



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00201-22

AGENCY DKT. NO. 2022-33665

P.C. AND C.C. ON BEHALF OF N.C.,

Petitioners,

v.

SPARTA TOWNSHIP

BOARD OF EDUCATION,

Respondent.

P.C., appearing pro se

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, LLP,
attorneys)

Record Closed: September 21, 2022

Decided: October 20, 2022

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

STATEMENT OF THE CASE

Petitioners P.C. and C.C. (the parents) on behalf of N.C., filed a Petition for Due Process against the Sparta Board of Education (the Board or District), alleging that the District's proposed in-District program for N.C. for the 2021-22 school year was not appropriate, did not provide FAPE, and an out of district placement should be made.

PROCEDURAL HISTORY

On or about January 6, 2022 the parents filed a Petition for Due Process against the District, seeking an out of district placement, together with reimbursement for all fees and compensatory education. The District filed an Answer with Defenses on January 6, 2022. The parties agreed to mediate. The matter was transmitted to the Office of Administrative Law, and a settlement conference was scheduled for January 20, 2022. The matter did not resolve.

Hearing dates were conducted on June 1, 2022, June 3, 2022, and June 8, 2022 respectively. Post hearing submissions were filed on September 21, 2022.

TESTIMONY AND DISCUSSION

Eight witnesses testified for Respondent, including case manager Lourdes Franconere, Kristen Lenox, N.C.'s classroom teacher, and Ashley Hernandez, the District BCBA.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

By way of background, at the time this matter commenced, N.C. started school in a self-contained pre-school disabled class. N.C. evidenced signs of progress, and the District recommended gradually transitioning her into a larger inclusion class

Her first inclusion class was led by Ms. Rhonda Tiseo. During her time in that class, her progress reports reflected consistent gains, which led to new objectives being added over time. As a result, the District team recommended increased time in the inclusion class, and according to Ms. Franconere, and Ms. Tiseo, N.C." did great."

Another teacher, Kirsten Lenox also testified about the Progress N.C. made during the 2020-21 school year. Ms. Lenox, who had an extensive background working with special education students, was also qualified as an expert in the area of special education.

Among other things, Ms. Lenox testified that N.C. made friends easily, and was always happy when she entered the classroom. According to Ms. Lenox, N.C. adjusted to the new routine and schedule very well, and she was performing well in her academics in accordance with what would be expected of a three-year-old.

During her testimony Ms. Lenox indicated that petitioners had reached out to her with concerns about N.C.'s behavior at home. In response to this concern, she started taking data regarding behaviors that were identified by the parents. Ms. Lenox also suggested that the parents start to use a communication/feelings binder at home. Finally, in a further effort to address the parents' concerns, Ms. Lenox offered some additional strategies to help them cope with N.C.'s behaviors at home.

The next witness called by the District was Ashley Hernandez, BCBA. Ms. Hernandez reported that she observed N.C. in her classroom approximately every two weeks. During these observations, she indicated that no unusual behaviors were reported in the classroom, which was also confirmed by Ms. Tiseo.

An annual review was conducted on June 2, 2021, during which it was recommended that N.C. go into the inclusion class on a full-time basis. Among other things, Ms. Franconere reported that N.C. was meeting and, in some cases, exceeding her goals. She was doing very well in a smaller, self-contained classroom, and so, the next logical step for her was to place her in a regular classroom with her peers, as she was showing the readiness to succeed in that environment.

As a result of the IEP team's conclusions at the June 2nd meeting, Ms. Lenox testified that "the most appropriate recommendation for N.C. as she started the 2021-2022 school year was to provide in-class support in a least restrictive environment." Ms.

Lenox was pleased to report that N.C. could learn in a larger group, and emotionally she didn't have any outbursts or show signs of maladaptive behavior.

N.C.'s parents shared their continuing concerns with District officials. More specifically, unrelated to the academic and social progress reported by members of the child study team, petitioners reported that an incident which occurred towards the end of the 2021 school year continued to "traumatize" her, for the remainder of the 2020-21 school year, through the summer of 2021 and into the start of the 2021-2022 school year.

Essentially, as described by the school principal Joe Leone, N.C. was inadvertently left in a classroom by her former teacher Ms. Tiseo, without realizing that no other students were in the room. Approximately nine minutes went by before the error was discovered, and she was taken to the proper place.

Although her father P.C. strongly disagrees and conducted extensive cross-examination on the incident, Ms. Franconere, Mr. Leone and Ms. Lenox all reported that N.C. had a normal school day, the next day on June 10th, without incident.

Understandably, petitioners remained very concerned and despite reassurances from the District superintendent and Mr. Leone, they continued to have doubts about how N.C. could function in the same building.

A complaint was filed with the New Jersey Division of Children and Families accusing Ms. Tiseo of neglect. Following an investigation, the agency determined that the accusation was unfounded.

