State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

J.S. ON BEHALF OF T.R. ., Petitioner, v. **NEWARK CITY BOARD OF EDUCATION,** Respondent.	OAL DKT. NO. EDS 10309-20 AGENCY DKT. NO. 2021-32167,
NEWARK CITY BOARD OF EDUCATION, Petitioners, v. **J.S. ON BEHALF OF T.R.,** Respondent.	OAL DKT. NO. EDS 10456-20 AGENCY DKT. NO. 2021-32261
NEWARK CITY BOARD OF EDUCATION, Petitioner, v. **J.S. ON BEHALF OF T.R,** Respondent.	OAL DKT. NO. EDS 01142-21 AGENCY DKT. NO. 2021-32494

Crystal Rogers, Parent Advocate. for petitioner

Sabrina Styza, Esq. for respondent (Newark Board of Education)

Record Closed: August 20, 2021 Decided: September 3, 2021

BEFORE **ANDREW M. BARON,** ALJ:

STATEMENT OF THE CASE

Petitioner, J.S. (the parent) on behalf of T.R., filed a Petition for Due Process against the Newark Board of Education (the Board or District), alleging that the District's proposed in-District program for T.R. did not provide FAPE to T.R. Among other things, petitioner, who was joined throughout the proceedings by T.R.'s father, sought new evaluations to be conducted by the District, some of which had never been done or were very old, and an appropriate out-of-district placement, as petitioners are of the belief that the Newark School District cannot meet T.R.'s complicated educational needs and challenges.

Although some discussion on the FAPE aspect of the proposed IEP and T.R.'s placement during the 2020-2021 school year is necessary, as the testimony developed during the course of the hearing, the District did not seem to dispute that the placement T.R. was in did not meet the District's FAPE obligations, as it was the District itself that proposed an alternate placement for T.R. in January 2021.

Therefore, most of the emphasis in this case is on the appropriateness of the placement proposed by the District at Newark Day Regional and the alternate out-of-district placement sought for T.R. by the petitioners at Academy 360.

For the reasons set forth herein, Academy 360 is the more appropriate program for T.R. to attend commencing with the 2021-2021 school year.

PROCEDURAL HISTORY

On or about September 20, 2020, petitioner filed a due process petition seeking a private placement in a specialized school to address T.R.'s cognitive disability. On November 14, 2020, the District filed its own due process petition objecting to petitioner's request for independent evaluations, including but not limited to an applied behavioral a

analysis and an independent physical therapy evaluation.

On February 4, 2021, the District filed a second due process petition essentially to petitioner's request for an independent augmentative evaluation.

Thereafter, petitioner withdrew the requests for independent evaluations to focus on the request for placement at a private out-of-district school, identified as Academy 360.

Following a conference on February 18, 2021, all three cases were consolidated.

Hearing dates were conducted on May 19, 2021, May 21, 2021, June 11, 2021, July 21, 2021 and July 23, 2021 respectively.

Due to a significant delay in processing transcripts with the Office of Administrative Law transcription service, both parties waived transcripts and proceeded to submissions which were received on August 20, 2021.

TESTIMONY AND DISCUSSION

Six witnesses testified for Petitioner, including Stacy Tate, a learning consultant, Jamel Gibbs, school psychologist, Rachel Colamenco, physical therapist, speech and language therapist Adam DiDonna and Jennifer Gruber, behavior analyst.

On the issue of appropriateness of the placement proposed by the District, Jennifer Mitchell, the principal of the New Jersey Regional Day Program testified.

Interestingly, the District did not call as a witness T.R.'s teacher at the 14th Avenue School, who was most familiar with her performance and challenges.

Both of T.R.'s parents testified in support of their position that Academy 360 was a more appropriate placement for T.R. than Newark Regional Day.

According to petitioner, T.R. is a rising 7th grader currently enrolled in the Newark Public Schools.

