State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 18029-16

AGENCY DKT.NO. 2017 25318

J.D. o/b/o J.H.,

Petitioner,

v.

PLAINFIELD BOARD OF EDUCATION,

Respondent.

J.D. on behalf of J.H., petitioner, pro se

Lisa M. Fittipaldi, Esq., for respondent (DiFrancesco Bateman, attorneys)

Record Closed: April 30, 2018 Decided: June 13, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.D.,[1] o/b/o her son J.H., filed a due process petition seeking a finding that there was a denial of a Free and Appropriate Public Education (FAPE) by the Plainfield School District (Respondent), including the Respondent's failure to grant the Petitioner the opportunity for meaningful input into decisions affecting her child's education, to provide a specialized reading program entitled "Linda Mood Bell," and to provide any and all other relief which is deemed equitable and proper.

[1] J.D. is an Attorney at Law for the State of New Jersey.

PROCEDURAL HISTORY

On or about January 11, 2016, Petitioner filed a third due process petition on behalf of her son, J.H. Hearings were held on September 9, 2016, September 28, 2016, and November 14, 2016, before the Hon. Michael Antoniewicz, ALJ. A Final Decision was issued on April 13, 2017. Petitioner then filed her appeal of Judge Antoniewicz's final decision on May 26, 2017. The Plainfield Board of Education and the New Jersey Department of Education and the New Jersey Commissioner of Education filed Motions to Dismiss arguing that "Petitioner has not pleaded a prima facie case of disability discrimination under the ADA or Section 504 of the Rehabilitation Act." To date, a decision on these applications has not been rendered. On October 22, 2016, the Petitioner filed her fourth due process petition objecting to the Respondent's 2016-2017 Individualized Education Program (IEP).

The Department of Education, Office of Special Education Programs, transmitted this matter to the Office of Administrative Law (OAL), where it was filed on November 29, 2017, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was originally assigned to the Hon. Joan Bedrin-Murray, A.L.J., who handled the matter through December 13, 2017, at which point it was transferred to the undersigned. On March 19, 2018, the Respondent filed a Motion for Summary Decision. Opposition to the Motion was filed on April 6, 2018, and a response to the opposition was filed on April 11, 2018. The matter was scheduled for a hearing on April 13, 2018, and with consent of all parties, the hearing was converted to an in-person settlement conference which was conducted by the Hon. Jeffrey A. Gerson, ALJ. In light of the settlement discussions, the Motion for Summary Decision was held in abeyance pending a follow-up in-person settlement conference conducted by Judge Gerson on April 30, 2018.

New hearing dates were scheduled for July 24 and 25, 2018.

FINDINGS OF FACT

I **FIND** the following to be the undisputed **FACTS** of the case:

1. Petitioner, J.D., is the mother of J.H. who is currently enrolled in the Plainfield School District. J.H. turned twenty-one years of age on January 13, 2018.

2. J.H. is currently eligible for special education and related services under the disability category "Autistic." Fittipaldi Cert. (hereinafter Fitt. Cert. Exh. D. J.H. attended school at the New Roads School in Parlin, New Jersey in the 2014-2015 school year and had attended that school since approximately the second grade. Thereafter, at the request of Petitioner, and based on an IEP dated October 20, 2015, J.H. was transferred to the Deron II School. J.H. was found to have fulfilled the requirements for high school and was ready for transition services. Deron II focuses on a plan for the student's transition, including vocation training, full-time supported employment, and other skills for independent living. This is the private placement specified for J.H. beginning in the 2015-2016 school year and he has remained there to the present day.

3. On September 9, September 28, and November 14, 2016, Judge Antoniewicz held hearings regarding J.H.'s 2014-2015 and 2015-2016 IEPs (Fitt. Cert. Exh. E).

4. Thereafter, on April 13, 2017, Judge Antoniewicz issued a Final Decision and written opinion making findings of fact and conclusions of law that among other things held: (1) J.H. was provided FAPE; (2) J.H. is not entitled to any compensatory education; (3) J.H. would never read at grade level even with the Linda Mood Bell program; (4) the services provided in J.H's IEP provided a meaningful education benefit; (5) J.H. has an appropriate classification and an appropriate educational program; (6) J.H.'s IEP provided afterschool tutoring five days per week, extended school year, specialized transportation, counseling sessions, and speech

and language sessions; (7) the areas of J.H.'s weaknesses set forth in the Leonard Evaluation were addressed in his IEP; (8) the goals and objectives in J.H.'s IEP meet the requirements for J.H. to qualify for a New Jersey State-endorsed diploma; (9) a one-on-one aide is not appropriate for J.H. as it is important that J.H. begin to function independently and (10) the goals that were set in the IEP were finalized in the IEP meeting based on input from the school and parent. Fitt. Cert. Exh. E.

