

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

J.D. and C.D., Individually and as : Hon. Joseph H. Rodriguez
Guardians ad litem of C.D.,

Plaintiffs, : Civil Action No. 08-1894

v. : **ORDER**

CHERRY HILL BOARD OF EDUCATION, :

Defendant. :

This matter has come before the Court on cross-motions for judgment on the record below in an Individuals with Disabilities Education Improvement Act (IDEIA) case. Oral argument was heard on the motions on September 29, 2009, and the record of that proceeding is incorporated here. For the reasons expressed on the record that day, as well as those articulated below, judgment on the record below will be entered in Plaintiffs' favor.

PROCEDURAL HISTORY

The Complaint was filed pursuant to the IDEIA, 20 U.S.C. § 1415(i)(3)(B) by the parents of an educationally disabled student residing in Cherry Hill. The parents filed a request for a due process hearing because they disagreed with their child's Individualized Education Program (IEP) for the 2006-07 school year. In short, the parents felt that the school district's in-district placement was inappropriate and not reasonably calculated to confer educational benefit upon their child. They maintained that the most appropriate placement for C.D. was at the Orchard Friends School. After a hearing, a decision was rendered by an administrative law judge on March 24, 2008. The ALJ ruled in favor of the Plaintiffs, finding that the most appropriate educational

placement in the least restrictive environment for C.D. was placement at the Orchard Friends School. On April 9, 2008, Plaintiffs requested reimbursement of counsel fees and costs pursuant to 20 U.S.C. § 1415(i)(3)(B); they filed the Complaint requesting the same in this Court on April 22, 2008. The Board of Education counterclaimed, seeking reversal of the ALJ's final administrative decision.

BACKGROUND

The underlying facts have been stipulated by the parties, and are repeated here merely for ease of reference. C.D. was born in 1995. He began having problems early on, with difficulty verbalizing, and he stopped eating. When sent for testing, he was diagnosed with Pervasive Developmental Disorder, Asperger's Disorder, Attention Deficit Hyperactivity Disorder, a reading disability, a writing disability, Dyscalcula, sensory integration dysfunction, visual perceptual motor integration dysfunction, Central Auditory Processing difficulties and Verbal Apraxia.

Early Intervention Services were started at approximately 30 months of age. At age 3, he was enrolled in the Cherry Hill pre-school disabilities class. For kindergarten, in 2000-01, he transitioned to a self-contained kindergarten class within the Cherry Hill public school district. In the afternoon, he was bussed to St. Peter Celestine Catholic School ("St. Peter's") for another kindergarten session. During that 2000-2001 school year, C.D. began to act out with inappropriate behavior as a result of being frustrated and unable to control his emotions. For 2001-02, the Child Study Team recommended a repeat of kindergarten, at a full time self-contained program at the Cooper Elementary School, a Cherry Hill public school. C.D.'s behavioral issues continued, and socially he was suffering.

A neurodevelopmental evaluation in March 2002 reflected the disabilities listed above. For 2002-03, the CST recommended a first grade inclusion class with his kindergarten classmates. The D. family rejected that proposal, and enrolled C.D. at St. Peter's in a self-contained special education class. He remained at St. Peter's for grades 2-4. He was mainstreamed for Religion, lunch, recess and specials. He received speech and occupational therapy from the Camden County Educational Services Commission ("CCESC"). Initially, C.D. did well, but by third grade (2004-05), his academic, social, and emotional problems again began to manifest.

After third grade, C.D. was due for a triennial re-evaluation. The family arranged for an independent evaluation in October 2005 by Dr. Ellen Fenster-Kuehl. C.D. also received an occupational therapy evaluation and a Central Auditory Processing Evaluation. These were accepted by the CCESC, which itself performed a Speech Evaluation and Social Evaluation.

Dr. Fenster-Kuehl's psycho-educational evaluation revealed that C.D. had difficulty transitioning, remembering directions and speaking fluently. In addition, he had high levels of stress and anxiety. Also, C.D.'s inability to understand the thought, feelings and motivations of others made it difficult for him to maintain peer relationships. In addition, she determined his cognitive ability was impaired, which lessens his functioning in thinking, reasoning and learning. This results in lower academic performance, especially in reading. As a result, Dr. Fenster-Kuehl recommended a small school setting to aid in transitioning and reduce anxiety which will foster learning and appropriate attitudes. She also recommended C.D. should have teachers who are specifically trained to reinforce his lessons throughout the day and

allow him to practice learned skills without fear of ridicule. His small classes should be taught by teachers trained in multi-sensory methods and have speech and language training integrated in his lessons. C.D. should also have sensory integration and social skills training incorporated into his daily activities, as well as remedial physical education.

