



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

OAL DKT. NO. EDS 00666-22

AGENCY DKT. NO. 2022-33759

**L.F. ON BEHALF OF E.F.,**

Petitioner,

v.

**POMPTON LAKES BOARD**

**OF EDUCATION,**

Respondent.

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L.F., petitioner, pro se

**Cherie L. Adams**, Esq., for respondent (Adams, Gutierrez, Lattiboudere,  
attorneys)

Record Closed: May 17, 2022

Decided: June 22, 2022

BEFORE **SUSANA E. GUERRERO**, ALJ:

**STATEMENT OF THE CASE**

Petitioner L.F. on behalf of E.F. filed a due-process petition (Petition) asserting that Pompton Lakes School District failed to appropriately implement E.F.'s 504 Plan, and that the District's failure warrants an out-of-district placement.

## **PROCEDURAL HISTORY**

The parent, L.F., initially filed a request for mediation, which was then converted to a request for a due-process hearing. The contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on January 26, 2022. The hearing was held on April 27 and 29, 2022, via Zoom due to the COVID-19 pandemic. The parties subsequently filed post-hearing summations, and the record closed on May 17, 2022.

## **FACTUAL DISCUSSION**

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

E.F. is a thirteen-year-old student who attends Lakeside Middle School in the Pompton Lakes School District. At all relevant times, E.F. has been in a general education setting, with accommodations and supports provided through the 504 Plan. The 504 Plan was put in place to address a visual impairment, convergence insufficiency.<sup>1</sup>

The 504 Plan in effective during the 2020–2021 and 2021–2022 school years, while E.F. was in the seventh and eighth grades, provides for the following accommodations:

- Use of slant board—3-inch binder is available for E.F. in each classroom to use when necessary.

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<sup>1</sup> Convergence insufficiency is described by the Mayo Clinic as: “a condition in which your eyes are unable to work together when looking at nearby objects. This condition causes one eye to turn outward instead of inward with the other eye, creating double or blurred vision. . . . It can cause difficulty reading, for which parents or teachers might suspect that the child has learning difficulties rather than an eye disorder.” <https://www.mayoclinic.org/diseases-conditions/convergence-insufficiency/symptoms-causes/syc-20352735>.

- Provide enlarged text—increase font of lengthy text to reduce visual fatigue (via computer/tablet/copier, etc.), and provide enlarged-text paper copies of required digital text.
- Frequent breaks—provide short, frequent visual breaks upon request on tasks requiring screen time of twenty minutes or more.
- Support for vision needs—E.F. will keep reading materials 18–21 inches from face and wear glasses for her convergence insufficiency diagnosis throughout the school day.
- Support for vision needs—E.F. is permitted to write directly in test booklets as needed throughout the school year.
- Support for vision needs—provide lined paper or lines within the assignment booklet for written answers; provide raised-line graph paper for any class, when graphing is required.
- Reduce visual field—provide visual mask to reduce visual text presented at one time.
- Support vision needs—E.F. is permitted the use of an electronic notebook for all classes to assist with visual needs.
- Support visual needs—E.F. will have the choice to print out materials and use hard copies to support her visual needs.

Testing accommodations were also provided in the 504 Plan.

L.F. removed E.F. from the District school in January 2020, and E.F. was homeschooled through the end of the 2019–2020 school year when she was in the sixth grade. Due to COVID-19, the District went to virtual learning near the end of the 2019–

2020 school year, and to a hybrid schedule, which consisted of a mix of in-person and virtual instruction, during the 2020–2021 school year. L.F. chose to keep E.F. fully virtual during the 2020–2021 school year, and a medical plan was also implemented for E.F. that school year. E.F. returned to the school building in September 2021 for the 2021–2022 school year.

The 2020–2021 504 Plan for E.F. was continued for the 2021–2022 school year following a meeting with L.F. The Petition does not contest the sufficiency of the 504 Plan. While L.F. attempted to raise that issue in her written summation, that will not be addressed here as it falls outside the scope of this hearing.

