



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 05498-24

AGENCY DKT. NO. 2024-37216

A.E. AND K.E. ON BEHALF OF R.E.,

Petitioners,

v.

SAYREVILLE BOROUGH

BOARD OF EDUCATION,

Respondent.

Alyssa Drazin, Esq., for petitioners (Barger & Gaines, attorneys)

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, P.C., attorneys)

Record Closed: July 30, 2024

Decided: August 7, 2024

BEFORE **JUDITH LIEBERMAN, ALJ:**

STATEMENT OF THE CASE

Petitioners, parents of a rising eighth-grade student who is eligible for special education services, filed a due-process petition in which they seek an out-of-district placement based upon their contention that respondent, Sayreville Borough Board of Education (“Board” or “District”), failed to comply with an Order issued in a February 16, 2024, final decision that found that the student’s IEPs did not provide him a free

appropriate public education (FAPE). That Order directed respondent to prepare a new individualized education program (IEP) incorporating recommendations made by petitioners' experts and provide compensatory education. The parties filed cross-motions for summary decision and stipulated that issuance of an IEP consistent with the recommendations of the experts constitutes provision of a FAPE, while issuance of an IEP that is inconsistent with the recommendations of the experts constitutes denial of a FAPE. Respondent asserts that the new IEP properly incorporates the experts' recommendations. Petitioners contend that the undisputed material facts demonstrate that respondent's new IEP largely repeats the same program and goals that were in the prior IEPs and that it does not comport with the experts' recommendations. In their cross-motion for summary decision, petitioners seek:

1. A determination that respondent violated the February 16, 2024, final decision order because it did not provide for different programming that aligns to what petitioners' experts, Dr. Morrison and Dr. Snider, determined R.E. requires.
2. A determination that a placement in a specialized, out-of-district school is required.
3. An order directing respondent to immediately revise R.E.'s IEP for the 2024-2025 school year to provide for placement at a specialized, out-of-district school that meets the two experts' recommendations and continuation of this placement for as long as it is appropriate.
4. An order directing the District to apply to out-of-district schools, in particular the Center School and any others that meet the experts' recommendations.
5. An order directing the District to reimburse petitioners' experts' costs pursuant to Section 504 of the Rehabilitation Act of 1973.
6. An order for compensatory education for the remainder of R.E.'s seventh grade year.

PROCEDURAL HISTORY

Petitioners filed their first due-process petition¹ on January 9, 2023. The matter was transmitted by the Department of Education, Office of Special Education (OSE), to the Office of Administrative Law (OAL), where it was filed on March 3, 2023, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on March 22, 2023, during which the hearing was scheduled to be conducted on June 7, 2023, June 8, 2023, and June 28, 2023. These hearing dates were adjourned in response to petitioners' request, which was occasioned by the unavailability of their expert witness. The hearing was rescheduled to September 18, 2023, September 20, 2023, and October 17, 2023. These dates were adjourned in response to respondent's request, due to a change in counsel. The hearing was conducted on October 6, 2023, October 16, 2023, October 23, 2023, and January 11, 2024. The record closed on January 11, 2024. A final decision was issued on February 16, 2024 ("February 2024 final decision").

Petitioners filed the current due-process petition on March 15, 2024. The matter was transmitted by the OSE to the OAL, where it was filed on April 25, 2024, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. It was assigned to me on May 24, 2024. A prehearing conference was held on May 29, 2024, during which the parties requested an adjournment of the June 3, 2024, hearing date so that they may proceed by way of cross-motions for summary decision. The parties filed their motions on June 28, 2024 and their opposition briefs on July 1, 2024. Oral argument was heard on July 30, 2024, and the record for the cross-motions closed that day.

STATEMENT OF FACTS

The following facts, taken from the February 2024 final decision, the due-process petition filed in this matter, and the parties' briefs and supporting documentation, are undisputed.

¹ A.E. and K.E. ex rel. R.E v. Sayreville Borough Board of Education, OAL Dkt. No. EDU 01883-23.

Petitioners' son R.E. is a rising eighth-grade student. He has been eligible for special education under the Specific Learning Disabilities classification category since he was in second grade. In their January 9, 2023, due-process petition, petitioners asserted that the IEPs provided by respondent for sixth and seventh grade failed to provide a FAPE, as required by the Individuals with Disabilities Education Act (IDEA). They argued that based upon the information available to the District at the time it prepared the sixth- and seventh-grade IEPs, the IEPs were not reasonably calculated to provide their son with significant learning and a meaningful educational benefit. Rather, the District continued the same or essentially the same program that had already failed to meet R.E.'s educational needs. They also asserted that the IEPs proposed by the District for sixth and seventh grade violated Section 504 of the Rehabilitation Act of 1973. They sought an order placing R.E. in an out-of-district school "for so long as remains appropriate," reimbursement of the costs of their experts, and compensatory education. The District asserted that the IEPs provided R.E. a FAPE in sixth and seventh grade and that it offered a revised IEP that added additional benefits for his education. The District contended that R.E. achieved significant learning outcomes.

