



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
(CONSOLIDATED)

OAL DKT. NO. EDS 01547-22

AGENCY DKT. NO.2022-33833

S.S. ON BEHALF OF A.S.,

Petitioner,

v.

NEWARK CITY BOARD OF EDUCATION,

Respondent.

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

Petitioners,

v.

NEWARK CITY BOARD OF OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 05756-22

AGENCY DKT. NO.2022-34494

Michael I. Inzelbuch, Esq., for petitioners

Teresa L. Moore, Esq., for respondent (Riker Danzig LLP, Attorneys)

Record Closed: July 24, 2023

September 7, 2023

BEFORE ERNEST BONGIOVANNI, ALJ

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act, 20 U.S.C. § 1415, S.S., (parent/parents/petitioner(s)) requested a due process hearing on behalf of her daughter A.S., who is classified as eligible for special education and related services. Petitioners assert that the Individualized Educational Program (IEP) did not offer A.S. a Free and Appropriate Public Education (FAPE). The parents unilaterally placed A.S. in an out of district preschool. located in Little Falls, for which they seek reimbursement and related compensatory education and services.

PROCEDURAL HISTORY

Petitioner, S.S. filed pro se a process petition on behalf of A.S. a child of preschool age, on January 27, 2022, which included a request for emergent relief. The underlying petition challenged the District for failing to provide a FAPE to their child, then three years old, who was qualified for special education services. The emergent relief request was withdrawn after the District provided a schedule showing when A.S. received speech and occupational therapies. The District filed an Answer to the Pro Se Petition on April 4, 2022. However, on June 13, 2022, petitioners E.S. and S.S. through counsel filed a second petition for due process, again seeking reimbursement for the out of district placement, out of pocket expenses related thereto, reimbursement for any costs related to the failure to provide FAPE, attorneys fees and costs, demanding an appropriate IEP, and additionally seeking unspecified compensatory education and services. The two petitions were consolidated to be heard together. Nine hearing sessions were provided to allow each side to thoroughly present their respective positions. Thus, via Zoom video conferences, hearings were held on November 1, 2022, November 3, 2022, December 12, 2022, January 12, 2023, January 25, 2023, February 15, 2023, March 10, 2023, March 17, 2023 and March 23, 2023. Post hearings briefs were received June 21, 2023. A post hearing conference was held July 21, 2023 to create a stipulated record of exhibits in evidence. At the conference the issue of appropriate standards, if any, for special education needs of preschool children was discussed, following which a memo by

petitioner's attorney on the subject was received and accepted on July 24, 2023, at which time the record closed.

TESTIMONY

Respondent presented six witnesses at hearing: Learning Disabilities Teacher Consultant (LDTTC) and initial case manager Denise Gordon; current case manager Madalyn Perez; speech and language therapist Joanne Odiase; preschool instructional specialist Amy Woods; school psychologist Jamel Gibbs; and the board's Director of Special Education, Marilyn Mitchell.

Petitioners presented five witnesses: petitioner and A.S.'s mother, S.S.; former substitute teacher Estrella Castro-Tavares; speech and language therapist Melanie Feller; LDTTC Susan Caplan; and special education teacher Erin Wecht.

Denise Gordon

Denise Gordon, LDTTC and A.S.'s initial district case manager, testified for respondent. She taught special education in the district for 18 years, having obtained her LDTTC certification in 2005. Ms. Gordon is part of the Child Study Team (CST) that determined that A.S. was eligible for special education and related services under the eligibility category "preschool child with a disability." She is also a member of the board's Intake Evaluation Center (IEC), which coordinated initial assessments for A.S., including a social work assessment, a speech assessment, and an occupational therapy assessment. According to Ms. Gordon, initially there was no psychological evaluation conducted because evaluations are typically selected based on concerns the parents have at the time of the identification meeting. Nor was there an academic evaluation completed because such evaluations are often not performed for children as young as A.S., who was not yet enrolled in school.

Ms. Gordon was assigned as A.S.'s case manager after petitioners consented to A.S.'s initial evaluations. She testified that the IEC team, when determining A.S.'s eligibility for services, considered the evaluations, as well as a "developmental pediatric

study” report (neurological report) from A.S.’s pediatrician (J-7) diagnosing A.S. with Autism Spectrum Disorder, receptive and expressive language deficits, and deficits in fine motor and adaptive functioning. Her testimony was inconsistent in terms of what was done with the neurological report—whether it was accepted or rejected, as required, or merely “used.”

Ms. Gordon was involved in A.S.’s transition from receiving home-based services through Early Intervention Services to starting preschool at age three. More specifically, she developed A.S.’s initial IEP (J-15) with input from petitioners and other members of the CST. At the time, Newark schools were not offering in-person instruction due to COVID. As the drafter of the IEP, Ms. Gordon created goals and objectives for A.S., which were to be monitored by the teacher. There were, however, no enumerated goals for science, social studies, or reading. Ms. Gordon admitted these goals should have been stated in the IEP, but explained that, for preschool age children, goals are integrated into the curriculum.

Ms. Gordon expressed to S.S. that she believed the most appropriate program for A.S. was an in-class support resource program—i.e., a general education preschool class where a special education teacher visits and offers assistance for a designated portion of the day. She and the other members of the CST recommended this program based on “a host of strengths” they saw in A.S. that she was beginning to imitate words and use a fork to eat independently, that she could count while walking up and down stairs, and that she was starting to engage in parallel play, to name a few. They believed she needed to be around other children who could serve as “language models.” Petitioners had concerns and wished for A.S. to be placed in a self-contained Applied Behavior Analysis (ABA) classroom for children with autism. S.S. was particularly concerned for A.S.’s safety because of her tendency to wander or elope. She believed A.S. needed to be in a small, structured setting.

Based on petitioners’ concerns, the CST offered to place A.S. in a “preschool disabled-nonspecific disability” (PSD-N) class of no more than twelve children, comprised of students with a mix of disabilities. The district also offered A.S. speech therapy and

occupational therapy. Petitioners did not consent to this IEP and filed for mediation. Mediation resulted in an amended IEP in March 2021, which petitioners accepted, increasing speech services from two days a week to three days a week and providing A.S. with a one-to-one aide. (J-24). The mediation agreement also provided for a psychological evaluation and a functional behavioral assessment (FBA) within 30 days of the start of school, though the FBA was not administered within the required timeframe. Ms. Gordon's involvement with A.S. ended after mediation, when A.S. began attending George Washington Carver Elementary School.

Madalyn Perez

Madalyn Perez, LDTC and A.S.'s case manager at George Washington Carver Elementary School, testified for respondent. Ms. Perez was admitted as an expert in the field of special education and in the area of learning disabilities for children, based on her decade-plus of experience teaching students with disabilities.

Ms. Perez testified that her first interaction with petitioners was a meeting with them and her supervisor, Dr. Bresnahan, on September 8, 2021. The parents expressed their preference to have A.S. attend a preschool class for children with autism (PSD-A) at Ivy Hill Elementary School, where their son was in kindergarten. Following that meeting, arrangements were made for A.S. to be picked up earlier to better align with the pick-up time at Ivy Hill.

