



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

**ORDER**

**DENYING SUMMARY DECISION**

OAL DKT. NO. EDS 13301-15

AGENCY DKT. NO. 2016 23269

**C.R. AND P.R. ON BEHALF OF W.R.,**

Petitioners,

v.

**LENAPE REGIONAL BOARD OF EDUCATION,**

Respondent.

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BEFORE **PATRICIA M. KERINS**, ALJ:

In this matter respondent Lenape Regional High School Board of Education (Board) has moved for summary decision. The Board argues that it provided W.R. with a free, affordable, and public education (FAPE), that he was eligible for graduation in June 2015, and that he is not eligible for continued special education, related services, or compensatory education. Petitioners, on W.R.'s behalf, and individually, do not dispute W.R.'s academic skills. They argue that his 2014-2015 IEP was inadequate, that he was not eligible for graduation and that due to his ongoing behavior-related issues, he should continue to attend his current placement, at The Y.A.L.E School's Standard 9 Program.

## **PROCEDURAL HISTORY**

On August 4, 2015, petitioners, on behalf of W.R., and individually, filed a due process petition seeking the following: (a) compel the Board to pay for W.R.'s placement at S9; (b) compensatory education; (c) reimbursement for petitioners' payment for classes noted in the IEP but not paid for by the Board; (d) compel the Board to provide a FAPE for W.R. (e) declaratory judgment that the Board violated Section 504 of the Rehabilitation Act; (f) expert fees pursuant to Section 504; and (g) counsel fees and costs. (R-31.) On November 15, 2015, petitioners requested that an interim IEP be created for W.R. pending the due process hearing. On December 3, 2015, the Board submitted its motion for summary decision seeking to dismiss petitioners' due process petition. On December 22, 2015, the petitioners submitted their opposition to the motion, and on January 6, 2016, the Board submitted its reply brief.

## **FACTUAL DISCUSSION**

As the parties have filed voluminous documents in support of and in response to the motion, for convenience, the following chart references pertinent documents in the evaluation of this matter<sup>1</sup>.

IEPs	Exhibits 1-4, 8, 13, 19
Transcripts	Exhibits 5, 10, 15, 21
Educational Planning Conference documents (part of IEPs)	Exhibits 9, 14, 20
W.R.'s evaluations	Exhibits 32-35
Approved Behavior Progress Graphs and Statistical Information	Exhibits 7, 12, 17, 23, 25
Academic Progress Reports	Exhibits 6, 11, 16, 22, 37, 38
Emails/Letters of Rec./Correspondences	Exhibits 18, 24, 27, 28, 30

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1. Petitioners argue that W.R. should continue to attend The Y.A.L.E. School because of his social, emotional, and behavioral issues, not because of his academic deficiencies. They do not dispute that W.R. is academically gifted. Therefore only the relevant facts with regard to W.R.'s behavior-related issues are noted.

1. W.R. is an 18-year old student diagnosed with multiple disorders, including Asperger Syndrome (AS), Obsessive Compulsive Disorder (OCD), Attention Deficit Disorder (ADD), Anxiety Disorder (AD) and Disruptive Mood Disorder (DMD). (R-1, pg. 3.) He has been classified as “Other Health Impaired” since the sixth grade. He resides at petitioners’ house and petitioners are in the process of establishing themselves as his guardians. (R-31, ¶ 4.) He has been in weekly therapy since the first grade.
2. On July 7, 2009, W.R. underwent a formal speech and language assessment. (R-31, ¶ 10.) The assessment revealed that he had below average scores in pragmatic skills and auditory reasoning. (R-31, ¶ 10.) He also underwent a psychological assessment called the Behavioral Assessment Scale for Children-IV (BASC). (R-31, ¶ 11.)
3. On April 14, 2011, when W.R. was in the eighth grade, he underwent a psychiatric evaluation conducted by Dr. Mala Gupta. (R-32.)
  - a. In relevant part, the evaluation noted that while W.R. “. . . has been exceptionally successful academically . . . the past several years have been increasingly difficult for him socially.” (R-32.)
  - b. Dr. Gupta confirmed W.R.’s diagnosis of AS and recommended that he be placed out of district. (R-32.)
4. In September 2011, when W.R. entered the ninth grade, the Board, as a regional high school district, became obligated to provide W.R. with a FAPE. (R-1, pg. 3.)
5. In September 2011, W.R. started his high school career as a freshman at The Mill Creek School in Philadelphia, Pennsylvania, an approved therapeutic school for disabled students. (R-1, pg. 3.)