In the final decision, issued February 16, 2024, I concluded that the District did not demonstrate by a preponderance of the credible evidence that it crafted a program and provided a placement for sixth and seventh grade that was reasonably calculated to provide R.E. significant learning and meaningful benefit in light of his individual needs and potential. The IEPs for those years were not adequately responsive to the data and other evidence of R.E.'s deficits and needs that were available to the District. Although the District had ample evidence of the many areas in which R.E. failed to progress or regressed as well as his struggles with executive function and social skills and his behavioral issues, the sixth- and seventh-grade programs did not provide him the integrated supports and instruction he required. Also, the evidence in the record did not permit a finding that R.E.'s capacity was limited such that he could not progress beyond a certain level or rate. Thus, while the District was responsive to recommendations made on behalf of R.E., it was not sufficiently responsive.

Despite this, I concluded that petitioners had not demonstrated that their desired remedy, an out-of-district placement, was warranted. Petitioners' experts did not cite

facts, data, or other information that supported a finding that a private school was required, and one of them suggested the District could possibly provide an appropriate program. Further, petitioners did not offer testimony or evidence about specific out-of-district schools, their programs, and how those programs would be responsive to R.E.'s needs.

I ordered the parties to reconvene within fourteen days of the date of the final decision to discuss a revised program, whether in-district or out-of-district. The District was directed to thoroughly address and respond to petitioners' experts' recommendations. If the parties were unable to agree to a revised program that aligned with the experts' recommendations within thirty days of the date of that decision, they were to enlist a mutually agreed-upon third party to facilitate an agreement. The parties were directed to finalize a new IEP no later than thirty days after the selection of the third party.

I also concluded that petitioners were entitled to compensatory education. Although the evidence indicated that the District acted in good faith to the extent it responded to petitioners' expert's recommendations and its own assessments, more was required. I ordered the following compensatory education: instruction in the skill areas identified by both of petitioners' experts, including but not limited to executive functioning and social skills, and therapeutic intervention by a professional trained to work with students with R.E.'s diagnoses and needs. Further, because the District was on notice of the linkage between R.E.'s limitations in these areas and his academic difficulties, based upon its receipt of an August 2019 expert report, I ordered compensatory education in the form of remedial literacy and math instruction. Petitioners' consent to the specific learning strategies and skills training that were to be provided was required.

The quantity of compensatory services and instruction could not be discerned from the record. Petitioners merely sought compensatory education "equal to the period of deprivation wherein an appropriate education was not being rendered," and their witnesses did not quantify the compensatory education they believed was required. I therefore ordered the parties to reconvene within fourteen days of the date of the final decision to discuss the total amount of compensatory education to be provided. If the

parties were unable to agree within thirty days of the date of this decision, they were directed to enlist an agreed-upon third party to facilitate an agreement. The total amount of compensatory education was to be finalized no later than thirty days from the date the third party was selected.

Finally, I concluded that petitioners were not entitled to an award of reimbursement of their experts' fees pursuant to Section 504 of the Rehabilitation Act. 29 U.S.C. § 794(a).

The parties convened an IEP meeting on February 29, 2024. The District offered a draft IEP for March 1, 2024, through February 28, 2025, that it asserts is consistent with the programming recommendations made by petitioners' experts, Drs. Morrison and Snide, and provides a FAPE.

Petitioners assert that in proposing the IEP, the District "failed to thoroughly address or respond to [their] experts' recommendations" and instead proposed an IEP that is "virtually identical to the IEP that" was previously found to have not provided R.E. a FAPE. Petitioner's Brief ("Pet. Brf.") at 3.

For the cross-motions, the parties stipulated to the following:

1. The issuance of an IEP consistent with the recommendations of petitioners' experts constitutes provision of a free, appropriate public education for the 2024–2025 school year; and
2. The issuance of an IEP not consistent with the recommendations of petitioners' experts constitutes denial of a free, appropriate public education for the 2024–2025 school year.

Prior IEP (October 5, 2023)

The October 5, 2023, IEP, which was the subject of the February 2024 final decision, provided the following special education programs and related services:

1. Pull-out resource replacement class (POR) for language arts.
2. POR math.
3. POR science.
4. POR social studies.
5. Supplemental instruction in language arts, once per week for forty minutes.
6. Supplemental instruction in math, once per week for forty minutes.
7. Pull-out supplementary instruction in language arts, twice per week for forty-five minutes, from October 30, 2023, through April 6, 2024.
8. Pull-out supplementary instruction in math, twice per week for forty-five minutes, from October 30, 2023, through April 6, 2024.
9. Speech-language group therapy (group to not exceed four students), once per week for twenty-five minutes.
10. Social Skills group, eight sessions per year for twenty-five minutes.
11. Individual counseling services, once per week for thirty minutes.
12. Extended school year (ESY) services (POR language arts and math) were offered four times per week for ninety minutes, July 8, 2024, through August 8, 2024.

(P-15 at 1–2.)

New IEP (February 29, 2024)

The February 29, 2024, IEP, which is the subject of this due process petition, offered the same classes and services as the October 5, 2023, IEP, with the following exceptions:

1. The new IEP offers one-to-one reading instruction for thirty minutes each day instead of supplemental language arts instruction once per week for forty minutes.
2. The new IEP offers forty, rather than thirty, minutes of individual counseling once per week.
3. Twenty minutes of individual counseling each day is added.
4. Pull-out supplementary instruction in language arts and math, each twice per week for forty-five minutes, remained; however, it was offered from March 1, 2024, through April 26, 2024, and November 1, 2024, through February 28, 2025.

