3d at 247-48. The appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. S.H., 336 F.3d at 271. Rather, the pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

Here the student is observed by the District employees to be personable and intelligent. She performs average or above average with the education she is being provided. She is distractible, as are many students of this age with a diagnosis of autism.

Here the student is not in the least restrictive environment, placement of the student is at home pursuant to a stay put order issued in 2019. That order is on

interlocutory appeal to the United States District Court for the District of New Jersey. Ideally, this student will be returned to a classroom setting. Her medical direction is for home study because of anxiety while at school. It appears the anxiety is related to loud noises which tend to distract this student. This anxiety and sensitivity to noise with autistic children has been observed previously with children with similar diagnoses. The student does not desire to use headphones to reduce the noise sensitivity. The District has observed sensitivity to noise, in the form of distraction. However, it sees no educational policy differences it can address based upon the results of the auditory evoked potential evaluation. Neither party introduced evidence of use of hearing aid devices by the student. The mother became aware of the proposed evaluation as a result of an acquaintance whose child has autism. Her hope is that the evaluation could lead to the recommendation of the use of an FM system, this system is designed for students with hearing impairments. There is no indication of the student's inability to hear, just that loud noises lead to distraction.

The proposed evaluation is also called a brainstem auditory evoked response test. It allows those with diminished hearing and the inability to identify such diminished hearing to be tested to determine if the sound waves are resulting in brain activity. It is administered to dogs to determine hearing loss and to children who are yet unable to communicate with professionals to determine the extent of the hearing loss. The necessity of this test in the present circumstance is confounding. Petitioner's counsel raised the argument, the request is frivolous and done in bad faith, related to the existing actions. It is easy to understand such an argument.

Respondent argues the District never performed any auditory evaluation. He argues this failure is bad faith. The District never observed auditory issues but the District and the parents have subjected the student to thirty two evaluations over the past nine years, and has performed them for the most part every two years, not waiting for the required tri-annual assessments. This cannot be said to be any indifference on the part of the District.

Respondent maintains the evaluation is mandated by 34 C.F.R. §300.502(b)(1); however, that section refers to a parent's right to an independent educational evaluation, at public expense, if the parent disagrees with an evaluation obtained by the public agency. Here the District did not conduct an auditory evaluation, it had already been provided by the parent. The district did not agree with the recommendations of the evaluations, it did not dispute the diagnosis. This all has to do with the existing actions, and should have been included in that presentation. To now add a different type of evaluation when the deficiency is known to the District and the new evaluation will provide no additional educational data to otherwise alter how the District addresses the education of the student, is an inappropriate expenditure.

The regulations provide the scope of assessment: "The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. § 300.304(c)(4). The New Jersey statute adds that the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the suspected eligibility category." N.J.A.C. 6A:14- 2.5(b)(7). This does not appear to require districts to test a hearing disabled student for all possible disabilities, even where there is no basis to suspect impairment. See, e.g., P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 738-39 (3d Cir. 2009) (applying federal law). G.A. v. River Vale Bd. of Educ., 2013 U.S. Dist. LEXIS 133911, *46.

Respondent cites L.A. Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815 (Cal D.C., 2008) that case supports the District's position here. The District has no obligation to fund the independent evaluation.

In A.H. v. Colonial Sch. Dist., 779 Fed. Appx. 90 (3d Cir., 2019) the Court held the school district was not compelled to conduct an evaluation where its internal observations satisfied the educational needs which would result from the evaluation.

The District recognizes an ALJ. may order an independent evaluation when good cause is present. The undersigned has not found good cause in the present request.

The issue here is whether the Board's denial to conduct a brain auditory evoked potential evaluation is unjustified or denies J.A. FAPE.

I **CONCLUDE** that the Board provided FAPE to J.A. by complying with the stay-put order of ALJ John Kennedy, dated September 12, 2019, in consolidated OAL Docket numbers EDS 8588-17 and EDS 11524-18.

I **FURTHER CONCLUDE** the District has not acted unreasonably in failing to conduct a brain auditory evoked potential evaluation of J.A. at District expense.

I **FURTHER CONCLUDE** no just cause exists to conduct an auditory evoked potential evaluation of J.A.

I **FURTHER CONCLUDE** respondent's request for a brain auditory evoked potential evaluation is unjustified and frivolous.

ORDER

It is hereby **ORDERED** that petitioner's application to deny an auditory evoked potential evaluation is **GRANTED**, and petitioner is deemed the prevailing party in connection with this petition.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019). 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 Policy and Dispute Resolution.



July 16, 2020
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency

July 16, 2020

Date Mailed to Parties:

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WITNESSES

For Petitioner:

Gillian Corsi, District employee, School Psychologist and Case Manager

John Bersh, Ph.D., District employee, Director of Special Education

For Respondent:

J.A. mother of JA.

LIST OF EXHIBITS

JOINT

- J-1 Petitioner's Exhibit List
- J-2 Respondent's Exhibit List
- J-3 2020 OT Evaluation
- J-4 2020 OT Evaluation
- J-5 2020 OT Evaluation
- J-6 2020 OT Evaluation
- J-7 2020 OT Evaluation
- J-9 2020 OT Evaluation
- J-10 2/3/20 Notice to Parents
- J-11 IEE demand 2/17/20
- J-12 2/18/20 IEP
- J-13 2/25/20 IEP
- J-14 List of Evaluation Reports
- J-15 Report Cards grades 5 and 6
- J-16 Test Result History
- J-17 Decision December 12, 2019, John Kennedy, ALJ
EDS 08577-17, EDS 11524-18, consolidated.

- J-18 Petitioner's opening statement and brief
- J-19 Respondent's opening statement and brief

PETITIONERS'

- P-24 Resume of Gillian Corsi Bates BOE
- P-9 District's Annual Review of JA July 11, 2019 Bates BOE 197-232
- P-10 Post Kennedy Order IEP Bates BOE 153-196
- P-24 Resume of John Lee Bersh, Ph.D. Bates BOE 3903-3910

RESPONDENT'S

In joint exhibits