State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT NO. EDS 10246-19

AGENCY DKT. NO. 2020-30287

D.S. and M.S. on behalf of A.S.,

Petitioners,

v.

EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY,

Respondent.

Julie Warshaw, Esq., for petitioners (Warshaw Law Firm, LLC, attorneys)

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys)

Record Closed: December 18, 2020 Decided: January 5, 2021

BEFORE **SARAH G. CROWLEY,** ALJ:

STATEMENT OF CASE

A.S. was found eligible for special education and related services as a preschool child and required Early Intervention Services in 2005. She remained eligible under the classification of Communication Impaired. In 2009, her classification changed to "Other Health Impaired" due to diagnosis of Pervasive Developmental Disorder, Attention Deficit Hyperactivity Disorder. She also suffers from Anxiety Disorder, Disruptive Mood Disorder and Expressive Language Disorder. Thereafter in 2011, her classification was changed back to Communication Impaired due to significant issues with her language and reading abilities. She was in self-contained classes for

New Jersey is an Equal Opportunity Employer.

LLD and in general education settling with supports though her grammar and middle school years. She began struggling significantly in high school, both academically and socially. She was receiving grades of Cs, Ds and Fs in her classes. Notwithstanding her significant issues, she continued to be passed through to the next grade. Between 2008 and 2018, there were no evaluations conducted and no written waivers were obtained. There has been no prior due process proceeding between the parties. In 2019, the parents served notice and unilaterally placed A.S. at The Lewis School of Princeton (The Lewis School) after her sophomore year at East Brunswick High School. The parents seek reimbursement for costs of tuition and payment of tuition going forward at The Lewis School, along with compensatory education, counsel fees and costs.

PROCEDURAL HISTORY

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401-1484(a). A.S. is a seventeen-year-old student who is eligible for special education and related services under the IDEA. Petitioners, D.S. and M.S. filed a petition for due process alleging that the respondent (Board or District) failed to provide A.S. with a free appropriate public education (FAPE) in the least restrictive environment (LRE). Petitioners also seek reimbursement for the costs of their unilateral placement at The Lewis School. After unsuccessful mediation, the case was transmitted to the Office of Administrative Law (OAL) where it was filed on July 30, 2019. Hearings were conducted via Zoom Video Communications (Zoom) on August 10, 12 and 14, 2020. Briefs were filed by the parties and the record closed after a conference call with the parties on December 18, 2020.

FACTUAL DISCUSSION AND FINDINGS

TESTIMONY

RESPONDENT'S WITNESSES

Jacqueline Emert (Emert), is the case manager for A.S. She met A.S. four years ago. She recalls talking to the mom about some social and emotional issues and she recommended a resource setting. She discussed the January 11, 2016, IEP which noted some language

problems and recommended resources classes and speech and language therapy. She felt the pullout would have been better, but the parents and A.S. did not want her pulled out, and the mom withdrew her from speech and language pull out. She does not recall why, but she thinks it was because there was a stigma attached to being pulled out and A.S. did not want to be pulled out. Until the very recent evaluations that were done, the last evaluations were done in 2008. She is not sure why no evaluations were done between 2008 and 2018.

Ms. Emert identified and discussed the 2016 IEPs but does not recall meeting with the parents. The related services were not to be provided per discussion with parents because they advised that they were providing them privately. She does not know if she was actually getting these services privately. In June of 2017, at the end of eighth grade, there was a re-evaluation planning meeting. An education and psych evaluation were proposed but the parents did not consent to the proposed evaluations. She does not know if they ever got a waiver and they did not file for due process over the issue. There is no signed waiver or anything to document that the reason why no evaluations were done. The new IEP was signed by the parents on August 18, 2017. There was no speech and language, or counseling in the IEP. She recalls that they recommended pull out in English and Math, but the parents wanted her in general education classes and there was no speech and language provided in the IEP. No functional behavior assessment (FBA) requested or completed. The June 2018 IEP was similar, and no evaluations were done prior to that IEP.

Connor Scott (Scott), was employed by the District and was head of special services for the District. He was the case manager for A.S. in eighth and ninth grade. A.S. was classified and deemed eligible for special education services in the District in 2009. She was classified as Communication Handicapped and Other Health Impaired (OHI) at one point. She suffered from attention deficit hyperactivity disorder (ADHD), and pervasive developmental disorder (PDD). There were no evaluations conducted between 2011 and 2018. An IEP was completed in June 2018 before she entered high school and a re-evaluation planning meeting was held in October of 2018. No vocational evaluation was done on her at any time. She had communication impairment and was entitled to speech and communication services.