(P-16 at 1–2.)

The February 2024 IEP explained that the “The [POR] setting will provide [R.E.] with a clear and consistent daily structured routine in a small, supportive classroom environment. Clear rules and expectations are established in the [POR] setting to make the environment as consistent and predictable as possible.” P-16 at 37. It also explained that the “one-to-one daily structured literacy instruction (30 minutes per day)” would be provided “by [a] reading interventionist who will collaborate with all of [R.E.’s] teachers across all environments.” Ibid.

The modifications and accommodations in the two IEPs were identical with exception of the following additional provisions in the February 29, 2024, IEP:

- “Provision of breaks to improve attention, as needed.” P-16 at 25.
- “Use of an assignment notebook or planner and structured organizational system should be consistently used to help promote development of executive functioning skills.” Ibid.
- “Provide rubric and cue card for long written assignments. Rubric should be in front of [R.E.] to assist with organization. The cue card should remind [R.E.] to utilize proper capitalization and punctuation, proofread, and spell check his work. [R.E.] should be granted extra time on written assignments.”² Id. at 26.
- “Directions simplified, repeated, clarified or reworded. Directions should be explicit and direct, yet friendly, so that [R.E.] clearly understands expectations while feeling supported and nurtured.” Ibid.
- “Additional time to complete tests/quizzes. Extra testing time (Time +50%).” Ibid. Both IEPs also permitted extra time for the NJSLA standardized tests. P-15 at 28; P-16 at 33.
- “A scribe that can write what [R.E.] shares verbally can be used as needed for R.E.’s exam completion if anxiety prevents him from demonstrating what he has learned.” P-16 at 26.

The new provisions in the IEP were explained as follows:

While [R.E.] is receiving the outpatient care that Dr. Morrison has recommended that his parent provide, Effective School Solutions (ESS) staff will provide TIER 3 ESS services and meet with [R.E.] daily for 20-minute check-in’s to ensure effective management of his complete social, emotional, academic, and executive-functioning

² The underlined language was added to the modifications and accommodations that were in the October 5, 2023, IEP. The October 5, 2024, IEP provided for extra time for task completion and for classroom tests and quizzes. R-1 at 21. “Extra time” is highlighted here because it was added to this modification.

needs. Monthly in-person sessions with both of [R.E.'s] parents and relevant staff will be provided. Family sessions will also be increased from once to twice per month to assist with home-based social-emotional-behavioral and executive functioning concerns.

[Id. at 37–38.]

In addition to [ESS] meeting with [R.E.] daily, these increased supports will also include collaborating and training [R.E.'s] teachers to provide motivational, social-emotional responsiveness within the classroom setting. [R.E.'s] teachers will be trained to manage his anxiety while still affording him access to the very high level of specialized academic support to be provided in his small, structured [POR] classes.

[Id. at 38.]

Based on [the February 2024 final decision,] the District will fund a total of 180 hours of supplemental educational services (representing 30 minutes of 1:1 instruction for each day of [R.E.'s] sixth and seventh grade years during which [the February 2024 final decision concluded,] the District failed to provide him with an appropriate program), to be secured by [R.E.'s] parents, in a manner that fits R.E. and his parents' schedules, from a vendor or qualified staff member. [R.E.'s] parents, through direct communication with the providers of the supplemental educational services through the vendor or qualified staff member, shall consent to the specific learning strategies and skills training that are to be provided. The District will contract directly with this vendor or qualified staff member to fund the compensatory education services to be provided, and District staff will share information with the vendor's teaching staff or qualified staff member to ensure consistency of instruction to the maximum extent possible.³

[Ibid.]

³ During oral argument, petitioners acknowledged that this compensatory education is appropriate and that they seek provision of this compensatory education through the end of the 2023–2024 school year.

David Knaster, Director of Special Services, supplied a chart comparing the provisions of the February 29, 2024, IEP with Dr. Morrison and Dr. Snider's recommendations. It also compares the provisions of the prior IEP (October 5, 2023) to that of the new IEP (February 29, 2024). Certification of David Knaster ("Knaster Cert.") at ¶10, Exh. 8 (hereinafter referred to as "R-8"). Knaster highlighted the following recommendations and provisions of the new IEP:

- I. Dr. Morrison recommended an evidence-based, multi-sensory program to address language-based learning deficits. All "academic interventions should be integrated throughout [R.E.'s] school day in all of his classes." R-8 at 1.⁴
 - The District continued to offer the POR classes for language arts literacy, math, science, and social studies that were in the prior IEP and in which Project Read, "a multi-sensory language arts curriculum," was utilized. Ibid.
 - The District continued to offer pull-out supplementary instruction ("Literacy Academy") twice per week for forty-five minutes for language arts literacy. The new IEP provided that if R.E. did not attend any of the twice weekly sessions, the District would reimburse the cost of make-up sessions provided by an agreed-upon third-party provider. Ibid.; P-16 at 26.
 - The new IEP added one-on-one supplemental reading instruction once per day for thirty minutes provided by a "reading interventionist who will collaborate with all of [R.E.'s] teachers across all environments." R-8 at 1; P-16 at 37.
- II. Dr. Morrison recommended "intensive support for math deficits" also integrated throughout the school day in all classes. R-8 at 1.

