



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

M.D. ON BEHALF OF R.B.,

Petitioner,

v.

**EAST ORANGE BOARD OF
EDUCATION,**

Respondent.

OAL DKT. NO. EDS 02080-21

AGENCY DKT. NO. 2021-32431

M.D., petitioner, appearing pro se

Nathanya G. Simon, Esq., for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: October 14, 2022

Decided: October 20, 2022

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE

Petitioner, M.D. on behalf of R.B., filed a Due Process petition on January 13, 2021, with the Office of Special Education Policy and Procedure ("OSEP"), under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 to 1482, alleging that the East Orange Board of Education ("Respondent" or "District") deprived R.B. of a free and appropriate public education ("FAPE"), and seeking, among other relief, compensatory education, transportation, an ESY and placement in an out of district program.

PROCEDURAL HISTORY

The matter was transferred to the Office of Administrative Law (“OAL”) on February 26, 2021.¹ Hearings were conducted on June 1, 2021, June 8, 2021, October 1, 2021, and October 7, 2021. The parties requested and were permitted to obtain transcripts and file written summations. Written summations were due on March 17, 2022; (45) days following receipt of the transcripts. Respondent submitted same on March 17, 2022. A telephone conference was held on May 17, 2022, because petitioner had not yet submitted her written summation. Petitioner advised that she was unclear what was required of her and that she was unsure whether she wanted to proceed with the matter. At the end of the telephone conference, petitioner advised that she simply wanted a Final Decision. Once again, the undersigned explained that she was entitled to submit a written summation and that more time would be given to submit same. To date, petitioner has not submitted a written summation and thus a Final Decision is hereby being issued.

ARGUMENTS

It is the argument of the District that R.B. was making documented progress during his kindergarten year, 2019-2020, when the COVID pandemic forced the District to move to remote instruction. It is further argued that despite R.B.’s progress, continued communication from the District, and the District’s efforts to continue to implement his IEP to the greatest extent possible under the circumstances, M.D. unilaterally refused to assist R.B. with attending his classes via virtual instruction. When the 2020-2021 school year began and R.B. continued to not attend remote instruction, District staff again contacted petitioner to assist. Petitioner informed the District that she was removing R.B. from the District program and home schooling him. In response to petitioner’s notification, R.B. was dis-enrolled in September 2020.

¹ For the purpose of an accurate depiction of the procedural history in the case, it should be noted that on January 13, 2021, petitioner simultaneously filed a Request for Emergent Relief alleging similar claims and demanding similar relief as that being requesting in the Due Process Petition. On January 27, 2021, the Honorable Danielle Pasquale, ALJ, issued a Final Decision on the request for Emergent Relief denying petitioner’s demands for relief. It was found that petitioner had never availed herself for virtual learning for R.B. The disagreement over home schooling or disenrollment was due to lack of communication between the parties but was of no moment if petitioner refused to accept help setting up virtual learning as that was the only option in the District during the current global health emergency. A copy of Judge Pasquale’s Final Decision has been marked as R-39.

In December 2020, petitioner re-enrolled R.B. in the District. Based on limitations due to a change in student enrollment, the District placed R.B. at another elementary school in the District but his program, services, and placement remained the same. The District argues that despite enrollment and the District staff's best efforts, petitioner remained obstinate and unreasonable about remote learning including repeatedly refusing to pick up or accept the District devices and equipment necessary to participate.

Petitioner then filed the instant litigation and argues that the District failed to provide R.B. with a FAPE during the 2019-2020 and 2020-2021 school years and seeking an out of district ("OOD") placement and reimbursement, compensatory education, transportation, and ESY for the school years in question.

STATEMENT OF FACTS

Based upon the testimonial and documentary evidence presented at the hearing, the following **FACTS** are undisputed and therefore, I **FIND**:

R.B.'s birthdate is August 2, 2014. In 2017. After petitioner first enrolled R.B. in the District, the District Child Study Team ("CST") conducted initial evaluations that included: a Medical Examination (R-6), a Neurodevelopmental Evaluation (R-5), a Battelle Developmental Inventory (R-4), a Social Assessment (R-7), a Psychological Evaluation (R-8), and a Speech and Language ("S/L") Evaluation (R-9) (collectively "2017 Evaluations"). After the District conducted the 2017 Evaluations, in November 2017, R.B. was determined to be eligible for Special Education and Related Services, under the classification of Preschool Child with a Disability ("PSD") and offered an IEP in the Self-Contained PSD program in the District. (R-3).

In 2019, as R.B. prepared to move from preschool to Kindergarten, the District CST conducted reevaluations that included: a Neurological/Neurodevelopmental Evaluation (R-20), an Educational Evaluation (R-21), a Psychological Report (R-19), and a S/L Evaluation (R-18) (collectively "2019 Evaluations"). Rebecca Linn was R.B.'s Case Manager at the time and indicated that petitioner agreed with the IEP because she was unable to attend in-person but participated by phone. (R-16 and R-17.) After the District

conducted the 2019 Evaluations, in May 2019, R.B. was determined to be eligible for Special Education and Related Services under the classification of Autistic and offered an IEP (“May 2019 IEP”) in the Autism Program in the District for the 2019-2020 school year. (R-17). The May 2019 IEP proposed placement in the Autism Program for the 2019-2020 school year accompanied by OT 2x/week, S/L therapy 2x/week, and PT 1x/week along with individualized G/O’s and appropriate modifications.