6. On October 5, 2011, an IEP was developed. (R-1.) This IEP noted that while W.R. displayed a relative strength in academics, he needed improvement in social skills due to his “. . . history of difficulty with emotional regulation and with social relationships.” (R-1, pg. 3.)
7. On October 13, 2011, after numerous behavioral issues, including an attack on another student as well as his mother, The Mill Creek School terminated his enrollment. (R-2, pg. 3.)
8. On October 26, 2011, a temporary IEP was developed, placing W.R. on home instruction until another placement could be secured. (R-2, pg. 3.) This IEP noted that W.R.’s “behavior control” should be addressed. (R-2, pg. 3.)
9. On November 21, 2011, another IEP was developed, determining that The Y.A.L.E. School in Cherry Hill, New Jersey, an approved school for disabled students, was an appropriate out of district placement for him. (R-3, pg. 3.)
10. On November 28, 2011, W.R. began to attend The Y.A.L.E. School. (R-3, pg. 3.)
11. On December 14, 2011, another IEP was developed. (R-4.) This IEP made provisions for speech and language therapy training once per week for 30 minutes as well as social skills training one per week for forty minutes, transition planning, transition services, and a Behavioral Intervention Plan (BIP). (R-4., pgs. 5-7,9,15.) This IEP provided for an extended school-year (ESY).
  - a. Petitioners claim that W.R. did not receive speech and language training after his sophomore year. (R-31, ¶ 24.)
12. During W.R.’s freshman year, The Y.A.L.E. School recorded data concerning W.R.’s behavior-related issues. (See R-7.)

13. On May 3, 2012, another IEP was developed for the 2012-2013, school year, W.R.'s sophomore year. (R-8.) W.R.'s "Approved Behavior Progress" report details his progress with regard to the goals and objectives of his 2012-2013 IEP. (R-12.)
  - a. W.R. was provided with social skills group training once per week as well as bi-weekly individual counseling sessions. (R-8.)
  - b. The BIP was redeveloped to address his behavioral issues. (R-8.)
14. On June 4, 2012, this IEP was amended to include W.R.'s "Desired Post-Secondary Outcomes (Future Visions)." (R-9.)
  - a. The "Present Levels of Academic Performance Section," identifies his social, emotional, and behavioral needs. (R-9, pg. 2-1, 2-2.)
15. On April 9, and April 12, 2013, W.R. underwent a psycho-educational assessment in order to obtain information necessary to inform his IEP. (R-33.)
  - a. In relevant part, the assessment noted W.R.'s "average" to "high average" academic range and that he "has adjusted well [to The Y.A.L.E. School] and he has been successful both academically and socially." (R-33, pg. 1.)
16. On April 16, 2013, another IEP was developed for the 2013-2014, school year, W.R.'s junior year. (R-13.) W.R.'s "Approved Behavior Progress" report along with the "Social Skills Checklist" detail his progress with regard to the goals and objectives of his 2013-2014 IEP. (R-17.)
  - a. This IEP provided W.R. with social skills group training once per week and continued his BIP. (R-13, pgs. 2.1-2.1,5.1.)
17. W.R.'s May 8, 2013, progress report noted that W.R. . . . continues to independently seek staff support when he feels he is becoming agitated and is better able to regulate his emotions when presented with a stress-provoking situation. Counseling will continue to address ability to recognize non-verbal social cues, take responsibility for his role in social interactions, and effectively recognize and manages his anger. [R-11.]

18. On April 11, 2014, another IEP was developed for the 2014-2015, school year, W.R.'s senior year. (R-19.) Petitioners claim that services listed in W.R.'s 2014-2015 IEP, including participation in a job program and calculus instruction were not provided. (R-31, ¶¶ 36-37.)
  