A.S. began the 2021-22 schoolyear in person at George Washington Carver on September 20, 2021, and a skills test was administered that same day. (J-14). A classroom aide, Miss Carly, was assigned to A.S. at the start of the schoolyear. Ms. Perez visited A.S.'s classroom, Room 116, at least once per week, and A.S. did not demonstrate any flight risk behaviors in the times that Ms. Perez observed her.

Initially, A.S. was taught by Ms. Ortez, who was a certified special education teacher. When Ms. Ortez left the district in November 2021, a substitute teacher, Ms. Estrella Castro-Tavares (who testified for petitioners), took over. Ms. Tavarres is not a

certified special education teacher. Ms. Perez stated that she visited the classroom more frequently after Ms. Ortiz left. Both teachers, as well as Miss Carly, told Ms. Perez that they did not believe A.S. required a personal aide.

Ms. Perez reviewed the classroom schedule during her testimony. (R-1). She explained that academic subjects are not necessarily covered in discrete class periods because, in a preschool setting, “everything is infused through play.”

A.S. began receiving in-person occupational therapy services in September, though she did not receive as many sessions as she was supposed to. Ms. Perez testified that staffing shortages caused by COVID prevented the district from providing speech therapy in the fall. A.S. finally began receiving speech therapy from Ms. Joanne Odiase (who also testified for respondent) on January 20, 2022. Ms. Perez did not advise petitioners that A.S. had not been receiving speech therapy until the week before the annual IEP review meeting held on January 27, 2022. At that meeting, where participants discussed A.S.’s current level of academic functioning, the CST assured S.S. that compensatory services would be provided, and Ms. Tavares advised that A.S. would benefit from being in a regular preschool class. S.S. was upset that A.S. had not been receiving speech therapy until recently and expressed a desire for her to receive ABA therapy. Petitioners filed for due process and emergent relief that same day.

Following the January IEP meeting, Ms. Perez sent a draft IEP to petitioners on February 17, 2022. (R-34). The new IEP (J-25) included extended school year (ESY) participation and compensatory services, which were offered in the home at S.S.’s request. On February 28, 2022, S.S. sent the CST a four-page letter listing her concerns with the IEP. (P-76 at 2541). A virtual meeting that included S.S., Ms. Perez, Dr. Bresnahan, and Ms. Odiase was held on March 7, 2022, to discuss the parents’ concerns. According to Ms. Perez, S.S. ended the meeting early because she did not think the discussion was productive.

Ms. Perez also testified about two classroom observations that occurred after the March 2022 meeting—one general education preschool class without a special education teacher and one with a special education teacher present.

Joanne Odiase

Joanne Odiase, Speech Language Specialist at George Washington Carver, testified for respondent. She provided speech and language services to A.S. three times weekly from January 2022 through June 2022.

Ms. Odiase testified that S.S. wished for A.S. to receive individual speech therapy to address the way A.S. articulated the “r” sound. Ms. Odiase recommended that A.S. receive speech therapy in a small group because she had a lot of verbal skills and needed to practice language with peers. She was concerned that A.S. did not have sufficient exposure to peer communication models in Room 116, and she told S.S. that a classroom geared to children with autism would not be good for her. Rather than provide individual speech services, Ms. Odiase reduced the group size from five to three students and included two of A.S.’s “verbal peers” from another preschool class.

Ms. Odiase’s testimony regarding A.S.’s goals and progress was confusing at times. She testified that A.S.’s IEP was never “finalized.” She said she developed the speech and language goals in A.S.’s IEP from January 27, 2022, based on “an educational review” of the documents that were available to her. A.S.’s first- and second-marking period progress reports for the 2021–22 school year indicated that A.S. made progress in speech and language, even though she did not receive speech and language services until January 2022. By March 2022, A.S. had achieved the speech goals that were in her IEP, so Ms. Odiase began developing new speech goals for her. These were not incorporated into the IEP that petitioners contested, but Ms. Odiase did communicate A.S.’s progress to S.S. via emailed reports and informal speech notes that she sent home with A.S.

Since A.S. was not offered speech therapy in the fall, Ms. Odiase offered to add a compensatory speech session on Tuesdays. S.S. declined, preferring to have

compensatory speech and occupational therapy sessions provided in her home by a third party.

Ms. Odiase observed A.S. in her new placement at Ben Samuels Children's Center (BSCC). The class has twelve children, two of whom have IEPs, and the classroom teacher is not certified in special education. A certified special ed teacher (who testified for petitioners) visits the classroom three days per week. Ms. Odiase testified that the observation started late and that she and her colleague, Ms. Woods (who also testified for respondent), were not permitted to observe A.S. in occupational therapy after initially being told they could.

Jamel Gibbs

Jamel Gibbs, psychologist in Newark's Office of Special Education, testified for respondent. Like Ms. Gordon, Mr. Gibbs is part of the IEC team. He conducted a psychological evaluation of A.S., which included subsets of the Stanford-Binet Intelligence Scales (Fifth Edition), a cognitive ability and intelligence test. The Stanford-Binet test was abbreviated because A.S. could not sustain her attention for additional subsets. She became "antsy" and started "moving," behaviors which could be characterized as "eloping." The Stanford-Binet produced an abbreviated IQ score of 76, placing A.S. in the fifth percentile of children her age. (J-12 at NBOE25).

Mr. Gibbs also administered the Vineland Adaptive Behavior test (Third Edition), which measures everyday living skills such as motor skills. S.S. provided information about A.S. for this assessment, which demonstrated areas of relative weakness in communication, daily living skills, and socialization skills. Motor skills were considered a strength. Mr. Gibbs concluded that the results of the assessments supported "a possible suspected disabling condition."

Mr. Gibbs testified that it was unnecessary for the CST to know A.S.'s I.Q., since she met the criteria of "a preschool child with a disability" based on other assessments.

Amy Woods

Amy Woods, preschool disabilities instructional specialist in the board’s Office of Special Education, testified for respondent. Her duties include coaching teachers, meeting with child study teams, developing behavior plans, and supporting the district’s “inclusion students.” She previously taught a class for children with autism and holds a master’s degree in special education.

Ms. Woods testified to what she observed in A.S.’s out-of-district placement at BSCC. In many respects, her testimony duplicated that of Ms. Odiase and Ms. Wecht. She testified about two instances when A.S. became upset and how the staff responded. She further testified that the Newark school district offers an inclusion option comparable to what she observed at BSCC, in a general preschool setting.

Marilyn Mitchell

Marilyn Mitchell, Director of Special Education for the Newark Board of Education, testified for respondent. Ms. Mitchell has thirty-plus years of experience in special education, including three years in her current role.

She testified that she has had some interactions with petitioners. They spoke on the phone in February 2022, and Ms. Mitchell was the one to respond to petitioners’ notice of their unilateral placement of A.S. at BSCC. She also responded to petitioners’ complaint investigation requests to the Office of Special Education (OSEP).

Ms. Mitchell disputed petitioners’ claim that the district does not offer a true “inclusion” setting for preschool children. She described three such options that the district offers: a regular preschool class whose teacher receives consulting from a special education teacher; a class co-taught by a general education teacher and a special education teacher; and a general education class where a special education teacher “pushes in” to teach a child with a disability.