They did evaluations in 2011 but none had been conducted between 2011 and 2018. Mr. Scott drafted a proposed IEP dated December 8, 2018, after the eligibility meeting and the testing he had conducted. The IEP proposed in-class resource for the four core subjects, study skills in the resource center and speech therapy. They recommended direct services be continued for speech and language, but the parents did not want them, so they modified the IEP and no speech and language were provided. They also wanted her in a resource room for several subjects, but the parents did not want that, so they changed the IEP. He conceded that in class support in a general education class was really not enough for A.S. He was also aware that she had no speech services for eighth and ninth grade. He conceded that she had not been meeting her goals and objectives.

Mr. Scott testified that although she was getting grades of Cs and Ds, she insisted that she was not struggling and did not want the extra support or to go into a resource room. He also testified that even where she was receiving better grades in some classes, these grades were inflated due to accommodations that were made for her. The parents were worried about her socially and said they would get tutoring outside of school. They also recommended a study stills class and speech therapy but that was also rejected by the parents because they wanted her with her socially appropriate peers and not kids with significant behavior issues or disabilities. The parent rejected resource center and corrective programs. If she was in fact receiving private tutoring, it was not addressing her significant deficits. He thought that if the parents refused to consent to the re-evaluations, that they were not obligated to do them. The parents had some problems with the proposed IEP, so they made changes to accommodate their requests. He discussed some of the test results from his educational evaluations which confirmed the very low range in most critical areas.

Mr. Scott was unclear why they had not done any evaluations for so long. He believed it was because the parents wanted to wait. Yet, there was no waiver from the parents or anything to document that the parents had refused to consent or produce her for testing or that they had waived the evaluations. He believed that that a resource room placement was the appropriate placement for her, but she was not put in the resource room. He went over some of the IEPs during his testimony which confirmed that A.S. was not reaching her goals and was reading at a very low level. The low level of her reading abilities was confirmed when she was

evaluated in 2018. He went though some prior assessment which confirmed her below average testing levels. She continued to be passed on to the next level despite her failure to meet any of her goals and objectives.

Rosella Minervini (Minervini), is a supervisor in the District but was not there at the time petitioner was there. However, she was the supervisor for the child study team that prepped the 2018 IEP for petitioner. Ms. Minerva discussed the IEP which continued with A.S.' classification as communication handicapped. She confirmed that A.S. had severe academic and language issues and would be a candidate for an LLD class. However, she had no firsthand knowledge of A.S., and never met with her. They did not have a final IEP and thus, no report from this witness. The proposed IEP that she mentions in her testimony was never presented to the parents and no IEP meeting was ever conducted, due to the fact that the child had already been unilaterally placed over the objection of the District.

PETITIONER'S WITNESSES

Jaime Lehrhoff (Lehrhoff), is employed by the Livingston Education Center. Her company does educational testing of children and IEP reviews. She is the owner and director of the Livingston Education Center and she is a learning disability teacher. Lehrhoff was qualified as an expert in education and education of learning-disabled children. She prepared a report in connection of her independent evaluation of A.S. which was conducted on February 26, 2020. The report was marked and entered into evidence at the hearing as R-20. She did not observe A.S. in her prior educational setting but reviewed her student records and observed her at The Lewis School. She also observed some classes in East Brunswick and reviewed the December 11, 2019, report from Dr. Healey, a neuropsychologist. Her general assessment of the resource room at the District high school was there was minimal supervision and little teaching going on and that A.S. would not have functioned well in that environment due to the lack of structure and her inability to work independently. In contrast, she found the environment at The Lewis School was calmer and A.S. was able to work in a small group setting with more one on one interaction with the teachers.

Ms. Lehrhoff discussed some of the evaluations that were conducted on A.S. She found that A.S. was very cooperative in all the testing. She indicated that she tested in the impaired range on most of the tests. She had weak listening and comprehension skills and deficits in auditory processing and expressive and receptive language. Her Wechsler Individual Achievement Test Second Edition (WIAT II) score was low in the sixteenth percentile and other testing showed very low scores. She testified that A.S.' communication impairment was a significant factor in her deficits in learning. Her profile and scores confirmed by Dr. Healy suggest that A.S. has a borderline intellectual function, unspecified ADHD, language disorder, learning impairment in reading, writing and mathematics.