19. The 2014-2015, IEP addressed W.R.'s academic as well as behavioral needs. (R-19.)
  - a. This IEP included the following special education services:
    - i. Math (Calculus), five times a week for forty minutes;
    - ii. Science (Anatomy), five times a week for forty minutes;
    - iii. World History, five times a week for forty minutes;
    - iv. English IV, five times a week for forty minutes;
    - v. Financial Literacy, five times a week for 40 minutes;
    - vi. PE/Health 12, five times a week for forty minutes;
    - vii. Visual Arts, five times a week for forty minutes;
    - viii. Critical Thinking, once a week for forty minutes;
    - ix. Industrial Arts, once a week for forty minutes; and
    - x. Interest based learning (elective), once a week for forty minutes.
  - b. This IEP included the following related services:
    - i. Social skills training group, once a week for forty minutes.
  - c. The following individuals participated at the IEP meeting:
    - i. petitioners;
    - ii. a special education representative;
    - iii. W.R.'s case manager;
    - iv. a coordinator of special services;
    - v. a Y.A.L.E. School neuropsychologist; and
    - vi. attorneys representing the Board and The Y.A.L.E. School
  - d. In the IEP's "Strengths" section, W.R. is described as ". . . very hard working, teachers indicated his academic, social, and emotional progress this year. (emphasis added). (R-19, pg. 3.) In addition, the IEP pointed out W.R.'s academic strengths, noted that he ". . . has shown maturation with both his behaviors and his socialization . . ." but also noted that his behavior impedes his learning. (R-19, pg. 3.)

- e. The IEP noted that W.R. was “. . . volunteering at the Mount Laurel Library.” (R-19, pg. 5.) In addition, the IEP details W.R.’s measurable post-secondary goals. (R-19, pg. 7.)
  - f. The IEP prescribed ESY for summer 2014 for “continuation of instruction” and provided an additional “opportunity for socialization.” (R-19, pg. 15.)
20. On June 3, 2014, the IEP team met for an annual review and developed W.R.’s “Educational Planning Conference” document. (R-20.)
- a. This meeting was attended by W.R., his mother, and a Y.A.L.E School Child Study Team member.
  - b. This document pointed out W.R.’s academic strengths but noted that he . . . needs to keep working on employing appropriate coping strategies when frustrated or anxious, as well as, socializing with his peers to continue to build and deepen his relationships. [W.R.] needs to continue to learn strategies that lower anxiety, control frustration, and appropriately express concerns. [R-20, pg. 21.]
21. In 2014, at the end of his junior year, W.R. took the High School Proficiency Assessment (HSPA), achieved a score of 215 in Math and 235 in Language Arts, and was determined to be “Proficient” in both subjects. (R-21.)
22. Petitioners point out that during W.R.’s senior year (2014-2015), he became “. . . so violent and out of control that we needed to seek crisis intervention through New Jersey’s System of Care, i.e, Perform Care.” (Reid Cert. ¶ 4.) Petitioners point to numerous email communications (November 2014 through March 2015) between themselves and the staff at The Y.A.L.E School that highlight his behavioral issues. (Reid Cert., Ex. A.)
23. On January 30, 2015, W.R. was given a “Skill Development” progress report for the first semester of his senior year. (R-22.)
- a. According to the progress report, he was assessed four times on topics concerning bullying, expected and unexpected behaviors, stress, and a

stress management plan. He achieved 102% on one assessment and 100% on the other three assessments. (R-22.)