Despite petitioner’s later claims that R.B. was incapable of receiving virtual instruction, the 2019 Evaluations reported that R.B. “enjoys playing on the computer” during the structured observation. (R-18). Linn indicated during a classroom observation that “. . . children were moving to a GoNoodle video on the SmartBoard. R.B. was participating and attempting to mimic the movements.” Evaluator also noted R.B.’s strongest performance area was on Fluid Reasoning and R.B.’s “responses require[d] pointing, without verbalizing” and R.B. “was able to point to pictures corresponding with prompts (e.g., show me which one you can eat), but without a visual stimulus, he was unable to answer other questions.” (R-19). R.B.’s reading, decoding skills and his ability to comprehend text while reading at the time of testing was comparable to that of the average individual at age 6-2 making his reading standard score in the Superior Range (percentile rank of 94). (R-21). His sight word reading, and passage comprehension abilities were very advanced at the time of the evaluation. (R-21).

Despite R.B. having skills that would enable him to participate in virtual instruction, petitioner did not make R.B. available for virtual instruction after school facilities closed pursuant to Governor Murphy’s Executive Order 104 issued on or about March 16, 2020 that suspended in-person preschool programs and K-12 education to reduce the rate of community spread. In March 2020, when the District contacted petitioner for failure to produce R.B. for remote instruction, they were told that kindergarten was not mandatory in the State of New Jersey. (R-22). The District teaching staff repeatedly called petitioner throughout April due to R.B.’s failure to attend remote instruction with no success or response from petitioner. (R-23).

On May 26, 2020, in the midst of the early period of the COVID-19 pandemic, the District held an Annual Review IEP (“May 2020 IEP”) meeting for R.B. and invited

petitioner. (R-24). Tamisha Engram (“Engram”) updated R.B.’s present levels but no staff member had an opportunity to evaluate or instruct R.B. since the District’s closure due to petitioner’s refusal to make him fully available for remote instruction. The May 2020 IEP was therefore based on reports from R.B.’s teachers and services providers and recent related services progress reports. (R-26, R-27, R-28, and R-29). Recent progress reports indicated that petitioner’s preferred mode of virtual therapy was asynchronous and electric communications with specific activities and/or links had been provided weekly. (R-28). The PT also stated attempts were made to virtually assess R.B. remotely, however, his aunt declined the offer. The May 2020 IEP proposed continued placement in the Autism Program for the 2020-2021 school year accompanied by OT, S/L therapy and PT along with individualized G/Os and appropriate modifications. (R-26).

According to his Kindergarten Report Card for the 2019-2020 school year, R.B. earned the following final grades: Language Arts C, Physical Education B, Art A, Computer Literacy B, Music A, Science C, Mathematics B, and Social Studies B. (R-45).

R.B. turned six (6) years old on August 2, 2020. At the beginning of the 2020-2021 school year, first grade, when R.B. did not log onto classes, Engram contacted petitioner and in a follow-up email, dated September 11, 2020, asked petitioner to confirm in writing that it was her intention to home school R.B. Petitioner copied Hardin-Santos and other administration in her response to Engram and stated, “I am Homeschooling my child.” ... “Sitting in front of a computer for long periods of time is not an option. I will not be logging in and marking my child ‘Present’ when R.B. is not receiving an appropriate Education by means of Remote Learning.” Petitioner’s stated, “R.B. has broken the electronic device and [she does] not have Internet Service.” Petitioner expressed concern on “how this could affect R.B.’s future enrollment, free Breakfast/Lunch and any services that he is due to have now or in the future.” Petitioner also informed the District via multiple text messages that she was going to home school R.B. (R-30 and R-31).

Based on petitioner’s request, R.B. was dis-enrolled from the District. (R-10). Petitioner then re-enrolled R.B. in the District on or about December 17, 2020. (R-10). R.B. was placed in an Autism Program consistent with the May 2020 IEP though classes were fully virtual at that time. (R-10) There was no longer availability in the former

classroom at Bowser School (“Bowser”) and R.B. was assigned a spot in the Autism Program at Dionne Warwick Institute (“DWI”). (R-33). Despite petitioner’s later claims, a change in teacher or school is not a change in placement. R.B.’s placement remained in the in-district’s Autism Program. (R-33). Denise Skakel, Seeking Admissions Social Worker, e-mailed petitioner on January 2, 2021 stating: “she had called before break on December 22, 2020 and the call went to voicemail and the mailbox was full”. She then instructed petitioner to contact the District on January 4, 2021 to pick up a laptop. (R-34).

Mary Fayton, Confidential Secretary to the Superintendent sent an e-mail dated January 5, 2021 stating: “The parent of [R.B.] arrived at Central office on January 5, 2021 at 3:45 p.m. and refused the chrome book because she wanted a touch computer and internet services”. Also attached to Fayton’s email was a Technology Equipment Release Form signed by petitioner stating, “I cannot accept the current device as is”. (R-35).

