State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 01098-22

AGENCY DKT. NO. 2022-33777

MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
A.P. ON BEHALF OF A.P.,
Respondent.

Jared S. Schure, Esq., for petitioner (Methfessel & Werbel, P.C., attorneys)

A.P., respondent, pro se

Record Closed: September 30, 2022 Decided: September 30, 2022

BEFORE **BARRY E. MOSCOWITZ**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

On September 15, 2021, Middletown proposed an individualized education program (IEP) for A.P. that enabled A.P. to make progress in light of his circumstances. Did Middletown propose an IEP that offered A.P. a free appropriate public education

(FAPE)? Yes. To provide a FAPE under the law, an IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

PROCEDURAL HISTORY

On January 13, 2022, Middletown filed a petition for due-process hearing with the Department of Education, Office of Special Education (OSE). In its petition, Middletown asserts that on September 15, 2021, it proposed an IEP for A.P. that provided A.P. with a FAPE in the least restrictive environment (LRE) in conformity with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482, but his mother refused to sign the IEP and A.P. has failed to attend school ever since. Because A.P. has failed to attend school, Middletown asserts that it was compelled to file this petition.

On February 14, 2022, the OSE transmitted Middletown's petition to the Office of Administrative Law (OAL) as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.4.

On August 19, 2022, Middletown filed this motion for summary decision. A.P. submitted no opposition. As such, the motion is unopposed.

FINDINGS OF FACT

Based on the documents submitted in support of the motion for summary decision, and having viewed the competent evidential materials in the light most favorable to A.P., I **FIND** the following as **FACT**:

A.P. is a seventeen-year-old student who is eligible for special education and related services under the classification category "specific learning disability" and has a history of academic and socioemotional difficulties.

On September 15, 2021, Middletown proposed an IEP placing A.P. in a classroom for students with moderate learning or language disabilities for his major academic subjects. This class is referred to as the LLD class. The IEP also placed A.P. in a therapeutic program, Effective School Solutions, Dual Diagnosis Program, which is referred to as the DD program. This DD program would provide A.P. with group counseling twice a week and individual counseling once a week.

During the IEP team meeting on September 15, 2021, which A.P. and his mother, A.P.P., attended in person, the team worked collaboratively to create a plan for A.P. to ease into the LLD class and DD program, including an appointment for A.P. to undergo a psychiatric evaluation with a school psychiatrist, as A.P. was not under the care of any psychiatrist at the time.

A.P. participated in the DD program five times in September 2021, and A.P. met with the school psychiatrist in October 2021, but A.P. never returned to the DD program for his counseling sessions in October 2021, and he never returned to the school psychiatrist for his follow-up appointment in November 2021.

September 27, 2021, is the last day A.P. went to school; A.P. never returned to school after that date.

Middletown attempted to contact A.P.P. by email and by phone numerous times between late-September 2021 and mid-December 2021 to discuss these absences and to assess this situation. Most attempts were ignored; only a few were answered. The most concerning communications were emails in December 2021 in which A.P.P. expressed her refusal to return A.P. to school and her concern for his mental health. Middletown scheduled a reevaluation planning meeting for December 7, 2021, but neither A.P.P. nor A.P. attended the meeting. In short, A.P.P. has ignored virtually all attempts by Middletown to reassess the situation and to reevaluate any need. As such, the proposed IEP is based on the latest information.

The IEP is also appropriate under the circumstances. This fact is found because Michele Tiedemann, who is the director of Special Education for Middletown and an

expert in special education, has so certified, without any opposition or challenge. Tiedemann served as the supervisor of the child study and IEP teams in this case, was familiar with A.P. and his assessments and evaluations, and had been personally involved in the development of the IEP. For the reasons detailed in her certification, Tiedemann asserts that the IEP was reasonably calculated to enable A.P. to make progress in light of his circumstances.

CONCLUSIONS OF LAW

A party may move for summary decision upon any or all substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion for summary decision shall be served with briefs and may be served with supporting affidavits. N.J.A.C. 1:1-12.5(b). "The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid.

In this case, the papers and discovery that have been filed, together with the affidavit that has been filed, show that there is no genuine issue as to any material fact challenged, and that Middletown is entitled to prevail as a matter of law for the reasons below.

To begin, this case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to ensure 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." 20 U.S.C. § 1400(d)(1)(A). This "free appropriate public education" is known as FAPE.

The Act defines FAPE as special education and related services provided in conformity with the IEP. 20 U.S.C. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203 (1982), the United States Supreme Court held that a state provides a

handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, 458 U.S. at 189.

Yet the Act did not impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, 458 U.S. at 192. In support of this limitation, the Court quoted Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972), and Mills v. Board of Education of District of Columbia, 348 F. Supp. 866, 878 (D.D.C. 1972). Rowley, 458 U.S. at 192. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, 458 U.S. at 192–93. The Court also wrote that available funds need only be expended "equitably" so that no child is entirely excluded. Rowley, 458 U.S. at 193, n.15. Indeed, the Court commented that "the furnishing of every special service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go." Rowley, 458 U.S. at 199. Thus, the inquiry is whether the IEP is "reasonably calculated" to enable the child to receive educational benefits. Rowley, 458 U.S. at 206–07.