In fourth grade, C.D. continued in the self-contained class at St. Peter's except for Religion, home room, and specials. CCEESC continued his classification as Multiply Disabled. His problems were increasing, however. Transitioning became difficult to perform, noises were disrupting C.D., and too much was going on at once for C.D. to cope in the mainstream classroom. His parents wrote a letter to Charles Lange, the Director of Special Services for Cherry Hill asking that he be referred to the District's special education department. Mrs. D. received and signed a form allowing Cherry Hill to receive documentation from St. Peter's.

The Cherry Hill CST observed C.D. twice at St. Peter's, in his mainstream Religion class and the self-contained program. They reviewed his records from St. Peter's and scheduled an IEP conference for 2006-07 planning.

On May 30, 2006, a draft IEP was presented to the parents. It called for C.D. to attend the Resource Center Replacement Instruction for Language Arts (spelling, reading and written expression) 90 minutes per day and for math 60 minutes per day. For Science, Social Studies, lunch, Art, Music, P.E./Health and library, he was to be mainstreamed. A one-on-one aide was to be provided, and he was to receive speech/language therapy two times per week and small groups/integrated and occupational therapy once per week. Counseling was to be provided once a month for 20-30 minutes, individually or in a small group.

No requests for change were made by the family at the IEP meeting. T9, 120:24-122:1. At the parents' request, however, Dr. Fenster-Kuehl was allowed to observe the proposed program before they made a decision as to accepting or rejecting that program. While her assessment was ongoing, C.D. did attend the Cherry Hill Extended School Year ("ESY") program in the summer of 2006.

Dr. Fenster-Kuehl observed at the Russell Knight School on June 14, 2006, and it was her conclusion that it would not meet C.D.'s needs. Specifically, she found C.D.'s mainstream classes could have as many as 24 students. It was not yet determined who would be his teachers and aide or what their training and/or experience would consist of. In addition, she learned there was no social skills program in place nor a counselor or other person available if immediate counseling was needed in the event C.D. had a meltdown or loss of control. Dr. Fenster-Kuehl found the mainstream classes to be too busy, noisy and fast moving for C.D. Student participation was encouraged and spontaneity was the norm. She found these classes to be wonderful for the regular student population but concluded C.D. would be quickly lost, frustrated and unable to perform positively in that environment, even with the assistance of a one-on-one aide.

Dr. Fenster-Kuehl also observed the lunch/recess period. She found the lunchroom to be disorganized and extremely noisy. She believed this would create a real problem for C.D. The outdoor recess had no organized activities so there was no opportunity for C.D.'s social training. She concluded this environment would again frustrate C.D. and this frustration would carry into the afternoon academic lessons.

Dr. Fenster-Kuehl observed what she was told was a typical resource room such as C.D. would attend. She found the teacher to be of a negative disposition and the room

was noisy and distracting. The teacher worked with children individually, which resulted in other students having to wait their turn in order to have the teacher's attention. This fostered behavioral problems among the students because they could not stay on focus, as each student had an individual lesson to work on and there was an abundance of distractions. Dr. Fenster-Kuehl determined that even with an aide, the noise, misbehaviors and multiple distractions would prevent C.D. from receiving any academic benefit in Cherry Hill's resource room program.

She concluded the entire program offered by Cherry Hill to be inappropriate for C.D. The accommodations he required continuously were not available. The proposed program could not provide C.D. with the extra time he needed to grasp the academic concepts, the detailed explanations he needed to understand those concepts and the repetition needed to learn what is being taught. She believes that if C.D. were to be placed in this program he would become frustrated, angry and distressed. Dr. Fenster-Kuehl concluded these emotions would manifest in inappropriate behaviors which C.D. would not be able to control. He would then likely experience negative feedback from his peers, and his school experience, as a whole, would spiral downward.

Dr. Fenster-Kuehl's report was submitted to the District, and a request made that Cherry Hill agree to send C.D. to Orchard Friends, a private school for special education geared toward children with needs similar to C.D. The parents were under the impression that the report was sent with the purpose of having the draft IEP of May 30, 2006 revised to incorporate Dr. Fenster-Kuehl's findings into a final document identifying an appropriate educational program for C.D. The District never revised its IEP.