Susan Russo (Russo), case manager, testified about the development of the 504 Plan, and she confirmed that the accommodations provided for in the 504 Plan were all made available to E.F. She also testified credibly that she trained all of E.F.’s teachers on the 504 Plan and the accommodations provided therein at the beginning of each year. This school year she met with E.F.’s teachers after each marking period to review whether E.F. is receiving and using the 504 Plan accommodations. Russo’s records, and District witness testimony, confirmed that while E.F. is offered the accommodations in the Plan, there are times when she chooses not to use some of them. She did not, for example, always wear her glasses, and the visual mask was offered but not used early this school year. There is no evidence, however, that E.F.’s choice not to consistently utilize all accommodations had any negative impact. Despite petitioner’s suggestion, the 504 Plan also does not require the District to inform L.F. when E.F. does not wear her glasses or when she opts not to utilize every accommodation available to her.

The evidence also clearly demonstrates that E.F. is a bright student who has been very successful in school and has made meaningful educational progress. This is evident by the District witnesses’ testimony, E.F.’s report cards, and the fact that she even participates in the District’s gifted-and-talented program, and has consistently made honor roll, including every marking period during the 2021–2022 school year. While L.F. asserts in her written summation that the District is manipulating data to support its assertion that E.F. is doing well in the District, this position is without merit as there was no evidence presented to support this claim. While L.F. asserts that E.F. is not doing so

well because she “failed the college algebra class” she took at the start of eighth grade, it was L.F.’s choice to enroll her daughter in an online college class while she was only in the eighth grade, and the District did accommodate her request to later return E.F. to the District for math instruction. E.F. successfully completed math requirements for the seventh and eighth grades, and the fact that she failed a college-level class that L.F. chose to enroll E.F. in does not reflect a failure to make meaningful academic progress.

Dr. John Herninko, principal at Lakeside Middle School, was the District representative whom petitioner primarily reached out to with any questions or concerns. Despite L.F.’s testimony, Dr. Herninko was clearly very responsive and accommodating to her concerns and requests. He testified how slant boards and visual masks have always been available to E.F. for all of her classes. During E.F.’s sixth-grade year, the District spoke with L.F. and offered to provide E.F. with a Kindle that would allow E.F. to enlarge the font of books E.F. was reading. The Kindle was offered and utilized because it was an effective method to enlarge the font size of reading material, particularly while E.F. attended school virtually, which was through the end of the 2020–2021 school year. Dr. Herninko described E.F. as an excellent student.

Dr. Herninko testified credibly concerning two instances when E.F. did not immediately receive large-print books. The first time was in late August 2021, when E.F.’s teacher, who was receiving cancer treatment, simply forgot to provide her with a large-print version of a book the class was to read. When this was brought to Dr. Herninko’s attention, he immediately offered to secure the large-print book for E.F., although L.F. offered to take care of that issue herself, and did so. L.F. also informed Dr. Herninko that the English teacher did not provide a novel in large print, and Dr. Herninko immediately spoke with the teacher and informed L.F. that a large-print copy would be available the next day, along with a pdf or audio version that day or the next.

To ensure that E.F. received enlarged texts when needed, Dr. Herninko assigned one dedicated aide to enlarge texts for E.F. as needed during the 2020–2021 and 2021–2022 school years. E.F. has also had access to technology, through a Chromebook/Kindle, to enlarge texts.

Petitioner asserted that the District failed to provide E.F. with large-print books during “DEAR” time at school. “DEAR” time takes place about once a month. It is essentially a quiet reading period when students are able to read books of their choice that they bring into school. The District does not provide reading material for “DEAR” time, although petitioner asserts that the school should still be responsible for providing E.F. with large-print reading materials during this time. This is not included in the 504 Plan, and the District witnesses testified that the designated staff member is still able to enlarge any reading material that E.F. brings to school for “DEAR” time.

Dr. Herninko testified that he ordered E.F. special graph paper when he was informed that she needed it. There was also one instance this year when a teacher failed to provide E.F. with a large-print book, but it was given to E.F. the next morning, and the lesson was delayed until she received it.