Although she is a generally happy girl, she suffers from a condition known as Schizencephaly, a rare congenital brain malformation which results in abnormal slits or clefts in the cerebral hemispheres of the brain. The testimony and evidence show that people with this condition also suffer from hydrocephalus, intellectual disabilities, poor muscle tone, seizures and extreme difficulty with verbal communication. According to petitioner and not disputed by any of the District's witnesses, T.R.'s ability to communicate with teachers and peers is severely hampered.

In her testimony, petitioner says the seizures have been controlled over time with medication, and it is primarily the lack of ability to communicate and the intellectual disability that over an extended period of time has caused T.R. to fall even further behind that finally caused petitioner to take action with the filing of the within petition.

Within the last two years, with frustration mounting that T.R. was not progressing, her parents LS. and T.R. escalated their advocacy efforts on behalf of T.R. as they observed her getting even more frustrated at home with her inability to do her schoolwork. They both state that it was only after the filing of the Due Process petition that the District began to pay more attention to T.R.'s challenges, and several more current assessments and evaluations were performed. It was noted that L.S. got very emotional as she described what finally caused her to file, for which she expressed remorse that she had not acted sooner as T.R.'s advocate. Like the witnesses who testified for the District. L.S. was credible in her testimony, even though there obviously is some bias on her part because she is T.R.s mother. Nonetheless, her testimony about the events leading up to the filing, and what occurred thereafter, including but not limited to the rejection of the IEP and proposed placement in January 2021 were genuine.

According to L.S., while T.R. was in 4th grade, L.S. did her own research and learned about a technological device known as an A.A.C., which could help T.R. communicate better with teachers and peers. So, she purchased it on her own for T.R.,

and slowly through online platforms taught herself and T.R. how to use the device, which she brought to school with her every day. The District did not dispute that initially there were some limitations on the effectiveness of the device as the teacher did not have her own corresponding device, nor was the teacher trained in how to use the device.

As she stated, following the filing of her formal Due Process petition, a series of formal evaluations were conducted in October and November 2020 by the District. It is also not disputed by the district that T.R. was entitled to special needs services, even before the filing. It is the type and level of services that drove the parents to file, seeking a placement.

Testifying for the District was Stacey Tate, a certified learning disabilities consultant, who is the case manager at the Fourteenth Avenue School where T.R. was enrolled through 2021. In her capacity as case manager, Ms. Tate coordinated the scheduling of a series of evaluations for T.R. including but not limited to psychological, educational, speech and language, social and assistive technology. Later added at the petitioner's request were ABA Behavioral and physical therapy evaluations.

After the reports were completed, and a new IEP was completed for review, Ms. Tate scheduled a re-evaluation and IEP meeting with petitioners and the members of the Child Study team for January 27, 2021. Also invited by the District to attend the meeting was the principal of New Jersey Regional Day program, as a proposed alternate placement for T.R.

Petitioner said she was unaware that the principal of Newark Regional Day would be in attendance, didn't authorize her presence, and that no other alternate programs were made available for review.

Ms. Tate testified that as a result of the outcomes of all of the assessments, the team determined that T.R. fell into the category of "multiply disabled' and that Newark Regional Day was the most appropriate alternate program for T.R. to enter, so she would have the benefit of the program for the remaining five months of the 20-21 school year.

The next witness was Jamal Gibbs, a Certified School Psychologist. Mr. Gibbs was admitted as an expert in his field. He testified that after reviewing the results of his testing, the most appropriate program for T.R. was one that met her multiple disabled needs, due to her intellectual disability and her medical conditions including neurological challenges and seizure disorder. He was of the belief that the Newark Regional Day program was the most appropriate and least restrictive environment that could meet all of T.R.'s educational needs.

Also testifying for the District was Rachel Colamenco, a Certified Physical Therapist. Her testimony was unremarkable, other than to say that T.R. could receive the physical therapy she needs while enrolled at Newark Regional Day.

Emphasis was the placed on the next two witnesses, Adam DiDonna, a Certified Speech and Language Pathologist, and Jennifer Gruber, a Board Certified Behaviorist.