LaShaun Daniels-Edney was assigned as R.B.’s new Case Manager. She reached out to petitioner on January 4, 2021 via telephone and followed up her telephone conference with an email. Daniels-Edney reached out to petitioner to provide her information regarding R.B.’s teacher and to assist in the transition back to District. (R-36). Daniels-Edney stated that during the conversation, petitioner expressed concerns with virtual platform and declined to have R.B. participate. This was before coming to the District and rejecting computer. Petitioner responded via email and informed Daniels-Edney that she intended to file for Due Process. (R-36).

Cindy Mills, R.B.’s new teacher, also reached out to petitioner on January 5, 2021. Petitioner stated that she was working with the District to obtain an appropriate computer for R.B. to use. (R-36). Mills provided petitioner with information to assist her with internet services and the computer on January 7, 2021. (R-36). Mills and staff contacted petitioner on January 8, 2021 and petitioner claimed she was returning to the other school, which is not the case. On January 12, 2021, Mills mailed an Academic Packet to R.B. since petitioner again has not taken the District provided laptop or obtained internet services nor had she asked for further assistance with same. (R-36).

Hardin-Santos then attempted to arrange pick up of a device for R.B. (R-48). Petitioner agreed to pick up a Chrome Book, MiFi, and an external mouse on January 28, 2021. Petitioner never showed up to pick up the devices or sign for the equipment. (R-48). From January 5, 2021 until May 20, 2021, R.B. was absent from school for fifty-three (53) out of a possible one hundred and three (103) school days. (R-46). In March 2021, the District held an Annual Review IEP (“March 2021 IEP”) meeting for R.B. and invited petitioner to participate. R-40. The March 2021 IEP proposed to continue R.B.’s placement in the Autism Program at DWI for second grade for the 2021-2022 school year along with OT, PT, S/L therapy and an ESY program that also included related services. (R-41). The District also proposed additional re-evaluations for R.B. including Educational, Psychological, and S/L. Though petitioner verbally agreed to the proposed evaluations at the meeting, she did not provide written consent or provide the additional evaluations she had conducted privately. (R-42).

TESTIMONY

The above facts and documentary evidence were substantiated through the following testimony:

Rebecca Linn

Linn testified on behalf of the District. She is the District’s School Psychologist and R.B.’s former Case Manager. Linn was qualified as an expert as a School Psychologist and in Special Education. Linn testified that she first became the case manager of R.B. in the fall of 2018 when R.B. arrived at Althea Gibson Academy. Prior to the start of the Kindergarten school year, R.B. had attended preschool daycare in 2017 but was removed due to behavior concerns. She also testified that she prepared R.B.’s initial IEP and that petitioner was involved in the meeting and advised of her procedural safeguards.

Linn testified that as a result of R.B.’s Reevaluation Planning Meeting, which was held on December 19, 2018, the District proposed Educational, Speech/Language, Psychological, OT, PT, and Neurological Evaluations. She further testified that petitioner

agreed to same. The evaluations were conducted and reviewed by the IEP team on May 22, 2019 and petitioner participated in same via telephone.

Linn testified that she had conducted the Psychological Evaluation and was able to review and interpret the scores for the parent at the IEP meeting. Linn stated that she administered the Bracken Basic Concept scale to R.B. Linn indicated that R.B. had a standard score of 85 which is considered low average range, she stated that an average score was between 90-109. She testified that the information from the Bracken shows R.B.'s mastery of readiness skills was considerably strong. Id. Linn stated that on the Wechsler Assessment, R.B. had a wide range of functioning. The standard scores on this Assessment are between 90-109, R.B. scored an 85 for Fluid Reasoning and his Verbal Comprehension score was 64. Linn testified that R.B.'s FSIQ is 70, which is two standard deviations below average mean but, that it could be a low estimate. Linn testified that R.B. displayed impulsivity and difficulty sticking with a test. She stated that R.B.'s inattention issues and impulsivity compromised his ability to show full potential, which became evident on the Fluent Reasoning Test. Linn stated that based on her evaluation, R.B.'s verbal development was delayed relative to his nonverbal reasoning skills. She stated that R.B.'s weaknesses were evident on testing and consistent with diagnoses previously given. Id. She stated that he still engaged in nonfunctional language/use of speech and had difficulty processing more complex verbal instruction.

Based on her evaluation and other reports reviewed at the eligibility conference, Linn testified that the disability category of Autistic impacted R.B. the most. Based on this category and the other evaluations, Linn testified that she recommended additional activities that included activities that can be done at home or in a classroom. Linn suggested that R.B. would benefit from sorting activities based on physical attributes and then to sort by function to help encourage the child's reasoning ability.

Linn testified that as R.B.'s case manager, she considers the LRE at each meeting. When asked what was considered and discussed as the LRE for R.B., Linn testified that it would benefit the student to keep the child as close to a general education setting as possible. R.B. had relative weaknesses of verbal processing and a need for substantial behavioral support that indicated a standard general education setting would be too

overwhelming. She stated that the curriculum is the same in a self-contained versus general education classroom. Linn testified that the self-contained setting had substantially fewer students and more individualized support. She further stated that the curriculum experience is tailored to the child, very individualized, has a higher level of support and is less overwhelming for the child who may be socially overwhelmed.