E.F.’s eighth-grade science teacher, Andrea Veltre (Veltre), also testified at the hearing on behalf of the District. Veltre confirmed that she was aware of E.F.’s 504 Plan, and that the accommodations listed in the 504 Plan are available to E.F. in her classroom. She testified that E.F. has never requested visual breaks in class, but that she is able to do so, and that she does not always use her glasses. On one occasion, E.F. requested raised graph paper for an assignment, and Veltre testified credibly that she immediately sought to obtain the graph paper. Veltre testified that she has not seen E.F. use her visual mask, but testified that it is available for her use. She has no concerns about E.F.’s ability to do well in the class, and she is performing well.

L.F. raised several allegations against the District, including one relating to a teacher who was yelling during virtual instruction, another relating to allegations of bullying, and allegations that the District did not comply with a prior settlement agreement. These allegations are not addressed here as they fall outside the scope of this hearing.

L.F. testified about the two aforementioned instances where E.F. did not receive large-print books, and confirmed that she did agree to enlarge the one novel herself. In her written summation, L.F. asserts that for the 2020–2021 school year E.F. was not provided printed text “so [that E.F.] could participate in the reading and classes without

looking at the screen.” That year, however, petitioner chose to have E.F. attend school virtually, and, with the exception of the one instance involving the one summer reading book, there is insufficient evidence in the record to find that the District failed to “provide enlarged-text paper copies of **required** digital texts” (emphasis added) at any other time as required by the 504 Plan, or that petitioner made requests for these during virtual instruction. On cross-examination, L.F. also recognized that she only requested a copy of a large-print novel at the very end of summer, and that L.F. informed the District that she would obtain it herself. L.F. acknowledged that she provided E.F. with many large-print materials during virtual instruction.

L.F. asserts that E.F. was not given “large print tests” at the start of the 2021–2022 school year, but that this was later corrected. The evidence is inconclusive as to whether or how often E.F. was not provided “large print tests,” as well as whether these were needed or requested, and there is no evidence that this alleged failure had any impact on E.F.’s education or performance.

While petitioner testified that E.F.’s 504 accommodations were not always available to her, L.F. testified very generally and she provided little to no specific evidence to support this assertion.

L.F. called E.F.’s eighth-grade social studies teacher, Ryan McCleery (McCleery), as a witness. He confirmed that E.F. is doing “very well” in his class and has a 99 average. McCleery confirmed that the accommodations listed in the 504 Plan are available to E.F. in the classroom but that she does not always choose to use them. He testified credibly that increased-font materials are available to her, and that paper printouts are always provided, but that she sometimes prefers digital/computerized versions, and that she has not asked for paper versions of assignments. McCleery testified credibly that E.F. does not always wear her glasses, that she is able to take visual breaks at her discretion, and that visual masks are always available to her in his classroom, whether or not she chooses to use them.

Given my assessment of the testimony and documentary evidence, I **FIND** that the District has consistently provided E.F. with a visual mask consistent with her 504 Plans

during the 2020–2021 and 2021–2022 school years. I also **FIND** that the District has regularly provided E.F. with large-print material consistent with these 504 Plans, with the exception of a handful of isolated instances that the District quickly addressed and remedied when brought to its attention. I also **FIND** that the District implemented the 504 Plans for the 2020–2021 and 2021–2022 school years with fidelity, and that E.F. was able to access her education, and made meaningful educational progress at all relevant times. Finally, I **FIND** that there is no evidence that E.F. was ever discriminated against by the District due to her disability.

### **LEGAL ANALYSIS AND CONCLUSIONS**

Section 504 of the Rehabilitation Act of 1973 mandates that no otherwise qualified individual with a disability shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program that receives federal funds. See 29 U.S.C. § 794. A recipient’s education programs are governed by Subpart D of Section 504’s implementing regulations, 34 C.F.R. §§ 104.31 to 104.39 (2022). Pursuant to Subpart D, every “qualified handicapped person” is entitled to receive a FAPE, 34 C.F.R. § 104.33 (2022), and a recipient is responsible for providing a FAPE. 34 C.F.R. § 103.34 (2022).