In addition to her educational deficits, she suffers from general anxiety disorder, disruptive mood dysregulation disorder and central auditory processing disorder. After reviewing all the reports from the District and her current evaluation of A.S., she concluded in her expert opinion the IEPs from the District failed to provide A.S. with FAPE in the LRE. The IEP from the District failed to provide any meaningful educational benefit to A.S. Ms. Lehrhoff observed classes at The Lewis School and found that A.S. was an active participant in the classes that Lewis had provided a meaningful educational benefit to A.S. and they focused on her deficits and remediating of what had been missing. A.S. had made significant improvements since her enrollment at The Lewis School. She opined that A.S. was comfortable in the setting at Lewis and was not suffering from the level of anxiety she had in East Brunswick which was a result of her improper placement. She concluded that the program at Lewis was providing meaningful educational benefit in the LRE.

M.S. is A.S.' mother. She testified that A.S. was diagnosed with developmental delays at an early age and was at risk for learning disabilities. She never had any occupational therapy after third grade. She had a tremendous amount of anxiety and she had been diagnosed with ADHD. They offered her learning disability (LD) after first grade, but she had issues with the resources room. There was also erratic behavior and she was bullied. She was stressed and cried a lot. They obtained counseling outside of school for her anxiety disorder. The source of all her anxiety was school related. The problem was that what they recommended was always too much or too little and she never fit in and there was nothing else available She was either

with the kids that were at a much lower level functioning and had significant behavior issues or she was in a classroom that she could not keep up with. Her grades were all over the place.

M.S. testified that her daughter had difficulties in the resources room. There were children that had significant behavior issues and she was attacked by one of them. She spoke to Ms. Green about it, but they did not want to file a report as they understood that the other child was a special education student. Most of the children were below her socially in the resource room and she had a number of friends in the general education classes. She was being pulled out for speech, but it was twenty-three minutes in the middle of the day, so she was pulled out of her class, taken to speech, and then returned. It was doing no good and the pull out caused a great deal of anxiety for A.S. Her teachers liked her, and she worked hard, but she really had a hard time keeping up. Her grades were all over the place and she cried a lot. They did not have an LD class at the high school, and they had not done any evaluations in many years. They never discussed putting her in an LD class. There was a speech evaluation done in 2007 and then not until 2018. They pretty much decided that as long as she goes to class, they will pass her, but she was not learning anything and had so much anxiety about not being able to keep up in class.

M.S. knew that she was not doing well, but she trusted the District to do what was best for her. She trusted the case manager and left it up to them. When they finally got some evaluations, it was shocking how far behind she was, and she was really not learning anything. They never offered any corrective reading program and they never had an LLD program. She was passing her classes, but her grades were not reflecting her ability. We were shocked when we saw her scores and her actual reading levels. She was never offered extended school year or social skills class. She was never offered occupational therapy. She has done great at The Lewis School. They did a lot of remediations with her skills and she is in the appropriate classroom. Her anxiety and stress levels are much better, and her test scores are better. She does not recall ever signing a waiver of evaluations. She signed the IEPs because she trusted them to know what was best for her daughter.

FINDINGS OF FACT

The resolution of the petitioners' claims in this matter requires that I make a credibility determination regarding the critical facts, as well as the expert testimony. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See, D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view, and I **FIND** that M.S. was sincere and credible. I also **FIND** that the testimony from Jaime Lehrhoff was credible and was consistent with the facts and documentary evidence presented at the hearing. On the contrary, I **FIND** that the testimony of Connor Scott and Jacqueline Emert was not credible, and their testimony was inconsistent with the documentary evidence and their own testimony about the program that was provided to A.S.

Accordingly, I **FIND** as follows:

The IEPs from the respondent District did not provide any meaningful educational benefit to A.S., did not have appropriate goals and objectives for A.S., and failed to provide FAPE in the least restrictive environment. I further **FIND** that the out of District placement at The Lewis School has provided a meaningful education benefit to A.S. and has meet her

educational and emotional needs and provided FAPE in the LRE. I further **FIND** that proper notice of the out of district placement was provided by the parents.