During his testimony, Mr. DiDonna acknowledged his review of T.R.'s prior records in the central registry, indicated T.R. had significant delays in the areas of oral motor and articulation skills, admitted that in his professional and expert opinion, T.R. would benefit from speech and language services as well as an augmentative communication device. Although he indicated T.R. did not exhibit any "behavioral outbursts during his evaluation. Like the other witnesses for the District, he did not communicate with the teacher T.R. had for almost two years Ms. Rosario.

And while he recommended the use of an augmentation device, (AAG), he could not explain why over a year had passed with T.R. already using a device purchased by the parents, with no corresponding classroom device or training on how to use it by T.R.'s in class teacher. He admitted and could not explain why he did not consult with T.R.'s classroom teacher, including but not limited to whether the use of the AAG device in the prior year had helped T.R.

To his credit, he was familiar with the appropriate software to be loaded on the device called, "Proloquo2Go." He emphasized that a new device, that the District would

purchase for T.R. could be used in school and at home, and that the device would help T.R. socially as well as academically. After the District purchased the device, parent training, as well as training for T.R.'s teacher's aid was provided.

Like the other District witnesses, he too supported a placement for T.R. in Newark Regional Day, but he did not question whether any other alternate placements were explored.

The next witness for the District was Jennifer Gruber, a Certified Behavior analyst. Unlike the other District witnesses, Ms. Gruber is not employed by the District, she works for an independent agency. Since the behavioral component, (or lack of as presented by petitioner) was a key aspect of petitioner's case, Ms. Gruber testified and was cross-examined on this issue extensively. She too came across as a credible witness.

One week before the re-evaluation/IEP meeting, Ms. Gruber conducted her evaluation. While thorough, the evaluation did not include an in-class observation. She too indicated that the evaluation showed emerging language concerns, but nothing in the behavioral category. She explained the difference between a strict life behavior program and a program based on discrete trials. She believes that if any behavioral supplement is needed for T.R., it could be accomplished in a natural classroom setting, though she thought T.R. would benefit from an ABA methodology program which has a strong functional communication focus and training. Because T.R. did not exhibit any outburst or behaviors during her assessment, she did not believe a behavior intervention program was appropriate. Instead, Ms. Gruber emphasized that T.R.'s behaviors should simply be monitored, with communication tools and life skills the primary focus. Ms. Gruber also did not interview T.R.'s classroom teacher, who was not called upon to testify.

Ms. Gruber's testimony did not include an opinion about the appropriateness of the Newark Regional Day program, or any other alternate out-of-district program.

The last witness who testified for the District was Jennifer Mitchell. Ms. Mitchell serves as Principal and Director of the Newark Regional Day Program and has been

working with students with disabilities for thirty-one years. Although petitioner's consent was not sought or obtained, Ms. Mitchell was invited by the District to participate in the re-evaluation/IEP meeting, and was given access to the assessments and records of T.R.

Ms. Mitchell comes across as an enthusiastic and knowledgeable educator who cares about her students. Though there is a separation between Newark Regional Day and the Newark School District, her salary is paid by Newark. Although the program and staff she discussed is impressive, among the things that is of concern to T.R.'s parents. is that there is no separation between age students. In essence, though the size of the school population is small according to Ms. Mitchell, the entire program is housed in one building, which means that T.R. would be interacting with students much higher in age and maturity through grade 12. That is something that made petitioner extremely uncomfortable, as T.R.'s mother and advocate. And she went on to justify her concern that should T.R. be confronted or even bullied in the hallway by a student several years older, because of her intellectual and communication challenges, she would not know how to handle such a situation, let alone communicate with a teacher or staff member about what occurred.

As she continued her testimony, Ms. Mitchell recounted a number of reasons why Newark Regional Day, was appropriate for T.R. She testified that T.R. would receive the benefit of a specialized program individually designed for her, including a multi-sensory reading and writing program. A specially designed math program would also be offered, together with social skills training and physical therapy.

