



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

(CONSOLIDATED CASES)

OAL DKT. NO. EDS 00607-20

AGENCY REF. NO. 2020-31017

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

Petitioners,

v.

**WEST ORANGE TOWN BOARD OF
EDUCATION,**

Respondent.

**WEST ORANGE TOWN BOARD OF
EDUCATION,**

Petitioner,

v.

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

Respondent.

OAL DKT. NO. EDS 00717-20

AGENCY REF. NO. 2020-31035

**WEST ORANGE TOWN BOARD OF
EDUCATION,**

Petitioner,

v.

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

Respondents.

OAL DKT. NO. EDS 00780-21

AGENCY REF. NO. 2021-32471

Michael I. Inzelbuch, Esq., for petitioner/respondent E.S. and K.S. o/b/o K.S.

Eric L. Harrison, Esq., (Methfessel and Werbel, attorneys.) for
respondent/petitioner West Orange Board of Education

Record Closed: October 23, 2024,

Decided: December 9, 2024

BEFORE ERNEST BONGIOVANNI, ALJ

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act, 20 U.S.C. § 1415, E.S. and K.S (parents/petitioners) requested a Due Process Hearing concerning the controversy between that parties that began with the Individualized Educational Plan (IEP) for student A.S. from the Spring of 2019, concerning her second-grade year. The original petition challenged the 2019 IEP and it was subsequently amended to challenge the IEPs for A.S.'s third and fourth grade years. The Board's petitions include a response to the petitioner's demands for independent educational evaluations (IEEs) and seek a determination that the Child Study Team's evaluations of A.S. were appropriate and hence no IEEs is warranted.

PROCEDURAL HISTORY

On or about January 18, 2021, petitioners filed an Amended Due Process Petition (P-6) and which was docketed at the Office of Administrative Law (OAL) as EDS 00607-20. Petitioners sought for A.S., then a seven-year-old second grader, all records, a change in Classification, an IEP that set appropriate goals and objectives an appropriate program recognizing A.S. individualized needs, out of district placement at the Sinai School in Livingston, New Jersey, reimbursement for A.S.'s attendance there, reimbursement for transportation, for all monies paid by parents for private therapies caused by the Districts failure to provide appropriate therapies, for all costs for the Districts failure to provide FAPE, for evaluations, for reimbursement of evaluations, Compensatory costs and other relief as deemed appropriate. The amended petition

challenged the IEPs and school programs for A.S.'s third and fourth grade as well. This matter was eventually consolidated with matters also transmitted to the OAL, namely, v. West Orange Town Board of Education, OAL Docket No. 00607-20, West Orange Town Board Of Education v. E.S. and K.S. o/b/o A.S., OAL Docket No. 00717-20 and with West Orange Town Board of Education v. E.S. and K.S. o/b/o A.S., Docket No. EDS 00780-21. The West Orange Town BOE cross petition and direct petition (R-2) and (R-5) encompassed in this consolidated matter, sought a determination that the Child Study Teams evaluations were appropriate and no Independent Educational Evaluations (IEE) were necessary or appropriate. Hearings were held on May 4, 2021, May 5, 2022, May 12, 2022, June 23, 2022, and May 23, 2024. Parties spent extensive time and effort in attempts to reach a settlement even after hearings had begun, over a period of years, which were ultimately unsuccessful. Post Hearing briefs were received on or about July 10, 2024, was transmitted to the Office of Administrative Law. On August 16, 2024, the parties entered into a stipulation of Exhibits that were entered into evidence. Additional time was permitted to allow petitioners and respondent to supplement their post hearing briefs to answer questions based on possible ambiguities in facts in the record and/or to stipulate to the same. Each party chose to submit their own answers to questions posed without stipulations, the final submission being made on October 23, 2024, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS

Preliminarily, it is undisputed, that A.S., currently age 12 is a twin, born March 28, 2012, 11 weeks premature, weighing just 1 lb., 15 ounces and was hospitalized post birth for 2- and one-half months. She suffered a brain bleed (R15), and was a late walker (R-16). While petitioners contend that the District wrongfully failed to do evaluations as far back as April 2015, when A.S. was just 3, the District conducted evaluations as early as October, 2015.¹ Also undisputed is that A.S. attended preschool and a Special Needs preschool program at the Kelly School from November 2015 to June 2017. Also

¹ The District's alleged failures in their treatment of A.S, which occurred prior to the development of the IEP for the 2019-2020 School year are not the subject matter of this case and no relief is sought nor could be granted on such issues;; however such facts and allegations that occurred prior to the 2019-2020 IEP may be considered for historical context and to explain the parents' and the District's motivations and actions.

undisputed, is that A.S. attended kindergarten 2017-2018 at the District's public schools until the parent withdrew her and sent her to the private Kushner Academy for first grade 2018-2019. Further it is undisputed that the parents rejected the IEP for the 2019-2020 School year and unilaterally placed A.S. at the Sinai School, a private special education school located within the Kushner Hebrew Academy Building in Livingston, N.J. Moreover, it is not disputed that the parents also rejected IEPs offered by the BOE for A.S.'s 3rd and 4th grade year and continued their unilateral placement.

TESTIMONY

Ms. Cindy Newell (Ms. Newell)

Ms. Cindy Newell testified as the first and only witness called by the District. She is a certified New Jersey Social Worker, with a bachelor's and master's degree in social work and has eleven years' experience as a case manager for preschool to 12th grade students. She was qualified as an expert in the field of social work and special education. She has expert knowledge in educational programming of students whose diagnosis include autism ADHD and central auditory processing disorder. She testified as follows: Upon receiving on July 8, 2019, A.S.'s registration packet and June 2019 Essex Regional Educational Services Plan from the Essex Regional Services Commission service plan Ms. Newell found that although A.S. had been identified during preschool as a child with a disability, A.S. had been subsequently declassified at the end of her preschool year and thus attended kindergarten as a general education student.

At this point, it should be noted there is much dispute concerning when A.S. was first diagnosed with certain conditions which may or may not have been incorporated into the IEP for 2019-2020 and relevant subsequent IEPs. However the June, 2019 IEP eventually developed by Newell noted that A.S.'s mother reported that A.S. had prescribed medication for Attention Deficit Hyperactive Disorder (ADHD)(R-21). Also, as of February 2019, from a "Complete Audiological Evaluation and Auditory Processing Test Battery" conducted in February, 2019, A.S. was diagnosed with Auditory Processing Disorder (APD) (R-14).

However, the most important issue concerns when A.S. was first diagnosed with Autism and when and if the District (or its Child Study Team) knew of the diagnosis. Petitioners cite to a July 17 2017 Psychological evaluation of Bradford Ross of the Children's Specialized Hospital (P-95); however that report expressly states, "a diagnosis of Autism Spectrum Disorder not being made at this time." It further states that previous tests "do not suggest [A.S.] has a diagnosis of Autism Spectrum Disorder." Instead, it noted "delays in social skills and attentional weaknesses.". (P-95). Accordingly, I **FIND** there is no evidence that the District knew or should be charged with having knowledge of any diagnosis of Autism Spectrum Disorder for A.S. until June 2021, as explained throughout Newell's testimony. Moreover it is clear from the video recorded IEP meeting of June 7, 2021 (R-71) that the diagnosis was disclosed for the first time at that meeting and it appears that E.S. and his advocates Susan Caplan and Melanie Feller had only received this diagnosis recently.