The Third Circuit later held that this educational benefit must be more than "trivial." See Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988). Stated otherwise, it must be "meaningful." Id. at 184. Relying on the phrase "full educational opportunity" contained in the Act, and the emphasis on "self-sufficiency" contained in its legislative history, the Third Circuit inferred that Congress must have envisioned that "significant learning" would occur. Id. at 181–82. The Third Circuit also relied upon the use of the term "meaningful" contained in Rowley, as well as its own interpretation of the benefit the handicapped child was receiving in that case, to reason that the Court in Rowley expected the benefit to be more than "de minimis," noting that the benefit the child was receiving from her educational program was "substantial" and

meant a great deal more than a "negligible amount." Id. at 182. Nevertheless, the Third Circuit recognized the difficulty of measuring this benefit and concluded that the question of whether the benefit is de minimis must be answered in relation to the child's potential. Id. at 185. As such, the Third Circuit has written that the standard set forth in Polk requires "significant learning" and "meaningful benefit"; that the provision of "more than a trivial educational benefit" does not meet that standard; and that an analysis of "the type and amount of learning" of which a student is capable is required. Ridgewood, 172 F.3d at 247–48. In short, such an approach requires a student-by-student analysis that carefully considers the student's individual abilities. Id. at 248. In other words, the IEP must confer a meaningful educational benefit in light of a student's individual needs and potential. See T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).

In Endrew F. v. Douglas County School District RE-1, 580 U.S. 386 (2017), the United States Supreme Court returned to the meaning of FAPE. The Court explicated that while it had declined to establish any one test in Rowley for determining the adequacy of the educational benefits conferred upon all children covered by the Act, the statute and the decision point to a general approach: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 580 U.S. 399. Toward this end, the IEP must be "appropriately ambitious" in light of those circumstances. 580 U.S. at 402.

The Court continued that a student offered an educational program providing merely more than de minimis progress from year to year could hardly be said to have been offered an education at all, and that it would be tantamount to sitting idly until they were old enough to drop out. 580 U.S. at 402–03. The Act demands more, the Court asserted. "It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 403.

Thus, in writing that the IEP must be "appropriately ambitious" in light of the child's circumstances, the Court sanctioned what has already been the standard in New Jersey: the IEP must be reasonably calculated to provide significant learning and meaningful benefit in light of a student's individual needs and potential.

An IEP must not only be reasonably calculated to provide significant learning and meaningful benefit in light of a student's needs and potential but also be provided in the least restrictive environment. See 20 U.S.C. § 1412(a)(5)(A). To the maximum extent appropriate, children with disabilities are to be educated with children without disabilities. Ibid. Thus, removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Ibid. Indeed, this provision evidences a "strong congressional preference" for integrating children with disabilities in regular classrooms. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993).

To determine whether a school is in compliance with the Act's mainstreaming requirement, a court must first determine whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. Id. at 1215. If such education cannot be achieved satisfactorily, and placement outside of the regular classroom is necessary, then the court must determine whether the school has made efforts to include the child in school programs with nondisabled children whenever possible. Ibid. This two-part test is faithful to the Act's directive that children with disabilities be educated with nondisabled children to the maximum extent appropriate and closely tracks the language of the federal regulations. Ibid.

Accordingly, a school must consider, among other things, the whole range of supplemental aids and services, including resource rooms and itinerant instruction, speech and language therapy, special-education training for the regular teacher, or any other aid or service appropriate to the child's needs. Id. at 1216. "If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive." Ibid. Indeed, the Act does not permit states to make mere token gestures to accommodate handicapped children, and its requirement for modifying and supplementing regular education is broad. Ibid.

To underscore, the Third Circuit has emphasized that just because a child with disabilities might make greater academic progress in a segregated special-education classroom does not necessarily warrant excluding that child from a general-education classroom. Id. at 1217.

In this case, Middletown found A.P. eligible for special education and related services, and developed an IEP for him. At the time, September 15, 2021, the IEP was reasonably calculated to enable A.P. to make progress in light of his circumstances and in the LRE, and no genuine issue of fact exists to suggest otherwise. Moreover, no fact or argument exists otherwise. Therefore, I **CONCLUDE** that a preponderance of the evidence exists that the IEP Middletown proposed for A.P. on September 15, 2021, provided A.P. with a FAPE in the LRE for the 2021–22 school year.

ORDER

Given my findings of fact and conclusion of law, I **ORDER** that the motion for summary decision is hereby **GRANTED** and that this case is hereby **DISMISSED**.

This decision is final under 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) and is appealable by filing a complaint and bringing a civil action 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 (2022). If the parent or adult student believes that this decision is not being fully implemented with respect to a program or service, then this concern should be communicated in writing to the Director, Office of Special Education.

September 30, 2022
DATE

BARRY E. MOSCOWITZ
Acting Director and Chief ALJ

Date Received at Agency: September 30, 2022

Date Mailed to Parties: September 30, 2022
dr