Ms. Mitchell also said that T.R.'s behavior in and out of the classroom would be tracked, and that the tracking would foster progress towards achieving communication goals, as well as participation in community activities. She admitted however, that the school had just hired a behaviorist, and that person would not be in the classroom with T.R. and would have responsibility for several other students at the same time.

Since Ms. Mitchell was not part of the Child Study Team who prepared the proposed IEP in January 2021, and consent from the parents was not sought for her to

participate in the IEP meeting, she was not allowed to testify about whether the document contained sufficient goals, recommendations and supports for T.R. to thrive. Were T.R. to enroll at Newark Regional Day, she would be classified as "multiple disabled" primarily due to her medical history of occasional seizures, a condition which her mother indicated had been in check for at least the last to years with medication. The program both parents seek, which was never addressed at the IEP meeting, was the program offered at Academy 360, (also known as Spectrum 360), which is more of a cognitive program.

None of the District witnesses were able to explain why only one program was discussed and offered during the IEP meeting, nor could anyone explain how Ms. Mitchell was included, without appropriate notice and consent by the parents.

Thus, as petitioner explained during her testimony, it seemed as if there was a predetermined outcome of T.R.'s placement even before the meeting started, which seemed suspect to her and T.R.'s father and against the legal requirements of the IEP process, and IDEA.

In essence, in addition to the fact that petitioner did not believe the IEP goals and objectives were sufficient for T.R., the almost foregone conclusion that they would accept Newark Regional Day, without the District at least considering one or two alternate programs and sending packages out to see if T.R. could fit into other placements, led petitioner and T.R.'s father to reject the IEP, and maintain the status quo until their case could be heard.

And, for reasons unknown, after asking that T.R. be returned to Ms. Rosario's classroom, the teacher who knew her needs best, and who was the one member of the team who felt a cognitive program was more suited for T.R., it took four more months for T.R. to be switched back, not until May 2021 for this to occur.

For all of the aforementioned reasons, petitioner and T.R.'s testified that Newark had failed T.R. for several years, the AAC device was only added by the District within the past year, and there was a complete lack of trust in the District's handling of their

child, previously and moving forward. According to petitioner, this was the first IEP meeting where multiple members of the Child Study team were in attendance, except for the teacher Ms. Rosario, who was not called to testify and who apparently had a different opinion about T.R.'s needs.

Were it not for the formal filing of the petition that gave rise to this case, petitioner believes that the District would have followed the same course of education it had for T.R. over the preceding years, and her educational development would have stagnated even more.

FINDINGS OF FACT

1. T.R. has just completed 6th grade student at the 14th Avenue School in the Newark School District.

2. Almost immediately when she started kindergarten, T.R., was in essence non-communicative. Among other things, she showed signs of multiple language and learning and intellectual disabilities.

3. T.R. struggled with her assignments at home, evidencing symptoms of anxiety about completing assignments.

4. At an early age, she was diagnosed with Schizencephaly, a cognitive brain malformation, which severely hampers one's ability to communicate verbally.

5. T.R. endured other medical conditions and illnesses at an early age, including seizures, which led the Newark School District to classify her a "multiple disabled"

6. The seizures have been overcome with medication, and her educational challenges are more of a cognitive nature.

7. According to her doctor T.R.'s last seizure occurred in October 2016, thus supporting petitioner's premise that while the condition may always be there, it is controlled with medication and should not be the basis of the District's classification as multiple disabled.

8. Despite the obvious existence of T.R.'s significant communicative challenges, an alternate means of communication through the use of a communication book, a recommendation which was only included by the District in June 2018, at the end of another school year.

9. Her teacher in 2020, Ms. Rosario, who was not presented as a witness by the District in this case, noted in September 2020, that T.R. has a hard time communicating even a simple request such as the need to go to the bathroom or a supply in the classroom.

10. Though Ms. Rosario attempted to help her with an IPAD, this did not help, which ultimately led T.R.'s mother on her own to purchase an AAC device for T.R.