According to Newell, during the school year, 2019-2020, West Orange provided supplemental instruction pursuant to the Service Plan, and/or related services pursuant to a 504 plan, but did not provide special education pursuant to an IEP. Also, that year, despite A.S.'s parents' requests, the Child Study Team determined an independent evaluation was not necessary. Instead, an Audiology and Auditory Processing Evaluation, a Social Assessment, an Educational Evaluation, a Psychological report, a Physical Therapy Evaluation and Speech and Language Evaluation, all dating from late February 2019 and late May 2019 (Exhibits R-14 through and including R-19) were utilized and from which Newell and A.S.'s parents collaborated to develop, with the Child Study Team, the 2019 IEP.(R-22). That IEP offered an in-class resource setting for language arts, social studies and a pull-out replacement room for math. The IEP listed October 31, 2019 as the end date for the IEP so ensure a meeting would take place within 60 days of the school year to determine A.S.'s progress. To assuage the parents' concerns about A.S.'s distractibility in a larger school setting, the IEP was revised to provide language arts studies to a pull-out resource classroom.

It should be noted that the June, 2019 IEP for 2019-2020 stated "[A.S.] is prescribed medication for a diagnosis of ADHD. (Exhibit R-21.) Further, this diagnosis was incorporated in a May 19 Physical Therapy Evaluation (R-18) and an April 9, 2019

Psychological Evaluation (R-19). I find that the respondent had no knowledge prior to the June 2019 IEP of this diagnosis. Further, I **FIND** that the respondent was aware at the time of the development of the June 2019-2020 IEP that A.S. had a diagnosis of Central Processing Disorder. (R-14).

The parties were asked for possible factual stipulations, post hearing to supplement the record or to bolster their post hearing legal brief submissions. As to the primary diagnosis, if any, which motivated the IEPs for the school years 2019-202-, 2020-2021, and 2021-2022, while the parties were unable to stipulate, I believe and I **FIND** that the IEPs for A.S. for all three years were based on the primary diagnosis of ADHD (See e.g. R-24, page R-724, R-49, page R-906 and R-72-page R-1045.). This diagnosis was categorized as “Other Health Impaired.” I also **FIND** that for the IEPs for 2019-2020, and 2020-2021, a classification of A.S. as “multiply disabled” would have been inappropriate given what the Child Study Team knew, or should have known about A.S. considering the evaluations and history available to them at the time.² However that fact alone does not mean that FAPE was not offered.

Despite Ms. Newell’s opinion that the collaboratively created IEP offered an appropriate public education appropriate to the student’s needs in the least restrictive environment, on August 14, 2019, she learned the parents rejected the IEP and planned to send A.S. to the Sinai School. At an IEP meeting of October 17, 2019, after a revised IEP developed from said meeting was rejected once again by the parents, the District requested to observe A.S. in her current setting at Sinai School. Soon thereafter, Newell and a special education teacher from the District observed A.S. in her language, Arts class. Based in part on her observations (See Exhibits R-33, R-36, R-42, R-44, R-60, R-65, R-67, R-68, Newell described how the IEP would work to support A.S. in the IEP’s proposed program. (T1 119:16-120:12)

Newell expressed concern that the parents requested independent evaluations for A.S. via correspondence of December 10, 2019 as she believed the District had the

² The IEPs at issue in any controversy such as presented here must be assessed for appropriateness based on the information and data available at the time the IEPs were offered. See Fuhrmann o/b/o Fuhrmann v. E. Hanover Bd. of Educ. 993 F.2d 1031, 1040 (3rd Circ. 1993).

information necessary to program appropriately for A.S. (R-34). Further, heretofore the parents have never discussed the educational component of A.S.'s program either at the District school or at Sinai.

Newell testified that although the parents retained an expert, Melanie Feller, who authored a report dated December 28, 2019. Ms. Feller had never communicated with Newell until June 7, 2021, IEP meeting, and that she and the District were not provided with the Feller report until August 2021. Moreover, neither Feller nor the parents presented any information at the June 7, 2021, IEP meeting, suggesting that the program the District was offering would not meet A.S.'s academic needs. Another expert for the parents, psychologist Elliot Kuffler, authored a report dated January 9, 2020. It is not known when this report was ever provided to the CST; however the report was attached to the January, 2021 Du Process Petition for A.S. To Newell's knowledge, this report was not made known to anyone at the District until January 2021-by being attached to the aforesaid January 2021 Due Process Petition, as was the Feller report. In any event, upon her review of the Kuffler report in August 2021, Newell thought it was consistent with the District's 2019 evaluation. She disagreed with Kuffler's recommendation that a functional behavior assessment be conducted while A.S. was attending Sinai School, because it would not provide information helpful to A.S.'s education in District, and the District already employed adequate behaviorist support staff for A.S.

Despite her efforts to develop an IEP for A.S.'s third grade, 2020-2021 school year, Newell was unable to get adequate information from the parents and Sinai school during the time leading up to the June 9, 2020 IEP. She knew that at Sinai, A.S. was only receiving 20 minutes of math, but she had no records of counseling sessions, the behavioral skills program, no course description of science or social studies class nor how A.S.'s emotional and social needs were being met. Despite apparent reluctance of Sinai to cooperate, she eventually learned from Sinai that A.S. was receiving small group instruction, was distractable, and at times destructive in class (R-48). I **FIND** that the lack of cooperation by the parent's agents at the Sinai School after unilaterally placing A.S. there hindered the collaborative process necessary to make the 2019-2020 and 2020-2021 IEPS and school years successful in meeting A.S.'s needs.

The June 2020 IEP drafted by Newell added a paraprofessional throughout the day to acclimate A.S. to her new setting in District. This IEP came six months after the parents filed for Due Process and asked for additional evaluations. Newell believed with the evidence she collected including her observations at Sinai School, that the District could offer better services than what A.S. was then receiving at Sinai. The IEP by necessity contained language assessing A.S.'s needs objectives, supplementary service and other essentials based on information provided by Sinai School. Although not told from Sinai what A.S.'s reading level was, in math A.S. was utilizing a first-grade math book. The IEP took note that Sinai did not employ a board-certified behavior analyst. Her IEP did not incorporate reports from various experts employed by the parents such those by the aforesaid Dr. Kuffler and Ms. Feller, nor of Susan Caplan because at that time, Ms. Newell had not been provided with those reports. In any event, the parents rejected the June 2020, IEP.

Newell said that the parents' educational consultant, Susan Caplan told her at the IEP meeting of June 7, 2021 that she (Caplan) had no evaluations of A.S. (R-71 and R-52). However, after Newell received the report, she still believed the IEP the CST proposed was appropriate. At the meeting, Caplan discussed with Newell her concerns over class size and Caplan's opinion of the need for individualized instruction. At the June 7, 2021 IEP meeting, Newell asked for the recent evaluation of A.S. of autism, but was not provided with the evaluation until a week before having to testify on August 4, 2021. Regardless of the autism diagnosis, however, Newell believed the change in classification did not alter A.S.'s needs, which could be met with the current program. The June 2021 IEP added additional counseling supports for A.S. In her opinion, the IEP provided A.S. with an appropriate education in the least restrictive environment.