5. On October 13, 2016, an IEP for the 2016-2017 school year was created. Petitioner and J.H. were present at the IEP meeting; however, did not provide the Respondent with any meaningful input nor did Petitioner object to any of the goals and objectives included in J.H.'s 2016-2017 IEP. (Fitt. Cert. Exh. C.) Under the "Parental input used to develop the IEP" section of the proposed IEP documentation it states, "[Petitioner] attended today's IEP Meeting, [Petitioner] was concerned that J.H.'s most recent cognitive testing from tests administered over the past two years indicate his reading level to be in a first-grade range." Fitt. Cert. Exh. C. The Child Study Team (CST) testing considered and took these special factors in consideration when determining J.H.'s accommodations and implementing J.H.'s IEP. Ibid. There was no objection to the IEP based on Petitioner's concerns. Further, all recommendations and accommodations in the IEP have been provided and implemented.

6. Even Karen Wildt, J.H.'s teacher, stated there was no objection expressed by Petitioners in her presence. Wildt Cert.

7. Thereafter, Petitioner filed her Fourth Due Process Petition on October 22, 2016, objecting to the Plainfield School District's 2016-2017 IEP, "because the Parent was not granted opportunity for meaningful input into decisions affecting her child's education," seeking a graduation plan, seeking new evaluations be conducted, for reimbursement of all evaluations, and for the implementation of the Linda Mood Belle program. (Emphasis added.). All of the issues raised in the current Petition before the OAL, are the same as

those raised and decided by Judge Antoniewicz who made findings of fact and conclusions of law.

DISCUSSION AND LEGAL ANALYSIS

A Motion for Summary Decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(a). If "a Motion for Summary Decision is made and supported, an adverse party 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." Ibid.

A Motion for Summary Decision before the OAL must be analyzed "in accordance with the principles set forth by the New Jersey Supreme Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995)." Nat'l Transfer v. New Jersey Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). The rule the Court announced was that a determination that there is a genuine issue of material fact:

> requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself (or herself) to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . ." The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. It is critical that a trial court ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial . . . ." To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed "worthless" and will "serve no useful purpose."
>
> [Brill, 142 N.J. at 540-41 (emphasis added).]

In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact relevant to the case. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Id. at 529 (citations omitted). If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law.

J.H. turned twenty-one years of age on January 13, 2018, and has met the graduation requirements for the Plainfield Board of Education and the State of New Jersey. J.H. received Special Education services and had all academic required courses in his educational program, including: daily after-school tutoring, transportation to school and tutoring, social skills group, speech in group, individual speech, counseling, one-to-one assistance, supplementary aids, phonic ear, extended school year including all these related subjects, and multiple evaluations forming recommendations for his future. Fitt. Cert. Exh. B, E, I; Wildt Cert.

As set forth above in the undisputed facts, all issues pertaining to J.H. and his IEP's for the 2014-2015 and 2015-2016 school years have been fully adjudicated. Petitioner has failed to provide any new evidence that J.H.'s condition, circumstances, or plan have changed with respect to the 2016-2017 IEP.

Here, Petitioner produced a thirty-one (31) page Opposition that is replete with legal conclusions while providing no citations to any documents or factual evidence. Petitioner pleads no facts that refute any of Respondent's contentions. Furthermore, Petitioner does not supply a Certification or Affidavit attaching documents upon which she relies to form a basis for her belief; nor does Petitioner refer to any documents or evidence attached to the Certifications supplied by the Respondent. The only Certification provided by Petitioner was one that merely states that "all of her, foregoing statements made by her are true." J.D. Cert. However, Petitioner did not make any factual statements in either her Certification or within her Brief in Opposition to the

Summary Decision Motion. Therefore, there are no contradicting material facts presented. In fact, there were no facts presented at all. I **CONCLUDE** that Petitioner has failed to set forth specific facts showing that there is a genuine issue which can on determined in an evidentiary hearing.