Ms. Mitchell acknowledged that petitioners should not have had to wait three weeks to receive an IEP following the January 2022 meeting. She also acknowledged

issues sharing progress reports with petitioners in a timely manner, that the GOLD assessment should have been administered twice a year but was not, and that petitioners were justified in wanting a certified special education teacher instead of a long-term substitute. She explained some of the conditions that made it difficult to hire a special ed teacher, including retirements in the district and a state- and nationwide shortage of special ed teachers exacerbated by the pandemic.

Estrella Castro-Tavares

Estrella Castro-Tavares, a substitute teacher assigned to A.S.'s classroom at George Washington Carver Elementary School, testified for petitioners. Ms. Tavares taught A.S. from November 19, 2021, until the last day of school, June 23, 2022. She is a certified substitute teacher for all subjects from grades pre-k to eight, and she is working on her teacher's certificate.

Ms. Tavares testified that there were normally three adults in the classroom, including herself and two paraprofessionals, one of whom was assigned to A.S. Initially, there were six students in the class. By March 2022, there were eleven students in the class. She instructed the students based on a curriculum that was given to her by another teacher at George Washington Carver, which was modified according to the needs of the students in Room 116.

Ms. Tavares was familiar with A.S.'s level of achievement. She testified that A.S. was "low in math," that she could count to ten without assistance and to twenty with help, that A.S. was not ready to read, and that she could write her name. Ms. Tavares said she did not conduct any evaluations of A.S. or complete any progress reports for her. In fact, she said as a substitute teacher, she was not permitted to do any evaluations. Only Ms. Perez and the specialized therapists completed evaluations.

Ms. Tavares did not review any of the students' IEPs. She testified that she did not believe Room 116 was appropriate for A.S. because all but one of the other students in the class were non-verbal. According to Ms. Tavares, Ms. Perez agreed that Room 116 was not appropriate for A.S., and the district was looking to place A.S. in a different

classroom for September. They both agreed that a small class of ten to twelve students was ideal because A.S. gets overwhelmed in larger groups.

Ms. Tavares testified that she believes she is unqualified to teach A.S. and that she was not able to give A.S. enough attention. She estimated that she spent approximately forty minutes each day providing individual instruction to each of her students. She also testified that A.S. needs a special education teacher and a one-to-one aide. She said she told S.S. during the IEP meeting that she believed A.S. should be in a regular preschool class.

Melanie Feller

Melanie Feller, a forensic speech and language therapist, testified for petitioners. Ms. Feller was admitted as an expert in speech pathology for children with autism, special education, and DIR/Floortime, a therapy model for treating children with autism.

Ms. Feller conducted a speech and language evaluation of A.S., consisting of two of four subsets of the Oral and Written Language II assessment, in May 2022. She testified that A.S. scored well below average. (P-70 at P2273-74).

Her testimony reinforced some of the concerns raised by petitioners and other witnesses—Newark’s failure to provide speech and language services in the fall, for example. She expressed her opinion that the compensatory services offered by the district were inadequate, that the speech therapy Ms. Odiase provided was not tailored to A.S.’s needs, and that some of the goals in her IEP were inappropriate.

Ms. Feller observed A.S.’s PSD-N classroom (Room 116) from the 2021-22 schoolyear at George Washington Carver, as well as A.S.’s out-of-district placement at BSCC. Ms. Feller erroneously believed the PSD-N classroom at George Washington Carver was the district’s proposed program for the upcoming year. She testified to issues she observed in Room 116, including noise, unclear student activities, and a lack of transitions between activities. She expressed concern that A.S. did not have any opportunities to engage with neurotypical peers, and that the class was not led by a

special education teacher. BSCC, in Ms. Feller's opinion, offered appropriate services in an inclusive environment.

On November 1, 2022, Ms. Feller observed in person Newark's proposed preschool disabilities class for A.S. She concluded in her report (P-86) that the district program "would not provide [A.S.] with any peer models of language." A.S., she opined, "would not have peers who are on a similar development level to play with or interact with" and that she would be the highest functioning child in the classroom. These factors and her observed lack of support of staff who understand A.S.'s development profile, would deprive A.S. of "meaningful instructional opportunities." By contrast, at Ben Samuels, A.S. was "thriving" and the placement was "clearly" meeting A.S.'s speech and language needs."

On cross-examination, counsel for respondent highlighted that Ms. Feller has accepted dozens of clients from petitioners' counsel over the years. Respondent pointed out the difference in approach to the two classroom evaluations—specifically, how Ms. Feller engaged in lengthy discussions with BSCC staff but did not ask to speak to anyone from George Washington Carver or the district. Respondent also questioned whether Ms. Feller's evaluation, which included opinions about the IEP and A.S.'s placement, amounted to advocacy by inappropriately exceeding the scope of a typical assessment.

Susan Caplan

Susan Caplan, LDTC, testified for petitioners. She was admitted as an expert LDTC and an expert in special education.

Ms. Caplan remotely observed A.S.'s classroom at George Washington Carver on June 2, 2022. She testified to her report summarizing her observations. (P-71 at p. 2327–29). She noted that a video was played on the classroom smartboard, but the teacher failed to explain what the video showed or why she was showing it to the students. The teacher did not provide any materials or manipulatives to help the students connect with the video. Ms. Caplan observed that A.S. appeared to be the only student who was able

to pay attention to the video. The other students appeared to be nonverbal and unable to focus.

Ms. Caplan shared her opinion that Newark's IEP included unrealistic and inappropriate goals for a preschooler, such as mastering reading, and lacked goals for more basic skills and academic achievement.

Ms. Caplan administered two standardized tests to A.S.—the Woodcock-Johnson IV Tests of Early Cognitive and Academic Development (ECAD) and the Young Children's Achievement Test (YCAT). (P-71 at p. 2319–24). On the ECAD, A.S.'s results were average or better in six of nine subtests. The YCAT demonstrated that A.S. has average functioning in reading skills, such as recognizing letter names, picture vocabulary, and verbal analogies. A.S. showed weaknesses in attention and memory, sustaining focus, and pragmatic language skills. Overall, Ms. Caplan found A.S. to be of average intelligence with average pre-academic skills and weaknesses in speech and language skills.

Based on her evaluations and observations of A.S., Ms. Caplan believes A.S. would benefit from being in a general education classroom with "typical" peers and special ed support—either in the form of a one-to-one paraprofessional, or an "inclusion" placement where a general education teacher and a special education teacher are present simultaneously. In Ms. Caplan's opinion, the BSCC placement, which she also observed, offers an appropriate program.

On November 1, Ms. Caplan observed in person Newark's proposed preschool disabilities class for A.S. In her report, she opined that the class was "not an appropriate learning environment" for A.S. She noted that all the other students were nonverbal, and appeared younger and more delayed than A.S. She opined that as a result, "preschool/Kindergarten readiness skills do not appear to be addressed. She noted and criticized the lack of language models in the classroom, and an apparent lack of a positive/reward behavior system in place.

As with Ms. Feller, cross-examination highlighted that Ms. Caplan has been retained by many of opposing counsel's clients.

Erin Wecht

Erin Wecht, a certified special ed teacher, testified for petitioners. Ms. Wecht "pushes in" to A.S.'s class at BSCC three days per week. She was admitted as an expert in special education and "inclusion," which she defined as "providing appropriate supports for children with disabilities in a general education classroom."