I **FIND** as **FACT** that the District has failed to demonstrate that they provided an IEP which provided some meaning education benefit, reasonable goals and objectives and provided FAPE in the LRE. I further **FIND** that in order to accommodate the desires of the parents, and perhaps avoid litigation the District lost sight of its obligation to provide an IEP which provided A.S. with a meaningful educational benefit. I further **FIND** that the District IEPs for the past several years were not reasonably calculated to provide any meaningful educational benefit to A.S. and failed to provide FAPE.

LEGAL DISCUSSION AND ANALYSIS

The Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §§ 1400-1482, provides the framework for special education in New Jersey. It is designed "to ensure that all children with disabilities have available to them free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. §1400(d)(1)(A); see, generally Id. §1400(c), (d) (describing need for, and purposes of, the IDEA). A state may qualify for federal funds under the IDEA by adopting "policies and procedures to ensure that it meets" several enumerated conditions.

This Act requires that boards of education provide students between the ages of three and twenty-one who suffer from a disability with a free appropriate public education, or FAPE. In fulfilling its FAPE obligation, the Board must develop an IEP for the student, and the IEP must be reasonably calculated to confer some educational benefit. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 192, 73 L. Ed. 2d 690, 703, 102 S. Ct. 3034 (1982) (Rowley). The Third Circuit Court of Appeals has clarified the meaning of this "educational benefit." It must be "more than trivial and must be significant" and "meaningful." Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989) (Polk); Ridgewood Board of Education v. N.E., 172 F.3d 238, 247-48 (3rd Cir. 1999) (Ridgewood). In evaluating whether a free, appropriate public education was furnished, an individual inquiry into the

student's potential and educational needs must be made. Ridgewood, 172 F.3d at 247. In providing a student with a FAPE, a school district must provide such related services and supports as are necessary to enable the disabled child to benefit from the education. Rowley, 458 U.S. at 188-89. If an administrative law judge finds that a district has not made FAPE available to a student who previously received special education in a timely manner prior to his enrollment in a nonpublic school, the judge may require the district to reimburse the parents for the cost of that enrollment if the private placement is appropriate. N.J.A.C. 6A:14-2.10.

The Supreme Court also held that two factual findings must be made before awarding reimbursement for the costs of a unilateral placement: (1) the school district failed to provide a FAPE to the student, and (2) the placement selected by the parents was proper. School Comm'n of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369-70 (1985). Since the Burlington decision, its holding has been adopted by both Congress and the United States Department of Education. 20 U.S.C. §1412(a)(10)(C); 34 C.F.R. 300.403(c) (2005). It is also set forth at N.J.A.C. 6A:14-2.10(b) in that an ALJ may require the district to reimburse the parents for the cost of enrollment if the ALJ finds that the district had not made FAPE available to that student in a timely manner prior to that enrollment and that the private placement is appropriate.

Parents who are dissatisfied with an IEP may seek an administrative due-process hearing. 20 U.S.C.A. §1415(f). The burden of proof is placed on the school district. N.J.S.A. 18A:46-1.1. The Board will satisfy the requirement that a child with disabilities receive FAPE by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). To meet its obligation to deliver FAPE, a school district must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. (2017);137 S. Ct. 988; 197 L. Ed. 2d 335. In Endrew, the District Court for the District of Colorado initially upheld the school denial of a reimbursement for an out of district placement. However, the Supreme Court reversed finding that an IEP should be appropriately ambitious in light of the child's circumstances, and "tailored to the unique needs of a particular child."

In Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, 1001 (2017), the United States Supreme Court construed the FAPE mandate to require school districts to provide "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Court's holding in Endrew F. largely mirrored the Third Circuit's long-established FAPE standard, which requires that school districts provide an educational program that is "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities." Dunn v. Downingtown Area Sch. Dist. (In re K.D.), 904 F.3d 248, 254 (3rd Cir. 2018) [quoting Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3rd. Cir. 2012)]. In addressing the quantum of educational benefit, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the IEP provides for "significant learning" and confers "meaningful benefit" to the child. Endrew F., 137 S. Ct. at 1000–01; T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 247 (3d Cir. 1999), superseded by statute on other grounds as recognized by P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988). Hence, an appropriate educational program will likely "produce progress, not regression or trivial educational advancement." Dunn, 904 F.3d at 254 (quoting Ridley, 680 F.3d at 269).