On June 30, 2006, and August 2, 2006, petitioner's counsel wrote to the District's counsel advising that C.D.'s parents did not find the current program offered to be appropriate. By letter dated August 2, 2006, the District was advised that a unilateral placement at Orchard Friends would be made if no agreement could be reached. Receiving no response, that unilateral placement was made in September 2006. Dr. Fenster-Kuehl observed C.D. at Orchard Friends on October 26, 2006 and concluded that his needs were being met there.

Testimony of behalf of the Cherry Hill BOE

At a due process hearing, the District provided the testimony of three witnesses: Marla Jay, Cherry Hill's speech language specialist; Marta Audino, a certified teacher of the handicapped who provided services to C.D. during Cherry Hill's 2006 summer ("ESY") program which he attended; and Janet Singer, a Learning Disability Teacher Consultant ("LDTC") who was accepted by the court as an expert in development, implementation and evaluation of special education programs. T9, 23:18-26:19.

Ms. Jay testified that she had a Masters in Speech Language Pathology. T6, 13:18-25. She provides speech therapy to children in a one-on-one setting, small groups and in an integrated manner, which means classroom instruction with "real time" reinforcers for speech language therapy and social skills interaction. T6, 15:1-23. At the May 30, 2006 IEP meeting, the case manager for C.D., Janet Singer, was in charge. Ms. Singer used a computer which showed the IEP on a screen. As it was discussed and changes made, they were reflected immediately on the screen. T6, 29:10-31:13. As the meeting went on, Ms. Jay made changes responsive to the parents' concerns and C.D.'s needs. Thus, she added "articulation," "auditory

comprehension,” and “expressive language.” T6, 34:4-35:1. In order to help C.D. with his recognized weakness in social skills, Ms. Jay would have used integrated (classroom) small group sessions discussing, modeling and role playing social skills. T6, 46:1-9. Integrated sessions would be in a mainstream classroom. She also uses a text with illustrations of proper behavior, to which she adds discussion and role playing. She may also write a social story with the child. An assistant comes into the session so that the terminology used can be carried on throughout the day. T6, 46:10-25.

In the classroom sessions, Ms. Jay would be giving cues and reminders on how to interact socially. She would not be seen as there just to help C.D., as there would be other children with similar needs in the class. Reinforcement of the skills would take place in a private session. T6, 53:11-54:25. The one-on-one aide would facilitate through the day with cues on interaction, having discussed those with Ms. Jay, who would confer with his other teachers so that they were familiar with his needs and the techniques for helping him. T6, 55:21-57:10. Another tactic would be the use of “pre-teaching skills before lunch.” This involves talking, during a therapy session, about what lunch would be like and going through a list of reminders. The one-on-one aide would be at lunch with C.D. near enough to help if needed, but not hovering over him. T6, 65:9-67:3. An outside consultant retained by the District, Cathy Grayson, gives social skills training to teachers and aides. For individual teachers of a child such as C.D., with whom she is directly involved, Ms. Jay herself supplies such training. T6, 69:6-70:18. As C.D. has been diagnosed with Asperger’s, he is prone to weakness in the area of pragmatic social skills. Ms. Jay testified that she is experienced in providing social skills services to children with Asperger’s. T6, 74:1-16. She has also received additional training regarding social skills from Ms. Grayson. T6, 96:18-98:1.

Marta Audino had been in the Cherry Hill school system for eight years as of the time of the hearing, after having worked at the Yale School for two years. She started out as a teacher of a self-contained classroom with children having emotional and behavior disorders. She did that for six years. Then she became the colleague teacher of special education for the District. In that role, she works with the teachers by providing in-service training sessions. T6, 154:7-156:9. For three of the five weeks, Ms. Audino was one of the teachers for C.D. in the 2006 ESY Program over the summer. He received language arts and math for three hours per day, four days a week. She testified that, in a class of twenty five, with two teachers and one educational assistant, he did well with the other children. T6, 164. When needed, he would take a "time out" on his own initiative, and had no melt downs while she was present (although he did have a melt-down during a week she was not there). T6, 162:22-166:23, 202:24-203:5. When he engaged in monopolizing a conversation, one of his problems, Ms. Audino would go over and redirect him. T6, 166:3-13. He was attentive to his instruction. During the unstructured break time, C.D. would typically draw pictures. T6, 166:24-169:6.