Newell said that the parents and Caplan raised no objection to the goals and objectives of the proposed IEP. Newell continued to believe that there was no need for A.S. to be in a smaller learning environment. Instead she believed that continued placement in such a setting at Sinai school would make it impossible to modify behaviors that interfere with her education.

Under cross examination, Newell said she learned during a meeting with A.S.'s father for the first time in July 2019 that A.S. had a 504 plan for kindergarten. (8/4/21 T67:10-17,). The July 8, 2019 IEP draft by Newell detailed various reading difficulties problems with expressive vocabulary spelling problems, emotional immaturity and impulsiveness poor handwriting, and other problems. Newell did not believe A.S.'s behavior would impeded her learning or the learning of other students. She believed modifications in the IEP provided for behavioral supports, e.g. addressing distractibility, impulsivity, emotional immaturity and social difficulties with refocusing and redirection, breaks as needed and breaking up lessons and rewards for compliant behavior.

Ms. Newell had explained during direct her decision not to seek additional evaluations after a December 2019 request by parents because "we already had the information we needed to identify her as a student requiring an IEP." (8/4/21 T119:21-120:12.) Further, the parents were free to obtain their own behavior evaluation.

Regarding the educational component of the IEP, Newell stated that the District consistently offered pullout resource replacement for language arts and math and in class resource for social studies and science. It consistently offered two thirty-minute sessions in social studies and science. It was her experience, she said that when a child comes to the District from a small group setting, that doesn't always prove what is appropriate for that child. She noted that moving a child from a more restrictive setting to a less restrictive setting can be based on a recommendation that the child will make meaningful progress. She did not find behavioral interventions dating to when A.S. was in preschool justified the same interventions now. Newell did not believe written documentation was necessary to prove A.S. could endure thirty minutes of language art studies, noting that breaks were built into instruction as well as individualized supports. This opinion was strengthened by what Newell observed at Sinai. Finally, Newell was unaware of any rule requiring a fresh eligibility determination meeting unless the IEP team was considering declassification; likewise, there was no need for a special meeting to determine if A.S. should remain eligible for special education and related services.

She noted that the parents' expert Ms. Feller did not observe A.S. before writing her December, 2019 report and the filing of the December 2019 Due Process. Further,

Newell was not provided with the expert Caplan's report until June, 2020. Finally none of the reports Newell received in January 2021 suggested the IEPs offered in 2019, 2020 and 2021 were inappropriate. When Newell met with petitioners in April 2022, she did not receive and consent for recommended revaluations (at least as of May 5, 2022)

Ms. Judith Karp (Ms. Karp)

Ms. Judith Karp testified first on behalf of petitioners. She is employed at the Sinai School as she was qualified and admitted as an expert in the area of Special education. She testified first that A.S. remains in her classroom at the Sinai School throughout the day rather than transitioning out of her classroom between classes. She discussed A.S.'s prior preschool experience at the Kushner Academy when A.S. could not sit or stay in her seat, interrupted the teacher and disturbed the other students. She explained that A.S. was not given an aide because it would disrupt the other students.

Likewise at the Sinai School, A.S. was not given a 1:1 aide because it would stigmatize her A.S. in front of her peers, with whom she already had trouble building relationships. However, one of the changes on the June 9, 2019 IEP included the change to provide a 1:1 aide to accompany A.S. throughout the day. The IEP also added modifications and goals and increased services for counseling and physical therapy. Despite that, Ms. Karp believes such an aide would be an obstacle to A.S. to concentrate on the teacher. Because, in her opinion, A.S. was a "bright verbal kid," she would rather talk with the aide rather than listen to the teacher.

At Sinai School, Karp described various methods employed to address A.S.'s behavioral issues, (T3 53:16-57:15). Homeroom class consisted of nine students but each academic class had just 2-3 students. In Karp's opinion, during the prior year A.S. had a much harder time when dealing with three other students in an instructional class. In her opinion, A.S. was highly distractable and therefore could not succeed in an in-class support setting in a room of 20 other students. It would be "impossible" for her to focus and stay on task. In her opinion, a resource room would be inappropriate. Further, in class support would only create anxiety, upset and lack of self-regulation. In Cross examination, Ms. Karp said that all the students at Sinai are in self-contained settings,

which accounted for her having no experience with inclusive education. She said that in the past year, a behaviorist had been employed to develop a plan for A.S., however, no functional behavioral assessment had been conducted. Ms. Karp admitted that previously when A.S. was in a classroom of four other students, it was difficult for her to wait her turn to speak and no techniques were discussed between a behaviorist and teacher before removing A.S. from the classroom.

On the subject of transitions, Ms. Karp stated that A.S. leaves her classroom for music therapy, occupational therapy, physical therapy, sensory motor group and speech therapy, totaling in weekly sessions per week when she is pulled out of the classroom. Ms. Karp who admitted she was not familiar with the District's program, nevertheless believing it to be inappropriate. Despite that, she agreed that the June, 2021 IEP accurately described A.S. and the social, emotional, and behavioral goals and objectives in the IEP were appropriate.

She admitted that at Sinai she had no experience in transitioning a student to the less restrictive in-class resource setting. While A.S. benefits from the 8-9 students in the homeroom setting, Sinai did not attempt to move her to a larger setting.

Kristen Gogerty-Fitzgerald

Kristen Gogerty-Fitzgerald, West Orange's Director of Special Services, was called by petitioner; however, as she was not part of the IEP team, and did not conduct an evaluation or observe A.S., her evidence did not appear helpful on any contested issue.

Ms. Coleen Horan (Ms. Horan)

Ms. Coleen Horan, a speech and language therapist employed by the district for seven years, was also called by Petitioners. She attended an April re-evaluation planning meeting and follow up meeting where the IEP team discussed proposed evaluations and made adjustments. At the April 2022 meeting, Ms. Horan, who had to that point, never met A.S. never evaluated A.S. nor evaluated her, reviewed proposed evaluations and

measures that she would use to evaluate A.S. She determined a need to do her own speech and language evaluation of A.S. because of A.S.'s age and her lack of involvement. She was aware that a past speech language therapist observed A.S. in 2021. Later at the June 2022 meeting, she reviewed Ms. Feller's report and had no questions concerning it. The Feller report found A.S. required prompting for attention, not interruption and using speaking listener techniques as therapy.

She opined that the two reports she read by Feller were consistent with the observations of District's staff, and disagreed with the Feller's remote observations of one of Ms. Horan's sessions³. Further aside from then meeting Feller at the IEP meeting, she did not discuss Feller's findings with her, and did not contact Sinai or Sinai's speech therapist. She did, however, review the service plans of Sinai and expressed no concerns. The only change to her planned and actualized speech-language evaluation, was eliminating one of the standardized measures she had planned as Feller had already employed it and she didn't want A.S. subjected to excessive testing.