A determination was made to have N.C. remain with Ms. Lenox as her teacher for the remainder of the 2021 school year. Despite the incident of June 9th, there were no reports from any school officials through the end of the school year that N.C. was exhibiting any maladaptive behavior. In fact, school officials reported just the opposite, that her behavior was no different than before, that she had met the goals and objectives in the IEP, and that she was deserving of the less restrictive environment that had been recommended for the 2021-22 school year.

The District produced several more witnesses who were involved with N.C. from the start of the 2021-22 school year.

Case Manager Jessica Colligan testified that after reviewing N.C.'s IEP and speaking with Ms. Franconere and Special Services Director Dr. Castorini she participated in an IEP meeting which was held on August 18, 2021.

With the June 9th incident still fresh on their minds, petitioners requested a one-to-one aide be assigned and a tracking device be installed on N.C. While not agreeing with these requests as being too intrusive, the District did consent to having the school psychologist check in on N.C. periodically, as well as the school counselor.

To ease the transition into the new school year, the District reached out to the family and scheduled a meet and greet so N.C. could see her new classroom and meet her new teacher, Ms. Hassett.

In a further effort to accommodate the parents' concerns, Ms. Colligan created a daily timeline to track N.C.'s daily activities, attendance, and related information while in school.

During the first month of 2021, N.C. was present in school for twelve (12) out of eighteen (18) days. The teacher, Ms. Hassett testified that N.C. seemed to immerse herself in activities with friends and was excited to be in class. As another layer of memorialization of N.C.'s daily activities, Ms. Hassett created a "feelings binder."

On September 15, 2021, another IEP meeting was held. This was the third IEP meeting between the parties, over a period of three months. The reason for this meeting was that an issue had developed with N.C. not wanting to enter the building after drop-off or wanting to leave early. District members reluctantly agreed to another accommodation request from the parents to allow N.C. to call home during school.

In October, N.C. missed several days of school, and towards the end of the month, petitioners outright stopped sending her to school, allegedly due to her reluctance to enter the building Ms. Hassett was surprised by this development, as she felt N.C. was engaged in class activities and was following the lesson plan.

October 21st was the last day N.C. was dropped off at school. Before entering the building, something happened outside that triggered an outburst from N.C.'s mother, who made several negative comments in front of her, and within an earshot of school officials and other students who were already in the building.

After two more weeks went by with no appearance at school by N.C. and without an excused absence, Dr. Leone and Dr. Castorina wrote to petitioners asking them to return N.C. to school. A fourth IEP meeting was scheduled for November 17, 2021 where the focus by the parents was to request home instruction, which District officials did not believe was in N.C.'s best interests.

As an alternative to returning N.C. to the building, the parents then requested an out of district placement, which all school officials indicated was not appropriate. N.C. never returned to school.

The only witness who testified for N.C. was her father, petitioner, P.C.

Throughout the entire case, both through his cross-examination and direct testimony, he came across as a loving, caring and devoted father, dedicated to what he believed was his daughter's best educational interests.

Having seen a positive experience with N.C.'s older sister, petitioners were optimistic N.C. would also have a smooth transition to entering school.

Although PC. admitted that some of his daughter's first year was in his words, "somewhat successful," her behavior at home, especially when she came home from school, gave them concerns.

Like many students in districts throughout the State, the pandemic created issues for students young and old alike, who had trouble with adapting to being confined to home.

Among other things, it was determined N.C. needed counseling. According to P.C., she was ultimately placed in the New Jersey CMO program. And though there wasn't any medical testimony presented, it was not disputed that N.C showed traits of being somewhere on the autism scale.

According to P.C., the incident towards the end of the prior school year, wherein N.C. was left in an empty classroom for ten minutes, had a long-term negative impact on N.C. and her emotional well-being, and her ability to learn and be comfortable in the school she was assigned to attend.

Ultimately, according to P.C., after several challenges convincing N.C. to enter the school in September and October 2021 respectively, petitioners made a determination that she should not return, despite several attempts by school officials to convince them otherwise.

FINDINGS OF FACT

1. N.C. was a pre-school student at the Alpine School, which is part of the Sparta School District. Early in her schooling, she showed signs of some learning challenges that made her eligible for special education services.
2. Initially, N.C. adapted to the school routine relatively well, but showed signs of some behaviors at home that gave her parents' concerns.
3. The District noted these concerns, and attempted to address them through the introduction of a "feelings book" as well as other minor adjustments that school officials thought would make N.C. more comfortable.
4. Before the end of school in June 2020, an unfortunate incident occurred where N.C. was left alone in a classroom for approximately ten minutes.