With respect to the 2014-2015, 2015-2016, and 2016-2017 school years, Petitioner's claims are barred by the doctrines of res judicata and collateral estoppel. Although parents have the right to an impartial due process hearing on any issue pertaining to their child's placement, a parent's request is subject to the doctrine of res judicata and may be dismissed under the doctrine should a final judgment have been made on a previous petition that involved identical parties and an identical cause of action raised in the current petition. S.P. ex rel. M.P. v. E. Brunswick Bd. of Educ., EDS 6670-98, Final Decision (September 1, 1998), <http://lawlibrary.rutgers.edu/oal/final/eds6670-98.html.

The doctrine of res judicata, also identified as claim preclusion, Pittman v. La Fontaine, 756 F. Supp. 834, 841 (D.N.J. 1991), bars the "relitigation of claims or issues that have already been adjudicated" in a prior suit based on the same cause of action. Tarus v. Borough of Pine Hill, 189 N.J. 497, 520 (2007) (citing Velasquez v. Franz, 123 N.J. 498, 505 (1991)). Res judicata or claim preclusion can be invoked when the subsequent action involves "substantially similar or identical causes of action, issues, parties and relief as were involved in the prior action" and a final judgment was rendered in the prior action by a court of competent jurisdiction. Pittman, 756 F. Supp. at 841 (citing Culver v. Ins. Co. of N. America, 115 N.J. 451, 460 (1989). For claim preclusion purposes, two causes of action are considered the same by identifying:

> (1) whether the wrong for which redress is sought is the same in both actions (that is, whether the acts complained of and the demand for relief are the same), (2) whether the theory of recovery is the same, (3) whether the witnesses and documents necessary at trial are the same and (4) whether the material facts alleged are the same.
>
> [Pittman, 756 F. Supp. at 841 (citing Culver, 115 N.J. at 461-62); see also S.P., EDS 6670-98 (Identifying the same four factors).]

In applying the doctrine of res judicata to a petition for due process, an ALJ may dismiss the petition when all factors for res judicata are met, particularly when a petitioner fails to support that material facts have changed since the resolution of a prior identical petition for due process. S.P., EDS 6670-98. In S.P., M.P.'s mother filed a petition for due process seeking the resolution of whether an autism class at the in-district school was an appropriate placement for M.P. Ibid. This same issue had been resolved a year earlier in EDS 6832-97 wherein the placement was determined inappropriate, and S.P.'s appeal of that decision was also ultimately dismissed with prejudice. Ibid. In resolving whether the second petition should be dismissed under the doctrine of res judicata, the ALJ considered the four factors used to analyze whether the cause of action was the same as the previous one. S.P., EDS 6670-98.[2] The ALJ determined that the doctrine of res judicata warranted dismissal of the petition because, even assuming that facts regarding M.P.'s slight progress were true, "the other indicia relied upon by the district and by parents still lead to the conclusion that no material facts are different now than when the original case was litigated." Ibid.

The doctrine of Collateral Estoppel is also identified as issue preclusion, Pittman, 756 F. Supp. at 841, and bars the re-litigation of any issue that arises in a proceeding that "was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." Tarus, 189 N.J. at 520 (citing Sacharow v. Sacharow, 177 N.J. 62, 76 (2003)). Collateral estoppel or issue preclusion "requires only that an issue of fact or law be determined in a valid proceeding and that final judgment on that issue was necessary to the decision. The decision on that issue is

[2] The ALJ in S.P. relied on M.R. ex rel. D.R. v. East Brunswick, 838 F. Supp. 184 (D.N.J 1993), for the language it provided on the doctrine of res judicata. Two OAL decisions were reversed and remanded based on that reliance: one determined that a settlement agreement was binding, D.R. v. East Brunswick Board of Education, 93 N.J.A.R.2d (EDS) 31, and another that determined that the parents' second petition, brought a week later, should be dismissed under res judicata because the first decision determined the agreement was binding and "no facts [were] alleged which show a change of circumstances since the [first] decision was issued," D.R. v. East Brunswick Board of Education, EDS 10062-92, Final Decision (January 19, 1993) (not available online or in N.J.A.R.). After the district court's remand, the OAL determined again that the settlement agreement was binding, and this decision was appealed to the district court. D.R. v. E. Brunswick Bd. of Educ., No. 94-CV-04167, slip op. (D.N.J. 1994). The district court then reversed the OAL's determination. Ibid. An appeal in the Third Circuit followed, whereby the Third Circuit reversed the district court, ultimately agreeing with the OAL that the settlement agreement was binding. D.R. by M.R. v. E. Brunswick Bd. of Educ., 109 F.3d 896 (3d Cir. 1997), cert. denied, 522 U.S. 968 (1997). The Third Circuit's opinion did not impact the language relied upon with regard to the doctrine of res judicata.

conclusive in any subsequent action between the parties on either the same or different claim." Pittman, 756 F. Supp. at 841-42 (citing Alfone v. Sarno, 87 N.J. 99, 112 n. 9 (1981)); Taylor v. Engelhard Indus., 230 N.J. Super. 245, 253 n. 7 (App. Div. 1989). The party asserting collateral estoppel must show that

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [First Union Nat'l Bank v. Penn Salem Marina, 190 N.J. 342, 352 (2007) (citing Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005)).]