⁴ Dr. Morrison wrote that the supplemental instruction offered by the District in October 2023 "is not appropriate given the extent of [R.E.'s] academic deficits. [R.E.] requires evidence-based intervention integrated throughout the school day in all of his classes. . . . Providing a piece-meal approach for academic remediation is not appropriate to address the severity of [R.E.'s] academic challenges." P-2 at 1.

- The District continued to offer pull-out supplementary instruction (“Math Academy”) twice per week for forty-five minutes. The new IEP provided that if R.E. did not attend any of the twice weekly sessions, the District would reimburse the cost of make-up sessions provided by an agreed-upon third-party provider. Id. at 1–2.

III. Dr. Morrison recommended that R.E. “requires explicit instruction to address difficulties related to symptoms of inattention and poor executive functioning” because he does not “implement or utilize these skills in his daily life.” R-8 at 2. “[I]t is also important someone teaches him how to utilize a planner, prioritize assignments, break down long-term projects or essays, create a study plan for tests, and manage school materials. School staff and his parents should regularly check in with him to make sure he continues to utilize these tools and provide assistance as needed. Similar to other interventions, these strategies should be practiced and reinforced throughout all of [R.E.’s] classes.” Ibid.

- The District continued to offer individual counseling services via ESS. The new IEP increased the session time by ten minutes. R-8 at 2; P-16 at 2. It also provided for twenty-minute “check-in’s” each day. R-8 at 2. Also provided were monthly in-person sessions with petitioners and staff as well as an increase in family sessions from once to twice per month “to assist with home-based social-emotional-behavioral and executive functioning concerns.” R-8 at 2–3; P-16 at 38.
- Knaster cited the above-referenced classroom modifications and accommodations. He also referred to study skills and social/emotional/behavioral goals that were added in the new IEP:
 - Study Skills: “come to school on time and prepared with all required materials . . . for all his classes with 80% success[;]” “complete homework and classroom assignments for all his classes with 80% success[;]” and “maintain attention on task during class lessons and

assignments in order to complete assignments on time on a daily basis across all academic settings with 80% success.” P-16 at 21–22.

- Social/emotional/behavioral: “participate in and follow classroom routines and activities throughout the school day with 80% success.” Id. at 23.

IV. Dr. Morrison also recommended:

In order to address challenges with social communication, [R.E.] requires explicit support for social skill development that can also be integrated throughout all classes and school-based activities. [R.E.] expressed feeling at a loss as to how [to] initiate and maintain friendships. Further, he demonstrated limited insight into how to foster the friendships he has recently formed, reporting that he does not feel particularly close with either peer. Teaching [R.E.] specific skills and then subtly prompting or reminding him as needed will likely be beneficial. Further, reinforcing use of these skills is critical in order for [R.E.] to be successful. Simply providing him opportunities to interact with peers is not sufficient.

[R-8 at 3, citing P-1 at 21.⁵]

- In response, the District reiterated that the new IEP offered individual counseling services via ESS once per week for forty minutes and daily twenty-minute “check-in’s.” R-8 at 3.

V. Dr. Morrison also recommended a supportive educational program that will provide:

- Evidence-based, multi-sensory intervention for language-based learning deficits and intensive intervention for math deficits. This should include systematic and targeted individual and/or small group instruction.

⁵ Emphasis added by Knaster.

- Specific instruction to address difficulties with executive functioning and reinforcement integrated throughout the day across all subjects and school activities.
- Explicit instruction in social skills and support for learning and implementation of these skills throughout the school day during all classes and school-based activities.
- Consideration of R.E.'s fine motor challenges and provision of intervention and/or support as needed.
- Consistent communication with R.E.'s parents and any relevant private clinicians. Collaboration is critical for the success of any type of intervention or support.

(R-8 at 4, citing P-1 at 21–22.)

- In response, Knaster wrote that in addition to the above-referenced IEP provisions, the District offered the following in the new IEP:
 - Classroom modifications and accommodations listed above, specifically use of “speech-to-text . . . due to difficulties with typing” and “[p]rovision of guided notes and/or teacher or peer notes[.]” R-8 at 6; P-15 at 20-21; P-16 at 25-26.
 - Social skills group.
 - Occupational therapy evaluation conducted September 2022, reported that “reduced functional status in school may be related to attention and memory rather than fine motor development and skill acquisition. There is no evidence of areas for remediation that occupational therapy would address.” R-8 at 6; P-16 at 6. This

evaluation report and its recommendations were also cited in the October 5, 2023, IEP. P-15 at 6.

VI. Dr. Morrison recommended “[i]ndividualized behavioral interventions to facilitate increased engagement in academic work. . . . [U]tilizing targeted interventions will likely be helpful to increase on-task behavior and task completion.” R-8 at 7, citing P-1 at 22. She recommended a “behavior plan with clearly outlined target behaviors and a menu of positive reinforcement options[;]” “[r]einforcement should be rotated and changed frequently, as providing the same rewards will not continue to be motivating over time[;]” and recognition that it may be necessary to “adjust[] goals and creat[e] smaller, short-term goals.” Ibid.