24. Between February and March 2015, numerous communications occurred between petitioners and the Board occurred concerning W.R.'s future at The Y.A.L.E. School. (R-28.)
25. Beginning on February 4, 2015, W.R.'s case manager, G.R. attempted to schedule a "Senior Summary" meeting with petitioners. The purpose of this meeting was to review his "Senior Summary of Performance" and to see if he was eligible for graduation. (R-27.)
26. In March 2015, due to some behavioral outbursts during an off-campus excursion, W.R. placed on a ten day probation period.
27. On April 7, 2015, in an email to G.R., petitioners stated that they ". . . do not believe [W.R.] is ready for graduation," and pointed out that ". . . as you are aware from my communication . . . [W.R.] has had medication changes this winter and spring." (R-27.)
28. On April 23, 2015, in an intra-communication between The Y.A.L.E. School staff, it was noted that "[w]e will be neutral in this meeting and let district and parents decide. We will provide information about [W.R.'s] success in college, how he becomes upset with certain peers here, has had some instances of verbal aggression during time of medication issues, but is still able to keep it together." (emphasis added) (R-28.)
29. On April 27, May 4, and May 6, 2015, at the request of petitioners, W.R. underwent a neuropsychological evaluation. (R-34.)
  - a. In relevant part, the evaluation noted that although W.R.'s parents believed him to be a ". . . cognitive[ly] perspective student . . ." they were



worried that “. . . he is not academically or emotionally ready to independently cope with the demands of a college setting.” (R-34, pg. 4.)

- b. In terms of W.R.’s behavioral observations, the evaluation noted the following:

[W.R.] was accompanied to the evaluation by his mother and was tested over two half-day sessions. He was casually dressed and well-groomed for the evaluation. [W.R.] was a pleasant young man who for the most part interacted appropriately with the examiner. He was motivated to perform well and was cooperative with all testing demands. [W.R.’s] frustration tolerance was tenuous. He never protested or refused to complete a task; however he stated on a few occasions that he was becoming frustrated and needed to stop working before he became too upset. He also apologized continuously if he felt that he did not complete an item correctly or if a task was too difficult for him. Additionally, there were occasions when [W.R.] disagreed with the premise of a question or the usefulness of a test. However, he was able to regulate this emotional response and never became overly argumentative with the examiner.

Upon informal observation, [W.R.’s] attention was adequately sustained and his behavior was well-regulated. He engaged easily in informal conversation and responded to all questions posed to him to the best of his ability. Expressive speech was articulate and of appropriate rate and volume. He understood task instructions of mild to moderate complexity. [W.R.’s] use of eye contact, facial expression, voice prosody, and gesture was appropriate during conversation. [R-34, pg. 5.)

- c. The evaluation included numerous recommendations. (See R-34, pgs. 13-14.)

30. On May 21, 2015, the Board issued a letter to petitioners stating that W.R. “. . . met the requirements of his IEP and will graduate at the conclusion of the 2014/2015 school year.” (R-27.)

31. On June 3, 2015, a “Senior Summary” meeting was held. (R-27.)

- a. Petitioners claim that at this meeting, they expressed their concerns about W.R.'s readiness for graduation, that he was not placed into a job program, and that he did not receive calculus instruction as per the 2014-2015 IEP. (R-31, ¶¶ 45-47.)
  - b. Petitioners claim that the Y.A.L.E School staff expressed reservations about W.R.'s readiness for graduation, and W.R. himself noted that he could not attend a post-secondary institution without support. (R-31, ¶ 46.)
32. On June 8, 2015, the petitioners requested mediation. (R-29.)
33. On June 19, 2015, W.R. was given a "Skill Development" progress report.
  - a. According to the progress report, he was assessed six times on topics concerning sexuality, communication, community service, internet safety, conflict resolution, and bullying. He achieved 105% on one assessment, 100% on three assessments, 95% and 96% on the other assessments. (R-22.)
  - b. In addition, W.R.'s "Approved Behavior Progress" report details his progress with regard to the goals and objectives of his 2014-2015 IEP. (R-23.)
34. W.R. participated in the High School Scholars Program (HSSP) during his junior and senior years at The Y.A.L.E. School and received performance reports. (R-25.)
  - a. During his junior year, he satisfied all "task completion criteria" with 100% and satisfied all other criteria to remain in enrolled in HSSP in his senior year.
35. By the end of his senior year, W.R.'s accomplishments reflected the following:
  - a. overall 4.2 GPA;
  - b. completion of 148 high school credits;
  - c. admission into The Y.A.L.E. High School Scholars Program;
  - d. completion of 12 college credits at Camden County College (CCC);
  - e. completion of 5 college-level classes at the CCC;