Linn expressed her professional opinion that she had enough information available to her at the time to create a suitable IEP for R.B. and that his disability category was appropriate. In her expert opinion, the Autism Program was the appropriate program for R.B. for Kindergarten, that his G/Os were appropriate, and the IEP would benefit R.B.

Under cross examination, petitioner asked Linn about the delay in the evaluation process in 2019 and Linn explained that it was due to an outside evaluator performing the educational evaluation. Linn also explained that the delay did not impact R.B.'s then current program and placement including ESY because the evaluations were being conducted to inform the appropriate program and placement for the 2019-2020 school year.

R.B. was first removed from the District in early January 2018 before the initial IEP would have been implemented. In September 2018, petitioner and R.B. returned to the District and petitioner provided a letter indicating that she wanted R.B. to be enrolled in Special Education. At that point, R.B. was legally adopted by petitioner and his last name changed from M. to B. When the petitioner arrived in Fall 2018, Linn scheduled an identification due to the last name change under the belief that he was a new student. She stated that she then realized R.B. did not require a full CST evaluation because his current IEP was still valid for another few months. In late September or October 2018, R.B. started attending another school with the same IEP.

Sandra Montoya

Montoya testified that she had been working as a Special Education teacher with the District for 19 years and had been teaching the Autism Program for the last 6 years. When asked to describe a typical Autism Program setting, she stated that the class was

a small setting for kindergarten to second grade students with higher adult ratio where there is a focus on academics, general curriculum and the Rethink program. Rethink is a database used to track students work through trials, once mastered the student then moves on to the next skill level.

Montoya stated that she first became familiar with R.B. in September 2019 when he entered her Kindergarten class. When asked to describe his academic functioning, she stated that he knew some sight words, numbers, how to count, days of week and months. She mentioned that his biggest issue was writing. Whenever he was directed to write out numbers, he requested hand over hand help, dots, or tracing, same issue with his name writing. When asked how R.B. was behaviorally, Montoya indicated that he exhibited screaming, some spitting incidents occurred but that it was mostly screaming and yelling when asked to write his name independently. During lunch, Montoya testified R.B. would push food off the table in the cafeteria when he did not get to eat a peanut butter and jelly sandwich. Id. Montoya testified that R.B.'s strengths were counting, reading sight words, and reading comprehension. She stated that his relative weaknesses were in writing.

Montoya was asked how she kept records on R.B., to which she responded that she kept an Assessment Book which petitioner had seen with all of his tests and scores from September 2019 to March 2020 before the Pandemic closed schools. She sent home copies of assessments to petitioner. testified that due to COVID, all of these items and binders containing records for R.B. and other students that were remaining in the classroom upon reentry were destroyed for safety purposes and were not saved electronically. Id. She also maintained a Communication Book that was sent home to petitioner. Montoya also testified to the behavioral interventions the District utilized with R.B. and his progress.

Montoya was asked to clarify what happened to the records in Montoya's possession at the end of the school year. Montoya stated that due to her fear of COVID and the possibility that the documents and papers were dangerous, all paper copies of documents and records for students of that year were destroyed as a result of a personal safety decision of Montoya and not upon instruction from the District. Montoya stated

that this was not her usual practice as she always saved all records. She thought the grades for the assessments would still be available electronically later on and only found out later that was not the case. The undersigned acknowledged what a difficult and unsure time this was for everyone and that not everyone knew the proper protocol under the circumstances.

When asked to explain R.B.'s progress in the IREAD program, Montoya testifies that R.B. stated at level A and completed half of the level. In terms of Math, Montoya testified that R.B. knew how to identify numbers but when it came to printing them, it was a problem for him and that he was also able to do simple addition and subtraction. Montoya also stated that R.B. was capable of navigating in the virtual environment when asked to describe his functioning with technology.

Montoya testified that R.B. was receiving related services such as OT, PT, and S/L therapy in a pull-out format while enrolled in her classroom. She testified that the OT and PT providers were contracted employees and that the S/L Services were provided by the district. When asked if R.B. participated in her class for the entire 2019-2020 school year, she stated that he did not participate during COVID and that he was in her class from September until the District went remote in March. Montoya stated that prior to COVID, R.B. attended school consistently and that after going virtual, Google accounts were created through Google Classroom and parents were notified the following day on the new virtual format. Montoya also testified that R.B. did not participate in any virtual instruction provided by her, that he did not log on during class time, and did not submit any work after COVID-19 school closure.

When asked how R.B.'s progress was assessed for the year, Montoya testified that while they were in school, she relied on her assessments. She stated that during the last marking period she did not have any grades so, she issued R.B. a grade of 50 due to not receiving a single assignment. When she asked Mom if she would log on, her response to Montoya was "no."

Montoya then discussed the Call Log that was created by the Vice Principal at the time to keep track of the times they would call parents and Communication Log that she

kept. Montoya testified that she called petitioner in the beginning, and they would speak and petitioner would send Montoya pictures of R.B. along with status updates. Montoya testified that after a while, the petitioner told Montoya that Kindergarten was not mandatory and that she was not logging in and then asked Montoya to please stop calling her. When asked what her response was when petitioner told her Kindergarten was not mandatory, Montoya testified that she contacted the CST and informed the Vice Principal of the petitioner's statement. Upon verification, Montoya testified that she was informed that petitioner was correct, and that Kindergarten was not mandatory. Montoya added that she gave R.B. "50's for his grades for Marking Period 4 during 2019-2020 school year in accordance with the District's policy when a student failed to log into remote learning or complete assignments. When R.B. was attending class, prior to March 2020, Montoya stated that he was progressing academically and behaviorally. In Montoya's opinion, the Autism Program was the LRE for R.B.