5. A decision was made by school officials to have N.C. spend the balance of the school year with another teacher.
6. The family filed a formal complaint with the State Division of children and Families against the teacher responsible for leaving N.C. in the empty classroom.
7. After an investigation against that teacher, the allegation of neglect was not substantiated.
8. Although school officials say N.C. went on with a regular routine the next day with her new teacher, her father P.C. contends the incident severely impacted her emotional well-being to the point where she refused to enter the school.
9. After several communications with the parents, District officials determined it was in everyone's best interests to set up a "meet and greet" for N.C. prior to the beginning of the 2021-22 school year.
10. Though it was not a normal practice, District officials allowed for N.C. to call home during the school day if she became emotionally conflicted or agitated.
11. N.C. missed six (6) out of the first eighteen (18) school days in the Fall of 2021.
12. As October 2021 started, she missed more days, leading school officials to try to convince her parents to bring her to school on a regular basis.
13. From 2020 through November 2021, at least four (4) IEP's revised IEP's and IEP meetings were held IEP's were prepared in an effort to accommodate N.C.'s needs.

14. N.C. last attended school on October 21, 2021, leading school officials to send two formal letters to her parents in November 2021 requesting she be produced at school.
15. To meet its burden, the District presented eight witnesses, each of whom in their respective capacities I **FIND** to be credible, and whose testimony supports the fact that the District fulfilled its obligations to N.C. in accordance with FAPE.
16. No expert witnesses were presented by petitioners.
17. I **FIND** that in addition to the goals and objective and accommodations in N.C.'s IEPs with all the time and attention District officials offered N.C. and her family, including but not limited to multiple IEP's, calls to home during class, a "meet and greet" feelings book and data tracking, the District did not violate FAPE under IDEA and under Section 504. Therefore, I **FIND** the proposed IEP was appropriate and had it been fully enacted, would have permitted N.C. to continue to experience significant learning and meaningful educational benefit.
18. I also **FIND** that the proposed IEP does not violate N.J.A.C, 6A;14-1.1 et. seq, and I also do not **FIND** that the district violated Section 504 of the Rehabilitation Act.
19. No compensatory education and no costs are awarded.

LEGAL ANALYSIS AND CONCLUSIONS

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). N.C. has been diagnosed with autism and classified as a preschool child with a disability.

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 Andrew 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. Andrew 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 N.C. in the least restrictive environment. Conversely, petitioners contend that the District’s proposed program was not appropriate to meet N.C.’s individualized needs and would not provide N.C. 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.

As would be expected the witnesses from both sides significantly disagree on N.C.’s present levels of achievement and functional performance. Yet, there are several overriding factors that N.C. was receiving FAPE.

The record is replete with evidence from several district witnesses that N.C.’s academic performance was improving as she became more accustomed to a school setting.

I further **CONCLUDE** that Petitioners were not within their rights to make the demand that N.C. should be enrolled at an out of district placement.

The alternative of requesting 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.

After consideration of all the testimony and evidence, I **CONCLUDE** that the District did sustain its burden that N.C. was receiving FAPE in the Least Restrictive Environment, and that N.C.'s rights under Section 504 were not violated.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioners is **DENIED**.

No Order is entered granting compensatory education as there is no way for the undersigned to evaluate the need for same.

It is further **ORDERED** that if they have not done so already, petitioners and the District should meet within thirty days of this decision or as soon as practical to create an IEP that addresses N.C.'s current situation.

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 Policy and Dispute Resolution.

October 20, 2022

DATE



ANDREW M. BARON, ALJ

Date Received at Agency:

October 20, 2022

Date E-Mailed to Parties:

October 20, 2022

lr

APPENDIX

WITNESSES

For Petitioners:

P.C.

For Respondent

Lourdes Franconere

Kristen Lenox

Ashley Hernandez

Giusepe Leone

Jessica Colligan

Alexandria Hassett

Jodi Skiba Fitpatrick

Adrienne Castarina

EXHIBITS

Petitioners:

P-1 Timeline

P-2 Email to Tiseo

P- 4 Detailed email

(P-5 through P-14 were offered but objected to and not admitted into evidence)

Respondent:

R-1- CV/Resumes Franconere and Lenox

R-2- Memo Leone to Beck

R-3- DCP&P findings

Joint Exhibits

- J-1 Neurological exam
- J-2 Battelle Development Inventory
- J-3 Parent interview
- J-4 IEP
- J-5 2/24/21 IEP meeting
- J-6 December progress report
- J-7 March progress report
- J-8 6/2/22 Annual review
- J-9 August 2021 IEP
- J-11 September 2021 IEP
- J-12 October 2021 IEP
- J-13 Social Assessment
- J-14 Observations
- J-15 Colligan timeline
- J-16 District letter 1 to parents
- J-17 Letter Merkel to WMC
- J-18 IEP November 2021
- J-19 Letter 2 Leone to parents
- J-21 June progress report
- J-22 Attendance records
- J-23 Nurse's records
- J-26 Feelings binder
- J-27 Feelings binder
- J-28 Feelings binder
- J-29 Class Dojo messages
- J-30 Data sheet
- J-31 E-mails

(There was no J-10, J-20 J-24 nor J-25)