- In response, Knaster highlighted the following (in addition to the above-referenced provisions):
 - A September 29, 2022, functional behavioral assessment that recommended use of binders or notebooks with clear dividers to separate and store materials for each class; presentation of easier/preferred classwork prior to more difficult/less preferred classwork to present an incentive; provision of up to five breaks per day, which R.E. could choose to use; visual checklist inside planner or binder to remind R.E. “of what he needs to get and remain prepared for class[;]” and consideration of use of a “Self and Match chart . . . to explicitly outline 1-3 behavioral goals. . . . This chart works to teach students to observe and manage their own behavior by reinforcing them for both working towards their goals and being honest about their behavior.” P-16 at 5. This evaluation report and its recommendations were also cited in the October 5, 2023, IEP. P-15 at 5.
 - Collaboration and training of teachers “to provide motivational, social-emotional responsiveness within the classroom setting.

[R.E.'s] teachers will be trained to manage his anxiety while still affording him access to the very high level of specialized academic support to be provided in his small, structured [POR] classes." R-8 at 7–8; P-16 at 38.

VII. Dr. Morrison recommended provision of the following supports in the classroom:

- Advanced warnings for transitions or changes to the daily schedule.
- Preferential seating in order to reduce distractions. (R.E.) should be seated near the teacher so he can be easily redirected, as needed.
- Continued modification of the curriculum, as needed.
- Information broken down and simplified, as needed.
- Provision of visual aids and prompts when presented with verbal information or instructions.
- Continued reading aloud, simplification, repetition, clarification, and rewording of instructions.
- Provision of written instructions with verbal instructions, rather than only providing directions verbally.
- Opportunities to correct spelling errors rather than receiving a penalty whenever the purpose of the assignment is not to assess his spelling skills.
- Explicit instruction and guidance in using graphic organizers.
- Provision of an editing checklist for written work and support in utilizing this tool effectively.

- A calculator and other mathematical tools when the purpose of the assignment is not to assess his basic calculation skills.
- Direct assistance in getting started on tasks. Answering the first question together or reviewing the first problem.
- Continued assistance in breaking down tasks into manageable units and interim deadlines.
- Continued provision of brief breaks, as needed. However, breaks should be monitored and timed and/or limited if they are used inappropriately.
- Continued provision of additional time for task completion, as needed. This may vary depending on the nature of the task.
- Reminders to double-check work for errors. This should be a routine that occurs for every task.
- Guided notes and/or copies of teacher or peer notes.
- Access to dictation software, especially for lengthy assignments.

(R-8 at 8–9, citing P-1 at 23.)

- In response, Knaster referred to the above-referenced modifications and accommodations. R-8 at 8–9.

VIII. Dr. Morrison recommended the following evaluations, examinations, or treatments: speech and language, occupational therapy, medication consultation to discuss treatment options for symptoms of ADHD and anxiety, and cognitive behavioral therapy to address symptoms of anxiety and depression. She suggested it would

be “helpful to have a professional consistently check-in and monitor [R.E.’s] mood.” R-8 at 10, citing P-1 at 24. She added that treatment should include education about anxiety; “identifying feelings and their intensity[;]” identifying thoughts; “developing a bravery hierarchy[;]” and “exposure to feared situations (i.e., practice confronting his fears.)” Ibid.

- In response, Knaster cited the above-referenced ESS counseling and check-ins, sessions with petitioners and staff, and family sessions. He also cited the above-referenced collaboration and training of R.E.’s teachers to “manage his anxiety while still affording him access to the very high level of specialized academic support to be provided in his small, structured [POR] classes.” R-8 at 11; P-16 at 38.

IX. Dr. Snider also recommended “small group and/or 1:1 instruction with regular, consistent, and thorough executive functioning scaffolding all throughout his day — not just in core academic subjects. He should have this support throughout his school day in order to better access, and benefit from, his education.” R-8 at 12, citing P-4 at 20.

- Knaster reiterated the above provisions of the February 29, 2024, IEP. He noted that the daily one-to-one supplemental reading instruction will be conducted by a “reading interventionist who will collaborate with all of [R.E.’s] teachers across all environments.” R-8 at 13. He also noted the above-referenced accommodations and modifications and that there were IEP goals for study skills and social/emotional/behavioral. Id. at 14.

X. Dr. Snider recommended “structured literacy instruction daily, from a teacher appropriately certified in the chosen program and he requires that instruction provided with fidelity to program requirements.” R-8 at 14, citing P-4 at 20. R.E. “should only be moved on when he demonstrates mastery of skills taught. Ensuring mastery of concepts before moving on will ensure [R.E.] has the foundational skills to move on to more robust reading skills. In addition to structured literacy instruction that will support both his reading accuracy and fluency, [R.E.] requires

explicit instruction reading comprehension as that is the foundation for more advanced academic skills. He also requires very specialized writing instruction that is also structured, sequential and designed for students with learning disabilities (using a structured, empirically based writing program).” Ibid. Dr. Snider added, “The literacy instruction [R.E.] requires must be carried through, and supported, in all classes,” and he requires special education classes for science and social studies. Ibid. He should “receive grade level content instruction in these classes but will also have the literacy expectations adjusted so as to match his instructional literacy needs. This will ensure both his access to grade level content and provide him with increased opportunities to work with reading and writing tasks at his instructional level.” R-8 at 14–15; citing P-4 at 20.

- In response, Knaster reiterated the program provisions that are discussed above. R-8 at 14–15.