Montoya later testified about a text exchange with the petitioner on September 8, 2020. Montoya stated that she had provided petitioner with the username and password for her to access the Google Classroom and petitioner stated that she would not log on. Montoya asked about R.B.'s attendance and was told by petitioner that she would not log him on to satisfy the attendance requirement. When informed by petitioner that R.B. would be "homeschooled", Montoya advised petitioner to contact the Board to avoid having R.B. marked as a no show and disenrolled. Montoya could not recall when exactly R.B. Was disenrolled from her roster but, he was dropped from her roster.

On cross, petitioner discussed a biting and spitting incident that she alleges to have occurred in Montoya's classroom. When asked whether this was something she documented for R.B.'s IEP, it was clarified for the record that the spitting did not occur in Montoya's class but rather in OT and the afterschool program.

Petitioner asked Montoya about a Behavior Chart that was referenced to during her prior testimony. When asked to explain the colors, Montoya explained that everyday students come in, their names are on green. The students receive three chances if they do something inappropriate, they are moved to yellow and after the third chance, they are moved to red. Montoya explained how the goal was for the student to return to green.

Petitioner presented text messages between Montoya and petitioner regarding an incident with R.B. and another student. Petitioner asked Montoya whether an Incident Report was created, and Montoya replied that she took R.B. to the nurse to get him checked out, and that she had called petitioner as soon as it happened. When asked whether an Incident Report was created, Montoya replied that the incident had taken place in the Computer Lab and not her classroom and that the nurse was not present but someone in the office reported it.

Petitioner asked Montoya whether at any time when schools were being closed due to COVID, if Montoya asked if R.B. had an electronic device. Montoya replied that she did not because the petitioner would not answer her phone calls and told her that she was not logging R.B. on so she never had a chance to ask her.

After acknowledging R.B.'s homeschool status, petitioner asked Montoya whether she reached out to the CST. Montoya confirmed that she reached out to Administration, then to petitioner relaying what the Vice Principal said and then she would let the CST know.

Tamisha Engram

Engram is a District School Social Worker and R.B.'s Case Manager and testified on behalf of the District. She first became R.B.'s case manager in September 2019. Engram testified that she notified petitioner in March 2020 that services would continue during remote instruction and that they would reconvene when the District reopened but, petitioner did not respond or participate in the meeting. Engram confirmed that the May 2020 IEP which was updated with progress reports and parental concerns, and that during remote instruction, R.B.'s program would continue to be the Autism Program and all services would continue. When petitioner informed her in September 2020 that she would be home schooling R.B., Engram referred her to the District contact person who could assist with the transition to home schooling.

Tanya Hardin-Santos

Hardin-Santos, District Director of Special Education, testified on behalf of the respondent and was qualified as an expert in Special Education administration. Hardin-Santos confirmed that when the District transitioned to remote instruction in March 2020 and throughout virtual learning, R.B. had “very little engagement and did not really participate in the remote program for the balance of that year.” During the Spring 2020, the CST and District staff utilized virtual platforms, Zoom, Google, Classroom Dojo, Google Meet, Google Hangout, telephone calls, instructional packets, staff training, weekly communication logs, and attempted to collaborate with parents as best they could under the circumstances. In Hardin-Santos’ professional opinion, the May 2020 IEP was appropriate, utilized the correct classification, and was supported by District staff. Summarizing the extensive email correspondence between District staff and petitioner between January and May 2021, Hardin-Santos noted that petitioner had tech issues and that the District staff attempted to troubleshoot for her. Hardin-Santos noted that despite allegations that R.B. struggled with remote instruction, when the District returned to hybrid in-person instruction in April 2021, petitioner exercised her right to keep R.B. fully remote for the remainder of the 2020-2021 school year. R.B. continued to have low engagement and rarely participated in remote instruction for the remainder of the year. Hardin-Santos wanted R.B. to return to educational structure and in-person services in the Autism Program until more information could be obtained to determine the appropriate program and placement going forward. Hardin-Santos confirmed that the District would support updated evaluations to ascertain R.B.’s present levels of academic achievement and functional performance after being away from in-person instruction for so long and that he would also be willing to consider any outside evaluations that petitioner provided. R.B. was in the District’s in-person Autism Program for thirty (30) days, the District could hold an additional IEP meeting to assess and potentially revise his IEP if appropriate. By the next day of the Hearing, on October 7, 2021, petitioner had provided consent to reevaluations and the IEP Team had met to discuss the appropriate program and placement going forward in light of new information. Hardin-Santos confirmed that Engram provided the appropriate contact person and resources for a parent considering

home schooling. Santos also explained how the District properly complied with non-attending students and disenrollment.

M.D.