According to Ms. Audino, C.D. would be one of about one hundred students in the District with Asperger's. T6, 161:11-162:17. Cherry Hill argues that it has specific programs to deal with the kind of problems experienced by special education students, including the Crisis Prevention Institute, which provides training for dealing with out of control students. Ms. Audino provides the training, across all levels of staff. T6, 175:3-177:13. In addition, behavior intervention plans are offered. Cherry Hill has in-house behaviorists as well as outside contractors, such as Cathy Grayson, Interactive Kids, Behavior Counts, Building Blocks and A Total Approach, as well as Dr. Lou Pica. An

example of the use of these consultants was the director of Interactive Kids coming in to the District to set up a social skills group in response to the difficulties a particular child had interacting with peers. Cathy Grayson, an expert in Asperger's is used frequently. T6, 178:1-181:25. There is also a program in the Cherry Hill schools called the "Lunch Bunch" that would be available to C.D., T6, 182:1-183:11, although it ultimately was not included in his IEP. Behavior consultants come in to do counseling for Asperger's children. T6, 187:16-188:1. Aside from special programs, social skills and socialization are worked on throughout the day. T6, 188:7-190:6. While there is no social skills class, children with these problems will be brought together, and it will be worked on throughout the day. There is a character program which works on social skills for children, not just those with special needs. T8, 76:2-12.

The final witness for the Board was Janet Singer. Ms. Singer, qualified as an expert, testified that she first became aware of C.D. in February 2006, when his parents inquired about his returning to public school, after having been designated as his case manager for Cherry Hill if he entered the district's schools. (While C.D. was attending St. Peter's, his case manager was from the CCESC. T9, 34:12-20.) She observed him twice at St. Peter's, the first time on March 22, 2006 for 45-60 minutes. T9, 37:24-38:24. She spoke with Sister Margaret, C.D.'s teacher at St. Peter's, observing that C.D. did all his work, was very respectful, interacted well with another student and was able to do an independent assignment. Sister Margaret related how proud she was of C.D. T9, 39:24-41:1. The second observation was on April 24, 2006, Earth Day. It was intended to see him in Religion, a mainstream class. T9, 43:6-18. There were 33 children in that class. C.D. was "wonderful," holding up his hand more than anyone else

in the class and demonstrating knowledge of the subject matter. He took notes as required, and wrote a paragraph addressed to God about protecting the earth. T9, 46:2-18.

As case manager, Ms. Singer attended the IEP meeting which lasted about three hours, longer than the typical IEP meeting. T9, 57:5-16. The IEP prepared by Cherry Hill combined resource room for some classes and mainstream for others. For the mainstream classes, Cherry Hill had resource support. This was described by Ms. Singer as additional help for mainstream classes, as opposed to Resource Replacement classes where the instruction is by a special education teacher. T9, 61:7-62:16. Ms. Singer consulted with Sister Margaret and reviewed the St. Peter's records. She looked at C.D.'s cognitive profile, and his test scores were in the average range. Weaknesses were noted, and would have been addressed through accommodations and interventions. T9, 65:1-66:1. She stated that she could say with "100% confidence" that the proposed IEP was appropriate for C.D.'s needs for 2006-07. This was based partly on Sister Margaret's comments on the proposed IEP, with which she was very impressed. T9, 67:15-68:6. Ms. Singer had also consulted with Linda Gladding, C.D.'s case manager from the CCESC more than once. T9, 104:9-105:15. She reviewed Dr. Fenster-Kuehl's report, and the CST relied on it in making recommendations. T9, 105:18-106:6.

Testimony of behalf of Plaintiffs

Dr. Fenster-Kuehl testified that she first met C.D. in September of 2005 as he was beginning his 4th grade school year at St. Peter's Celestine School. She was asked by Plaintiffs to conduct a psycho educational evaluation of C.D. She testified that she tested C.D. for ten hours and met with him for one hour, and that in all, she spent approximately 50 hours conducting her evaluation. Dr. Fenster-Kuehl administered Wechsler Intelligence Scale for Children - Fourth Edition ("WISC-IV"), on which he scored 99 on the Verbal Comprehension Composite, 90 on the Perceptual Reasoning Index, 77 on the Working Memory Index and 70 on Processing Speed Index. C.D.'s Working Memory Index score placed him in the 6th percentile in ability to hold information and then use it in some way. T 3/14/07 52:12-13. Similarly, his Processing Index Score held a percentile rank of 2. She explained that this meant C.D. would "work very, very slowly. We can expect that with all the material, whether it is verbal or visual, he is going to work very slowly." T 58:21-23. Dr. Fenster-Kuehl further testified that due to the nature and severity of C.D.'s difficulties, he needs to utilize verbalizing and visualizing strategies, which would not be possible in a mainstream Social Studies or Science class, even with an aide. T 75:9-24. Language Arts and Expressive Language testing revealed that C.D. would have trouble following directions and answering questions. Dr. Fenster-Kuehl confirmed that there is a delay in C.D.'s phonological processing that requires accommodations for reading, spelling, and writing, again indicating that mainstream classes would not be appropriate. Further testing revealed speed and accuracy problems with reading and writing. C.D. has central auditory processing difficulties, such that he has difficulty in a classroom where more than one thing is going on at a time.