Section 504’s negative prohibition on discriminating against or excluding those with disabilities is similar to the affirmative duty in the Individuals with Disabilities Education Act (IDEA) that requires schools receiving federal financial assistance to provide a free appropriate public education (FAPE) to each qualified person in the jurisdiction. See M.R. v. Ridley Sch. Dist., 744 F.3d 112, 116 at n.2 (3d Cir. 2014); Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280 (3d Cir. 2012). Providing a FAPE in accordance with Section 504 requires a school district to reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits. Ridley, 680 F.3d at 280–81. Section 504 does not mandate “substantial” changes to the school’s programs. Id. at 280. While the IDEA focuses on students’ progress in relation to their own potential and individual needs, Section 504 focuses on whether students with disabilities are receiving educational services that are



as effective as those made available to their nondisabled peers. See Franklin Cmty. Schs., 117 LRP 10901 (OCR 01/19/17).

The Third Circuit case Ridley School District v. M.R. is also instructive. 680 F.3d 260. There, the Third Circuit agreed with the District Court that although the incidents<sup>2</sup> at issue “may illustrate how E.R.’s daily school routine necessarily had to be different than her classmates,” they did not constitute Section 504 violations. Id. at 282. E.R. was a child with numerous learning disabilities and several health-related problems, including severe food and contact allergies. Id. at 264. Her parents claimed that the school “subjected E.R. to discrimination by failing to comply with the § 504 Agreement.” Id. at 267. The Third Circuit determined that there was no evidence in the record that E.R. was excluded from participation in educational activities, denied educational benefits, or otherwise subjected to discrimination. Id. at 282. For example, E.R. was not denied meaningful participation in the food-related activities; she simply had to eat something slightly different than the food eaten by her classmates. See Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979) (explaining that the Rehabilitation Act distinguishes “between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps”). The school took reasonable steps to accommodate E.R.’s disabilities and include her in all class activities; they were not required to grant the specific accommodations requested by the parents or otherwise make substantial modifications to the programs used for all other students. Ridley, 680 F.3d at 280–81; J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 70 (2d Cir. 2000). Likewise, Pompton Lakes took reasonable steps to accommodate E.F.’s disabilities. Despite petitioner’s assertion that E.F. was denied equal access because she could not use the same materials available to other students in the Media Center since the Media Center does not hold large-print materials, this is without merit since E.F. has a dedicated staff person available to her who can make large-print copies of any materials requested, including materials from the Media Center.

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<sup>2</sup> The “incidents” included as “evidence of Ridley’s discrimination against E.R.” were (1) giving E.R. a cupcake from the nurse’s freezer rather than the brownies given to her classmates during a “Clifford the Dog” celebration, due to her allergies; (2) during a program on nutrition, E.R. had to eat a snack from home, instead of the one provided, because of allergies, among other similar incidents. Id. at 281.

Petitioner asserts that the District failed to provide accommodations listed in the 504 Plan for the 2020–2021 and 2021–2022 school years, and specifically failed to provide E.F. with large-print material and a visual mask. The petitioner is not simply seeking to enforce a 504 Plan, but is asserting that the District’s failure to comply with the terms of the 504 Plan warrants an out-of-district placement. Therefore, this matter involves an assessment of whether the District’s alleged failure to properly implement the 504 Plan resulted in a denial of FAPE, and if so, whether an out-of-district placement is an appropriate remedy.