Ms. Susan Caplan (Ms. Caplan)

Ms. Susan Caplan, based on 32 years' experience as a learning disability teaching consultant, with a Learning Disabilities Teaching Certificate (LDTC) and a supervisor's certificate, qualified as an expert witness in Learning Disabilities Teaching and in special education. She testified that the District offered program for A.S. was inappropriate, while the placement at Sinai was appropriate. As she had maintained during the October 2019 IEP meeting, she testified that the District's program had too many transitions resulting in too much time "in and out" of the classroom. She identified through the District's staff that students were pulled in to get social studies, science and language arts, and as each subject was recommended to be six times a week a significant amount of time was spent moving A.S. from class to class, which did not happen at Sinai. While pull out resource classes in general education for science and social studies was recommended in general education, it would be inappropriate for A.S., based on comments of A.S.'s first grade

³ Opinion commentary regarding Ms. Feller's report was somewhat limited by the fact that Feller was not called as a witness by either side.

teacher regarding the inability to maintain A.S.'s behavior. (T4 65:4-18. T4 65:20-66:5). To her knowledge, in West Orange, the pull-out resource was 90 minutes for language arts and 75 minutes for math. She did not think 90 minutes for reading language arts for A.S. was appropriate, as her two years of experience with A.S., she had shown difficulty in following along and participating in instructional periods of only 30 minutes. While the District had no social skills as part of its program, A.S. received social skills and counseling at Sinai.

In reviewing her educational evaluation of July 7, 2020, Ms. Caplan was critical of the evaluations and of the education of A.S. at public school. Specifically, she believed the Essex Regional Services Service (ERSEC) Plan didn't acknowledge A.S.'s needs nor the desire of her parents to remove A.S. from public school. Although in her opinion, A.S. was eligible for special education under the "specific learning disability" classification, ERSEC developed its plan under the "other health impaired" classification. She believed A.S. had not developed the prerequisite skills to develop at grade level math and A.S. would also be unsuccessful at present with the amount of reading, math or writing during Science and social studies. She had observed part of West Oranges language arts and social studies program for A.S., and part of Districts resource reading room program and part of the in class support social studies program.

By contrast she had been able to observe A.S. at Sinai on numerous occasions. Her classroom observations and her own evaluation convinced her A.S. could not handle a program in large groups as she had observed in the District (a social studies class had 27 students). While acknowledging the Districts plan for a one-to-one aide, she could not testify such an aide would be helpful. Further it would stigmatize A.S. in front of her peers. Without providing details of reinforcement of Sinai Staff, she testified as to inclusion opportunities for A.S. at Sinai.

Caplan maintained that the several diagnoses of A.S. including ADHD, Autism Spectrum Disorder, Central Auditory Processing Disorder not only met the criteria "Specific Learning Disability" but also supported classifying A.S. as "Multiply Disabled". (MD). Because of the failure to appropriately classify A.S. the CST had developed wholly inappropriate IEPs. As testified by Newell and noted by Caplan, A.S.'s placement in

general education with in-class resource (ICE) settings for language arts social studies and science and a special resource classroom with a special education teacher present which could include twenty students and resource room and special education classroom of up to nine students did not recognize A.S.'s extensive behavioral and academic challenges.

Further Caplan explained that the IEPs failed to include appropriate measurable and reasonable goals for A.S. For example, a reading goal ("when presented with words from reading narratives or specific informational text from A.'s content area subject, she will correctly decode the words with 80% accuracy") placed A.S. at a second-grade level at a time when testing did not support A.S. was reading at a second-grade level. Similarly, a writing goal –"A.S. will write a narrative using three details to describe actions, thoughts and feelings about an event...and a closing statement with 80% success" was not a realistic goal given that at the time she was unable to write a complete sentence using correct capitalization and punctuation. These goals were beyond A.S.'s skillset as she was not functioning at grade level; therefore, the goals were not appropriately individualized to AS.'s needs.

Caplan noted that the July IEP was largely the same in its eligibility classification, PLAAF section, related goals and services all remained the same. The one change, a special education resource room for language arts rather than the previous ICR setting, did not address A.S.'s problems with focusing. Similarly, the IEP did not provide for a behavior plan. A third IEP from October 2019 was identical and again, in Caplan's opinion provided too many transitions and excessive in and out of classrooms and being prepared and "being prepared for and settling down and getting used to different environments" would be more than A.S. could handle. (T4 64:3-6). She reiterated her criticism that A.S. did not have the same skills level to follow grade level content as contained in the October 2019 IEP regarding the Districts use of Readers and Writers Workshop and Everyday Math which is used in both the general education classroom and the pullout replacement resource center.

Likewise the IEP of June 9, 2020, proposed the same placement, the same ICR for social studies and science and resource room for math and language (R-24, R-29 and

R-50). There was still no behavior plan, and again the IEP provided for a 1:1 aide, which Caplan continued to criticize as stigmatizing and distracting to A.S., i.e. in not focusing on the teacher). The IEP did provide some additional modifications and goals. Further there was additional services for counseling and physical therapy.

The final IEP of June 7 2021, did not mention the private evaluations done for A.S. (R-72) and instead, as noted by Caplan continued to recommend the same academic programming for A.S. and the same strategies and same behavioral supports. Ms. Caplan's education evaluation of July 2021, like reports of Feller's December 2019 evaluation and Koffler's psychological report, recommended programs with low pupil-staff ratios to address interventions to help A.S. self-regulate, and which could not be accomplished in a general education class setting.

By contrast, Caplan testified, A.S. made "notable progress" in behaviors, social skills and self-regulation (e.g. staying on task longer remaining seated in class). Because of that progress, the Sinai team was able to change A.S.'s goals and increase the amount of time being engaged in academics (T5 130:9-19).

During cross-examination, stated broadly that public schools are unable to handle students like A.S. through a general education model. She is very familiar with Sinai because two or three families a year have her evaluate their children for possible placement there. She admitted that a good number of families with children at Sinai are clients of hers and petitioner's counsel. In A.S.'s case, the parents contacted her for assistance after they rejected the July 2019 IEP and had decided to unilaterally place their daughter.

Ms. Caplan collected records from the parents and attended the October 2019 IEP meeting. Ms. Caplan contacted the District only to set up the observation and did not otherwise communicate with anyone there. Even after that, she did not evaluate A.S. until 9 months later in July 2020, attributing COVID as the reason. Ms. Caplan explained her lack of input at the IEP meeting because she believes her role was to provide a second set of eyes and ears rather than to advocate at such meetings. Thus, even though she believed that A.S.'s multiple disabilities were not addressed by the IEPs, she never

expressed that view at said meetings. Therefore, she waited nearly two years, until the June 2021 IEP meeting to express her opinion of an appropriate education for A.S. She justified that position because it is not her role, she said, to help shape the IEP. She did not seek during and between the meetings to change the IEPs because she did not consider herself to be a member of the IEP team.

Ms. Caplan opined that she did not know if Sinai works better than West Orange. To her, public schools and private schools follow different models. Therefore, subjects such as social studies must be taught to students at a certain level and intensity that private schools have more leeway, allowing them, for example, to offer more time to focus a bit more with behavior issues and a little less with core curriculum.

