State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

E.P. ON BEHALF OF E.P.,
Petitioner,
v.
NORTH ARLINGTON BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 04966-19
AGENCY DKT. NO. 2017-25078

ON REMAND

E.P. ON BEHALF OF E.P.,
Petitioner,
v.
NORTH ARLINGTON BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 04976-19
AGENCY DKT. NO. 2017 25049

Catherine Reisman, Esq., for petitioner (Reisman, Carolla Gran & Zuba, LLP, attorneys)

Eric Harrison, Esq., for petitioner (Methfessel &Werbel, attorneys)

Record Closed: May 24, 2019 Decided: June 3, 2019

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

These consolidated matters arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, and come before the Office of Administrative Law (OAL)

via remand of Administrative Law Judge Michael Antoniewicz's August 29, 2017, decision in E.P. v. North Arlington Bd. of Educ., EDS 12524-16 and 13086-16. Judge Antoniewicz had dismissed the petitions for due process, having determined that the Individualized Education Program (IEP) implemented by the Board during the 2015-2016 school year delivered a Free and Appropriate Public Education (FAPE) to E.A.P. [1] The Child Study Team (CST) declassified E.A.P. effective with the 2016-2017 school year; Judge Antoniewicz determined that this decision was likewise appropriate.

In a decision dated April 1, 2019, the Honorable Madeline Cox Arleo, U.S.D.J., largely affirmed Judge Antoniewicz's decision. She agreed that the 2015-2016 IEP delivered FAPE. She agreed with the appropriateness of the decision to declassify and held, as did the ALJ, that the decision to do so did not constitute a denial of FAPE.[2] But Judge Arleo found that "the ALJ did not consider whether North Arlington made efforts to include E.A.P. in an integrated classroom with supplementary aids and services for the 2015-2016 school year as required by the IDEA…" (District Court decision at page 19). Her remand decision directed that Judge Antoniewicz determine whether the North Arlington Board of Education (the Board), through its Child Study Team (CST), had properly analyzed whether E.A.P. had been placed in the "least restrictive environment" (LRE) during the 2015-2016 school year. If the CST did not do so, the ALJ was asked to determine whether E.A.P. is entitled to compensatory education. As Judge Antoniewicz has been elevated to the Superior Court, adjudication of the issues raised by the remand decision has been assigned to me.

The remanded matters were transmitted to the OAL on April 11, 2019. I conferred via telephone conference with counsel on April 30, 2019, and it was agreed that a decision could be rendered on the record below. The two remanded cases were consolidated by

[1] Initials are used to preserve the confidentiality of the student. As her initials are the same as her mother's, she will be referred to as "E.A.P." throughout this decision.

[2] The determinations by the prior ALJ and by Judge Arleo that the Board offered FAPE to E.A.P. both during the 2015-2016 and the 2016-2017 school years is the "law of the case." Our courts have held that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Christianson v. Colt Indus. Operating Corp.,486 U.S. 800, 816, 108 S.Ct. 2166, 2177, 100 L. Ed. 2d 811 (1988)(quoting Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L. Ed. 2d 318 (1983)). The Court recognized that "[t]his rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." Ibid.

order dated April 30, 2019. I was provided with, and reviewed, transcripts of the proceedings before Judge Antoniewicz. The parties filed briefs on May 17, 2019, and simultaneously replied on May 24, 2019, at which time the record closed.

FINDINGS OF FACT

The factual findings in Judge Antoniewicz's decision are incorporated herein by reference. The following facts are pertinent to the issue on remand.

During the 2015-2016 school year, E.A.P. was classified under the disability category "pre-school disabled" and was placed in a self-contained preschool disabilities classroom in-district. She received speech and language therapy three times weekly and was mainstreamed for art, music and gym. The only witness who could speak to the process that lead the CST to recommend this placement was case manager Caroline Kropp. She described the referral and evaluation process, but did not describe how or if she conducted an LRE analysis. Since the record reveals that the district operated no general education classrooms for preschool age children, the only possible alternative the CST could have considered would have been a private out-of-district program for mainstream preschoolers. And counsel for the Board concedes in his brief, and I **FIND** that "[a]dmittedly, the District did not expressly consider 'possible alternative placement options when formulating [the] IEP, including [p]lacing [E.A.P.] …in [a] private school program for nondisabled preschool children.'" I thus **FIND** that North Arlington did not make "efforts to include E.A.P. in an integrated classroom with supplementary aids and services for the 2015-2016 school year, as required by the IDEA." (District Court decision at page 19).