11. The District did not recognize or offer to purchase an AAC device for T.R. until after T.R.'s mother brought it to their attention, and so it was finally included in the January 2021 IEP.

12. Petitioner, who is self-employed, and petitioner's father, who is employed in the areas of maintenance/custodial work, did not have sufficient financial means to hire their own independent experts for this case. Though separated, they are both loving and caring parents who only want the best educational opportunity for their daughter.

13. Petitioner and T.R.'s father also did not have sufficient financial means to do a unilateral out of district placement for T.R., once they disagreed with the recommendations of the January 2021 proposed IEP and placement for T.R.

14. Given the extensive financial requirements of hiring independent experts, and/or doing a unilateral outside placement, neither of these realities can be held against T.R.'s parents in the manner the case was presented.

15. Once the Due Process petition was filed and the District started to give more attention to the needs of T.R the results of the Child Study team testing from October 2020 through December 2020 revealed low scores across the board in letter-word identification, word attack skills, broad reading skills, reading fluency math attack skills and general oral comprehension.

16. More specifically, scores in oral reading, reading vocabulary applied problems, calculations, writing samples, math facts fluency, sentence reading, sentence writing, number matrices reading recall and spelling were all in the Very Low Deficient range.

17. These results, which were not disputed by the District appear throughout the reports of all of the District's evaluators.

18. On the Behavior Assessment conducted by Ms. Gruber, T.R.'s scores in LRFFC were 0.5 out of 15, Intraverbal 1.0 out of 15, linguistic skills 0.0 out of 15, Reading 4.0 out of 15 and writing 5.0 out of 15.

19. Ms. Gruber did not dispute the fact that a Certified Behaviorist on staff is not always equated with a child who misbehaves our acts out. Such a professional can also be part of an educational team in other areas for a child such as T.R. who has marked communication impairments.

20. The January 2021 IEP refers to T.R. as "semi-verbal", which is not consistent with the testimony of petitioner or any of the District witnesses who admit that while she can form a word here and there, she cannot converse in sentences and when she does try to speak, her speech is almost incomprehensible, except to her parents.

Despite the District's argument to the contrary, as evidence by her extremely low scores on virtually all of the testing from October 2020 through January 2021, it is clear that the district has not conferred an education that provides a meaningful benefit to T.R. for an extended period of time. The failure to recognize the need for an appropriate communication device, with proper training for teachers and aides only reinforces this **FINDING.**

I **FIND** that the District violated FAPE under IDEA and has for some time neglected T.R.'s actual needs. T.R. has significant communication and cognitive challenges, which are the foundation of much of her educational status, have existed for some time and were never properly addressed. It was not until the filing of the within petition, when T.R. was in 6th grade, that the District recognized it was not meeting its obligations under FAPE and IDEA.

I FURTHER FIND, that the manner in which the District prepared and conducted the combined re-evaluation/IEP meeting in January 2021 was improper, leading to a lack of trust on the part of T.R.'s parents who elected to reject the recommended placement. No one asked petitioner for consent to have Ms. Mitchell attend the meeting or review T.R.'s records. No other options were explored by the District. So the meeting itself, gave petitioner the feel of a pre-determined outcome, which is not how under the law IEP meetings are to be conducted.

I FURTHER FIND, that while there is no way to measure T.R.'s regression while a virtual student during the Pandemic with physical school closed, that together with the unexplained four month delay by the District in returning T.R. to Ms. Rosario's class, a teacher who was most familiar with T.R., is sufficient grounds to warrant an award of Compensatory Education in this case, which instead of certain hours and dollars of private tutoring is best accomplished through placement at Academy 360.

I further **FIND** and **ORDER** that T.R. is entitled to enroll at Academy 360 for the next school year as I **FIND** given all of the circumstances herein this program is appropriate and is permitting T.R. to experience significant learning and meaningful

educational benefit, as well as to benefit from some form of compensatory education to which she is entitled without specifying a number of hours or dollars for the District's failure to meet its FAPE obligations to her. **Transportation costs** shall also be part of this placement and will be the responsibility of the District.