- f. induction into the Lenape High School National Honors Society; and
  - g. certification as an Eagle Scout.
36. Over the July 4, 2015, weekend, petitioners received W.R.'s diploma in the mail. (R-31, ¶ 53.)
37. On July 6, 2015, petitioners refused to accept the diploma and returned it to the Board. (R-31, ¶ 53.)
38. On July 7, 2015, following a dispute between the Board and the petitioners about what "stay-put" means in W.R.'s situation, the Board made arrangements for W.R.'s enrollment in The Y.A.L.E. School's Standard S9 program (S9). (R-30.)
39. On August 5, and August 25, 2015, W.R. underwent a pragmatic language evaluation. (R-35.) The evaluation describes W.R.'s behavior. (See R-35, pgs. 2-4).
40. On August 20, 2015, after filing an emergent application, ALJ Kennedy signed a "stay-put" order determining that the proper "stay-put" venue for W.R. is the S9 program. W.R. is currently enrolled in the S9 program where he attends all of his classes, including three college classes at the CCC. (R-26.)

### **LEGAL DISCUSSION**

The Board argues that it provided a FAPE to W.R. and that he is not eligible for continued special education, related services, or compensatory education. Petitioners argue that W.R. is entitled to continued special education and related services beyond his senior year in high school due to his ongoing behavior-related issues.

Both the N.J. Administrative Code and the N.J. Court Rules set forth the standards to be applied in the disposition of a case presenting no genuine issues of material fact and not requiring a plenary hearing. A motion for summary decision should be granted "if the papers and discovery, together with the affidavits, if any, show that

there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). If “a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid. See also Bakke v. Binn-Graham, BKI 483-05, Initial Decision (February 17, 2006), <http://njlaw.rutgers.edu/collections/oal/> (noting that while N.J.A.C. 1:1-12.5(b) states that a motion for summary decision may be filed “with or without supporting affidavits, the licensees had to file an affidavit or certification denying some or all of the facts set forth by the Commissioner in order to create an issue of material fact).

If a disabled student’s parents believe that the student’s IEP failed to provide the student with a FAPE, then the parents may file a due process petition. 20 U.S.C.S. 1415(b)(6). At a due process hearing, the obligation of the parents is merely to place in issue the appropriateness of the IEP. Lascari v. Bd. of Educ., 116 N.J. 30, 46 (1989). The Board has the burden of proof and the burden of production to establish that it provided a FAPE to the student. N.J.S.A. 18A:46-1.1. “The issue of whether an IEP is appropriate is a question of fact.” S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 271 (3d Cir. 2003); Carlisle Area Sch. v. Scott P. by & Through Bess P., 62 F.3d 520, 526 (3d Cir. 1995); see also Gwinnett Cnty Sch. District v. J.B. by D.B. and W.B., 45 IDELR 60 (N.D. Ga. 2005) (rejecting both parties’ motions for summary decision in favor of evidentiary hearing when issue was whether school district provided student with a FAPE).

Pursuant to the Individuals with Disabilities Education Act (IDEA), U.S.C.S. 1400 to -1484, federal funding for New Jersey’s special education programs is contingent on the state’s providing a FAPE to all age-eligible disabled students. Hendrick Hudson Central Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982); 20 U.S.C.S. 1412(a). Since New Jersey receives federal funding, the federal requirements are codified at N.J.S.A. 18A:46-1 to -55 and N.J.A.C. 6A:14-1.1 to-10.2. The phrase FAPE is defined in 20 U.S.C.S. 1401(9) as special education and related services that

- (A) have been provided at public expense, under public supervision and direction, and without charge;

- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under [20 U.S.C.S. 1414(d)].

A FAPE includes “educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” Rowley, supra, at 188-89. The term “special education” means “. . . specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education. 20 U.S.C.S. 1401(29)(A), (B).