STANDARD OF REVIEW

“When deciding an IDEA case, the District Court applies a modified version of *de novo* review and is required to give due weight to the factual findings of the ALJ.” *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 389 (3d Cir. 2006); *see also Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004) (noting that the district court “must make its own findings by a preponderance of the evidence” but “also afford ‘due weight’ to the ALJ’s determination”). Where, as here, a district court reviews administrative fact finding without hearing additional evidence, it is “required to defer to the ALJ’s factual findings unless it can point to contrary nontestimonial extrinsic evidence in the record.” *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 270 (3d Cir. 2003).

IDEA

Congress enacted the IDEA as a means to ensure that states follow a mandate to provide a “free and appropriate education” (“FAPE”) to all disabled children. 20 U.S.C. § 1412(a)(1)(A). FAPE is defined as “special education and related services that (A) have been provided at public expense . . . without charge; (B) meet the standards of the State educational agency; (C) include an appropriate . . . education in the State involved; and (D) are provided in conformity with the [IEP].” 20 U.S.C. § 1401(8). That is, “[e]ducational instruction specially designed to meet the unique needs of the handicapped child,” coupled with services “necessary to permit the child to ‘benefit’ from the instruction” constitute a FAPE. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 756 (3d Cir. 1995) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982)).

The IDEA instructs states to develop a detailed instructional plan, known as an

IEP, for every disabled child. 20 U.S.C. § 1412(a)(4). The IEP must address and include several elements as provided under 20 U.S.C. § 1414(d)(1)(A), and is designed to ensure implementation of a FAPE for the child. *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 264 (3d Cir. 2003). Under the IDEA, an IEP must be individually tailored to meet the needs of a disabled child such that the child receives a “meaningful benefit” from the instruction. *L.E.*, 435 F.3d at 390. It does not require school districts to “maximize” the potential of that child. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).

The IEP is developed by a team consisting of the child’s parent(s), at least one of the child’s special education teachers, a curriculum specialist and, if the parent or school board requests, a person with special knowledge or expertise related to the child’s education. *Id.*; *see also* 20 U.S.C. § 1414(d)(1)(B). The team must review the IEP annually “to determine whether the annual goals for the child are being achieved.” 20 U.S.C. § 1414(d)(4). New Jersey has enacted regulations which are intended to fulfill its responsibilities under the IDEA. N.J. Admin. Code 6A:14-1.1(b).

A parent who believes that a school district has not provided his or her child with a FAPE as required under IDEA, may request a due process hearing or a mediation conference. *See Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1184 (N.J. 1989). New Jersey has designated its Office of Administrative Law (“OAL”) to hear the special education complaints filed with the Department. *L.P. v. Edison Bd. of Educ.*, 265 N.J. Super. 266, 274 (N.J. Super Ct. Law Div. 1993). The dispute is adjudicated by an ALJ, who has authority under the IDEA and New Jersey law to deem the IEP inappropriate. *See id.*; N.J. Admin. Code 6A:14-2.7. Parents challenging the IEP may be entitled to reimbursement of their education costs if the ALJ finds that the IEP was inappropriate,