LEGAL ANALYSIS AND CONCLUSIONS

Education has long been fundamental to the workings of democracy. In the historic decision of Brown v. Board of Education, Chief Justice Earl Warren announced that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. 347 U.S. 483 (1954). The fact that the education of youth" is essential to the workings of democracy and the future well-being of society is widely appreciated." Abbot ex rel. Abbot v. Burke, 199 N.J. 140 (2009).

And in Abbot v. Burke, 119 N.J. 287 (1990), (also known as Abbot II), the New Jersey Supreme Court held that students in the poorest urban districts were deprived of their constitutional rights thorough and efficient education because of the State's failure to provide adequate resources for their educational programming.

The Supreme Court went on to find that the system of financing was also unconstitutional because in 28 or 31 special needs urban districts, (Newark being the largest), this constitutional mandate has not been fulfilled. Thus, the Court ordered the Legislature to either amend the existing law or pass new legislation to assure that poorer districts such as Newark received education funding equal to the average of the richer districts and be adequate to provide for the special education needs of their students in order to redress the extreme disadvantages such children face. (emphasis added).

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and ensures that the rights of children with disabilities and parents of such children

are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A).

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a free "appropriate public education." 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Each district board of education is responsible for providing a system of free, appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A "free appropriate public education" (FAPE) means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, 458 U.S. 176. Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A), (B).

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(14); 20 U.S.C. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student's educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). Annually, or more often, if necessary, the IEP team shall meet to review and revise the IEP and determine placement. N.J.A.C. 6A:14-3.7(i). FAPE requires that the education offered to the child must be sufficient to "confer some educational benefit upon the handicapped child," but it does not require that the school district maximize the potential of disabled students commensurate with the

opportunity provided to non-disabled students. Rowley, 458 U.S. at 200. Hence, a satisfactory IEP must provide "significant learning" and confer "meaningful benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577-78 (3d Cir. 2000).

The Supreme Court discussed Rowley in Endrew F. v. Douglas County School District RE-1, _ U.S. _,137 S. Ct. 988 (2017), noting that Rowley did not "establish any one test for determining the adequacy of educational benefits" and concluding that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Id. at 996, 1001. Endrew F. warns against courts substituting their own notions of sound education policy for those of school authorities and notes that deference is based upon application of expertise and the exercise of judgment by those authorities. Id. at 1001. However, the school authorities are expected to offer "a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." Id. at 1002.

In Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 46 (1989), the New Jersey Supreme Court concluded that "in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined." Further, the New Jersey Supreme Court stated:

> As previously indicated, the purpose of the IEP is to guide teachers and to insure that the child receives the necessary education. Without an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP. Furthermore, an IEP that is incapable of review denies parents the opportunity to help shape their child's education and hinders their ability to assure that their child will receive the education to which he or she is entitled.
>
> [Id. at 48-9. (citations omitted).]

In accordance with the IDEA, children with disabilities are to be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur 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. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to require that a disabled child be placed in the LRE that will provide the child with a "meaningful educational benefit." T.R., 205 F.3d at 578. Consideration is given to whether the student can be educated in a regular classroom with supplementary aids and services, a comparison of benefits provided in a regular education class versus a special education class, and the potentially beneficial or harmful effects which placement may have on the student with disabilities or other students in the class. N.J.A.C. 6A:14-4.2(a)(8).

The District contends that it provided FAPE to T.R. in the least restrictive environment. Conversely, petitioners contend that the District's proposed program was not appropriate to meet T.R.'s individualized needs and would not provide T.R. with a FAPE. The District bears the burden of proof and the burden of production whenever a due process hearing is held pursuant to the provisions of the IDEA. N.J.S.A. 18A:46-1.1.