Although she never expressed her views during the October IEP meeting, she would have proposed starting with a three-month IEP and either starting A.S. in a self-contained classroom with some mainstreaming, or if the parents wanted it, a resource room with a strict end date in the IEP. While critical of Newell, she wouldn't call her misguided for failing to change the IEP, but noted that Newell is a social worker with questionable expertise.

E.S.

E.S., the father of A.S., testified about the background leading up to the first-grade school IEP. He said A.S. had a preschool IEP and A.S. had lots of aggression and other behavior issues. (T5 7:3-23.) In her kindergarten year, A.S. was declassified and placed in general education, notwithstanding that he and his wife did not agree with this. In Fall of 2017, the District decided not to evaluate A.S. but she was going to have a 504 plan. (P-45). During kindergarten, A.S. had many behavioral issues (e.g. bathroom accidents, acting out). A.S.'s teacher said things were not going well and the principal told E.S. he did not know how to handle A.S.

E.S. told A.S.'s teacher they would look to private school for first grade and enrolled her at Hebrew Jewish Academy. The behaviors continued and she had poor academic performance. A.S. was tested that year by ERESC. By the end of the year, Kushner

asked E.S. to seek out other schools. The parents submitted the reports by ERES to the District. His hope was the District would offer an inclusion classroom. At the Summer 2019 IEP A.S. was offered a first-grade class with 23 students, two teachers, despite his stated misgivings over a program with the large number of students and the student-teacher ratio. He was also concerned about the amount of pull-out time, the provision of counseling during lunch break, and therapy during gym. E.S. said he rejected what the District offered and chose Sinai, where A.S. had made notable progress as a person and student.

Wanting to feel he made the correct decision, he observed the district's program in Fall, 2019. He found it overstimulating causing difficulty to focus. The general education and special education students were separated into different classrooms. At the October 2019 IEP meeting, he asked the District to place A.S. at Sinai. In the June 2020 IEP, the District offered essentially the same program, still did not offer a Learning Language Disabled program. The few changes, he recalled included the use of a paraprofessional. E.S. said he told the team, A.S. needed a small class. He then contacted Ms. Caplan to set up an observation of the District's program. On Cross, E.S. said he did not recall Caplan meeting A.S. before the observations of the District program, although she did review A.S.'s records. He admitted he only asked the District to fund independent evaluations the day after the first due Process petition was filed by his attorney.

LEGAL ANALYSIS AND CONCLUSIONS

This case arises under the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for children with disabilities. Receipt of those funds is contingent upon a state's compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). As a recipient of Federal funds under the IDEA, the State of New Jersey must have a policy that assures that all children with disabilities will receive FAPE. 20 U.S.C. §1412. FAPE includes Special Education and Related Services. 20 U.S.C. §1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public-school district. N.J.A.C. 6A:14-1.1(d). To meet its obligation to deliver FAPE, the school district must offer G.R.

“an educational program reasonably calculated to enable him to make progress appropriate in light of his circumstances.” Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017)

The primary issues in this case are whether the District failed to provide or offer A.S. with FAPE for the 2019-2020, 2020-2021 and 2021-2022 school years. And if not, whether the unilateral placement at Sinai School was appropriate. Lastly, if FAPE was not offered, whether the parents are entitled to any reimbursement for same.

IDEA 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). A.S. has been diagnosed with autism, since June 2021 and prior thereto was classified as “other disabled owing to her known ADHD and Central Auditory Processing Disorder, 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 Endrew 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. Endrew 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 environments 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).

2019-2020 and 2020-2021 School Years

As noted above the June 2019 IEP for the School year 2019-2020, which called for an abbreviated time frame for review and possible revision by the CST within 60 days of the school year. This IEP utilized the most recent Audiology and Auditory Processing Evaluation, a Social Assessment, an Educational Evaluations, a Psychological report, a Physical Therapy Evaluation and Speech and Language Evaluation. A.S. was at that time 7 years 4 months, and entering 2nd grade. Although A.S.'s academic performance in first grade at the Kushner Hebrew academy was described as "poor" by the parents was described, I **FIND** there was little to indicate A.S. could not make progress in the District's program. In her prior year she was placed by her parents in private school. While the parents spoke of her as part of the CST team as a child with behavioral problems, there was no expert opinion or even sound lay opinion voiced by the parents presented to the CST that indicated A.S. could not be academically successful with the proposed District school with in-class resource setting for language arts and social studies, and a pull-out resource for math. Although the IEP had an abbreviated period to October 31, 2019 to ensure another IEP would take place and determine A.S.'s progress, the District went beyond its original proposal and in August 2019 modified the program to include language areas studies to a pull-out resource classroom. Although the District's program could not be expected to guarantee progress, the CST was being proactive in agreeing to revisit the IEP In October 2019 even though they were disadvantaged in being able to prove progress was being made because by August 14, 2019 the parents unilaterally placed A.S. at the Sinai School.

Regarding the school years 2019-2020 and 2020-2021, the main complaints of the program offered at the District school per those IEPs was classroom size, too many transitions between classrooms, because of A.S.'s being highly distractable. However, Ms. Karp, who had no experience with inclusive education, and like Ms. Caplan, who works almost exclusively as a learning disabilities consultant, appeared to have a built-in bias against public, general education. At Sinai, there are no in class resource classrooms where classified students and unclassified students were taught by both a general education teacher and special education teacher (May 29. 2022 Hearing T3 135:3-10) Although believing the District's program was inappropriate for A.S., she admitted having no familiarity with the program (T3 119:17-25). She had no experience in transitioning a student from a self-contained classroom to the less restrictive

environment of an in-class resource setting. Although critical of the many transitions A.S. would have in the West Ornge public grade school, she admitted that A.S. would leave the classroom for many classes such as speech therapy and several others, totaling ten weekly sessions where she goes from one room to attend a class in another room. (T3 117:3-118:8). Although Ms. Karp believed A.S. benefited by being in a larger homeroom of nine students, no attempt had been made to transition A.S. to a larger classroom setting.

Although E.S. had hoped an inclusive classroom would be offered by the District, a Summer 2019 meeting with him, when the case manager and other staff offered A.S. to be in an inclusive class with 23 students and two teachers, E.S. complained about the large number of students, the student-teacher ratio, the amount of pull-out time counseling during lunch and therapy during gym. To his credit, E.S. observed the District's program in the Fall of 2019 and thought the classrooms were overstimulating and made it difficult to focus on the lessons. Further he observed the general and special ed students were separated in the classroom. However in the observations of the District classrooms recorded in early 2021, (See e.g. the videos R-57, R-58 and R-59) it is clear that the classroom sizes were small, the students' individualized needs were considered by the teachers in the classrooms, and the classroom sizes and curriculum offered by the District at that time were appropriate for A.S. despite her known ADHD diagnosis and classification of "other disabled."