The disabled student’s Individualized Education Plan (IEP) is the “‘centerpiece’ of the IDEA’s system for delivering education to disabled children.” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); See 20 U.S.C.S. § 1412(a)(4). “An IEP consists of a specific statement of a student’s present abilities, goals for improvement of the student’s abilities, services designed to meet those goals, and a timetable for reaching the goals by way of the services.” Holmes ex rel. Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 589 (3d Cir. 2000) ((citing 20 U.S.C.S. 1401(a)(20)). The IEP team consists of the student’s parents and teachers, a curriculum specialist or representative from the local school district, and, if requested, a person with special knowledge or expertise regarding the student. See 20 U.S.C.S. 1414(d)(1)(B). If a student is sixteen years old or older, the IEP must include appropriate measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment, and independent living skills, as well as corresponding transition services. 20 U.S.C.S. 1414(d)(1)(A)(VIII); 34 C.F.R. 200.320(b). A transition plan is a “set of activities” based on the student’s needs and is created to help the disabled student move from school to post-school activities. 20 U.S.C.S. 1401(34)(B); 34 C.F.R. 300.43.

A FAPE provides a disabled student access to a “meaningful” education. Rowley, *supra*, at 192. For example, in Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-84 (3d Cir. 1988), the Third Circuit noted that that the IDEA “. . . calls for more than a trivial educational benefit . . .” and requires a satisfactory IEP to provide “. . . significant learning . . .,” and it must confer a “. . . meaningful benefit . . .” And “[w]hen students display considerable intellectual potential, the IDEA requires a great deal more than a negligible [benefit].” Id. at 182. Courts have consistently held that “. . . at a minimum, [t]he IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential.” Chambers v. Sch. Dist. of Philadelphia Bd. of Educ., 587 F.3d 176, 182 (3d Cir. 2009) (quoting Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004)). Moreover, there is no bright-line rule to determine the amount of benefit required of an appropriate IEP, and a “student-by-student analysis that carefully considers the student's individual abilities” is required. Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 248 (3d Cir. 1999). Thus, the appropriateness of an IEP is determined with an analysis that carefully considers the student’s individual abilities. Id.

In addition to the appropriateness of the IEP, the student must be educated in the least restrictive environment. 20 U.S.C.S. 1412(5)(B); 34 C.F.R. 300.550 to-300.556. “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” Carlisle supra, at 535. Unless the student’s disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, students must be educated with students not disabled. Oberti v. Bd. of Educ., 995 F.2d 1204, 1213 (3d Cir. 1993).

#### **W.R.’s 2014-2015 IEP:**

Pursuant to 20 U.S.C.S. 1414(d)(1)(B), the 2014-2015 IEP was implemented with the assistance of petitioners, a special education representative, W.R.’s case manager, a coordinator of special services, and a Y.A.L.E. School neuropsychologist. In addition to a regular course schedule, the IEP included a social skills training group, once a

week for forty minutes. The IEP's "Strengths" section, describes W.R. as ". . . very hard working, teachers indicated his academic, social, and emotional progress this year. (emphasis added). In addition, the IEP pointed out W.R.'s academic strengths, noted that he "...has shown maturation with both his behaviors and his socialization . . ." but also noted that his behavior impedes his learning. The IEP also included W.R.'s post-secondary goals and transition services. Petitioners do not dispute W.R.'s academic skills; they argue that the 2014-2015 IEP was inadequate given his behavior-related issues and that he is not eligible for graduation.

The IEP ensures that a student receives a ". . . basic floor of opportunity . . .," but not necessarily ". . . the optimal level of services . . ." a student could receive. D.S., supra, at 557 (quoting Holmes, supra at 590). In Rowley, supra, the Supreme Court made it clear that, although the instruction must educationally "benefit" the child, ". . . the requirement that a State provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. at 198. The "basic floor of opportunity" provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the child. Id. at 201.

While the IEP must have ". . . measurable annual goals relating to both progress in the general curriculum and additional educational needs arising from her disability . . .," S.H., supra, at 264; there is no requirement that the student actually show educational improvement as a result of the educational program. Polk, supra, at 180. In this regard, the IEP should not be judged by a ". . . after-the-fact review of a child's performance, augmented with the benefit of hindsight." Fuhrmann on Behalf of Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993) (concurring op.). See Carlisle, supra, at 530, 534 (noting that evidence of actual progress or regress following the IEP is not legally relevant to the question of whether an IEP ". . . was calculated to confer some educational benefit"). The IEP is improperly implemented if the failure relates to ". . . substantial or significant portions of the IEP . . .," resulting in a denial of a meaningful educational benefit. Melissa S. v. Sch. Dist., 183 Fed. Appx. 184,

187 (3d Cir. 2006) (citing Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5<sup>th</sup> Cir. 2000)).