XI. Noting that R.E. “has significant emotional needs . . . that can serve to trigger significant distractibility and inattention[,]” Dr. Snider recommended the District “immediately set in place an action plan for his care that can manage his complete social, emotional, and academic needs.” R-8 at 15, citing P-4 at 20–21.

- In response, Dr. Knaster cited the above-referenced ESS counseling services and family and staff sessions; the proposed collaboration and training of teachers to “provide motivational, social-emotional responsiveness within the classroom setting[;]” and R.E.’s “teachers will be trained to manage his anxiety while still affording him access to the very high level of specialized academic support to be provided in his small, structured [POR] classes.” R-8 at 15–16.

XII. Dr. Snider recommended small classes with “a clear structure as well as consistent routines, giving [R.E.] a very clear set of rules and expectations to help make his environment consistent and predictable.” R-8 at 16, citing P-4 at 21.

- Knaster referred to the POR classes for language arts literacy, math, science, and social studies and the IEP's explanation that the POR "setting will provide [R.E.] with a clear and consistent daily structured routine in a small, supportive classroom environment. Clear rules and expectations are established in the [POR] setting to make the environment as consistent and predictable as possible." R-8 at 16.

XIII. Dr. Snider recommended social-emotional support and that "[e]motionally-sound, motivational support must be built into the curriculum, and a school environment should be able to monitor [R.E.'s] symptoms. They must also collaborate with any external providers that he is working with[.]" R-8 at 17, citing P-4 at 21. Dr. Snider noted that, while ESS is a "good program," it does not offer "motivational, social-emotional responsiveness inside of a classroom setting. [R.E.] must be able to have teachers and professionals who are trained to be able to manage his anxiety[.]" Ibid.

- Knaster referenced the weekly ESS counseling services, daily "check-in's," monthly sessions with petitioners and staff, and more frequent family sessions. R-8 at 17. He reiterated the above-referenced teacher collaboration and training.

XIV. Dr. Snider recommended accommodations and modifications. R-8 at 18–20, citing P-4 at 21. Knaster referred to the above-referenced accommodations and modifications that were found in both the October 5, 2023, and February 29, 2024, IEPs as well as those that were added to the latter IEP. R-8 at 18–20. He also noted that study skills goals were added to the latter IEP. R-8 at 18.

- While Dr. Snider recommended that R.E. be permitted to finish work at home or after class if extra time could not be given during class, the IEP did not include this provision. P-4 at 21; P-16.

- Knaster did not address Dr. Snider's recommendation that if R.E. "exhibits a problem with his attention span . . . [he] may benefit from (a) shorter periods of learning, (b) longer breaks between periods of learning and/or (c) a behavior modification program designed to reinforce his ability to sustain attention for progressively longer periods of time." P-4 at 21.

Finally, Knaster wrote that the February 29, 2024, IEP provides FAPE in the least restrictive environment and that placement in a private school would "deprive [R.E.] of an education in the least restrictive environment appropriate to his needs." Knaster Cert. at ¶9. Also, in his certification, Knaster wrote that he is "personally familiar with the supports and services available at Center School," and it is his "professional opinion that Center School does not have the resources necessary to satisfy the recommendations of Drs. Morrison and Snider." Id. at ¶12.

Petitioners offered the certification of Center School Executive Director Ronald P. Rinaldi in which Mr. Rinaldi explains the services offered by the school. P-20. He certified that all teachers are certified in special education and are "highly skilled in providing evidence-based, Structured Literacy programming to address specific learning disabilities in reading and writing, evidence-based instruction to address specific learning disabilities in math, executive functioning instruction and support, social-emotional skills instruction and support, occupational therapy, speech-language therapy, and physical therapy." Id. at ¶¶4–5. While Knaster generally opined that the school is not equipped to provide R.E. the education he requires, respondent did not dispute Mr. Rinaldi's specific assertions.

Petitioners also offered reports and certifications newly authored by Drs. Morrison and Snider, in which they opine concerning the propriety of the February 29, 2024, IEP. P-11; P-12; P-14; P-18; P-19. To the extent they offered new opinions beyond a reiteration of their prior opinions, these reports were not considered.

Petitioners also offered the certification of petitioner A.E. He opined that the new IEP does not comply with the February 2024 final decision and that the Center School can provide a program that aligns with the experts' recommendations. P-17 at ¶34. He

also asserted that Director Knaster stated, during the February 29, 2024, IEP meeting, that R.E.'s language arts "will remain the exact same as it has been and the supplemental instruction will be delivered from an Orton-Gillingham ("OG") *trained* teacher using an OG-like program rather than true OG instruction from an OG certified teacher." *Id.* at ¶23 (emphasis in original). He also asserted that on March 6, 2024, R.E. was sent to the emergency room due to his having expressed "homicidal ideation again in the school." *Id.* at ¶28. Moreover, the ESS counselor "reported multiple incidents of homicidal ideation towards [his] peers" during the 2023–2024 school year "as a result of continued social problems with peers." *Id.* at ¶29. Respondent did not dispute these assertions.