Ms. Wecht testified to the demographics of BSCC classes generally and A.S.'s class in particular. She explained that BSCC preschool classes are designed for an inclusion model, where the ratio of general education students to special education students is typically ten to two. This ratio is intended to reflect the demographics of society at large, exposing special education students to general education peers without overwhelming or isolating them. A.S. is one of two students with an IEP in her twelve-student class.

While in the classroom, Ms. Wecht splits her time approximately 50/50 between A.S. and another student. She joins them in play, helps them navigate routines, and differentiates instruction. At times, she leads the class in an activity. She also works with the two special education teaching assistants (SETA) and documents and assesses the progress of A.S. and the other special education student.

Ms. Wecht described the services A.S. receives, which include two thirty-minute sessions of occupational therapy (one push-in and one pull-out), plus an hour of occupational therapy with the full class each week; two thirty-minute speech therapy sessions (push-in); thirty minutes of individual music therapy (pull-out) and thirty minutes of group musical therapy. She also described how the school reports on A.S.'s progress via anecdotal notes, traditional IEP goals, and the online messaging program, Slack, through which the parents can communicate with staff.

S.S.

Petitioner S.S., mother of A.S., testified on her own behalf. The specifics of petitioners' grievances are thoroughly covered by their petition, the documentary evidence, and the testimony of other witnesses. While it was important to hear directly from S.S., summarizing her complete testimony—which was colored by her love as a mother, her role as a party to this litigation, and her obvious desire to do what is best for her child—would be redundant, and her relevant testimony is covered in the factual discussions and findings which follow

FACTUAL DISCUSSION AND FINDINGS

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

Prior to an Initial IEP meeting which took place January 12, 2021, which developed the Initial IEP (J-23), A.S., born January 25, 2018, resided in the Newark School District and received early intervention services (J-1). Among other relevant tests, examinations and evaluations of A.S. an evaluation from Punam Kashyap, MD, retained by A.S.'s parents, determined that A.S. met criteria for a diagnosis of Autism Spectrum Disorder, and also opined that A.S. needed intensive speech and language therapy and occupational therapy. (J-7). The IEP placed A.S. in a Preschool Disability Nonspecific Program. As noted in the testimony of Denise Gordon, this type of placement can fairly be described as an "In class support resource program in which a general education teacher is the primary instructor for the classroom and a special education teacher enters the classroom for a period of time to work with and assist," the child needing services, in this case A.S. Beyond that, the IEP established that A.S. was indeed eligible for special education and related services, classified her as a Preschool Child with a Disability and offered A.S. speech and language services twice a week for thirty minutes a session and occupational therapy individualized services twice a week for thirty minutes.

Within a weeks' time, the parents complained to the District regarding A.S.'s placement under the IEP, claiming the child would be overwhelmed by the classroom and school setting. They filed a petition for mediation, seeking placement for A.S. in a self-contained Applied Behavior Analysis (ABA) classroom with ABA trained staff individual and group speech, an ABA extended school year program and a paraprofessional. (J-10). The Mediation petition was resolved by agreement (J-11) and a revised IEP agreed to, (formally amended by the Child Study Team (CST) on March 23, 2021) providing for special education and related services for A.S. for the period of January 25, 2021 to January 24, 2022, for Pre-K and Kindergarten. More specifically, it provided for all special education classes (language arts literacy, math, science, Social studies/history) being self-contained and each once a day for 30 minutes. A.S. was also to receive Occupational therapy individualized twice a week for 30 minutes and speech language services by group, three times a week 30 minutes each session. A personal aide for six hours a day, under the direct supervision of the classroom teacher would be provided to assist A.S. In addition the agreement provided for consent for the District to have psychological and FBA evaluations within thirty days after the start of school.

At the time of the revised IEP, the school District was operating entirely online owing to the COVID-19 pandemic, and during said time, A.S. did not participate in online instruction. On or about April 26, 2021, A.S. began attending school at Newark's George Washington Carver Elementary School, and at first she was the only child attending in person, the others having chosen through their parents to attend virtually.

While the amended IEP increased the amount of speech therapy services to be provided to A.S., Newark's Speech Language therapist Odiase stated without contradiction that A.S. did not begin receiving such services at all until January 2022. A.S.'s first- and second-marking period progress reports for the 2021-22 school year indicated that A.S. made progress in speech and language, even though she did not receive speech and language services until January 2022. This anomaly was never explained by anyone on behalf of the District. Furthermore, as testified to by Odiase and others, A.S. did not receive all of the occupational therapy sessions as provided for in the amended IEP.

The agreed to District Psychological evaluation as reported by Dr. Gibbs, in his March 2021 evaluation, found A.S. to have poor communication skills, tended to “elope” from tasks, and scored an abbreviated IQ of 76, which is in the low/borderline range. His report supported a “possible suspected disabling condition in A.S. Dr. Gibbs report was contradicted somewhat by a second psychological evaluation completed in July, 2021 by Dr. Robyn Brody, (J-13) which found A.S. to have relative strength in Daily Living skills (Dr. Gibbs found that as a weakness) and performed in the average range of cognitive functioning. As Dr. Brody did not testify and the facts and opinions of that report were not stipulated to, I give greater credence to Dr. Gibbs assessment and his credible testimony.

At the outset of the 2021-2022 school year, the parents of A.S. attempted to have her transferred to Newark’s Ivy Hill Elementary School based on the Autism spectrum disorder (ASD) diagnosis. (R-17) Dr. Bresnahan communicated with them and explained such a transfer was not possible because the IEP did not support it. (Id) Although S.S. thought placement at Ivy Hill was more appropriate given A.S.’s diagnosis, her position was somewhat weakened by her admission that she wanted A.S. to attend the same school as her brother. (Id) In any event, A.S. was not transferred. S.S. complained that while at George Washington Carver, a one-on-one aide was assigned to A.S., in fact, the aide was not always present. (R-21). I **FIND** that contention was not contradicted by the District.

Additionally, as testified to by A.S.’s first case manager Gordon, the CST neither accepted nor rejected the ASD medical diagnosis. Rather, she said, the CST “used” the diagnosis. However, at other points, she wavered and said the diagnosis was accepted, however such fact was not included in the IEP. Similarly, Gordon said the IEP and the amended IEP offered A.S. placement in an inclusion classroom; however, such offer is not reflected in the IEP or amended IEP. Furthermore, the District apparently admitted such placement was not included in the IEPs because they maintained they offered a modification in the IEP in May 2022. Case Manager Perez did not dispute there was no baseline testing for A.S. throughout the 2021-2022 school year, no formal progress observations occurred during that time. Perez admitted, as noted infra, that Newark

failed, throughout the 2021-2022 school year to provide speech and occupational therapy as required by the IEP and amended IEP. Perez also admitted she additionally withheld this information from the parents. Newark's Speech and language Specialist Odiase noted that in the 2021-2022 school year, many of A.S.'s classmates were nonverbal, making the classroom setting inappropriate to A.S.'s needs. Furthermore, Ms. Tavares testified that all (not just many) of A.S.'s classmates were nonverbal, making that classroom inappropriate to her needs. That condition was also inconsistent with the IEP and I so **FIND**.