M.D. provided testimony by way of a statement. She began by explaining how R.B. entered the school District; she believed it was sometime in late 2017. She stated that meetings were held and both parties agreed on a program for R.B. Prior to the beginning of school with the District, R.B. was at private and home day cares. According to M.D., R.B. did require early intervention, like ABA and OT/PT. She admitted that she was not sure if it was OT or PT. When she reached out to the District to have R.B. enrolled in the District, she had concerns because of R.B.'s condition. She alleged that she attempted to observe the program that would be implemented, but that it never occurred. Then in the next breath, M.D. stated that she observed R.B.'s first day of school. She felt R.B. was roughly handled by staff and that she reported it to the then case manager, Engram. She also stated that she notified Ms. Coleman and it was documented in R.B.'s IEPs but was not clearly written the way it happened.

M.D. then skipped ahead and discussed re-enrollment of R.B. in the District sometime in September; not clear what year was being discussed. She began discussing the years 2018 and 2019 and her interactions with Linn who would later be the case manager for R.B. She was happy with Linn because she sat with her and created the best IEP. But she was still not fully satisfied because she felt more should have been included in the IEP. M.D. became a little erratic at this point in her testimony and it was difficult to follow. She began discussing the 2019-2020 school year and alleged that there was a lot of "disconnect" between her and Montoya; the communication about R.B. was not to M.D.'s liking. (Emphasis added.) M.D. felt that she should have known more about his daily activities than just his grades. M.D. alleges that there were never any pull-out services provided. Her testimony became even more confusing at this point. It was unclear what M.D. wanted from the District. Was it more pull-out services or a transition into the general education?

M.D. went on to state that she never received notices for the IEP meeting in 2020 and was never advised how remote learning would work for R.B. and that no one responded to her requests for an explanation. M.D. felt that remote learning would not work for R.B. The remainder of M.D.'s testimony and statements were difficult to follow; she jumped from one to another and at times even admitted to being confused and unsure of how the process works. It seemed that M.D.'s main issue with the District was that there was not enough explanation about the remote learning and that there were many technological issues. M.D. admitted and confirmed that remote instruction was available the whole time, including upon re-enrollment and that R.B. had access to same.

DISCUSSION

It is within an Administrative Law Judge's "province to determine the credibility, weight, and probative value of the expert testimony." State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied. 127 N.J. 321 (1990). The weight to be given to an expert's testimony depends upon "[sic] candor, intelligence, knowledge, and especially upon the facts and reasoning which it are offered as foundation of [their] [sic] opinion." County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). Further, "the weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984).

A trier of fact may reject testimony as "inherently incredible," and may also reject testimony when "it is inconsistent with other testimony or with common experience" or it is "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interest, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

I found all the witnesses to be credible. However, I feel it is necessary to expand

on the credibility of petitioner, M.D. Petitioner testified on her own behalf. The undersigned permitted M.D. to present a statement of her position. Unfortunately, petitioner did not support her testimony with any evidence. She seemed disoriented and disorganized throughout the entire presentation, repeatedly becoming confused about the timeline, what program she enrolled R.B. in, and at no time was she able to clearly explain or demonstrate why she believed the District's program was inappropriate or that R.B. failed to make progress.

LEGAL ARGUMENT

New Jersey as a recipient of Federal funds under the Individual with Disabilities Education Act (IDEA) 20 U.S.C. §1400 et seq. must have a policy that assures all children with disabilities the right to a Free Appropriate Public Education "(FAPE)", 20 U.S.C. §1412. IDEA defines FAPE as Special Education and Related Services that are provided at public expense, under public supervision and direction, without charge; that meet the standards of the state educational agency that include an appropriate preschool, elementary school or secondary school education in the state involved; and that it is provided in conformity with an IEP 34 C.F.R. § 300.17; 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.

In a due process hearing in which the question is whether the District has fulfilled its statutory responsibility to provide a FAPE, the District bears the burden of proving, by a preponderance of the evidence, that it has met its legal obligation. Lasari v. Bd. of Ed. of the Ramapo-Indian Hills Regional School District, 116 N.J. 30, 45 (1989). In providing a student with a FAPE, a school district must provide such related services and supports that are necessary to enable the disabled child to benefit from the education. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 188-89, 102 S. Ct. 3034 (1982). In fulfilling its FAPE obligation, the District must develop an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Andrew v. Douglas County School District RE-1, 137 S. Ct. 988 (2017).

The Supreme Court noted in Rowley that judges have no expertise in the area of Special Education, and as such they must rely upon the determinations of Special Education experts. Rowley, 458 U.S. at 208. Of course, judges have expertise in resolving disputed questions of fact according to the preponderance of the evidence presented. Id. at 206-207. The Court should review such testimony and other relevant evidence and determine, according to the preponderance of the evidence standard, the appropriate placement of the child in light of the statutory indication in favor of “mainstreaming” and after appropriate consideration of the conclusion of those involved in the child’s placement.

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. Of Burlington v. Dept. of Education of Mass., 471 U.S. 359, 368, 105 S.Ct. 1996, 2002, 85 L.Ed. 2d 385, 394 (1985). The educational opportunities provided by a public school system will differ from student to student, based upon the “myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.” Rowley, 458 U.S. at 198. The Rowley Court recognized that measuring educational benefit is a fact-sensitive, highly individualized inquiry.