LEGAL ANALYSIS AND CONCLUSION OF LAW

Standard of Review

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). "When the evidence 'is so one-sided that one party must prevail as a matter of law,' the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Protection, 2014 N.J. AGEN LEXIS 151 (N.J. Adm. 2014)⁶ (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

A party opposing a summary judgment motion, "in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). A party "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cnty. Welfare Bd. v. Stanley, 214 N.J. Super. 615, 622 (App. Div. 1987). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. "Thus it is the movant's burden to exclude any reasonable doubt as to the

⁶ This decision is not precedential.

existence of any genuine issue of material fact[.] . . . [T]he absence of undisputed material facts must appear ‘palpably.’ All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated[.]” Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74–75 (1954).

Here, the material facts are not in dispute. As explained above, while petitioners offered new evidence in the form of reports and certifications by their experts, these constitute new expert reports that were not considered here. Similarly, petitioner A.E.’s opinion about the new IEP and the Center School’s capacity to provide a program for R.E. are not material and were not considered. Because the material facts needed to assess whether the February 29, 2024, IEP aligns with the recommendations of petitioners’ experts are not in dispute, summary decision is appropriate.

Individuals with Disabilities Education Act

As discussed in the February 2024 final decision, 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).

In Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386 (2017), the United States Supreme Court held, “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. at 399. Toward this end, the IEP must be “appropriately ambitious” in light of those circumstances. 580 U.S. at 402. See also T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000) (the IEP must confer a meaningful educational 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 compliant 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. 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.

Importantly, the “measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute nor reason countenance “Monday Morning Quarterbacking” in evaluating the appropriateness of a child’s placement.” Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995) (quoting Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993)). In an administrative due-process hearing to challenge or support a proposed IEP, the school district bears “the burden of proving the appropriateness of the IEP it has proposed.” Id. at 533; N.J.S.A. 18A:46-1.1.

Here, the February 29, 2024, IEP placed R.E. in the same POR classes as he was in before. It also continues to use the same literacy instruction program, Project Read, as it did previously. It has not explained how these classes or this program will be different such that they will comport with petitioners’ experts’ recommendations. Also, it has not represented that Project Read will be taught by someone who is certified to teach it. While the District added one-on-one supplemental instruction for thirty minutes each day, there is no evidence in the record that permits a finding that this change alone will be sufficient to provide the required instruction. Rather, Drs. Morrison and Snider objected to the reliance upon supplemental instruction for language arts and math rather than focusing on instruction in the regular classroom. The District appears to recognize that it is likely that R.E. will continue to not want to attend supplementary classes, as it contemplates a need for additional instruction by a third party provider.

Furthermore, even if an appropriately structured literacy program were utilized, there is insufficient evidence in the record that the instruction is to be integrated throughout R.E.’s instruction. The February 29, 2024, IEP does not provide for reinforcement and carryover of instruction throughout the school day.

With respect to math instruction, the February 29, 2024, IEP does not depart from the math instruction offered by the prior IEP. It continues R.E. in the same POR math class and offers the same supplemental instruction.

The IEP does not expressly address executive functioning instruction that is incorporated throughout the day. Importantly, it does not include executive functioning goals and it largely repeats the same accommodations and modifications that were in the prior IEP. It does not respond to Dr. Snider's recommendation that R.E. be permitted to finish work at home or after class if extra time cannot be given during class. The IEP did not include a provision like this. Also, Knaster did not address Dr. Snider's recommendation that if R.E. "exhibits a problem with his attention span . . . [he] may benefit from (a) shorter periods of learning, (b) longer breaks between periods of learning and/or (c) a behavior modification program designed to reinforce his ability to sustain attention for progressively longer periods of time."

Finally, the IEP offers only eight twenty-five-minute social skills sessions per year, which is the same as the prior IEP offered. Social skills instruction and support does not appear to be integrated across all subjects throughout the day, and, significantly, the new IEP does not include social skills goals. It includes only one "social/emotional/behavioral" goal: participate in and follow classroom routines and activities throughout the school day with 80 percent success. Based upon the findings and recommendations of Drs. Morrison and Snider, it is clear that R.E. required substantially more in the way of social skills, emotional and behavioral supports. Moreover, that R.E. expressed homicidal ideation after the issuance of the February 2024 final decision underscores the urgency of his social, emotional, and behavioral needs.

For the foregoing reasons, I **CONCLUDE** that the February 29, 2024, IEP is inconsistent with the recommendations of petitioners' experts and, thus, constitutes denial of a FAPE. Given that this is the District's second failure to offer a program that is reasonably calculated to enable R.E. to make progress in light of his circumstances, I also **CONCLUDE** that petitioners are entitled to the relief they seek with respect to an out- of-district placement. Accordingly, the District shall revise R.E.'s IEP for the 2024–2025 school year to call for his placement in a specialized, out-of-district school that meets the recommendations of Drs. Morrison and Snider. R.E.'s IEPs for successive school years shall contain the same provision as long as it remains appropriate for his needs.

Further, the District shall apply to out-of-district schools that meet the experts' recommendations, including the Center School.

Petitioners also seek an award of compensatory education for the remainder of seventh grade. The purpose of compensatory education is to remedy past deprivations of a FAPE. Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990). It “serves to ‘replace [] educational services the child should have received in the first place’ and . . . such awards ‘should aim to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA.’” Ferren C. v. Sch. Dist. Of Phila., 612 F.3d 712, 717–718 (3d Cir. 2010) (quoting Reid ex rel. Reid v. D.C., 401 F.3d 516, 518 (D.C. Cir. 2005)). The authority of a court to remedy a deprivation of FAPE is “a profound responsibility, with the power to change the trajectory of a child’s life.” Thus, the “courts, in the exercise of their broad discretion, may award [compensatory education] to whatever extent necessary to make up for the child’s lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.” Upper Darby Sch. Dist. v. K.W., 2023 U.S. Dist. LEXIS 129803, **35–36 (E.D. Pa. 2023)⁷ (quoting G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015)).