Notably, the District does disagree on T.R.'s present levels of achievement and functional performance require an alternate placement. But FAPE and IDEA also require a legal process be followed in the re-evaluation and IEP process, which the District failed to adhere to in this case. As a result, while Newark Regional Day may be a fine program for some students, once the District determined and agreed it could not meet T.R.'s needs within District, it should have cast a 'wider net" of potential alternate programs for T.R.'s parents to consider and evaluate during the January 2021 IEP meeting.

Instead, however, the IEP meeting all but had a pre-determined outcome, with the District in essence telling the parents it knew what was best for T.R., here is the program, Newark Regional Day, (which while separate from the District, pays the salaries of its employees), and we will not discuss or offer any other choices.

While likely presented in a nicer way, this "take it or leave it approach" violates the spirit and intent of FAPE and IDEA, as well as Section 504 of the Rehabilitation Act, and defeats the purpose of how a District working together with parents of a disabled child who needs special services is supposed to occur.

The need of an out-of-school placement after determining a District did not provide a student with FAPE is well-established: see M.F. and L.F. o/b/o N.F. v. Secaucus Board of Education EDS 10762-06 (2007) see also: D.B. and C.B. o/b/o D.B v Windsor Twp. Board of Education EDS 933-11 (2011). Each of these cases resulted in an award of reimbursement to petitioners for all charges and expenses related to the unilateral placement of a student in another school.

Several of the goals and objectives in the IEP were not appropriate because T.R. lacked the prerequisites for those goals and the criteria and therefore were not appropriate to establish meaningful progress. Most troubling is the undisputed fact that it took the District over five years to determine that among other things, T.R. would benefit from the use of an AAC device, (which her mother purchased on her own a year before the District did the same for T.R.) And it is clear that only after the parents filed a formal Due Process petition, did the District give T.R. the necessary attention by way of a full battery of evaluations, in order to determine something, it should have already known from having previously determined T.R. was entitled to special education services.

Once the IEP was rejected by petitioner in January 2021, it took the District four more months to return T.R. to her original classroom, with the same teacher Ms. Rosario who identified the need for more services and was of the belief that T.R.'s needs were primarily of a cognitive nature. No explanation was given for this significant delay on the part of the District after in person classes were resumed. So T.R. ended up losing more critical time in an appropriate educational setting.

The District argues that it is only required to confer an education that has a "meaningful benefit", and does not require it to maximize a child's potential. See: See: T.R. v. Kingwood Twp. Bd. of Ed. 205 F 3rd. 572 (3rd Cir. 2000). See also Oberti v. Bd. of Ed. of Clementon Sch. Dist. 995 F2nd 1204 (3rd Cir. 1993). It further relies on the decision in Holmes v. Millcreek Twp. School Dist. 205 F. 2n 585, (3rd.Cir. 2000), for the proposition that the IEP should provide a "basic floor of opportunity" rather than an optimal level of services the parents might desire for the child. Thus, while not directly saying so, the District feels it only has minimum obligations to T.R., while her parents have confirmed through their testimony that the District has not even met this obligation to her. And,

Holmes also says that what is being offered has to take into account a child's unique circumstances.

Finally, the District's reliance on Judge Moscowitz's decision in N.S. and M.S. o/b/o A.S. v. West Milford Bd. of Ed.,OAL DKT.12783-14 and 01792-15. Is misplaced and clearly distinguishable. In that case, Judge Moskowitz found that "there was overwhelming evidence that the IEP offered was appropriate in the least restrictive environment, and there no need to evaluate the appropriateness of the placement sought by the parents. (emphasis added). In T.R.'s case, the District has all but admitted it had not provided FAPE, by introducing one alternate program during the IEP meeting, and so it recognized that it was not fulfilling its FAPE obligations to T.R. So reliance on this case is misplaced and not relevant to the facts or law here.