Meanwhile, although A.S. had only been at the Sinai School a matter of weeks. She was already, in her father's opinion, making notable progress with new skills as a student and as a person, the parents obviously, and I believe mistakenly, never gave the District the chance to demonstrate their program would work for this incoming second grader. Although the parents had hired their chief professional witness Susan Caplan around the time of rejecting the first IEP, and the parents engaged her to attend the October 2019 IEP, she did not appear to venture any opinion or point of view during the IEP meetings. She did not attempt to set up an observation before the meeting and didn't evaluate A.S. until July of 2020 citing COVID as the reason. She argued that it is not her role to attempt to influence decisions at IEP meetings; rather she saw her role as a second set of ears for the parents to help the parents express themselves.

Thus, Ms. Caplan's professional opinion that A.S.'s disabilities called for a very controlled setting, were not expressed at any IEP, although she at least asked questions which questioned the classroom size for the education program offered for the IEP of 2021-2022. Although by the time of the June 2021 meeting, she had been working with A.S. and her parents for nearly two years, she did not share her opinion with the CST for its consideration at the June 2021 meeting. Frankly, I am suspicious at this "close to the vest" approach and find it to be a weak justification for remaining silent. Despite her self-description as not being "an advocate" for the child, she certainly was an advocate throughout our court proceedings, and did not hesitate to come up with many criticisms of the District's approach, some of which might have helped persuade the CST to come closer to the parents' point of view. Instead Ms. Caplan's focus seemed to be more about nitpicking the West Orange School system, and Ms. Newall being a "social worker" notwithstanding Ms. Newall's years of being Case Manager for many IEPs for the District over the years. She based her opinion that the District's recommended in-class resource classes in general education, science and social studies were inappropriate based on comments made by A.S.'s first grade teacher regarding her inability to behave. She thought the recommended 90 minutes for reading language arts was inappropriate in that A.S. had difficulty following along and participating in classes that were only 30 minutes long. Although critical of the number of students in some of the District's classes, she would not opine if a one-on-one aid would help A.S.

Ms. Caplan recommended Sinai admitting that a good number of the families of clients send their children there. Although testifying that she herself didn't even evaluate A.S. until July 2020, she felt confident in expressing that the program for 2019-2020 was wrong for A.S.

Together, both Ms. Karp and Ms. Caplan and the rest of petitioner's evidence did not convincingly make a case, two years into A.S.'s education at Sinai, where A.S.'s last involvement in the District school was at age 5 in kindergarten, in their critiques of the alleged inappropriateness of the IEPs for the school years 2019-2020 and 2020-2021. Even though A.S. did not do well academically in kindergarten and had noticeable behavior issues, (the description of those behaviors or their interference with her learning

were not very clear), the “[M]easure and adequacy of an IEP can only be determined as of the time it was offered to the student and not at some later date.” Fuhrmann o/b/o/ Fuhrmann v. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3rd. Cir. 1993). Further, as an IEP is judged prospectively, the lack of progress under a particular IEP assuming there was no progress does not render the IEP inappropriate. Endrew F., 137 S.Ct. at 1001. Thus, a review in an IEP must focus on whether it is reasonable, rather than what the Court (even when relying on expert testimony) regards as ideal.

Under that standard I am convinced that the IEPs for the A.S.’s second and third grade were reasonable, promoted FAPE, and might have been successfully implemented had they been tried. Here, by its lack of true efforts for collaboration in the IEP process on the part of the parents advocates particularly at the early stages, it resulted in unfair consideration of the District’s interest in planning appropriately in A.S.’s education unfairly, and by doing so, even treated A.S. unfairly. Moreover, the classification of A.S. as “Other Disabled” was no hindrance in designing the right plan for A.S. for those years.

I believe that as stated by the parents regarding the 2019-2020 and 2020-2021 school years, they simply “panicked” by their six-year old’s educational performance and reported behavioral problems at the Kushner Academy and chose not to give the District a chance unless they could guarantee their results. They wouldn’t even wait for a 60-day re-assessment of the June 2019 IEP to measure their child’s possible progress. However, “the IDEA does not promise any particular educational outcome.” Endrew v. Douglas County School District, 137 S.Ct. 988, 989 (2017). However, the program offered for A.S., at the time of the IEPs for 2019-2020 and 2020-2021 were, given what the District knew or should have known about A.S, the District offered FAPE and the “Other Health Impaired” Classification was appropriate for those two school years. Further the District’s evaluations which took place a few months before the 2019-2020 school year was to begin adequately suited the need for an appropriate IEP.

Finally, I **FIND**, that respondent demonstrated their IEPs for 2019-2020 and 2020-2021 offered a “cogent and reasonable explanation for [its] decisions that show the IEP is reasonably calculated to enable the child to make progress appropriate in light of the circumstances.” Endrew F. v. Douglas County School District, 137 S.Ct. 988, 1002 (2017)

I **CONCLUDE** that clear and convincing proof established that that the District did offer a FAPE in their IEPs for the 2019-2020, and 2020-2021 school years, the IEPs on which they based the education plan did offer an individualized program addressing A.S.'s known disabilities, and that the IEPs provided appropriate goals and objectives in most areas, and placed her in the least restrictive environment. Those IEPs were calculated to offer, and did offer a meaningful educational benefit, not necessarily the ideal education. T.R. v. Kingwood Twp. Bd. Of Educ., 205 F.3d 572, 577 (3rd Cir. 2000), "[T]he IDEA does not promise any particular educational outcome." Endrew v. Douglas County School District, 137 S.Ct. 988, 989 (2017). The test in this case is whether A.S.'s educational program was "reasonably calculated to enable her to make progress appropriate in light of the circumstances." Endrew F., 137 S.Ct. at 1001. Put another way, the educational program must be "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." Shore Reg'l High Sch. Bd. Of Educ., 381 F.3d 194, 198 (3rd Cir. 2004).

In sum, as to the education A.S. received, for the time period covered by the IEPs of 2019-2020 and 2020-2021, and the allegation that the IEPs and the implementation of same denied A.S. FAPE, to be unfounded. Likewise, I **CONCLUDE** for the same reasons and owing to a lack of credible convincing evidence to the contrary that the evaluations requested by the parents prior to the 2021-2022 school year were not required by FAPE, and that those evaluations other than any valuation of Autism Spectrum Disorder which was not disclosed to the District until June 2021 were not required by FAPE and probably would not be resulted in any change in the IEPs offered to the parents were not required by FAPE. Also in sum, I find the educational program offered by the District in 2019-2020 and 2020-2021 was reasonable and placed A.S. in the least restrictive environment (LRE) as required by the IDEA. See N.J.A.C. 6A:14-1.2 (B)(5). Finally, I **CONCLUDE** that for those two school years, the District demonstrated that their evidence offered a "cogent and reasonable explanation for [its] decisions that show the IEP is reasonably calculated to enable the child to make progress appropriate in light of the circumstances." Endrew F. v. Douglas County School District, 137 S.Ct. 988, 1002 (2017). Accordingly, I **CONCLUDE** that the reimbursement of tuition and related expenses as well as related costs of transportation and similar educational costs

incurred by the parents/petitioners for A.S.' attendance and instruction while at Sinai School for school years 2019-2020 and 2020-2021 is **DENIED**.