Thus, the first issue is whether the District's IEP provided FAPE to A.S. The witnesses for the District failed to demonstrate that the IEPs were provided any meaningful educational benefit to A.S. However, the testimony of petitioners' expert, whom I found credible, as well as A.S.' mother demonstrates that the educational needs of A.S. were not being addressed by the District in her IEP, and A.S. was having significant academic troubles, as well as some social and emotional issues. There was significant testimony from the District about testing which was ultimately done and the IEPs which further solidified the fact that A.S. was not receiving FAPE in the District. The IEPs for the past several years in district failed to provide specific goals and objectives on a social, emotional and academic level which would provide a significant and meaningful educational benefit to A.S. Although, the District was trying to accommodate the desire of A.S. to stay with friends and not feel isolated, the goal is to provide FAPE in the LRE, not to make her and/or her parents happy. If the parents did not agree with the proposed IEP, they have the right to file for due process. It appears that in an effort to avoid litigation and make the parents and happy, the

proposed IEP failed to confer any meaningful educational benefit to A.S. Finally, given the fact that A.S. was struggling, which was evident from her grades, the District had an obligation to conduct evaluations and provide an IEP that provided some meaningful educational benefits. No evaluations were provided for almost nine years and no waiver of evaluations was obtained from the parents. Accordingly, I **CONCLUDE** that the District failed to provide FAPE to A.S.

Although the IEP should set forth a statement of the present levels of academic achievement and functional performance, including how the student's disability affects involvement and progress in the general curriculum [20 U.S.C. §1414(d)(1)(A)(i)(I); N.J.A.C. 6A:14-3.7(e)(1)], there was no such clear statement in the IEP. Although there should be a statement of measurable annual academic and functional goals with short-term objectives or benchmarks and the IEP should describe a program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives [20 U.S.C. §1414(d)(1)(A)(i)(II)-(IV); N.J.A.C. 6A:14-3.7(e)(2)-(4)], those were not clear in A.S.' current or proposed IEP. Although the IEP should establish the rationale for the pupil's educational placement, the IEPs in this case did not. In fact, the testimony from the District's own witnesses was that the petitioner's placement was not proper. Accordingly, I further **CONCLUDE** that the IEPs in question did not provide any meaningful educational benefit and thus, resulted in a denial of FAPE.

If a reviewing court finds as I have, that an educational agency failed to provide a student with a FAPE, it is broadly empowered to fashion relief that is appropriate in light of the purpose of the IDEA. School Comm'n of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985). The right of parents to make unilateral private placements when they disagree with the educational programs provided to their disabled children is well established. In the Burlington case, the United States Supreme Court held that the IDEA empowers courts to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement is proper under the IDEA. Ibid. This was considered to be a valid exercise of courts' broad powers to ensure that the purposes of the statute are carried out, i.e., to ensure that all disabled children have access to a FAPE. Ibid. The Court concluded that this would not unduly burden school districts. Rather, it merely requires a school district to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Id. at 359.

Based on the evaluations, reports, testimony, consistently low-test scores and no reasonable proposal to address these deficiencies, I **CONCLUDE** that the District's failed to provide FAPE in the LRE. I further **CONCLUDE** that the IEPs from the District did not provide any meaningful educational benefit to A.S., and were not reasonably calculated to deliver a measure of progress deemed reasonable and beneficial given the special needs of A.S.

Reimbursement is still dependent upon the parents establishing that the unilateral placement provides the pupil with an appropriate education. Burlington, 471 U.S. at 359; Florence County School District Four v. Carter, 510 U.S. 7, 15 (1993). Regarding the appropriateness of Lewis, petitioners provided documentary evidence of A.S.' progress at The Lewis School and provided testimony that A.S. was indeed demonstrating significant academic progress at same.

In New Jersey, such reimbursement is also dependent on compliance with N.J.A.C. 6A:14-2.10 entitled, Reimbursement for Unilateral Placement by Parents. The regulation provides in pertinent part:

> (a) Except as provided in N.J.A.C. 6A:14-6.1(a), the district board of education shall not be required to pay for the cost of education, including special education and related services, of a student with a disability if the district made available a free, appropriate public education and the parents elected to enroll the student in a nonpublic school, an early childhood program, or an approved private school for students with disabilities.
>
> (b) If the parents of a student with a disability, who previously received special education and related services from the district of residence, enroll the student in a nonpublic school, an early childhood program, or approved private school for students with disabilities without the consent of or referral by the district board of education, an administrative law judge may require the district to reimburse the parents for the cost of that enrollment if the administrative law judge finds that the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a court of competent jurisdiction or an administrative law judge according to N.J.A.C. 6A:14-6.5 for placements in unapproved schools, even if it does not meet the standards that apply to the education provided by the district board of education.