In October of 2021, A.S.'s Special Education Teacher Ms. Ortez resigned her position effective November 18, 2021. The District maintained that Newark's School District, like many throughout the nation during the Covid-19 pandemic had a shortage of permanent teachers and hence assigned a substitute teacher for A.S.'s Classroom 116, Ms. Taveres. As admitted by Ms. Taveres, she was not qualified to teach A.S. owing to her learning disability. Ms. Taveres is not a Special Education Teacher and she also believed Classroom 116 was also not correct for A.S. based on the number of and mix of students. The District's answer for that was it was simply "unable" to provide a Special Education teacher for A.S. and so Ms. Taveres continued as A.S.'s teacher through June, 2022. As a special education teacher, (Ms. Ortez) was being provided to A.S. at the time of the IEP and amended IEP for 2021-2022, I must **FIND** that the essential services as provided for in the IEP were not being provided to her at a critical period of seven full months (November through June) of the 2021-2022 school year, before A.S. was unilaterally placed.

In January, 2022, Case Manager Perez informed A.S.'s parents that A.S. was not as yet receiving speech language services. They later found out that up to that point, A.S. not received all her occupational therapy sessions either. It was under these somewhat disturbing circumstances that the CST and S.S.'s parents, on January 27, 2022, the CST and S.S. convened its annual IEP review. No Special Education teacher was present at the meeting, although a special education teacher was required to be present. The meeting resulted in the development of only one major change to the IEP which was to provide an Extended School Year (ESY) for A.S., apparently because of the

lack of a special education teacher being offered to her up to that time. A draft IEP was presented February 17, 2022. Given the fact that by that time, the parents had already filed a pro se Due Process petition, a resolution session was set for February 28, 2022. On March 2, 2022, S.S. submitted a complaint investigation form to OSEP, complaining that during the 2021-2022 school year A.S. was not provided speech services for five months, and occupational services were not provided for as mandated by the IEP. OSEP found that A.S. missed 51 speech language service sessions and 20 occupational services sessions and directed those numbers of sessions be provided as compensatory therapy.

The compensatory sessions immediately became subject to complaint as they were to be provided only 20 minutes before a previously arranged pick up by the parents, and they made it known they did not consent to this schedule (R-42), asked that instead the compensatory sessions be provided independently and at the parents' home, which request was denied.

Sometime in May 2022, the District offered to change A.S.'s placement to a regular preschool class with a special education teacher pushing in on a regular basis to instruct her. This Placement was based on an inclusive model of education that educates students with disabilities and without disabilities in the same classroom (R-49 and (R-51). Following observations by the parents of such a model classroom and an observation of the parents Expert Caplan, the parents refused to agree to such a placement. Around the same time, another expert for the parents, Ms. Feller provided her Speech and Language Evaluation Report. Among other things, her report noted the IEP mistakenly classified A.S. as blind or visually impaired. The report also noted the IEP failed to list where A.S.'s speech and language services would take place and did not note that between September 2021 and January 2022 only two speech and language sessions were provided. Soon thereafter, the second Due Process Petition was filed.

Notwithstanding the Due Process Petition, the parents agreed to enroll A.S. in the ESY sessions which began July 5, 2022. A.S.'s attendance there was brief and tumultuous. According to S.S.'s testimony, the ESY teacher left a voicemail stating that

A.S. needed a change of clothes, and that A.S. had been acting disrespectfully. But, again according to S.S., A.S. said the teacher had raised her voice to A.S. and A.S. had responded in kind, following which the teacher smacked A.S. hard on the knee making her cry. S.S. made inquiries to the ESY teacher who was not available to reply. The same day, June 27, 2022, A.S. told S.S. another student in the class slapped her. S.S. requested an HIB investigation. The parents believed the HIB investigation was nonresponsive and their concerns were ignored. Whether any, all, or none of these allegations were true, (at hearings, the District offered no contrary evidence) it is obvious that the parents' belief in the allegations in part motivated them to remove A.S. from ESY, and probably encouraged them to unilaterally place A.S. soon thereafter.

On August 22, 2022, the parents notified the District that they were unilaterally placing A.S. in a private school, Ben Samuels Children's Center. (Ben Samuels) On the same day, the District advised the parents they did not consent to said placement. The teaching model at Ben Samuels was similar to that offered in May, 2022 by the District to the parents to modify the IEP, to wit, an "inclusive program" with a preschool classroom led by a certified early childhood teacher and/or a certified Special Ed/General teacher with program consultation of a Special Educator. Speech and language and occupational therapy would "infuse" the daily learning program and a one-on-one Special Education Teaching Assistant would be provided. (P-13).

The parties arranged for observations by the parents' experts Caplan and Feller of A.S. at Ben Samuels. They also observed A.S.'s former class at George Washington Carver, all of which took place in October, 2022. Significantly, Caplan noted that the Newark preschool children were all nonverbal, and Feller noted A.S. would be the highest functioning child in the classroom. The children also appeared younger. These facts, and others observed by Feller and Caplan led them to conclude continued placement at George Washington Carver was not an appropriate learning environment for A.S. In contrast, by that time, A.S. was "thriving" at Ben Samuels. Regardless of the validity of the rest of their opinions, I **FIND** that it is undisputed that A.S. was testing, per the Woodcock-Johnson IV tests and Academic Development (ECAD) and the Young Children's Achievement Test (YCAT) administered in the Spring of 2022, overall to have

average or better skills and that overall her academic skills were average. However, I also agree with the overwhelming opinion of all who testified, as typified by the opinion of Ms. Caplan, and **FIND** that an educational program with typical peers with special educational supports with a one on one full time paraprofessional with co-teaching or an inclusion program was appropriate for A.S.'s needs in the 2021-2022 and 2022-2023 school years, and would have been consistent with the proper goals and objectives of the IEPs for A.S.; however such a program was not employed while A.S. attended Newark schools, despite the Board's assurances, in May 2022, that such a program could be put into place. Further, I **FIND** that the parents were not offered such a program until May, 2022, which I find was not made in a timely manner, and possibly not in good faith, as it was made as an offer to settle her due process petition and not for educational reasons to benefit A.S. by simply offering to modify the IEP.

I further **FIND** that the observations by Feller and Caplan of A.S.'s academic program while attending Newark was different from the program being offered to the parents in May 2022. After the unilateral placement of A.S. at Ben Samuels, based on the expert opinion of Ms. Feller and Ms. Caplan, the proposed placement at Newark's disabilities class did not provide a meaningful change in the program, in that the other students attending with A.S. were again nonverbal, younger than A.S. and were not peers, and thus the program and class offered was not as promised, a more appropriate placement in the least restrictive environment than what A.S. had already experienced at George Washington Carver. Accordingly, the appropriateness of such a program was not supported, during the hearings, by persuasive expert opinion on that subject for, for that matter by evidence of lay witnesses. I also **FIND** that Ms. Feller's and Ms. Caplan's testimonies were credible and persuasive, notwithstanding the fact that they had testified as witnesses in many other cases brought on behalf of other parents and children by petitioner's attorney.

As to the education A.S. had been receiving at Ben Samuels since the unilateral transfer, I **FIND** the testimony and evidence presented by Erin Wecht, their Instruction Specialist and Special Ed Teacher Consultant to be credible and persuasive. As noted, the school has a state approved program accepting preschool children with disabilities.