2021-2022 School Year

The primary issue for the 2021-2022 school year, as distinguished from prior school years was whether the District failed to provide or offer A.S., when the District's IEP failed to recognize and incorporate in its IEP the diagnosis of Autism Spectrum Disorder.

In their post hearing brief, petitioners argue that the "private evaluations confirmed what petitioner Parents always knew: A.S. needed extensive interventions to first learn and self-regulate to be able to learn." However, the District had its own evaluations performed just prior to the school year of 2019-2020, and even these evaluations from January 2021 did not note any diagnosis of Autism Spectrum Disorder. Without that evaluation, I agree with District and CST leaders those evaluations were not significantly different from the parents' private evaluations with the exception of the evaluation of Autism Spectrum Disorder Diagnosis. Therefore, the demand for reimbursement of the parents' cost of private evaluations, except for those evaluations/reports of expert advice of Melanie Feller and Susan Caplan prepared for this litigation and the 2021 evaluation that diagnosed A.S.'s Autism Spectrum Disorder are **DENIED**

However, the parents are correct in that the District's IEPs for 2020-2021 and 2021-2022 offered no significant changes from the initial IEP of June 2019. All of them proposed placement with general students 40-79% of the time, all of them proposed pull-out resources for language arts five times weekly for 90 minutes, in class resource social studies, and science and pull-out resources for math five times weekly at 75 minutes, etc. The only discernable difference in the programs offered were for 2021-2022, changing occupational therapy from one to two times weekly and speech language therapy group study with class size not to exceed five vs class size not to exceed 3. In "Special Alerts" section of the IEP for A.S. it noted medication for ADHD and an allergy to cinnamon but there was no mention there. nor anywhere else in the 2021-2022 IEP of a recent

diagnosis of Autism Spectrum Disorder. It is my belief that by 2021-2022, with the benefit of two years education at Sinai, the recent evaluation of Autism Spectrum Disorder, and other issues raised by the parents and their professionals at the June 7, 2021 IEP meeting that the District was not being open to these new developments and new knowledge gained of A.S. at the Sinai school and the CST was by that time operating “by rote.” As indicated *infra*, while the 2019-2020 and 2020-2021 were appropriate given the District’s knowledge at the time, and which were unaided by the parent’s experts and the Sinai School’s hesitancy in sharing their information with the District, by the time of the IEP for the 2021-2022 school year, the District had sufficient knowledge of A.S.’s multiple disability and were aware of the progress A.S. had made at the Sinai School, and should have offered more significant changes to the IEP to both reflect the updated knowledge of A.S.’s disabilities and the progress being made under the then current plan at the Sinai School.

Significantly, there was enough evidence based on the *questions* posed by Ms. Caplan, Ms. Feller and E.S. at the June 2021 meeting, that coupled with the diagnosis of Autism Spectrum Disorder at the June 2021 meeting, the CST erred in not recognizing the autism diagnosis in the IEP and more importantly, not incorporating into its educational program with specific ways of addressing this disorder in the school plan for A.S. for the 2021-2022 school year. As, correctly stated by E.S. at that meeting the IEP offered for 2021-2022, there were *no major changes offered in the IEP to meet A.S.’s emotional and academic needs despite the recent diagnosis of Autism Spectrum Disorder, and I so FIND*. Further, by this time, A.S. should have been reclassified as “multiply disabled.”

Therefore, I **CONCLUDE** that the IEP for 2021-2022 simply ignored this recent diagnosis, did not make any plans for it, and incorrectly continued to classify in 2021-2022 A.S. as “Other Health Impaired” rather than “Multiply Disabled” owing to her older ADHD diagnosis rather than her recent Autism Spectrum Disorder Diagnosis.

Further, even without the benefit of the Autism Spectrum Disorder diagnosis, it is obvious that A.S. was making appropriate progress by the time of the June 2021 IEP for 2021-2022 so that the District should have adopted, as best it could the program offered

A.S. at the Sinai School with the benefit of two years demonstrable progress by the 2021-2022 school year. Therefore, I believe the unilateral out of District placement for 2021-2022 in light of the District's failure to recognize and incorporate the Autism Spectrum Disorder in its 2021-2022 IEP and the progress made by A.S. in the two school years prior was a reasonable response by A.S.'s parents to the failure to provide FAPE for 2021-2022.

Parents who are compelled to unilaterally place their child in the face of a denial of FAPE, need not select a school that meets state standards. Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284, 293 (1993); L.M. ex rel H.M. v. Evesham Twp. Bd. of Educ., 256 F.Supp. 2d 290 (D.N.J. 2003). The Third Circuit has held that "parents [are] entitled to reimbursement even [when a] school lack[s] state approval because the [FAPE] state standards requirements . . . [apply] only to placements made by a public entity." *Id.* at 297 (citing T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 581 (3rd Cir. 2000)); *see also* Warren G. v. Cumberland Cty. Schl. Dist., 190 F.3d 80, 83 (3d Cir. 1999). Accordingly, our courts recognize that parents who unilaterally place their child by necessity do so without the expertise and input of school professionals that is contemplated by a truly collaborative IEP process. The courts recognize that under these circumstances, parents essentially do the best they can, holding that, "when a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' (IDEA) if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'" Florence, *supra*, 510 U.S. at 11, 114 S. Ct. at 365, 126 L. Ed. 2d at 293 (quoting Rowley, *supra*, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712).

Under this standard, I **CONCLUDE** that the Sinai School placement for 2021-2022 was appropriate. Rather than further describing the services at the Sinai School, I shall simply note that the record reflects that the District did not seriously contest the fact that A.S. was receiving appropriate placement and educational opportunities at the Sinai School nor the obvious facts that A.S. has made meaningful progress there. Rather, the District simply maintained that its own program was as good or better than Sinai's.

Pursuant to N.J.A.C. 6A:14-2.10(c)(4), reimbursement for a unilateral placement can be reduced or denied upon a finding “of unreasonableness with respect to the actions taken by the parents.” Here, It is understandable that the parents, by 2021-2022 had reasonably lost confidence in the District’s ability or willingness to build an appropriate IEP and then once done to thoroughly implement it. Therefore, notwithstanding the apparent reluctance of the parents or their experts to share information and opinion with the district prior to the 2021-2022 school year, I refuse to reduce the amount that the parents should be awarded reimbursement based on allegations of noncooperation and other inappropriate behavior by them. Instead, I **CONCLUDE** the parents’ actions by placement of A.S., at the Sinai School for 2021-2022 were reasonable and that all the costs of education for that school year, including books, transportation etc. be reimbursed to them. From that amount, however proportionate share should be reduced for the purely religious instruction received as part of the school program for that year.