“Such a remedy is ‘an appropriate form of equitable relief where a local educational agency (“LEA”) knows, or should know, that a child’s special education program is not appropriate . . . and the LEA fails to take steps to remedy deficiencies in the program.’” Id. at *36 (quoting R.B. v. Downingtown Area Sch. Dist., 509 F. Supp. 3d 339, 349 (E.D. Pa. 2020)). “Thus, a compensatory education ‘belatedly allows [a student] to receive the remainder of his free and appropriate public education.’” Ibid. (quoting Lester H., 916 F.2d at 873); see also Lauren P. v. Wissahickon Sch. Dist., 310 Fed. Appx. 552 (3d Cir. 2009) (Third Circuit affirmed the district court’s finding that the school district knew or should have known that the student’s behavioral problems were impeding her education, the IEP was inadequate, and it did not offer a consistent behavior management plan; held that compensatory education was required for the number of school days during the years at issue in that case).

⁷ This decision is not precedential.

In the February 2024 final decision, I found that petitioners were entitled to compensatory education in the form of instruction in the skill areas identified by Drs. Morrison and Snider, including but not limited to executive functioning and social skills, and therapeutic intervention by a professional trained to work with students with R.E.'s diagnoses and needs. Further, because the District was on notice of the linkage between R.E.'s limitations in these areas and his academic difficulties, compensatory education was also to be provided in the form of remedial literacy and math instruction. In the February 29, 2024, IEP, respondent detailed the compensatory education that it would provide. Here, because the District did not offer an IEP that provides a FAPE to R.E. for the remainder of his seventh grade year, I **CONCLUDE** that the compensatory education detailed in the February 29, 2024, IEP shall be extended to cover the remainder of his seventh grade school year after the issuance of the February 2024 final decision.

Petitioners also seek reimbursement of the costs of their experts, pursuant to Section 504 of the Rehabilitation Act (RA), which prohibits any federally funded program from discriminating against persons with disabilities. In the February 2024 final decision, I denied this request, as the relief sought by petitioners cannot be awarded in this forum. See W.Z. ex rel. G.Z. v. Princeton Reg'l Bd. of Educ., 2007 N.J. AGEN LEXIS 227, *7, (April 26, 2007).⁸ For this reason, I **CONCLUDE** again that petitioners are not entitled to an award of reimbursement of their experts' fees pursuant to Section 504 of the Rehabilitation Act.

ORDER

For the foregoing reasons, it is **ORDERED** that petitioners' motion for summary decision is **GRANTED** and respondent's motion for summary decision is **DENIED**. Respondent shall revise R.E.'s IEP to provide for an out-of-district private school placement for the 2024–2025 school year and successive years, as appropriate. On behalf of R.E., respondent shall also apply to out-of-district schools that meet petitioners' experts' recommendations, including the Center School. Petitioners are entitled to compensatory education as detailed in this decision. Petitioners are not entitled to

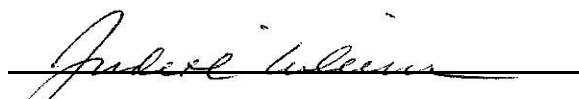
⁸ This decision is not precedential.

reimbursement of their experts' costs pursuant to Section 504 of the Rehabilitation Act of 1973.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2023) 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 (2023). 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.

August 7, 2024

DATE


JUDITH LIEBERMAN, ALJ

Date Received at Agency:

Date Mailed to Parties:

JL/mg

APPENDIX

EXHIBITS

For petitioners

- P-1 Dr. Morrison report, March 2022
- P-2 Dr. Morrison report, August 24, 2022
- P-3 Dr. Morrison report, February 6, 2023
- P-4 Dr. Snider report, May 12, 2023
- P-5 Dr. Morrison report, September 8, 2023
- P-6 Dr. Snider report, September 27, 2023
- P-7 Dr. Morrison report, September 28, 2023
- P-8 Petitioners' summation brief, EDS 01883-23
- P-9 Final Decision, EDS 01883-23, February 16, 2024
- P-10 IEP, February 29, 2024
- P-11 Dr. Morrison email, March 8, 2024
- P-12 Dr. Snider report, March 14, 2024
- P-13 Due Process Petition, EDS 05498-2024
- P-14 Dr. Morrison report, March 30, 2024
- P-15 IEP, October 5, 2023
- P-16 IEP, February 29, 2024
- P-17 Certification of A.E.
- P-18 Certification of Dr. Snider
- P-19 Certification of Dr. Morrison
- P-20 Certification of Ronald P. Rinaldi

For respondent

- R-1 David Knaster C.V.
- R-2 Dr. Morrison report, March 2022
- R-3 Dr. Morrison report, August 24, 2022
- R-4 Dr. Snider report, May 12, 2023

- R-5 Dr. Morrison report, September 8, 2023
- R-6 Dr. Snider report, September 27, 2023
- R-7 IEP, February 29, 2024
- R-8 Knaster Chart