But citing T.R., a meaningful benefit must consider a child's individual needs. (emphasis added). The District did not address the child's individual needs for a long time, as evidenced by her scores and the lack of an appropriate communication device. Further, when pressed due to the filing of a formal Due Process petition, the fact that the District did not follow proper protocol as it developed the latest IEP in question together with a mid-year proposed alternate placement, is sufficient for me to **CONCLUDE** that an outside placement at Academy 360, which the District has no affiliation with, is more **Appropriate** for the 2021-2022 school year.

I FURTHER CONCLUDE while Ms. Mitchell seems like a decent, capable educational leader, and I do not cast aspersions on Newark Regional Day, it was entirely inappropriate to merge the IEP meeting together with the placement discussion, inviting Ms. Mitchell and her staff to attend without asking for consent from petitioner, and then pre-determining the outcome of the meeting with a single proposed placement, with no other alternatives explored.

After consideration of all the testimony and evidence, I **CONCLUDE** that the District did not sustain its burden that T.R. was receiving FAPE in the Least Restrictive Environment, and that T.R.'s rights under FAPE, IDEA Section 504 were violated. I therefore **CONCLUDE** that Petitioners, who were represented by Ms. Rogers in a thorough and professional manner, are the prevailing party in this matter.

I ALSO CONCLUDE, that not only did the District fail to meet its FAPE obligations to T.R., but with its designation as an **Abbott** district, it failed to maximize the financial benefit it receives from such a designation and pass it along to T.R. with the manner in which her needs had not been met, and the manner in which the IEP and placement process were handled.

That said, the evidence does support that the District's proposed program and IEP leading into 7th grade for the 2021-2022 were not appropriate for T.R.

Based upon the testimony and documentary evidence, I **CONCLUDE** that the District's IEP was not appropriate to meet T.R.'s educational needs for the balance of 20201 and for the 2021-2022 school year and did not provide her with a FAPE. The undersigned does not believe that district officials deliberately set out to deny T.R. FAPE, and an education in a Least Restricted Environment. It was obvious instead, that once the District received the Due Process petition is September 2020, they knew they had to do something for T.R. as her challenges and needs far outweighed what the District was providing. The problem, however, is the method they established to do it, which was obviously long overdue, especially for a child like T.R. who will face a lifetime of coping and adjusting to work-related and social challenges due to her undisputed communication and intellectual limitations.

Having heard the parents' observations and knowledge of what Academy 360 can offer T.R., coming out of the additional learning challenges T.R. faced because of the school shutdown from the pandemic. **I CONCLUDE**, at least for the 2021-2022 school year that is the more appropriate educational setting for T.R.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the District failed to meet its obligations to T.R. under FAPE, and IDEA, and that for all of the aforementioned reasons, placement at Academy 360 for the 2021-2022 school year is appropriate.

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

(2020) 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 (2020).

September 3, 2021

_____	_____
Date	**ANDREW M. BARON**, ALJ
Date Received at Agency	September 3, 2021
Date Mailed to Parties:	September 3, 2021

mm

APPENDIX

Witnesses

For Petitioners:

L.S.

T.R.

For Respondent

Stacy Tate

Jamel Gibbs

Rachel Colamenco

Adam DiDonna

Jennifer Gruber

Jennifer Mitchell

Exhibits

P-1 (A) 2018-19 IEP

P-2 (B) 2019-20 IEP

P-3 (C) 2020-21 IEP

P-4 (D)Behavior Evaluation

P-5 (E) Psychiatric Evaluation

P-6 (F) Neurologist letter

P-7 (G) Invitation to Annual Review Meeting

P-8 (H) 1/27/21 IEP

P-9 (I) 4/20/21 email

P-10 (J) Academy 360 programs

P-11 (K) skipped not admitted

P-12 (L) article skipped not admitted

P-13 (M) letter skipped not admitted

Respondent

R-1 Proposed IEP

R-2 11/25/20 Education evaluation

R-3 1o/22/20 Psychological assessment

R-4 11/30/20 Physical therapy assessment

R-5 10/22/20 Speech and language assessment

R-6 1/13/21 Behavior Assessment

R-7 skipped (not admitted)