As for E.A.P.'s educational growth during the 2015-2016 school year, Judge Antoniewicz found that she made unusually good progress, and his findings were affirmed by the District Court. Judge Arleo wrote:

> In addition, the ALJ found that all of North Arlington's witnesses agreed that E.A.P. "made remarkable gains across all domains since entering the District's preschool program <u>including the area of social behavior</u>" [emphasis in original]…Even Ms. Porfido, who testified that

> E.A.P. lacked "appropriate social models" in the non-integrated setting, indicated that E.A.P. was "generally appropriately interacting with peers" and had mastered most of her goals during the 2015-2016 school year…The ALJ also noted that E.A.P.'s progress reports, report card, work samples, and other evaluations "supported the fact that the IEP provided E.A.P. with an education program reasonably calculated to provide meaningful educational benefit," which she attained during the 2015-2016 school year…Nothing in the record contradicts these factual findings. [emphasis supplied].

I **FIND** that E.A.P. made more than adequate progress during the 2015-2016 school year; indeed, so much so, that she was declassified at the conclusion of the year. And so much so that both the hearing judge, and the District Court judge, concluded that she had been provided with FAPE.

CONCLUSIONS OF LAW

Least Restrictive Environment

As a recipient of Federal funds under IDEA, 20 U.S.C. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to FAPE. 20 U.S.C. § 1412. FAPE includes special education and related services. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d). This Board satisfied the requirement that E.A.P. receive FAPE by providing her "an educational program reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances." Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988, 1001, 197 L. Ed. 2d 335, 352 (2017).

The IDEA also requires, under 20 U.S.C. § 1412(a)(5)(A), that

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

> with the use of supplementary aids and services cannot be achieved satisfactorily.

Federal regulations further require that placement must be "as close as possible to the child's home." 34 C.F.R. § 300.116(b)(3) (2018); see also N.J.A.C. 6A:14-4.2. The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115 (2018); N.J.A.C. 6A:14-4.3. The program provided to E.A.P. during the 2015-2016 school year thus also should have been delivered in the least restrictive environment.

In Oberti v. Board of Education, 995 F. 2d 1204 (3d Cir. 1993), the Third Circuit adopted a two-pronged test for determining whether a school district has complied with the IDEA's mainstreaming mandate: first, whether education in the regular classroom, with use of supplementary aids and services, can be achieved satisfactorily; and second, if placement outside of the regular classroom is necessary for the child's educational benefit, whether the district has included the child in school programs with non-disabled children to the maximum extent appropriate. Id. at 1215. As to whether the initial prong of this inquiry has been met, a reviewing court looks at the steps the school district has taken to attempt to include the child in a regular classroom; compares the benefits that the child would receive in a regular classroom versus the benefits the child would receive in a segregated special education classroom; and analyzes any possible negative effects that the child's inclusion will have on the education of the other children in the regular classroom. Oberti at 1515-18. Before placing a child outside the mainstream, "the school must consider the whole range of supplemental aids and services, including resource room and itinerant instruction, speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child's particular disabilities." Oberti at 1216; N.J.A.C. 6A:14-4.2.

T.R. ex rel N.R. v Kingwood Bd. of Educ., 205 F. 3d 572 (3d Cir. 2000), confirms that the obligation to place a student in the LRE applies equally to preschool disabled students. The Kingwood court stressed that "a district that does not operate a regular

preschool program is not required to initiate one simply in order to create an LRE opportunity for a disabled child." T.R. ex rel N.R. v Kingwood Bd. of Educ., 205 F. 3d at 579. However, the district is obliged "to take into account a continuum of possible alternative placement options when formulating an IEP," to include placement out-of-district. Id. at 580.