> (c) The parents must provide notice to the district board of education of their concerns and their intent to enroll their child in a nonpublic school at public expense. The cost of reimbursement described in (b) above may be reduced or denied:
>
> 1. If at the most recent IEP meeting that the parents attended prior to the removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the IEP proposed by the district;
> 2. At least 10 business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the district board of education of their concerns or intent to enroll their child in a nonpublic school;
>
> * * * *
>
> 4. Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

The District was given proper notice of the unilateral placement. Moreover, the District was aware that A.S. was failing to make any meaningful progress in the District. I therefore **CONCLUDE** that the unilateral placement by the parents at The Lewis School was reasonable.

I therefore **CONCLUDE** as set forth above that due to (1) the failure of the District to provide FAPE, (2) the appropriateness of The Lewis School for A.S., and (3) the parents' notice to the District of their placement, that reimbursement must be granted. N.J.A.C. 6A:14-2.10. Applying the notice requirements of N.J.A.C. 6A:14-2.10(c), reimbursement is appropriate from September 2019, and as long as that placement remains appropriate. The District shall develop an IEP consistent with A.S.' placement at The Lewis School.

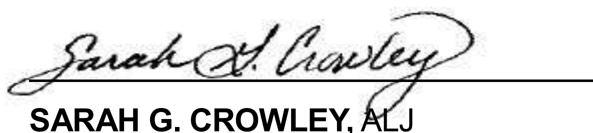
The issue of compensatory education is challenging in this case. Although the District failed to provide FAPE, I do not find the parents without fault in the process. The parents were resistant to the recommended proposal for A.S., which included resource classes, speech therapy and counseling. Moreover, the parents represented that they were providing A.S. with counseling and speech therapy as well as tutoring outside of school, which is what they preferred. It was their desire to do this outside of the school day. So, although I have **CONCLUDED** that it was the

District's obligation to provide an IEP that addressed her needs, regardless of the parent's desires, which they failed to do, the parents declined other services which they insisted on providing outside of the school day by their own providers. Moreover, the testimony regarding her past and current curriculum at The Lewis School indicates that she received a great deal of remedial learning as part of her curriculum at The Lewis School, which is included in the tuition. Compensatory education is an equitable award and is determined on a case by case basis. Accordingly, I am awarding a very limited compensatory education award of fifty hours to be used towards remedial education where needed.

ORDER

For the reasons set forth above, the reimbursement for the unilateral placement and continued placement at The Lewis School is **GRANTED**, and compensatory education in the amount of fifty hours is **GRANTED.**

This decision is final pursuant to 20 U.S.C. §1415(i)(1)(A) and 34 C.F.R. §300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. §1415(i)(2); 34 C.F.R. §300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.



January 5, 2021

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency ____________________

Date Mailed to Parties: ____________________

SGC/nd

APPENDIX

WITNESSES

For Petitioners:

Jaime Lehrhoff

M.S.

For Respondent:

Jacqueline Emert

Connor Scott

Rosalina Minervina

EXHIBITS

For Petitioners:

P-1 Not entered

P-2 Education Evaluation, Amy H. Karp, M.A., DT-C, dated December 16, 2011

P-3 Psychological Report, Barbara Ziegler, dated December 19, 2011

P-4 Social Assessment, Christine A. Grady, LSW, December 5, 2011; January 2009; December 2012

P-5 Agreement to Modify IEP without Meting; Effective Date of Amendment September 25, 2015

P-6 IEP Annual Review, Grade Seven

P-7 Not entered

P-8 IEP Annual Review, December 14, 2016

P-9 IEP Re-evaluation Eligibility Determination with Annual Review, dated June 7, 2017

P-10 IEP Amendment without a Meeting, dated August 18, 2018

P-11 IEP Amendment without a Meeting, dated September 6, 2017

P-12 IEP Amendment without a Meeting, dated September 18, 2017

P-13 Not entered

P-14 IEP Amendment without a Meeting, dated June 12, 2018

P-15 IEP Re-evaluation Eligibility Determination with Annual Review, dated December 6, 2018

P-16 Development Pediatric Evaluation, Initial Visit, Hilary Kruger, M.D., dated April 11, 2007