and that the parents' unilateral placement was appropriate, *Florence Cty. Sch. Dist. v. Carter*, 510 U.S. 7, 12 (1993), if the parents complied with the notice and reevaluation requirements of the IDEA and New Jersey regulations, 20 U.S.C. § 1412(a)(10) and N.J. Admin. Code 6A:14-2.10(c), and if the parents cooperated with the school district, *Patricia P. v. Board of Educ. of Oak Park*, 203 F.3d 462, 468 (7th Cir. 2000). Thus, the first step in determining whether a parent is entitled to reimbursement under a unilateral placement theory is whether the school district provided the child with FAPE. N.J. Admin. Code § 6A:14-2.10(a); *Shore Regional*, 381 F.3d at 198-99 (3d Cir.2004). If the school did provide FAPE, the parent is not entitled to reimbursement. The second and third steps of the unilateral placement analysis look at whether the unilateral placement was appropriate and whether parents complied with the notice and reevaluation requirements of the IDEA and New Jersey regulations so as to warrant reimbursement. *Shore Regional*, 381 F.3d at 198-99. Pursuant to 20 U.S.C. § 1415(i)(2), aggrieved parties may appeal the ALJ's decision to a state or federal district court.

ANALYSIS

Plaintiffs have argued that by failing to provide a final IEP and failing to communicate with them, the Defendant has violated the N.J. Admin. Code 6A:14-2.7(k), and the ALJ's decision should be upheld. Pursuant to the IDEA, a procedural violation committed during the formulation of a child's IEP is actionable only if that violation: (1) impedes the child's right to a free appropriate public education; (2) significantly impedes the parents' opportunity to participate in the decisionmaking process; or (3) causes a deprivation of benefits. *Winkelman ex rel. Winkelman v. Parma City Sch.*

Dist., 550 U.S. 516 (2007) (citing 20 U.S.C. § 1415(f)(3)(E)(i) & (ii)); *see also W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (holding that only “procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a [free and appropriate public education]”) (citations omitted); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) (“Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of education benefits.”) (citations omitted). It appears, however, that after the draft IEP was tested by Plaintiffs’ expert, the parties knew each others’ positions and simply disagreed.

Next, Plaintiffs argue that the Court should uphold the ALJ’s determination that Defendant’s IEP was not reasonably calculated to confer educational benefit on C.D. As mentioned above, the May 30, 2006 draft IEP called for C.D. to attend the Resource Center Replacement Instruction for Language Arts (spelling, reading and written expression) 90 minutes per day and for math 60 minutes per day. For Science, Social Studies, lunch, Art, Music, P.E./Health and library, he was to be mainstreamed. A one-on-one aide was to be provided, and he was to receive speech/language therapy two times per week and small groups/integrated and occupational therapy once per week. Counseling was to be provided once a month for 20-30 minutes, individually or in a small group. The ALJ relied upon Dr. Fenster-Kuehl’s reports and testimony as the only witness at the hearing who had actually tested C.D. The ALJ wrote:

I **FIND** the evaluation by Dr. Ellen Fenster-Kuehl to be a comprehensive assessment of C.D.'s status, with appropriate recommendations in order for C.D. to receive a meaningful educational benefit in a school setting. I further **FIND** the program offered by the District to be lacking in components necessary for C.D. to receive that educational benefit. One-half of his academic classes and his specials would be in a mainstream setting. This would not be appropriate for C.D. Two of his courses would be in a resource room setting which would require him to work independently while others were being taught. This also would not be appropriate even with an aide, because the distraction of others having instruction, moving around and making noise would keep C.D. off focus. C.D. is in need of social skills training. In spite of the fact the District knew of its importance, it made no provision for C.D. to receive same. C.D.'s program must allow for reinforcement of learned materials and behaviors throughout the day. This requires trained teachers which the District could not provide. While the District acknowledged C.D.'s needs, there was no concrete plan proposed to address them. The District has no idea how C.D. would react to his aide because it could not identify the aide nor did it have any idea how the aide would react to C.D., because the aide was not scheduled to have any training on how to deal with or assist in C.D.'s educational process. The belief that C.D. would receive an appropriate public education by supplying him an untrained aide and some minor accommodations in testing is misplaced. I **FIND** C.D. needs much more than that and those needs are met in the program offered at the Orchard Friends School.

Mar. 24, 2008 Decision, pp. 6-7. The judge goes on to state:

In this matter, the District never finalized the IEP that was proposed to be modified at the meeting of May 30, 2006. Although the District received the report of Dr. Ellen Fenster-Kuehl, which evaluated the program offered to C.D., it did nothing to modify the draft IEP presented to the petitioners. Therefore, the court must consider the draft IEP as the IEP offered for the child. In order to provide any meaningful educational benefit for C.D., the District must provide for a small school environment with students having similar difficulties and trained teachers who can attend to C.D.'s needs and issues throughout the day. His program must be administered in small classes with a low student teacher ratio and his teachers must have special education certifications and trained in multi-sensory teaching strategies. Speak [sic] and language remediation should be incorporated into his lessons throughout the day and should be specifically provided in individual and small group sessions. C.D.'s physical education should be tailored to his limited abilities and he should have specific social skills training, which should be reinforced through his entire program. The IEP offered by the District does not provide these

support services. While the District proposed resource room instruction in language arts and math, it also proposed full-size mainstream classes for science, social studies, and all special classes, including physical education. While it did provide a one-to-one aide, that accommodation would not provide any meaningful benefit to C.D. in his mainstream classes as he would not be able to maintain the pace or comprehend the broad focus of the lessons being taught. Similarly, the aide would not be able to provide the support needed for C.D. to function in the mainstream phys-ed, lunch and recess activities as they would be naturally noisy and to a large extent unstructured in their activities. In addition, there is no guarantee that C.D.'s teachers would have special education background or trained in multi-sensory strategies. Nor is there any provision in the IEP for speech and language instruction to be incorporated into the school day or for social skills training to be reinforced by the teaching staff. As a result of these deficiencies, I **FIND** the District did not offer an appropriate IEP for C.D.'s 2006-2007 school year. *Id.* at pp. 9-10.

Defendant first argues that it never had the opportunity to educate C.D. after his years at St. Peter's, so its proposed IEP should not be viewed against any success or failure in providing educational benefit to C.D. It cites to *Douglas W. V. Greenfield Public Schools*, 164 F. Supp. 2d 157 (D. Mass. 2001), which found that "neither the parents nor any of the . . . evaluators ever 'observed' the IEP because it was never implemented." *Id.* at 170. Plaintiffs have argued against that and Defendant's citation to *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 459-60 (6th Cir. 1993), insisting that while, in that case, the school district had come up with "some great ideas," the parents were uncooperative, so the IEP was never given a chance to work. Plaintiffs contend that in this case, the opposite is true, and Defendant has been unresponsive.

Defendant also has argued that although Dr. Fenster-Kuehl is a licensed psychologist in the states of New Jersey and New York whose resume was accepted and entered into evidence at the hearing, such that she was qualified as an expert in learning

disabilities, development of programs for students with learning disabilities, and global psychology, her testimony should not have been credited by the ALJ. She allegedly did not possess any educational certifications, nor was she a certified school psychologist, so she never did an internship in a public school setting. (Plaintiffs note that as a licensed psychologist, Dr. Fenster-Kuehl is authorized by law to administer any test that a Learning Consultant can administer, but the reverse is not true: a Learning Consultant may only administer academic measures. T 21:5-23:23.) Moreover, she had previously testified in special education due process hearings on only three previous occasions -- two times at the Newark Office of Administrative Law and one time at the Mercerville Office of Administrative Law; this was her fourth time testifying in such matters. Finally, Defendant argues that Dr. Fenster-Kuehl never actually educated C.D.

Plaintiffs rebut Defendant's argument that the Court should give more deference to the opinions of "trained educators" than that of Dr. Fenster-Kuehl. See Def. Br., p. 22 (citing *Heather S. v. State of Wisconsin*, 125 F.3d 1045 (7th Cir. 1997); *King v. Bd. of Educ. of Allegheny County, Maryland*, 999 F. Supp. 750 (D. Md. 1998)). Plaintiffs argue that, in contrast to Dr. Fenster-Kuehl, only one of the three "trained educators" called as witnesses for the Defendant actually observed C.D., and only one actually reviewed his records.

Defendant also has argued that insofar as Dr. Fenster-Kuehl's opinion was based on her observation of the District's proposed program for C.D., it should be discounted because "what Dr. Fenster-Kuehl observed on June 14, 2006, was not what the District had offered to C.D. for the 2006-2007 school year" because she did not observe the correct Resource Center program. The Court finds this argument somewhat

disingenuous because the witness observed what Janet Singer, C.D.'s case manager, arranged for her to see. T 182. In addition, Dr. Fenster-Kuehl did observe several "correct" areas of mainstream, which she deemed inappropriate for C.D.