**Did the District Fail to Comply with its Obligations**

**Under Section 504 to Provide a FAPE?**

**And if so, is the Petitioner Entitled to an Out-of-District Placement?**

Here, while there may have been a few isolated instances when E.F. was not provided large-print material as required in her 504 Plan, this did not result in a denial of FAPE. The evidence clearly demonstrates that the District implemented the accommodations in the 504 Plan with fidelity, and that while there were a few instances over the past two years when E.F. was not immediately provided with large-print materials, usually due to teacher oversight or inadvertence, the District immediately sought to correct the oversight once brought to its attention, and there is no evidence that E.F. ever failed to receive the same instruction provided to the rest of the class or that she suffered academically in any way as a result of these isolated instances. This is evident by teacher testimony expressing her excellence as a student, and the fact that E.F. has maintained excellent grades throughout the seventh and eighth grades—while making honor roll every semester this year. There is simply no credible evidence to support the assertion that E.F. failed to receive a FAPE, or was discriminated against by the District, at any time during the 2020–2021 and 2021–2022 school years. I, therefore, **CONCLUDE** that the District did provide E.F. with a FAPE during the 2020–2021 and 2021–2022 school years, and that she is not entitled to the requested relief.

**ORDER**

Based on the foregoing, I hereby **ORDER** that the relief requested by the petitioner be and hereby is **DENIED**, and that the Petition be **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) and is appealable by filing a complaint and bringing a civil action 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 (2022). 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 22, 2022  
DATE

  
\_\_\_\_\_  
SUSANA E. GUERRERO, ALJ

Date Received at Agency \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

jb

**APPENDIX**

**LIST OF WITNESSES**

For Petitioner:

Ryan McCleery

L.F.

For Respondent:

Dr. John Herninko

Susan Russo

Andrea Veltre

**LIST OF EXHIBITS IN EVIDENCE**

Joint:

- J-1 504 Plan, September 2019
- J-2 Decision Approving Settlement dated December 2, 2019
- J-3 Educational Evaluation by Robyn L. Blomn, M.Ed.
- J-4 Psychological Evaluation by Lisa Bracamonte, Psy.D.
- J-5 Social History Assessment by Kristen Alonso, MSW, LSW
- J-6 Dr. Douglas Fenkart, M.D., note to excuse E.F. from school for one week dated October 21, 2020
- J-7 Dr. Douglas Fenkart, M.D., note to excuse E.F. from school for one week dated October 28, 2020
- J-8 Dr. Douglas Fenkart, M.D., note to excuse E.F. from school for one week dated October 30, 2020
- J-9 Dr. Douglas Fenkart, M.D., note to excuse E.F. from school for one week November 9, 2020, to November 13, 2020
- J-10 Dr. Douglas Fenkart, M.D., note regarding accommodations needed at school dated November 10, 2020
- J-11 E.F.'s Report Card 2020–2021
- J-12 Attendance and Grades 2021–2022

- J-13 504 Tracking Sheet 2021–2022
- J-14 Email correspondence between District and parent regarding 504 re-evaluation meeting dated August 24, 2021
- J-15 Email correspondence from Dr. Herninko to parent regarding Zoom 504 meeting September 2021
- J-16 Email correspondence from Susan Russo to parent enclosing the 2021–2022 504 Plan and Procedural Safeguard dated September 2, 2021
- J-17 504 Plan for 2021–2022
- J-18 Correspondence between District and parent regarding 504 issues from October 7, 2021, to December 6, 2021
- J-19 Letter from NJDOE to parent advising that time for enforcement of prior settlement agreement had expired dated December 7, 2021
- J-20 Mediation Request that was subsequently converted to Due-Process Request dated December 7, 2021
- J-21 District’s Answer to Due-Process Request
- J-22 504 Request for Agreement to Amend Accommodation Plan without a meeting dated March 30, 2022
- J-23 504 Plan dated April 6, 2022
- J-24 SAT Accommodation Request form
- J-25 Report Card 2021–2022 dated April 8, 2022
- J-26 Email correspondence between District staff and petitioner
- J-27 Letter from Lucy Chen, M.D., dated January 16, 2020
- J-28 Prescription dated May 29, 2018

For Petitioner:

- P-1 Medical Plan for E.F. for 2020–2021 school year
- P-2 Email from petitioner to Dr. Herninko dated December 8, 2020
- P-3 Email from Dr. Herninko to petitioner dated February 18, 2021
- P-4 Email from E.F. to parent and Dr. Herninko dated February 3, 2022
- P-5 Email from E.F. to Andrea Veltre and parent dated April 24, 2022

For Respondent:

None