In applying the doctrine of collateral estoppel to a petition for due process, an ALJ may bar a petitioner from seeking specific relief when such relief has been determined unattainable to the petitioner in a previous final judgment. W.R., EDS 10392-09. In W.R., the petitioners brought a petition for due process seeking specific reading programs for H.R. to be provided by the district. However, the United States District Court had previously denied petitioners this relief determining that the IDEA does not require a school district to select a specific reading program over an appropriate in-house program. Ibid. Consequently, the ALJ in W.R., determined that the district court's opinion "collaterally estopped [petitioners] in their attempt to force the school district to implement the specific relief they sought" because its decision was conclusive to that issue. Ibid.

On April 13, 2017, under OAL Dkt. No. EDS 02498-16, the Honorable Michael Antoniewitz, ALJ, issued a Final Decision and written opinion making findings of fact and conclusions of law pertaining to the 2014-2015 and 2015-2016 school years and IEPs, that among other things held: (1) J.H. was provided FAPE; (2) J.H. is not entitled to any compensatory education; (3) J.H. would never read at grade level even with the Linda Mood Bell program; (4) the services provided in J.H's IEP provided a meaningful education benefit; (5) J.H. has an appropriate classification and an appropriate educational program; (6) J.H.'s IEP provided afterschool tutoring five days per week,

extended school year, specialized transportation, counseling sessions, and speech and language sessions; (7) the areas of J.H.'s weaknesses set forth in the Leonard Evaluation were addressed in his IEP; (8) the goals and objectives in J.H.'s IEP meet the requirements for J.H. to qualify for a New Jersey State-endorsed diploma; (9) a one-on-one aide is not appropriate for J.H. as it is important that J.H. begin to function independently; and (10) the goals that were set on the IEP are finalized in the IEP meeting based on input from the school and parent. Any attempt by Petitioner to have these issues re-raised under the guise of a third and new Petition for a subsequent school year is fruitless and can viewed as forum shopping. As such, I **CONCLUDE** that as to the 2014-2015 and 2015-2016 school years, the matter has been fully adjudicated and the petitioner is not entitled to the relief sought.

As to the present Petition, the criteria for res judicata have been met. All of the redress that Petitioner seeks for the 2016-2017 school year are the same as those decided by Judge Antoniewicz. The theory of recovery is identical as well. Further, all of the same witnesses and documents necessary at trial would be the same and Petitioner has not presented any facts or evidence which shows a change in circumstances since the decision issued by Judge Antoniewicz. As stated earlier, Petitioner's Certification and brief in opposition to the Summary Decision is replete with legal conclusions while providing no citations to any documents or factual evidence. Petitioner offers nothing new and would be merely relying on the testimony and evaluation of report which offers no change in circumstances from those previously presented before Judge Antoniewicz. In fact, Judge Antoniewitz, the CTS, Claudia S. Branco, Marlene Rosenblum, and Dr. Palmer all found that J.H. needs to explore his transition from school as he is twenty-one years old and on the cusp of graduation. The goal was to encourage and enable J.H. to become more independent and this is what the Deron School provides. See Fitt. Cert. Exh. E and Fitt. Reply Cert. Exh. A. These opinions and recommendations have not changed from one IEP to the next. I **CONCLUDE** that the current petition pertaining to the 2016-2017 school year has been fully adjudicated and the petitioner is not entitled to the relief sought.

Further, the Petitioner in the present case is attempting to re-litigate the same issues, with the same parties that were already presented and fully adjudicated before

Judge Antoniewicz, by disguising them as a new claim, i.e. the 2016-2017 school year. These include, but are not limited to, Petitioner's claims that Respondent failed to provide FAPE and the request for the implementation of the Linda Mood Bell program; which formed the basis of recovery in both cases. However, Petitioner is barred from doing so. All of the elements of Collateral Estoppel are met, therefore bars the re-litigation of any issue that arises in a proceeding that "was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." Tarus 189 N.J. at 520 (citing Sacharow, 177 N.J. at 76). I **CONCLUDE** that all issues raised in Petitioner's Petition as to the 2016-2017 school year have been fully adjudicated and the Petitioner is not entitled to the relief sought.