The record reveals, and I **CONCLUDE**, that this CST did not conduct the analysis Oberti requires to determine if education in the regular classroom could have been achieved satisfactorily for E.A.P. By its own admission, it did not take any steps to attempt to include E.A.P. in a regular classroom. It thus did not analyze or compare the relative benefits of a regular classroom versus the self-contained class offered by her IEP, nor did it analyze the affect E.A.P.'s presence in a mainstream class would have had on the children in that classroom. The Board argues that E.A.P. was educated in a setting that offered her appropriate mainstreaming opportunities, in essence suggesting that notwithstanding its error, she was educated in the least restrictive setting appropriate to her needs. But today, years later, it would be possible only to speculate as to whether E.A.P. would have achieved similar or even better success in an integrated or mainstream setting. What is clear however, is that under the Oberti test, this school district failed to comply with the IDEA's mainstreaming mandate, and thus, I must **CONCLUDE**, did not place E.A.P. in the least restrictive environment.

COMPENSATORY EDUCATION

Our courts recognize compensatory education as a remedy under the IDEA, which should be awarded "for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem." M.C. o/b/o J.C. v. Cent. Reg'l Sch. Dist., 81 F. 3d 389, 392 (3d Cir. 1996). Compensatory education requires school districts to "belatedly pay expenses that [they] should have paid all along." Id. at 395. It is well established that the courts, in the exercise of their broad discretion, "may award [compensatory education] to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." G.L. v Ligonier Valley Sch. Dist. Auth., 802 F. 3d 601, 625 (3d Cir. 2015).

I **CONCLUDE** that no compensatory education is appropriately awarded here. While the Board, through its CST, did not complete a proper LRE analysis when it placed E.A.P. in her preschool classroom, Judge Antoniewicz found, as affirmed by Judge Arleo, that she made "remarkable gains" during that school year. He found, and Judge Arleo agreed, that E.A.P. received FAPE. I am thus at a loss to understand what educational deprivation compensatory education would remedy under the circumstances presented here.

The decision in A.G. v Wissahickon School District, 374 Fed. Appx. 330, 334 (3d Cir. 2010) is instructive. Citing Kingwood, the court reconfirmed that the concepts of FAPE and LRE are distinguishable and should not be conflated. And the court reiterated that a school district can provide a student "FAPE while failing to educate a student in the LRE." Ibid. But importantly, the court went on to hold that "for purposes of entitlement to compensatory education, the ultimate inquiry is two-fold: (1) did the school district provide the student with a FAPE and (2) if it failed to do so, when did the school know of that failure?" Ibid. The court thus turned its compensatory education analysis squarely on the question of FAPE, and FAPE alone. As the child at issue had received a meaningful educational benefit, the court determined that "[a]n award of compensatory education would have been improper." A.G. v Wissahickon School District, 374 Fed. Appx. at 336, citing Lauren V. v DeFlaminis, 480 F 3d 259, 272-73 (3d Cir. 2007). Likewise, in A.S. v Harrison Twp. Bd. of Educ., 2016 U.S. Dist. LEXIS 57008, where a student was determined to have been on the "right educational path" the court determined that "[a]warding [the student] further compensatory education under these circumstances would be akin to awarding damages which is not appropriate under the IDEA." Id. at *13, citing Chambers v Philadelphia Bd. of Educ., 587 F. 3d 176, 186 (3d Cir. 2009), which confirms that monetary damages are unavailable under the IDEA.

Contrast S.H. v State Operated School Dist, 336 F. 3d 260, 273 (3d Cir. 2003), where a failure to offer sufficient mainstreaming opportunities resulted in an IEP that failed to convey a meaningful educational benefit. That decision is cited in Tyler W. v. Upper Perkiomen Sch. Dist., 963 F. Supp 2d 427, 435, n.3 (E.D. Pa., 2013) for the proposition that "under the S.H. formulation, violation of the LRE mandate necessarily entails failure

to provide a FAPE, which in turn triggers compensatory education." The Tyler W. court misconstrues the holding in S.H. The court there neither discussed compensatory education nor held that every violation of the LRE mandate is a denial of FAPE. The violation of the LRE mandate in S.H. denied FAPE to the student there. But not so always, and not so here. [3]