It is specifically designed for an inclusion model with general ed. students and special ed students typically with a 10:2 ratio. It has six preschool classrooms typically with 10-12 students. All the students have the same curriculum. I agree with her testimony and the balance of the evidence that A.S. should be and needs a proper inclusion setting as she benefits by interactions with her peers and, at this school, I unquestionably has support and an appropriate setting for communication, engagement and interaction opportunities. A.S. receives push in occupational therapy in two thirty-minute sessions per week, and one pull out session in a sensory gym. She also gets two 30 minutes push in sessions of language and therapy per week. I agree with Wecht's view that the push in sessions are appropriate for A.S., providing her with a natural environment to work on her speech/language skills. I also agree with the testimony of Newark's Director of Education Mitchell who admitted that Newark does not have a full day inclusion class with special education but only has a special education in class support class with a special ed teacher that occasionally enters the general education classroom. Thus, the alternative offered to A.S. by Newark was not the least restrictive environment (LRE) as required by the IDEA. See N.J.A.C. 6A:14-1.2 (B)(5) Finally, I **FIND**, that Newark failed to show their IEPs 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)

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.” Andrew 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 2021/2022 school year. And if not, whether the placement at Ben Samuels Children Center 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). J.S. has been diagnosed with autism 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).

The primary issues in this case are whether the District failed to provide or offer A.S.. with FAPE for the 2021/2022 school year. And if not, whether the placement at Ben

Samuels Children Center was appropriate. Lastly, if FAPE was not offered, whether the parents are entitled to any reimbursement for same.

I agree with petitioner and **CONCLUDE** that the District failed to offer a FAPE in that the IEPs on which they based the education plan did not create an individualized program addressing her disability because the initial IEP and revised IEPs of 2021 failed to provide goals and objectives in most areas, and did not place A.S. in the least restrictive environment. Even though, it is probable that A.S. progressed and had not yet regressed as a result of the failure to provide FAPE, most likely due to the natural maturation process, the IEP did not offer a FAPE in the least restrictive environment and did not allow A.S. to make meaningful progress. Further, A.S. was placed in a class where her disability was largely ignored by the lack of services provided. That was unsurprising because the IEPs did not correctly acknowledge and thus plan to address A.S.'s diagnosis of Autism Spectrum Disorder. I agree with petitioner and **FIND** that the District and the IEPs, most significantly the January 2022 IEP, did not acknowledge the diagnosis. In fact, the District refused in January 2022 to consider transferring A.S. to address her disability because, the diagnosis was not contained in the IEP when the CST and District knew or should have known about it. Additionally, the IEPs mistakenly described A.S.'s impairment as being blind or visually impaired which was entirely untrue. Therefore the IEP not only lacked guidance for carrying out the education plan for A.S. but worse was misleading. Further, the District failed to provide FAPE by its failure to implement the most basic component of its program by not providing any special education teaching from November 2021 through June of 2022. Further, A.S.'s placement was set for failure because unlike A.S. the other students she was placed with were mostly, and possibly all nonverbal.

I **CONCLUDE** that, since there was a failure to provide FAPE in a timely manner for A.S., the parents were reasonable in seeking to place A.S. unilaterally, and the parents gave timely and adequate notice to the District of their intent to do so. Given that no special education had been afforded to A.S. at all from November 2021-June 2022, and there were only modest insignificant changes made in the January 2022 IEP, it is understandable that the parents were somewhat desperate to try another route.

In accordance with N.J.A.C. 6A:14-2.10, parents may receive reimbursement for a unilateral placement as follows:

(b) If the parents of a student with a disability who previously received special education and related services from the district of residence enroll the student in a nonpublic school, an early childhood program, or approved private school for students with disabilities without the consent of, or referral by, the district board of education, an administrative law judge may require the district board of education to reimburse the parents for the cost of enrollment if the administrative law judge finds that the district board of education had not made a free, appropriate public education available to the student in a timely manner prior to enrollment and that the private placement is appropriate.

Our regulation mirrors well-established Federal Law. Parents who unilaterally withdraw their child from public school and place him in a private school without consent from the school district “do so at their own financial risk.” School Comm. of Burlington v. Mass. Dep’t. of Educ., 471 U.S. 359, 374, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985). See too: N.J.A.C. 6A:14-2.10(b)(1). They may be entitled to reimbursement for the costs of their unilateral private placement only if a court finds that the proposed IEP was inappropriate, and the private placement was appropriate under the IDEA. 20 U.S.C.A. § 1412(a)(10)(C)(ii). Once a court holds that the public placement violated IDEA, it is authorized to “grant such relief as the court determines is appropriate.” 20 U.S.C.A. § 1415(e)(2).

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 Ben Samuels placement for 2022-2023 was appropriate. A.S. receives teaching with a true inclusion model with a 10:2 ratio of general ed students to special ed students. The class is led by a certified early childhood education teacher, and by a special education teacher. The Special Ed teacher (MS. Wecht) spends three full days in the classroom and monitors them the other two days. She adapts materials and potentially differentiates instructions for A.S. regularly documents and assess what and how A.S. is doing. Special Education Teaching Assistants (SETAs), obtained through Montclair University’s Masters’ programs, 1:1 aides, are provided throughout the day, every school day. A.S. also receives appropriate occupational therapy both separately and in group sessions and speech and language sessions, supplemented by music therapy in group sessions. Rather than further describe the services, I shall note that the record reflects that the District did not seriously contend the fact that A.S. is receiving appropriate placement and educational opportunities at Ben Samuels, nor the obvious facts, as noted in the record, that A.S. made meaningful progress there in 2022-2023.

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 the District contends that the parents’ particularly petitioner S.S. engaged in provocative “litigious” behavior, and strategizing inconsistent with the collaborative process required by IDEA. It also contends the parents did not give them time to modify the placement to meet the parents’ concerns and A.S.’s needs. I cannot agree with either contention. S.S. while advocating as one would expect for her

child, did not abandon or miss meetings of the CST and stayed in appropriate contact and maintained interest in what was happening between meetings. It is not the parents' fault that the school failed to advise them until months after the fact that A.S. was not receiving service from a special education teacher nor that practically all the speech and language sessions and occupational therapy sessions were not done throughout the 2021-2022 school year. It is understandable that the parents lost confidence in the District's ability or willingness to build an appropriate IEP and then once done to thoroughly implement it. It is the District, in this case, that needs to rebuild confidence in the District, not the other way around. Therefore 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 were reasonable and that the all the costs of education at Ben Samuels, including transportation be reimbursed to them for the 2022-2023 school year.

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

The petitioners argues that none of the District's IEPs provided A.S. with a FAPE for the school years 2021-2022 and 2022-2023, and the District also failed to implement the IEPs. I have agreed and **CONCLUDE** that they should be fully reimbursed for the cost of tuition, and expenses (such as books), including transportation cost for the entire 2022-2023 school year while for A.S.'s attendance at, education received by Ben Samuels. In addition, A.S. is entitled to compensatory education. However, because the IEPs for the school year 2021-2022 were the subject matter of Mediation and undisputedly, the parties agreed to remedy any deficiency in the IEP s up to that point through that process, the only questions remaining as to that component of the remedies sought by petitioner for school year 2021-2022 was whether such "compensatory education" was eventually offered. The record shows that the school was able to and did provide an additional 51 sessions of speech and language skills and 20 additional occupational therapy sessions. It appears from the record that these sessions were provided. Therefore I cannot award compensatory education or services for that part of petitioner's claim.

