State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

WEST ORANGE TOWN BOARD OF EDUCATION, Petitioner, v. **J.C. ON BEHALF OF B.A.,** Respondent.	OAL DKT. NO. EDS 02684-22 AGENCY DKT. NO. 2022-34119
J.C. ON BEHALF OF B.A., Petitioner, v. **WEST ORANGE TOWN BOARD OF EDUCATION,** Respondent.	OAL DKT. NO. EDS 03046-22 AGENCY DKT. NO. 2022-34024

Kat McKay, Esq., for J.C. (Brain Injury Rights Group, attorneys)

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Record Closed: August 29, 2022 Decided: September 15, 2022

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

STATEMENT OF THE CASE

On May 19, 2021, West Orange provided B.A. with an individualized education program (IEP) that was appropriately ambitious in light of B.A.'s circumstances. On September 9, 2021, the effective date, West Orange implemented the IEP in the least restrictive environment (LRE). Did West Orange provide B.A. with a free appropriate public education (FAPE)? Yes. To provide a FAPE under the law, an IEP must be appropriately ambitious in light of the student's circumstances and in the LRE.

PROCEDURAL HISTORY

On March 14, 2022, petitioner J.C. filed a complaint, a request for due-process hearing, with the Department of Education, Office of Special Education (OSE). In her complaint, petitioner alleges that from mid-March 2020 until the present, West Orange denied her son B.A. a FAPE in the LRE in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482. More specifically, petitioner alleges that West Orange failed to provide this FAPE in the LRE because West Orange changed the location where the special education and related services were to be delivered and did so without notice and consent. Petitioner further specifies that from March 2020 to June 2021, West Orange failed to provide her son with any related services, and that from June 2021 to March 2022, West Orange failed to provider her son with some of the related services. As a result, petitioner seeks an order requiring West Orange to implement her son's IEP in person and to pay for independent psychoeducational, speech-language, and occupational-therapy evaluations. Finally, petitioner seeks compensatory education for the alleged denial of FAPE.

On April 6, 2022, West Orange field its answer, in which West Orange denied the allegations contained in the complaint, together with a cross-petition, in which West Orange denied the request for independent educational evaluations.

On April 7, 2022, the OSE transmitted West Orange's cross-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 -18.5. That petition bears agency docket number 2022-34119 and OAL docket number EDS 02684-22. On April 8, 2022, the case was assigned to me for hearing.

On April 13, 2022, the OSE transmitted petitioner's request for due-process hearing to the 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 -18.5. That petition bears agency docket number 2022-34024 and OAL docket number EDS 03046-22. On April 19, 2022, the case was assigned to me for hearing and consolidated with EDS 02684-22.

Efforts to settle the cases failed, so on July 29, 2022, West Orange filed a motion for summary decision, which petitioner does not oppose.

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 petitioner, I **FIND** the following as **FACT**:

During the 2019–20 school year, when B.A. was in preschool, B.A. attended a general-education program in district. At the end of the 2019–20 school year, petitioner asked West Orange to evaluate her son for eligibility for special education and related services, but before West Orange could complete the process, petitioner unenrolled B.A. from the district and placed him in a private school, where B.A. remained through kindergarten, the 2020–21 school year. Petitioner, however, sought to return her son to the district for first grade. Toward this end, petitioner asked West Orange to restart the evaluation process.

On May 19, 2021, the district found B.A. eligible for special education and related services and proposed an IEP for first grade, effective September 9, 2021.

The IEP was later amended in August 2021 to include counseling. It did not include speech-and-language services as suggested in the complaint. It did not include physical therapy either.

At this time, the IEP was reasonably calculated to provide significant learning and meaningful benefit in light of B.A.'s needs and potential, that is, it was appropriately ambitious in light of B.A.'s circumstances, and no genuine issue of fact exists to suggest otherwise. Evidence is the certification of the executive director of special education for West Orange, Kristin Gogerty, who is an expert in special education and had firsthand knowledge of B.A. and his education. Evidence is also the IEP itself, which is unchallenged in this motion.

From March 2020 to June 2020, when B.A. was in preschool and in private school, West Orange operated on a remote or hybrid basis, but for the 2021–22 school year, when B.A. was in first grade and enrolled in public school at Mt. Pleasant Elementary School in West Orange, West Orange operated in person.

B.A. is now in second grade at Mt. Pleasant Elementary School.

More significantly, during the relevant time period, September 2021 to March 2022, West Orange implemented the IEP in person, and B.A. made meaningful progress toward all his goals and objectives. Evidence is again the certification of Gogerty, who certified that B.A. made meaningful progress toward all his goals and objectives. Evidence is also the progress reports, which note that B.A. progressed either satisfactorily or gradually toward his goals and objectives, and the report cards, which note that B.A. either met or exceeded grade-level standards and expectations. B.A. also received all his related services. Once again, petitioner challenges none of this. As a result, none of the factual allegations that petitioner asserts in her complaint obtain, even when the competent evidential materials are viewed in the light most favorable to petitioner.

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. Ibid. "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." N.J.A.C. 1:1-12.5(b).

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 West Orange 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.

Finally, a parent shall be entitled to independent evaluations unless the school district shows that its evaluations were appropriate. N.J.A.C. 6A:14-2.5(c)(1).

In this case, West Orange evaluated B.A., found him eligible for special education and related services, and developed an IEP for him. At the time, the IEP was reasonably calculated to provide significant learning and meaningful benefit in light of B.A.'s needs and potential, that is, it was appropriately ambitious in light of B.A.'s circumstances, and no genuine issue of fact exists to suggest otherwise. Moreover, petitioner did not challenge the implementation of the IEP. As a result, the IEP was implemented as written and the special education and related services were delivered in person, not remotely, beginning September 9, 2021, the effective date of the IEP, and the start of first grade for B.A. Indeed, the IEP continued to be implemented as written and in person for the remainder of first grade and the 2021–22 school year. No related services were missed either.

More importantly, B.A. made meaningful progress, as evidenced by Gogerty's certification, B.A.'s progress reports, and B.A.'s report cards, even when the competent evidential materials are viewed in the light most favorable to petitioner.

Therefore, I **CONCLUDE** that a preponderance of the evidence exists that West Orange provided B.A. with a FAPE in the LRE.

I also **CONCLUDE** that a preponderance of the evidence exists that the evaluations were appropriate, and that petitioner is not entitled to any independent ones.

ORDER

Given my findings of fact and conclusion of law, I **ORDER** that the motion for summary decision is hereby **GRANTED** and that this consolidated 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 15, 2022
DATE

BARRY E. MOSCOWITZ
Acting Director and Chief ALJ

Date Received at Agency: September 15, 2022

Date Mailed to Parties: September 15, 2022
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