In assessing whether the District offered a FAPE, the focus is on the IEP, which the Supreme Court has referred to as the “modus operandi of the Act.” Burlington Sch. Committee v. Dep’t of Education, 471 U.S. 359, 368 (1985). Again, in Honig v Doe, 484 U.S. 305 (1988), the Supreme Court stated that “[t]he IEP is the primary vehicle for delivering the appropriate educational services to each disabled child” and further described the IEP as the “centerpiece of the statute’s education delivery system for disabled children.” 484 U.S. at 311.

Further, “it is well established that IDEA does not require a school district supply an education to a handicapped child that maximizes the child’s potential . . .” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553,556 (3d Cir. 2010) (emphasis added). As the Sixth

Circuit analogized, the IDEA requires "the educational equivalent of a serviceable Chevrolet" rather than a "Cadillac solely for [the student's] use." DOE v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455, 459-460 (6th Cir. 1993). "What the [IDEA] guarantees is an appropriate education, not one that provides everything that might be thought desirable by loving parents." Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (internal citations omitted). Additionally, the goal of maximizing a child's education, though laudable, goes beyond that which is required under the IDEA. See The School Board Education of the Christiana School District and the Delaware Department of Education v. R.F. and N.F., parents of T.F., 40 DELR 38 (2003). The focus should remain on what is "reasonable, not whether the court regards it as ideal" Endrew F. at 999 (quoting Rowley at 206-207). Accordingly, "though the IEP must provide the student with a 'basic floor of opportunity,' it need not necessarily provide 'the optimal level of services' that parents might desire for their child." D.S., supra, 602 F.3d at 557 (emphasis added) (quoting Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000) S.W. and J.W. o/b/o W.W. v. Florham Park Bd. of Educ., 2015 N.J. AGEN LEXIS 384, *60.

In the matter at hand, petitioner filed this litigation claiming that the District failed to provide R.B. with a FAPE during the 2019-2020 and 2020-2021 school years and seeking an out of district ("OOD") placement and reimbursement, compensatory education, transportation, and ESY for the school years in question. During the hearing in this matter, petitioner submitted very little evidence to support her allegations and called no fact or expert witnesses. She relied solely on her own unsupported claims in an attempt to demonstrate that the District's program was inappropriate or that R.B. failed to make progress. Further, M.D. confirmed that remote instruction was available the whole time, including upon re-enrollment. Any disagreement over home schooling or disenrollment even if due to lack of communication between the parties is of no moment if petitioner refused to accept help setting up virtual learning as that was the only option in the District during the current global health emergency. M.D.'s lack of cooperation to assist the District in providing all appropriate services and in implementing R.B.'s program was apparent throughout.

It should further be noted that it was apparent from the onset of the filing of petitioner's Due Process Petition that M.D. was never clear on or understood the services that R.B. was being provided by the District even after repeated attempts by the District to explain it to her.; attempts were also made by the District up to the rendering of this decision. Unfortunately, a lack of understanding about the services being provided to R.B. by M.D. does not prove that R.B. was not provided with the appropriate program and provided FAPE by the District.

The District's case relied on an overwhelming weight of evidence and significant expert testimony to meet their burden of showing that R.B. was offered and provided a FAPE in his least restrictive environment LRE. Though the District acknowledged the difficulty of providing instruction and related services during remote instruction, those difficulties did not prevent R.B. from having the opportunity to fully access the curriculum. Instead R.B.'s obstacles stemmed from petitioner's persistent refusal to collaborate with the District Child Study Team ("CST"), District teachers and support staff to provide R.B. with his program and services.

Therefore, by a preponderance of the evidence, the District has proven that at all times relevant, the District provided an appropriate IEP for R.B., which proposed and provided a FAPE in his LRE and was reasonably calculated to allow R.B. the opportunity to make meaningful progress towards his individualized G/Os. Petitioner has provided insufficient supporting evidence for the positions asserted within the Petition. Petitioner has failed to provide credible evidence that the District program and placement did not meet the standard of offering a FAPE in the LRE. Petitioner has also not demonstrated or provided any supporting reports or evidence that in order for R.B. to continue his educational progress, he must be placed into an OOD placement funded by the District. The District is not required to fund an OOD placement when the District has made a FAPE available in R.B.'s LRE. Therefore, petitioner's demands for an OOD placement and reimbursement, compensatory education, transportation, and ESY for the school years in question should be denied in their entirety.

CONCLUSION

Petitioner filed the Due Process Petition claiming that the District failed to provide R.B. with a FAPE during the 2019-2020 and 2020-2021 school years and seeking an OOD placement and reimbursement, compensatory education, transportation, and ESY for the school years in question. Petitioner did not submit any evidence to support her allegations and called no fact or expert witnesses. She merely relied upon her own unsupported claims failing to demonstrate that the District's program was inappropriate. The District demonstrated that R.B. was offered an appropriate program and that petitioner's failures to collaborate and her refusal to make R.B. available for remote instruction inhibited the District's ability to deliver the appropriate program and services under R.B.'s IEP. Therefore, I **CONCLUDE that** there was at no time a need for an out of district placement in order for R.B. to receive FAPE or that any compensatory services are owed to R.B. The District provided and continued to offer FAPE to R.B. throughout the 2019-2020 and 2020-2021 school years.