As for other compensatory education or services sought, compensatory education may be awarded if it is determined that a school district failed to provide FAPE to a disabled student, and the district knew or should have known, that FAPE was not provided. M.C. ex rel J.C. v Central Regional Sch. Dist. 81 F3rd 389, 396 (3rd Cir. 1996). A finding for compensatory education does not require bad faith or egregious circumstances-rather only a finding that a disabled child was receiving less than a “de minimus” education. Id. at 397. I **CONCLUDE** A.S. is entitled to compensatory education for the months at George Washington Carver where there was no special education teaching for A.S. but instead all teaching was done through an uncertified substitute teacher who admitted, credibly, that was not qualified to teach A.S. However, it appears from the record that any compensatory education A.S. may have needed has been provided for at Ben Samuels, which in part, explains her progress there. Beyond the reasonable assumption that this young child’s school time was wasted, throughout the 2021-2022 school year owing to an inappropriate IEP and one that in where there was no special education teaching provided, there is no way for me to evaluate A.S.’s specific need for compensatory education at present, by the record established at the hearing. Therefore, no specific compensatory education can be ordered.

It is clear, however, and despite respondent’s position to the contrary, that petitioners are entitled to reimbursement or payment of the costs of expert witnesses Feller and Caplan’s fees, provided they are reasonable, for their any evaluation/reports conducted after the filing of the first Due Process Petition, and for their testimony. 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** the request for a blanket Order for an “out of district placement program” as there have been no findings as to their necessity or suitability, other than as they pertain to the specific program and specific programming at Ben Samuels.

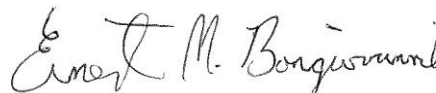
ORDER

Based on the foregoing, it is hereby **ORDERED** is **GRANTED**;

1. The District shall reimburse petitioners for the cost of A.S.'s placement/attendance at Ben Samuels Children's Center for the 2022-2023 school year, including transportation costs.
2. Reimbursement of any reasonable expert fees for evaluations conducted and reports published by Melanie Feller, M.A., and Susan Caplan M.Ed., after the filing of the first Due Process Petition, and for the reasonable costs of their testimonies.
3. The IEP should be amended to reflect Ben Samuels Children's Center was an appropriate placement for A.S. for the school year 2022-2023.

Any and other relief not specifically granted above is **DENIED**.

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.



September 7, 2023

DATE

ERNEST BONGIOVANNI, ALJ

Date Received at Agency: 9/7/23

Date Mailed to Parties: 9/7/23

id

APPENDIX

List of Witnesses

For Petitioner:

S.S.

Estrella Castro-Tavares

Melanie Feller

Susan Caplan

Erin Wecht

For Respondent:

Denise Gordon

Madalyn Perez

Joanne Odiase

Jamel Gibbs

Amy Woods

Marilyn Mitchell

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits

- J-1 Referral Letter from Early Intervention, dated 09/10/2020
- J-2 E-Mail from Eileen Mitchell to Ms. Smiley, Re: ID Meeting for A.S., dated 09/22/2020
- J-3 Evaluation Determination Plan, dated 09/22/2020
- J-4 Occupational Therapy Evaluation, Jason Gonzales (NBOE), dated 10/14/2020
- J-5 Speech Language Assessment Report, Ellen Nathan-Gruber (Delta T. Group), dated 10/14/2020

- J-6 Social Assessment Report, dated 11/23/2020
Melanie Mollozzi (NBOE), dated 11/16/2020
- J-7 Developmental Pediatric Study Report, Punam Kashyap, MD ((Institute for Child Development), dated 11/24/2020
- J-8 E-Mail exchange between Parents of A.S., Madalyn Perez, Adriana DeGiovanni, Malcom Terrell Re: Invitation to Meeting, dated 1/14-19/2022
- J-9 Eligibility Conference Report (Initial) Child Study Team, dated 01/14/2021
- J-10 Petition for Mediation Case #21-32578, (See also – “P-19”), dated 02/04/2021
- J-11 Notice of Agreement, Case #21-32578 [S.S. & E.S. o/b/o A.S. v. Newark City BOE], dated 03/22/2021
- J-12 Psychological Assessment Report, Jamal Gibbs (NBOE), dated 03/31/2021
- J-13 Psychological Assessment Report, Robyn Brody (Delta T. Group), dated 07/15/2021
- J-14 Individual Child Report of A.S., (My Teaching Strategies GOLD Assessment), for Fall 21-22
- J-15 IEP Progress Report, Reporting Period 1 for 21-22 SY
- J-16 IEP Progress Report, Reporting Period 2 for 21-22 SY
- J-17 IEP Progress Report, Reporting Period 3 for 21-22 SY
- J-18 IEP Progress Report, Reporting Period 4 for 21-22 SY
- J-19 IEP Progress Report, Reporting Period 5 for ESY 2022
- J-20 IEP Progress Report, Reporting Period 4 for 20-21 SY
- J-21 Speech-Language Progress Report, Reporting Period 3, Joanne Odiase (NBOE) for 21-22 SY
- J-22 Speech-Language Progress Report, Reporting Period 4, Joanne Odiase (NBOE) for 21-22 SY
- J-23 Initial IEP, dated 01/12/2021
- J-24 IEP Amendment without Meeting, dated 03/23/2021

- J-25 IEP Annual Review, dated 01/27/2022
- J-29 Functional Behavior Assessment, Jennifer Gruber (Kid Clan) 06/15/2022
- J-30 Letter from Parents to Carolyn Granato, Request for Unilateral Placement, dated 08/22/2022
- J-31 Letter from Marilyn Mitchell to Parents, Response to Parent Request for Unilateral Placement, dated 08/2022
- J-32 Questions and Answers from BSCC
- J-33 Questions and Answers from BSCC

For Petitioner

- P-13 Lyudmyia (Milla) Yakubov, Director Ben Samuels Children's Center to Parents with information pertaining to Inclusive Classrooms under Demonstration Program, dated 08/18/2022
- P-19 Petition for Mediation Case #21-32578 (See also – "J-10"), dated 02/04/2021
- P-22 OAL to Parties confirming withdraw of Pro Se Emergent Relief Request subject to receipt of amended Certification being provided by the District (EDS-00848-22 – Emergent Relief), dated 02/10/2022
- P-24 Pro Se Complaint Investigation (#C-2022-6548), dated 03/02/2022
- P-25 OSEP Complaint Investigation Report (#C-2022-6548) dated 04/11/2022
- P-70 Curriculum Viète of Melanie Feller, MA, CCC-SLP, DIR-E IMH-E
Speech & Language Evaluation Program Review of Melanie Feller, MA, CCC-SLP, DIR-E,IMH-E, dated 06/09/2022
Speech & Language Evaluation of Melanie Feller, MA, CCC-SLP DIR-E, IMH-E, dated 10/19/2022
- P-71 Educational Evaluation of Susan K. Caplan, M.Ed., LDT-C, dated 07/18/2022
- P-71 Curriculum Vitae Susan K. Caplan, M.Ed., LDT-C
- P-71 Classroom Observation (Newark), Susan K. Caplan, M.Ed., LDT-C, dated 06/02/2022
- P-71 Observation at Ben Samuels Children's Center – Susan K. Caplan, M.Ed., LDT-C, dated 10/11/2022