Compensatory Education, cost of litigation, expert fees and attorneys’ fees

The petitioners argue that for the three years at Sinai School, A.S. received FAPE. Their claim and proofs presented indicate no need for compensatory education during those time frames. However, I have agreed and **CONCLUDED** (see above) that they should be fully reimbursed for the cost of tuition, and expenses (such as books), including transportation cost for the entire 2021-2022 school year for A.S.’s attendance and education received at Sinai School, minus that portion received for religious study,

It is clear too, that, despite respondent’s position to the contrary, petitioners are entitled to reimbursement or payment of the costs of expert witnesses for Ms. Susan Caplan’s fees, provided they are reasonable, for any evaluation/reports conducted after the filing of the first Due Process Petition, and for her testimony, as well as reports prepared by Melanie Feller, prepared specifically for this case. As to attorney’s fees, I agree with respondent that I have not been provided with any authority that I have jurisdiction to decide attorney’s fees and costs and so I cannot grant them. As for other relief sought, such as “an IEP that provides appropriate goals and objectives” and “appropriate individualized services,” I do not grant them as they are already required by the IDEA and applicable New Jersey regulations, and thus need no Order. As for

prospective relief, I **DENY** them as they are not indicated and counsel has advised that for subsequent school years after 2021-2022, either no claim is pending or they have been settled by the parties.

ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's request for reimbursement for evaluations and out of District placement and related expenses (e.g. transportation) at the Sinai School, (e.g. transportation) and related relief (except as otherwise set forth) requested for the school years 2019-2020 and 2020-2021 is **DENIED**.

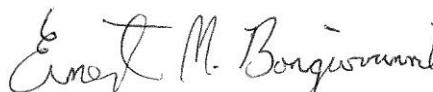
Based on the foregoing it is also **ORDERED** that for 2021-2022, and as of June 2021, the record should reflect A.S. be classified as multiply disabled, and it is also **ORDERED** that

1. The District shall reimburse petitioners for the cost of A.S.'s placement/attendance at the Sinai School, except for that portion related to purely religious study, for the school year 2021-2022, including transportation costs, books and similar supplies such as a computer and similar devices used exclusively for the school year 2021-2022.
2. Reimbursement of any reasonable expert fees for evaluations conducted and reports published after the filing of the First Due Process Petition, provided any written evaluations and reports were prepared for this litigation and were exchanged with the District, concerning this litigation and not any prior or subsequent litigation, if any, and for the reasonable cost of Susan Caplan's testimony at our hearings.
3. The IEP should be amended to reflect that the Sinai School was an appropriate placement for A.S. for the school year 2021-2022.
4. Any other relief sought by the petitioner not specifically mentioned is also **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2024) 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 (2024). 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.

December 9, 2024

DATE



ERNEST BONGIOVANNI, ALJ

Date Received at Agency:

12/09/24

Date Mailed to Parties:

12/09/24

id

APPENDIX

LIST OF WITNESSES

For Petitioners: E.S. and K.S .obo A.S.

Judith Karp
Kristen Gogerty-Fitzgerald
Coleen Horan
Susan Caplan
E.S.

For Respondent: West Orange Board of Education

Cindy Newell

LIST OF EXHIBITS IN EVIDENCE**

For Petitioner

P-6 Due Process Petition 01/18/2021
P-18 Report Card – Kindergarten, 2017-2018
P-34 Parent Email to Cindy Newell Request to Observe 12/09/2019
P-37 Parents to Cindy Newell with IEP Rejection and Placement Request 07/25/2019
P-43 Parent Email Chain with Cindy Newell 01/06/2021
P-44 Parent Email to District 01/11/2021
P-45 Initial Identification and Evaluation Plan – Evaluation Not Warranted 11/01/2017
P-56 SINAI Tuition Payment – Affidavit With Tuition Contract 19-20 SY
P-80 Memory Stick with Videos
Speech Session 01/11/2021
Meeting 06/07/2021
Reading Class 03/10/2021
ICR Class 03/10/2021
POR Math 01/11/2021

Speech Session 01/12/2021

P-95 Psychological Evaluation Children's Specialized Hospital By: Dr. Bradford Ross
07/26/2017

P-110 IEP Notes – Susan Caplan 10/17/2019

P-111 Educational Evaluation Susan K. Caplan, M.Ed., LDT-C 07/07/2020

P-112 Resolution Meeting Notes of Susan K. Caplan, M.Ed., LDT-C 08/24/2020

P-113 Observation of Proposed District Program Susan K. Caplan, M.Ed., LDT-C
03/10/2021

P-114 Curriculum Vitae of Susan K. Caplan, M.Ed., LDT-C

Respondent's Exhibits

R-14 Audiological and Auditory Processing Evaluation By: Judy Levitan 02/27/2019

R-15 Social Assessment By: Sheryl Greenwald March 2019

R-16 Educational Evaluation By: Catherine Sreepada April 2019

R-17 Psychological Report By: Anthony Musco 04/09/2019

R-18 Physical Therapy Evaluation By: Gina Brunetti-Zaccaria 05/06/2019

R-19 Speech and Language Evaluation By Kid Clan – Adina Brachfield 05/29/2019

R-20 Student Registration Form 07/08/2019

R-21 Service Plan- Essex Regional 06/05/2019

R-22 IEP 07/15/2019

R-23 Email Chain Regarding Proposed IEP – Cindy Newell and Parents 7/15 – 8/8/19

R-24 IEP 08/08/2019

R-25 Unilateral Placement Notice 08/14/2019

R-28 Draft IEP 10/17/2019

R-29 IEP 10/17/2019

R-30 Letter from Parents Rejecting IEP 10/20/2019

R-31 District Response to Petitioners Letter 10/24/2019

- R-33 District Staff Notes from Observation At Sinai 11/21/2019
- R-34 Petitioners Request for Independent Evaluations 12/10/2019
- R-36 Case Manger Notes from In-District Observation 12/12/2019
- R-42 Notes from Observation of POR Math Class 01/06/2020
- R-44 Notes from Observation of POR Language Arts Class 01/30/2020
- R-45 Email from Case Manager to D. Fine Regarding Participation In IEP Meeting
05/13/2020
- R-46 Email from Case Manager to Petitioners with Invitation to Annual Review Meeting
05/07/2020
- R-47 Email from Case Manager to Sinai Staff with Invitation to IEP Meeting
05/22/2020
- R-48 Documents from Sinai 06/04/2020
- R-49 Draft IEP 06/09/2020
- R-50 IEP 06/09/2020
- R-51 Correspondence from Petitioners Rejecting IEP 06/19/2020
- R-53 Unilateral Placement Notice 08/14/2020
- R-55 Email Chain Regarding Private Speech Therapist's Observation of In District
Program 01/11/2021
- R-56 Email Chain Regarding A.S.'s Progress in Current Program 01/11/2021
- R-57 Recording of Math Class 01/11/2021
- R-58 Recording of Science Class 01/11/2021
- R-59 Recording of Speech Session 01/12/2021
- R-60 Case Manager Notes from Observation Sessions 1/11-1/12/21
- R-63 Recording of ICR Class 03/10/2021
- R-64 Recording of Reading Class 03/10/2021
- R-65 Case Manager Notes from Observation 03/10/2021

R-67 Notes from Language Arts Observation at Sinai 04/19/2021

R-68 Speech Therapist Notes from Observation at Sinai 04/29/2021

R-71 Video of IEP Meeting 06/07/2021

R-72 IEP 06/07/2021

R-87 Parent Emails with Susan Caplan

** The nonsequential numbering of exhibits reflects the fact that other pre-marked exhibits were not identified or not entered into evidence.