Here, the inquiry is whether the 2014-2015 IEP, at the time it was developed, was appropriate for W.R., given his disabilities. Even if it is determined that W.R. regressed in terms of his behavior-related issues, this will not render the 2014-2015 IEP inadequate. Thus, petitioners' repeated references to W.R.'s continuing to have behavioral issues may not be relevant so long as the IEP provided him with a "meaningful educational benefit."

While there is no authority that expert testimony is required in special education matters, without specialized knowledge about special education, the fact-finder cannot determine whether the school district sustained its burden of proof. In Oberti v. Bd. of Educ. of Clementon Sch. Dist., 789 F. Supp. 1322, 1333 (D.N.J. 1992), the district court noted that the determination of the adequacy of services provided to a student requires expert testimony. In affirming the district court, the Third Circuit, in the context of evaluating a student's placement in a least restrictive environment, noted that courts ". . . will have to rely heavily . . . on the testimony of educational experts." Oberti, *supra*, 995 F.2d at 1216. Similarly, in J.N. and T.N. o/b/o E.N. v. Lawrence Township Bd. of Educ., EDS 13212-10, Final Decision (December 27, 2011), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ concluded that the school district did not provide the student with a FAPE, because while petitioner offered multiple experts who agreed that a FAPE was not provided, the school district failed to provide an expert who reviewed the IEP. And in K.R. and J.R. o/b/o N.R., v. Vineland City Bd. of Educ., EDS 2321-07, Final Decision (January 22, 2008), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ relied on petitioners' experts to conclude that the school district failed to provide a FAPE because the student's IEPs were "meaningless" since they failed to account for specific information on the student's goals, objectives, and progress.

Here, the issue is whether, given W.R.'s disabilities, the 2014-2015 IEP provided him with a "meaningful" educational benefit? Competent and credible expert testimony may answer this question. Petitioners point out that among the experts who may provide evidence of W.R.'s continued need for special education include Dr. Randi Kell

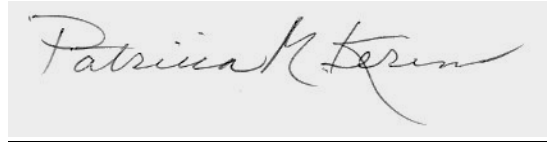


(Reid Cert., ¶ 6); Dr. Emily Perlis, a neuropsychologist who tested W.R. in April and May 2015 (Reid Cert., ¶ 8); and Rizza Miro-Lemonakis, CCC-SLP, a speech pathologist who evaluated W.R. in August 2015. (Reid Cert., ¶ 8.)

As discussed above petitioners argue that W.R.'s 2014-2015 IEP failed to adequately address his behavioral issues and did not provide him with sufficient transition goals and services. Specifically, petitioners argue that one of the IEP's goals, demonstrating W.R.'s social skills to independently function within a 2/4 year college program, has not been met. Petitioners also argue that certain services, listed on the 2014-2015 IEP were not provided—they claim that he did not receive calculus instruction and that he did not participate in a job program. The Board argues that petitioners cannot point to the record to support these claims and that their entire argument is based on a post-hoc assessment that the IEP was inadequate because W.R. continues to experience behavioral issues. The issue concerning the appropriateness of the 2014-2015 IEP is a question of fact, and should not be disposed of via a motion for summary decision. Petitioners should be given the opportunity to present expert testimony to rebut the Board's arguments as well as afforded the opportunity to place their arguments on the record. Thus, the Board's motion for summary decision is denied.

### **ORDER**

Respondent's Motion for Summary Decision is **DENIED**.



February 17, 2016

DATE

PATRICIA M. KERINS, ALJ

Date Mailed to Parties:

February 17, 2016 (emailed)

/mel