Federal funding of State Special Education programs is contingent upon the states providing a "free and appropriate education" (FAPE) to all disabled children. 20 U.S.C. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C. §§ 1400 et seq. "[T]he IDEA specifies that the education the states provide to these children 'specially [be] designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.'" D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). 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). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the Federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district "maximize the potential" of the student but requires a school district to provide a "basic floor of opportunity." Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate

standard is whether the child's education plan provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (Internal citations omitted).

As noted in Bayonne, an Individual Education Plan (IEP) is the primary vehicle for providing students with the required FAPE. D.S., 602 F.3d at 557. An IEP is a written statement developed for each child that explains how FAPE will be provided to the child. 20 U.S.C. § 1414(d)(1)(A)(i). The IEP must contain such information as a specific statement of the student's current performance levels, the student's short-term and long-term goals, the proposed educational services, and criteria for evaluating the student's progress. See 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(VII). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and "be measurable" so both parents and educational personnel can be apprised of "the expected level of achievement attendant to each goal." N.J.A.C. 6A:14-3.7(e)(2). Further, such "measurable annual goals shall include benchmarks or short-term objectives" related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The school district must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C. § 1414(d)(4)(A)(i).

A due process challenge can allege substantive and/or procedural violations of the IDEA. If a party files a petition on substantive grounds, the Administrative Law Judge (ALJ) must determine whether the student received a FAPE. N.J.A.C. 6A:14-2.7(k). If a party alleges a procedural violation, an ALJ may decide that a student did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) caused a deprivation of educational benefits. Ibid.

In the present case, Petitioner's claims appear to be both procedural and substantive. First, the Petitioner's allegations of procedural violations of the IDEA will be addressed. With respect to the 2016-2017 school year, and the IEP provided for, Petitioner did not object to the same accommodations for J.H. as those implemented in

the prior years. Petitioner now claims by way of her fourth and most current Petition, that she was not granted meaningful input into decisions affecting J.H.'s education. Petitioner does not present any facts or evidence which dispute that she along with her son, J.H., were present at the October 13, 2016, IEP meeting whereat the 2016-2017 IEP was formulated.

Further, Petitioner does not present any facts or evidence that she was not granted the opportunity for meaningful input into decisions affecting her child's education nor has Petitioner offered any expert evidence to support her claim that Respondent's program does not or cannot meet the needs of her son. In fact, in the 2016 IEP under "Parental input used to develop the IEP," Respondent took into consideration any concerns the Petitioner had and used the concerns in considering J.H.'s accommodations and the implementation of the IEP. Fitt. Cert. Exh. C. The Neuropsychological Evaluation Report of Dr. Palmer does not provide for any new programs or findings that would change the Final decision issued by Judge Antoniewicz. Further, most of Dr. Palmer's recommendations have already been implemented in the 2016 IEP. Petitioner's expert report by Dr. Palmer, which was produced by Respondent in their moving papers, failed to establish a denial of FAPE. Considering that most of the recommendations by the Petitioner's expert have already been fulfilled and that Judge Antoniewicz has already made factual findings for the 2014-2015 and 2015-2016 school years that J.H. was supplied FAPE after a full hearing in 2016, therefore, I further **CONCLUDE** that there are no genuine issues of material fact to adjudicate.

Petitioner has failed to present any evidence to support that the 2016 IEP and the Deron School has not provided J.H. with a transitional learning experience as evidenced by the reports of Claudia S. Branco, Marlene Rosenblaum, and Dr. Palmer. Fitt. Cert. Exh. D, I, J.

In order "[t]o prevail on a claim that a school district failed to implement an IEP . . . the school [must have] failed to implement substantial or significant provisions of the IEP, as opposed to a mere de minimis failure, such that the disabled child was denied a meaningful educational benefit." Melissa S. v. Dist. of Pittsburgh, 183 Fed. Appx. 184, 187 (3d Cir. 2006). The record in the present matter establishes that Respondent

implemented J.H.'s IEP. Petitioner has not identified evidence by way of Certification or other expert report that J.H. was denied a meaningful educational benefit by Respondent. A New Jersey District Court determined that the East Orange Board of Education did not deprive a student of a FAPE despite the fact that the student "was without an IEP for approximately one year, between May 18, 2004 and May 25, 2005." N.P. ex rel. J.P. v. E. Orange Bd. of Educ., Civ. No. 06-5130 (DRD), 2011 U.S. Dist. LEXIS 11171, *23 (D.N.J. Feb. 3, 2011). In the present case, J.H. has annually been provided with an IEP which has been fully implemented. Therefore, Petitioner was not denied in the past nor is currently being denied a meaningful educational benefit.