The cases cited by petitioner likewise do not support her claimed entitlement to compensatory education. Andrew M. v. Delaware County Dept. of Mental Health, 490 F.3 337 (3d Cir. 2007), is distinguishable on its facts. There, parents sought to have early intervention services delivered to their twin children in an integrated school setting; the agency refused.[4] The children had been enrolled in a program for disabled children, Cerebral Palsy Center of Delaware County (CADES), and had received Picture Exchange Communication System (PECS) services from the agency. But the parents urged that the children needed exposure to typical peers, and moved them to an integrated preschool program at their own expense. The Department of Mental Health discontinued the PECS services, an action the court determined violated the IDEA. The parents in Andrew M. received compensatory education not because the mental health agency refused to place their twins in the LRE, but rather, because they actually lost needed services. As the court stated, the relief afforded below was simply a determination "that the twins' natural environment for social interaction was a preschool and that the County failed to provide them services in that natural environment." Id.at 348.[5] It is clear that here, E.A.P. received the services she needed, per the determination by both the ALJ and Judge Arleo that she received FAPE.

Similarly inapposite is H.L. v. Downington Area Sch. Dist., 624 Fed. Appx. 64 (3d Cir. 2015). There, parents sought reimbursement for expenses incurred in unilaterally

[3] Had Judge Arleo believed that a failure to place E.A.P. in the LRE automatically meant E.A.P. had been denied FAPE, I would think she would have reserved on the FAPE issue, pending a determination on remand whether the Board had complied with LRE requirements.

[4] Andrew M. discusses the concept of delivering early intervention services in the "natural environment," a concept somewhat analogous to the LRE requirement applicable here.

[5] By way of further emphasizing the inapplicability of the Andrew M. holding, it is noteworthy that the claims there arose under Part C of the IDEA, and the court pointed out that FAPE is not a requirement under Part C. Andrew M. v. Delaware County Dept. of Mental Health, 490 F.3d at 348.

placing their child. The hearing officer concluded that the district had not considered mainstreaming options for the child, and accordingly, "failed to offer her a FAPE within the LRE…" Id. at 69. The child in H.L., unlike E.A.P., had been denied FAPE. And interestingly, the H.L. plaintiffs ultimately did not receive reimbursement via compensatory education, because the court found that the placement they chose was not appropriate. H.L. thus offers no precedential support for the arguments posited by petitioner here.

The CST's mistake here is akin to a procedural error, precisely because its IEP nonetheless delivered FAPE. N.J.A.C. 6A:14-2.7(k) provides that procedural violations deny FAPE if the violations impeded the child's right to an appropriate education; impeded the parents' opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. G.N. and S.N. on behalf of J.N. v. Livingston Bd. of Educ., 2007 U.S. Dist. LEXIS 57081 at *21-22 (D.N.J. 2007); see also Coleman v. Pottstown Sch. Dist., 2014 U.S. App. LEXIS 17685 *16 (3rd Cir. 2014). By determining that E.A.P. received FAPE, Judges Antoniewicz and Arleo have already, and definitively, answered those questions in the negative. See also: 20 U.S.C. § 1415(f)(3)(E)(i).

I thus **CONCLUDE** that a failure to conduct an LRE analysis is a substantive violation if, and only if, that failure deprives a child of FAPE. I moreover **CONCLUDE** that compensatory education is a remedy available to parents and children only upon proving a denial of FAPE. My view is consistent with the United States Supreme Court decision in Fry v Napoleon Cmty. Sch., 137 S. Ct. 743 (2017). There the Court confirmed that "[a]ny decision of the officer granting substantive relief must be 'based on a determination of whether the child received a [FAPE]'," citing 20 U.S.C. §1415(f)(3)(E)(i). Id. at 748. The Fry Court reiterated that FAPE is the IDEA's "core guarantee," and that "[i]n the administrative process, a FAPE denial is the sine qua non." Fry v. Napoleon Cmty. Sch. 137 S. Ct. at 754.

Judge Arleo makes note of the Tyler W. court's confusion regarding the relationship between FAPE, LRE and an award of compensatory education. For me, there is no confusion. Regardless of any shortcomings in a CST's approach, where there is no denial of FAPE, then by necessity there was the sort of educational program required by the IDEA and the interpretive case law. And by necessity, the child received

appropriate services, and no remedy is needed. An award of compensatory education under the facts presented here accordingly would be tantamount to an award of monetary damages, and is not countenanced by the IDEA.

ORDER

Based on the foregoing, together with the record as a whole, the demand for compensatory education is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2018). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

June 3, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency June 3, 2019

Date Mailed to Parties:

sej