- P-75 Dr. GraceAnn Furnari, Psy.D., BCBA Medical Summary Report & Bio (See also – “R-11a”)
- P-76 Parent E-Mail to Carolyn Granato, Asst. Superintendent – Parent Request for Independent Evaluations, dated 03/23/2022
- P-76 Parent E-Mail to Johanna Ortez, Re: Link for Classes, dated 04/12/2021
- P-76 E-Mail thread between Parent, Kyle Thomas (Principal), Jessica King-Williams (Vice Principal), Johanna Ortez, Ilanit Ohayan, Re: Concerns and Schedule, dated 05/03/2021
- P-76 Parents correspondence to District, Re: IEP Concerns, dated 02/28/2022
- P-76 Parent to Eleanor Narel Re: Follow-Up to incident with Mrs. Smith-Muhammad, Summer School Teacher, dated 07/27/2022
- P-76 Parents to T. Edmundson, Summer School Principal Re: Request for Copies of Documentation as to incidents that occurred, dated 07/31/2022
- P-76 Parents to Rashon Dwight, District HIB Coordinator Re: Status of ESY HIB Invest, dated 08/22/2022.
- P-85 Observation of Proposed Preschool Disability Class for A.S. – George Washington Carver Elementary School of Susan K. Caplan, M.Ed., LDT-C, dated 11/01/2022
- P-86 Classroom: Proposed District Placement Observation of Melanie Feller, MA, CCC-SLP DIR-E, IMH-E, dated 11/01/2022

For Respondent:

- R-1 Room 116 Schedule (2021 Daily Schedule) for 2021
- R-4 List of Certifications for Joanne Odiase
- R-5 Curriculum Vitae of Joanne Odiase
- R-7 List of Certifications of Denise Gordan
- R-10 List of Certifications – Madalyn Perez
- R-11 E-Mail Exchange between Cheryl Myrie Denise Gordon, and Parents of A.S., dated 1/19-20/2021
- R-11(a)/Furnari Letter Attached to P-75 (See also – “P-75”)

- R-12 Text Message Exchange between Jamal Gibbs and S.S., Mother of A.S., dated 03/25/2021
- R-17 E-Mail exchange between Cheryl Myrie Joseph Bresnahan, Parents of A.S. Malcolm Terrell, Madalyn Perez Michael Conte Re: Transfer for A.S., dated 09/07/2021
- R-18 E-Mail from Dr. Joseph Bresnahan to A.S. Parents Re: Transfer for A.S. dated 09/07/2021
- R-21 E-Mail Exchange between Parents of A.S. Malcom Terrell, Dr. Joseph Bresnahan Madalyn Perez, Michael Conte, dated 9/10-23/2021
- R-22 E-Mail exchange between Madalyn Perez And Johanna Ortez, dated 09/14/2021
- R-23 E-Mail exchanges between Joseph Bresnahan Madalyn Perez, and Nicole Ford Re:Speech, dated 11/18/2021
- R-25 E-Mail exchange between Parents of A.S., Madalyn Perez, Adriana DeGiovanni, Malcolm Terrell, Joseph Bresnahan Joanne Odiase Re: Invitation to Meeting, dated 01/14-19/2022
- R-26 E-Mail from Madalyn Perez to Mother of A.S. Re: Follow-Up, dated 01/20/2022
- R-28 E-Mail exchange between Joanne Odiase and Mother of A.S. Re: Speech Services, dated 01/29/2022
- R-29 E-Mail exchange between mother of A.S. Lisa Ruffner (OAL), Sabrina Styza, Esq., Susan Rogers, Therese Harrison, Father of A.S. Re: Emergent Relief 2022-33833, dated 02/04/2022
- R-32 E-Mail exchange between Madalyn Perez and Joseph Bresnahan Re: IEP Draft, dated 02/10-15/2022
- R-34 E-Mail exchanges between Joseph Bresnahan, Marilyn Mitchell, Sabrina Styza, Madalyn Perez, Parents, Dawn Haynes, Joanne Odiase, Malcom Terrell Re: Resolution Session, dated 02/04-18/2022
- R-35 E-Mail exchange between Joanne Odiase, Parents of A.S.; Madalyn Perez, Re: Speech Session, dated 02/04-18/2022
- R-36 E-Mail from Joanne Odiase to Mother of A.S. Madalyn Perez Re: Speech Notes and Parent Handout Weeks of 3/7 & 3/14 Speech Note; Handy Handout #607 Crafting Beautiful Speech and Language, dated 03/25/2022
- R-37 Speech Note; Handy Handout #377, Building Early Literacy Skills through Speaking and Listening, dated 04/2022

- R-38 Speech Therapy Report, dated 04/01-2/2022
- R-40 E-Mail exchange between Parents Joseph Bresnahan, Madalyn Perez Michael Inzelbuch, Esq. Re: Complaint Investigation, dated 04/11/2022
- R-41 E-Mail exchange between Joanne Odiase Nicole Ford, Joseph Bresnahan Re: Comp.,dated 04/11/2022
- R-42 E-Mail exchange between Mother of A.S. Joseph Bresnahan, Joanne Odiase, Madalyn Perez, Michael Inzelbuch, Esq., Father of A.S., Teresa Moore, Esq., Brenda Liss, Arsen Zatarian, Marilyn Mitchell Re: Updated Speech Schedule – Comp. Services, dated 04/19-20/2022
- R-45 E-Mail exchanges between Joseph Bresnahan Mother of A.S.; Madalyn Perez Re: Summer School Application – ESY, dated 05/12-17/2022
- R-47 E-Mail exchange between Melanie Feller, Madalyn Perez, Dr. Joseph Bresnahan, S.S.(Mother of A.S.); T. Moore, Esq., Joanne Odiase; M. Inzelbuch, Esq., Re: Observation for A.S., dated 05/04-19/2022
- R-48 E-Mail exchange between Parents, Madalyn Perez Re: Classroom Observation, dated 05/24/2022
- R-49 E-Mail exchange between counsel, dated 05/20-24/2022
- R-53 E-Mail exchange between Parents, Madalyn Perez; Joseph Bresnahan; Counsel Re: A.S. Parent Observation Follow-Up E-Mail, dated 05/26-06/01/2022
- R-56 E-Mail exchange between Parents Madalyn Perez Re: ESY, dated 06/16-21/2022
- R-60 E-Mail exchange between Marilyn Mitchell, Mother of A.S.; Carolyn Granata, Father of A.S., Michael Inzelbuch, Esq., Sabrina Styza, Esq., Teresa Moore, Esq., Joseph Bresnahan, dated 08/01-11/2022
- R-61 Invitation to Compensatory Service Meeting, dated 09/14/2022
- R-62 Invitation to Compensatory Service Meeting, dated 09/16/2022

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