Therefore, I **CONCLUDE** that Petitioner's procedural claims are without merit and that the Respondent did not deny J.H. a FAPE.

In addition, I would be remiss if I did not address the substantive claim which appears to be of the upmost importance to Petitioner; the once again attempt to have the Respondent implement the Linda Mood Bell program to address J.H.'s specific learning disabilities. However, Judge Antoniewicz clearly addressed the implementation of this program in his Final decision and found that J.H. ***would never*** read at grade level even with the Linda Mood Bell program. Emphasis added. See Fitt. Cert Exh. E. I **CONCLUDE** that Judge Antoniewicz's conclusion is clearly meant to not only address the 2014-2015 and 2015-2016 school years, but also any future years.

CONCLUSION

I **CONCLUDE** that there is no genuine dispute of material fact in this matter that might defeat Summary Decision and require a full evidentiary hearing. Petitioner failed to present any evidence to dispute the material facts set forth by the Respondent. Further, Petitioner failed to object to the goals and recommendations at the IEP meeting. Based upon Petitioner's failure to present any contradicting material facts I **CONCLUDE** that Respondent did not deny Petitioner FAPE during a time when he was entitled to it. For the foregoing reasons I **CONCLUDE** that Respondent's Motion for Summary Decision should be granted.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Respondent's Motion for Summary Decision is hereby **GRANTED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2010) 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 (2010). 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.

June 13, 2018
DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: June 13, 2018

Date Mailed to Parties:

sej

APPENDIX

List of Moving Papers

For Petitioner:

Brief in Opposition to Respondent's Motion for Summary Judgment filed April 6, 2018

Certification of J.D. dated April 6, 2018

For Respondent:

Brief in Support of Motion for Summary Decision filed March 19, 2018

Certification of Lisa M. Fittipaldi, Esq. dated March 16, 2018, with attached Exhibits:

Exhibit A	Petitioner's Third Due Process Petition filed on October 22, 2016
Exhibit B	District's Answer to Petitioner's Fourth Due Process Petition filed on January 10, 2017
Exhibit C	J.H.'s 2016-2017 IEP
Exhibit D	Petitioner's expert, Dr. Laura Palmer's 2017 Neuropsychological Evaluation Report
Exhibit E	ALJ Antoniewicz's opinion dated April 13, 2017
Exhibit F	Eligibility Conference Report dated March 16, 2017
Exhibit G	Leonard Educational Evaluation conducted on April 8, 2015
Exhibit H	Transcript of Recording Proceedings on November 14, 2016
Exhibit I	Psychological Assessment Report written by Claudia S. Branco, MA, School Psychologist dated March 1, 2017
Exhibit J	Educational Assessment Report written by Marlene Rosenblum, MA LDT-C dated March 10, 2017
Exhibit K	Copy of T.P. and P.P., ex rel. J.P. v. Bernards Twp. Bd. of Educ., EDS 6476-03, Final Decision dated March 12, 2004
Exhibit L	J.H.'s 2015-2016 IEP dated April 1, 2015
Exhibit M	J.H.'s 2014-2015 IEP dated April 22, 2014
Exhibit N	Marlene Rosenblum's MA, LDT-C rebuttal to recommendations of both Leonard Educational Evaluation Reports and Dr. Palmer's 2017 Neurophysiological Evaluation Report

Exhibit O Claudia S. Branco's MA, school psychologist, rebuttal to the recommendations of Dr. Palmer's 2017 Neurophysiological Evaluation Report

Exhibit P Petitioner's Last Due Process Petition which addresses the very same issues as her current Due Process Petition

Certification of Karen Wildt dated January 10, 2018

Certification of Natasha Eldridge dated March 15, 2018

Brief in further support of Respondent's Motion for Summary Decision filed on April 12, 2018

Certification of Lisa M. Fittipaldi, Esq. dated April 11, 2018, with attached Exhibits:

Exhibit A Deron School's Website Information