P-17 Developmental Pediatric Follow-up Visit, Attending Physician, Hilary Kruger, M.D., dated April 18, 2007

P-18 Neurodevelopmental Follow-up, Larry J. Tiefenbrunn, M.D., dated April 10, 2007

P-19 East Brunswick Occupational Therapy Consultation Note, dated February 16, 2006

P-20 Pediatric Therapy Group, Occupational Therapy/Consultation Notes, Mrs. Barksdale and Heather Lawrence, OTR/L, dated October 27,2006

P-21 Looking Upward-Pediatric Therapy Group Consult Note, dated January 26, 2007

P-22 East Brunswick Occupational Therapy Consultation Note, dated March 1, 2007

P-23 Looking Upward Pediatric Therapy Group, Educationally Relevant Occupational Therapy Progress Report, dated April 9, 2008

P-24 East Brunswick Occupational Progress Report, dated April 8, 2009

P-25 Education Evaluation, Conor Scott, M.Ed., LDT-C, dated October 11, 2018; October 26, 2018

P-26 Psychological Evaluation, Jill O'Hare, Psy.D., dated November 13, 2018

P-27 Not entered

P-28 Progress Note, Rachel Strohl, Psy.D., dated November 5, 2019

P-29 Lewis School, Learning Strengths and Weaknesses Overview, Test Administrator: Sarah Stevens, dated May 29, 2019

P-30 Not entered

P-31 Psychoeducational and Neuropsychological Evaluation, Jane M. Healey, Ph.D., dated December 11, 2019

P-32 Not entered

P-33 East Brunswick Student Report Card, Teacher: Karen Posluszny, dated September 25, 2019

P-34 A.S. Tenth Grade Schedule

P-35 Central Auditory Processing Evaluation, dated October 15, 2019

P-36 Unilateral Placement Notice, dated July 15, 2019

P-37 Notice of Unilateral Placement, dated July 17, 2020

P-38 The Lewis School of Princeton, Contract, dated August 6, 2019

P-39 Various Classwork, dated April 1, 2020

P-40 The Lewis School of Princeton, Official School Transcript, Fall Semester 2019-2020

P-41 The Lewis School of Princeton, Tuition 2019-2020, dated November 1, 2019

P-42 Jaime Lehrhoff, Curriculum vitea

P-43 Not entered

P-44 The Lewis School of Princeton, Tuition 2020-2021, dated February 1, 2020

P-45 Diagnostic Psychiatric Evaluation, Lisa A. Kotler, M.D., dated August 27, 2018

P-46 Not entered

P-47 Not entered

P-48 Letter from Lisa A. Kotler, M.D., dated June 25, 2019

P-49 Email Correspondence between M.S. and Scott

For Respondent:

R-1 Not entered

R-2 Not entered

R-3 IEP Annual Review, dated March 16, 2018

R-4 Not entered

R-5 Not entered

R-6 Not entered

R-7 Not entered

R-8 Not entered

R-9 IEP Annual Review, dated October 24, 2016

R-10 IEP Annual Review, dated January 11, 2016

R-11 Not entered

R-12 IEP Amendment, dated June 2, 2014

R-13 Not entered

R-14 Re-evaluation Planning Meeting, dated June 7, 2017

R-15 Email Correspondence between Scott and M.S., dated April 5, 2019

R-16 Scott Case Notes 2018-2019 School Year, dated September 2018 and April 2019

R-17 Education Evaluation, Scott, dated October 11, 2018 and October 26, 2019

R-18 Education Evaluation, Jaime Lehrhoff, M.A., LDT-C

R-19 Not entered

R-20 Not entered

R-21 Not entered

R-22 Not entered

R-23 Not entered

R-24 Conor L. Scott Resume

R-25 Not entered

R-26 Progress Report for IEP Goals and Objectives, School Year 2016-2017, dated November 21, 2016

R-27 Progress Report for IEP Goals and Objectives, School Year 2016-2017, dated January 9, 2017

R-28 Progress Report for IEP Goals and Objectives, School Year 2016-2017, dated April 7, 2017

R-29 Progress Report for IEP Goals and Objectives, School Year 2017-2018, dated March 23, 2018

R-30 Progress Report for IEP Goals and Objectives, School Year 2017-2018, dated November 21, 2018

R-31 Progress Report for IEP Goals and Objectives, School Year 2018-2019, dated November 21, 2018

R-32 Progress Report goals and Objectives, School Year 2018-2019