ORDER

For the reasons set forth above and the District having met its burden of proof, I **CONCLUDE** that the District demonstrated that at all times relevant in this litigation, it provided an appropriate IEP for R.B. which met the standard of FAPE in R.B.'s LRE, thus it is **ORDERED** that petitioner's petition is **DENIED**.

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.

October 20, 2022



DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency

October 20, 2022

Date Mailed to Parties:

October 20, 2022

sej

APPENDIX

WITNESSES

For Petitioners

M.D.

For Respondent

Rebecca Linn

Sandra Montoya

Tamisha Engram

Tanya Hardin-Santos

EXHIBITS

EVID.

Joint

- | | | |
|------|---|---|
| J-31 | (Pre marked as R-31) Text messages between Karin Melvin and Parent dated 9/8/20 | x |
| J-32 | (Premarked as R-32) Email between parent and Tamisha Engram Re: Homeschool R.B. dated 9/11/20 | x |

For Petitioner

P-1

P-2

P-3 to P-45

P-18	12/16/19 Text chain between M.D. and Sandra Montoya	x
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P-31	9/6/2019 Text chain	x
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For Respondent

R-1	District Registration form for Three Stages	x
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R-2	East Orange Eligibility Conference Report dated 11/29/17	x
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R-3	District IEP dated 11/29/17	x
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R-4	Battelle Developmental Inventory Normative Update dated 5/6/17	x
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R-5	Children's Specialized Hospital Neurodevelopmental Follow up	
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	Evaluation dated 6/21/17	X
R-6	District Comprehensive Medical Examination dated 7/24/17	X
R-7	District Social Assessment by Keisha Marsh dated 8/7/17	X
R-8	Psychological Evaluation by Mary Ellen Laughlin dated 9/11/17	X
R-9	RWJ Barnabas Health Speech Therapy Evaluation dated 9/27/17	X
R-10	Enrollment Records for R.B. for school years 2018-19, 2019-20 2020-21	X
R-11	District Registration form for Edward T. Bowser School dated 9/2018	X
R-12	District Comprehensive Medical Evaluation 9/17/18	X
R-13	District Reevaluation Planning Meeting Invitation dated 12/6/18 and Meeting Confirmation from dated 12/10/18	X
R-14	District Evaluation Determination Plan dated 12/19/18	X
R-15	District IEP Meeting Invitation dated 5/3/19 and Meeting Attendance Form dated 5/22/19	X
R-16	District Eligibility Conference Report dated 5/22/19	X
R-17	District IEP dated 5/122/19	
R-18	Speech and Language Reevaluation by Melba Liggins dated 1/4/19	X
R-19	District Psychological Report by Rebecca Linn dated 3/7/19	X
R-20	Neurological/Neurodevelopmental Evaluation dated 4/12/19	X
R-21	Educational Evaluation by Ivy Hutchins-Best dated 5/2/19	X
R-22	Non-Participation form by Mrs. Montoya for Grade K-2 Autism Dated 3/27/20	X
R-23	Bowser weekly Teacher/Parent Call Log by Ms. Montoya dated 4/20/20x	
R-24	District IEP meeting invitation dated 5/26/20	X
R-25	Email Transcript of Conversation between Karin Melvin and Parent Dated 5/2/20	X
R-26	District IEP dated 5/29/20	X
R-27	Pillar Care Continuum Occupation Therapy Annual Review Summary by Nicole Heavner dated 3/10/20	X
R-28	Pillar Care Continuum Physical Therapy Annual Review by Karen T. Melvin, PT dated 5/29/20	X
R-29	Annual Speech and Language Summary by M. Marra-Brown for School year 2019-2020	X

R-30	Text messages between Karen Melvin and parent re: Homeschooling R.B. undated	x
R-31	Text messages between Karin Melvin and parent dated 9/8/20	x
R-32	Email between parent and Tamisha Engram re: homeschooling R.B. dated 9/11/20	x
R-33	District registration from for Warwick Institute dated 12/15/20	x
R-34	Email from Denise Skakel to parent re: Arrangements for Laptop pick-up dated 1/2/21	
R-35	Email from Mary Fayton to Tonya Santos re: parent refusal to Accept laptop dated 1/5/21	x
R-36	Communications via email between District staff Petitioner for 2020-2021 school year dated 1/21 through 5/21	x
R-37	Parental request for Due Process Petition dated 1/13/21	x
R-38	Respondent's Opposition Letter Brief to Petitioner's request for Emergent Relief dated 1/21/21	x
R-39	Final Decision by ALJ Danielle Pasquale Denying Petitioner's Request for Emergency Relief dated 1/27/21	x
R-40	District IEP Meeting Invitation dated 3/1/21	x
R-41	District IEP dated 3/15/21	x
R-42	Email from Tonya Santos to parent requesting Consent to schedule Evaluations dated 5/11/21	x
R-43	Warwick Institute, Grade 1 Attendance Report School year 2020- 2021 dated 3/5/21	x
R-44	Record responses besides documents provided for Emergent Petition dated 3/5/21, 3/12/21, and undated	x
R-45-48	Unidentified	x