In addition, however, the ALJ did cite to the testimony of Defendant's witnesses, Jay and Singer, observing that while the District acknowledged that C.D. needed speech therapy and social skills training, those sessions had not yet been included in C.D.'s school schedule. See *Lascari v. Ramapo Indian Hills Regional Sch. Dist.*, 116 N.J. 30, 46 (1988) (In determining whether an IEP is appropriate, the focus should be on the IEP actually offered and not on the one that the school board could have provided.). Similarly, there was no behavior intervention plan for C.D., but it was believed one could be developed during the school year. Ms. Jay agreed that the lunchroom was noisy, and could not predict how C.D. would react to that setting. She also testified that over her career, she had worked with only six to seven children diagnosed with Asperger's Disorder. The Court notes that although Ms. Jay was to provide speech therapy for C.D. if he attended the Russell Knight School, she was transferred to another elementary school in the District prior to commencement of the 2006-07 school year. T6, 85:25-86:4. In addition, Russell Knight School has a speech pathologist on site only two and a half days per week, T6, 87:15-17, and C.D. would have to miss instruction in other academic areas to receive his speech services, T6, 96:2-12. Further, Ms. Jay admitted that she never evaluated or observed C.D., and never spoke with his teachers or reviewed any of his records except for his speech evaluation. T6, 98:22-99:21. Prior to the IEP conference, she did not meet with any other members of the CST to discuss C.D.'s program, placement, or recommendations. T6, 100:11-13. Finally, on cross-

examination, Jay acknowledged that C.D. has delays in listening comprehension and oral expression, but there are no goals and objectives in the IEP or CCESC evaluation to address those areas. T6, 103:4-14:14.

Ms. Singer testified that there are no self-contained classes at C.D.'s proposed school, Russel Knight, nor was there any possibility of Resource center Replacement Instruction for Science and Social Studies, but C.D. would be accommodated by having the regular education teachers modify the format of his tests. T6, 107:24-108:26. Further, Singer testified that she had not observed C.D. at lunch or on the playground, even though C.D.'s teacher at St. Peter's had advised Singer that C.D. had significant difficulty in those areas. T6, 103:25-104:2.

Nonetheless, Defendant has argued that providing a FAPE in the "least restrictive environment" for C.D. entails public school placement, rather than private, and requires the disabled student be mainstreamed with children who are not disabled, in the same school the child would attend if not disabled. *See* Def. Br., p. 27-28 (citing *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995); *Oberti v. Board of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1220 (3d Cir. 1993)). According to *Oberti*, the court should consider (1) the steps the school district has taken to accommodate the child in a regular classroom, (2) the child's ability to receive an educational benefit from regular education, and (3) the effect the disabled child's presence has on the regular classroom. 995 F.2d at 1215-17. If a court finds that placement outside a regular classroom is necessary for a child's educational benefit, it must evaluate "whether the school has mainstreamed the child to the maximum extent appropriate, i.e., whether the school has made efforts to include the child in school programs with non-disabled children whenever possible." *Id.* at 1215.

Here, the Court finds that the ALJ's Decision was well-founded and supported by the testimony in the record. Although the May 30, 2006 draft IEP called for C.D. to attend Resource Center Replacement Instruction for Language Arts for 90 minutes per day and for Math 60 minutes per day, other areas necessary to provide C.D. with a meaningful educational benefit were lacking.

-The District admitted that C.D. needed speech therapy and social skills training, but those sessions had not yet been included in C.D.'s school schedule.

-Despite a history of acting out, there was no behavior intervention plan for C.D.; instead, it was believed one could be developed during the school year.

-C.D. has delays in listening comprehension and oral expression, but there are no goals and objectives in the IEP or CCECSC evaluation to address those areas.

-There are no self-contained classes at C.D.'s proposed school, Russel Knight, nor was there any possibility of resource center replacement instruction, rather than mainstreaming, for Science and Social Studies.

-Similarly, C.D. was to be mainstreamed for lunch and specials, even though C.D. had significant difficulty at lunch and on the playground.

The Court finds that C.D.'s proposed IEP does not provide a FAPE in the least restrictive environment for C.D. because it has been shown that, as the District has proposed to implement it, the IEP does not provide C.D. with a meaningful educational benefit. In so ruling, the Court is well aware that the IDEA does not require school districts to "maximize" the potential of each child. Addressing the deficiencies outlined above would not be providing the "Cadillac" of education for this child, but rather, it would be meeting the requirements of the IDEA.

CONCLUSION

For these reasons as well as those expressed on the record on September 29, 2009,

IT IS ORDERED on this 30th day of September, 2009 that Plaintiffs' Motion for Judgment on the Record Below is hereby GRANTED.

IT IS FURTHER ORDERED that the Defendant's Motion for Judgment on the Record Below is hereby DENIED.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.